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DAVIS *v.* HARDAWAY CONTRACTING CO.

5-3468 386 S. W. 2d 707

Opinion Delivered February 15, 1965.

Odell Pollard and *W. R. Hastings, Jr.,* for appellant.

Smith, Williams, Friday & Bowen, By *B. S. Clark,* for appellee.

CARLETON HARRIS, Chief Justice. On December 21, 1960, appellees, under the name of Midland Constructors, Inc., entered into a contract with the United States of America for the construction of ballistic missile launching facilities in the State of Arkansas. Thereafter Midland entered into a subcontract with appellees, C.J.C. Corporation, and Caprock Material Company, Inc., subletting certain phases of its prime contract with the government. The contract between Midland and the government contained a schedule of wages for various classes and skills of laborers and mechanics, and the schedule set forth the rates of pay to be paid each such class or skill of laborers and mechanics as had been determined by the Secretary of Labor under the authority of the Davis-Bacon Act, Title 40, Section 276 (a), et seq, U. S. C. A.[1] The provisions of the government contract with

[1] Under the Davis-Bacon Act, as amended, the minimum wages to be paid various classes of laborers and mechanics are based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the state, in which the work is to be performed.

Midland were binding upon both the prime contractor and any subcontractors on the project.

Appellants performed labor and services for appellee sub-contractors during the calendar year of 1961 under the provisions of this contract. On January 4, 1962, appellants instituted suit in the Faulkner County Circuit Court against all appellees, contending that, under the wage schedule as determined by the Secretary of Labor for the contract, they were entitled to receive, and appellees were required to pay, the sum of $3.55 per hour for eight hours a day, with time and one-half paid for overtime. This was the rate set for the mechanics, and appellants assert that the subcontractors erroneously and gratuitously classified appellants as mechanics' helpers, greaser-oilers, agitator, and transit mix operators. A schedule of wages is also included for these classifications, but at a lesser rate of pay. Appellants sought the difference between the pay they actually received, based on the classifications just mentioned, and the pay allowed mechanics. Appellees first filed a motion to dismiss, and subsequently filed their answer, asserting that full payment had been made to appellants, and asking that the complaint be dismissed. After further motions and amendments, the cause was submitted to the court. No testimony was offered, the parties having stipulated as to pertinent facts. On March 23, 1964, the court rendered its opinion, holding that the complaint should be dismissed for want of jurisdiction "in that this is a suit as to the classification of the laborers (whether the mechanics or lower-paid employees)," and that under the Davis-Bacon Act, the matters at issue were to be determined solely by the Secretary of Labor. It was further found that the cover sheet of the wage schedule (introduced by stipulation), contained in the contract, required that matters of classification be referred to the Secretary of Labor for determination. From the judgment dismissing the complaint, appellants bring this appeal.

We think the answer to this litigation is found in the regulations of the Secretary of Labor, Title 29, Sub-

title A, Part 5,[2] Code of Federal Regulations. These regulations are based upon the Davis-Bacon Act, and other Federal legislation dealing with contracts in which the Federal government is interested. Part 5, Section 5, Subsection (1) (ii) of Title 29, Subtitle A, provides:

"The contracting officer shall require that any class of laborers or mechanics which is not listed in the wage determination and which is to be employed under the contract, shall be classified or reclassified conformably to the wage determination, and a report of the action taken shall be sent by the Federal agency to the Secretary of Labor. In the event the interested parties cannot agree on the proper classification or reclassification of a particular class of laborers and mechanics to be used, the question accompanied by the recommendation of the contracting officer shall be referred to the Secretary for final determination."[3]

In the litigation before us, appellants and appellees were unable to agree upon the proper classification of these appellants, *i.e.,* they could not agree as to which classified the work performed by appellants. We are of the opinion that the quoted language requires that the dispute be referred to the Secretary of Labor for his determination. Appellants insist that the referral to the Secretary of Labor for final determination is made only in those instances where the contractor anticipates using laborers and mechanics whose classifications are not listed in the wage schedule theretofore established, and in the event that there is inability to agree upon the

[2] Labor standards provisions applicable to contracts covering Federally financed and assisted construction.

[3] This is substantially the same language that is used on the cover sheet of the wage schedule, heretofore referred to, which is included in the contract. That language is as follows: "Under the Davis-Bacon Act (law code DB) the contracting officer shall require that any class of laborers and mechanics not listed in the Secretary's decision, which will be employed on the contract, shall be classified or reclassified by the contractor or sub-contractor conformably to the Secretary's decision and a report of the administrative action taken in such cases shall be transmitted by the agency to the Secretary of Labor. In the event the interested parties cannot agree on the proper classification of a particular class of laborers and mechanics to be used, the question, accompanied by the recommendation of the contracting officer, shall be referred to the Secretary of Labor for final determination."

proper classification. Appellants assert that, here, classification of mechanics has already been set up and there is no further need to refer the controversy to the Secretary.

We do not entirely concur with appellants' interpretation. While we agree that the situation mentioned by them would have to be referred to the Secretary, we do not agree that the language employed only refers to instances where there has been no classification. Rather, we are of the view that the quoted language also has reference to the type of dispute here presented.

Title 29, Subtitle A, Part 5, Section 6, provides that the Federal agency (entering into the contract) shall make such examination of the payrolls and statements as may be necessary to assure compliance with labor standards required by regulations, and further sets out that particular attention shall be given to the correctness of classifications and disproportionate employment of laborers, helpers, or apprentices. There is a further provision that the agency shall preserve payrolls and statements for a period of three years after the contract is completed, and shall produce same at the request of the Secretary of Labor.

The section also requires that the Federal agency (that entered into the contract) shall cause such investigations to be made as will assure compliances with the labor standard stipulations, and provides that the investigation shall include interviews with employees, examination of payroll data for the purpose of determining the correctness of classifications and disproportionate employment of laborers and helpers. This section also sets out that alleged violations shall be given priority, and that statements made by an employee shall be treated as confidential and not disclosed to the employer without consent of the employee.

Section 7 provides for reports to the Secretary of Labor. Subsequent sections provide penalties for the contractors' failure to comply with labor standard stipulations, and Section 11, Subsection (b) provides the man-

ner and procedure to be used by the Secretary of Labor in conducting hearings in making his determination.

It is apparent that these regulations are comprehensive, and are designed to afford relief to aggrieved laborers. The Davis-Bacon Act itself (Sections 276a to 276a-5 of Title 40, U.S.C.A.) also sets out remedies for laborers who have been paid less wages than the rate (of wages) required to be paid under a contract. We are persuaded that this act, together with the rules and regulations promulgated, and heretofore set out (Title 29, Subtitle A, Part 5), provides full and complete relief, and state courts are without jurisdiction to entertain the type of litigation here under discussion.

There seems to be a dearth of decisions from state courts in recent years on the issue involved, but the reported decisions appear to be in accord with the position here taken. *Kelly* v. *Grimshaw,* 167 P. 2d 627 (Kansas) and *Northern States Contracting Co.* v. *Swope* (Ky.), 111 S. W. 2d 610, support our interpretation. See also 163 A. L. R., pp. 1300 through 1307.

We have concluded that the court's ruling was correct.

Affirmed.

HOOBLER *v.* HOLDER.

5-3460 386 S. W. 2d 699

Opinion Delivered February 15, 1965.

Gordon B. Carlton, for appellant.

John B. Hainen, for appellee.

Ed. F. McFaddin, Associate Justice. This litigation arises because the parties did not have an attorney to prepare their contract for them or to advise them as to the effect of the papers prepared by a layman.

Mr. and Mrs. Holder, appellees, lived in California; they owned real property in Arkansas; Mrs. Holder's brother acted as their agent in selling the property to Mr. and Mrs. Hoobler, appellants, for $6,000.00. Five hundred dollars was paid in cash and the balance was to be paid monthly. The Hooblers signed the note which Mrs. Holder's brother had a well meaning laymen prepare, the germane portion of which note reads:

"$5,500.00 DeQueen, Arkansas, September 27, 1963

"We or either of us promise to pay to the order of Frank H. Holder and wife, Sally M. Holder, FIVE THOUSAND FIVE HUNDRED AND NO/100 DOLLARS with interest at the rate of six (6) per cent per annum from date until paid. The above sum shall be due and payable as follows: $30.00 plus accrued interest on or before November 1, 1963 and $30.00 plus accrued interest on or before the first day of each month thereafter until both principal and interest are paid in full.

"If any installment due upon this note becomes more than thirty days past due then the whole note shall, at the option of the legal holder hereof, without notice, at once become payable."

When the Hooblers did not pay all of the interest payments each month which the Holders thought should be paid, this suit was filed by the Holders on the said note. The defense was that the Hooblers had made regular payments as they understood the note. The Chancery Court held against the Hooblers, and this appeal results.

The only question is the amount of the monthly payments of interest.

The Holders insist that on November 1, 1963, the Hooblers owed interest on $5,500.00 at 6% for one month,[1] which amounts to $27.50, plus the principal payment of $30.00, or a total of $57.50 due on November 1st.

The Hooblers claim that on November 1, 1963, they owed the $30.00 principal payment, plus 15¢ as interest on the said $30.00 for one month. In other words, the Hooblers claim each monthly payment was $30.00 with interest on the said $30.00 payment from September 27, 1963, until paid.

The Chancery Court held in favor of the Holders, and we are convinced that the Chancery Court was correct. There is no ambiguity in the language used.[2] It says that the Hooblers agree to pay to the Holders $5,500.00 with interest at 6%. Then it says: "The above sum shall be due and payable . . ." "*The sum*" is certainly the principal of $5,500.00; and how is it payable? "$30.00 [of the principal] plus accrued interest on or before November 1, 1963 . . ." The accrued interest was on the principal of $5,500.00 and not on the payment of $30.00. The Chancery Court was correct in so holding. Ark. Stat. Ann. § 68-606 (Repl. 1957) provides:

"In calculating interest where partial payments may have been made, the interest shall be calculated to the time when the first payment shall have been made, and such payment shall be applied to the payment of such interest; and if such payment exceed the interest, the balance shall be applied to diminish the principal, and

[1] For convenience in calculation the parties have treated the time from September 27, 1963, to November 1, 1963, as being one month.

[2] Learned counsel for the respective parties to this litigation have filed excellent briefs. Their searches, and also ours, have shown a dearth of cases directly in point and with a note reading exactly like the one here. For those desirous of pursuing further study, we mention the following cases and texts: *Busch* v. *Gecks*, 209 Ark. 431, 190 S. W. 2d 625; *Sosik* v. *Conlon* (R. I.), 164 A. 2d 696; *Colovas* v. *Allen* (Ky)., 45 S. W. 2d 809; *Heisel* v. *York* (N. M.), 125 P. 2d 717; *Runyan* v. *Runyan* (Ind.), 126 N. E. 35; 30 Am. Jur. p. 12 *et seq.*, "Interest" § 11 *et seq.*; 11 C. J. S. p. 260, "Bills and Notes" § 722; 47 C. J. S. p. 72, "Interest" § 66; and annotation in 10 A. L. R. 997.

the same course shall be observed in all subsequent payments; but in no case when a payment shall fall short of paying the interest due at the time of making such payment, shall the balance of such interest be added to the principal."

As a second point, the Hooblers claim that this matter, of how much each monthly payment of principal and interest would be, was discussed with Mrs. Holder's brother, who was the agent of the Holders, before the note was signed; and that it was agreed that the amount of interest to be paid by the Hooblers each month would be interest only on the monthly payment. Thus, they in effect asked that the note be reformed to state the method of payment of interest as they claim. One seeking a reformation of a written instrument has the burden of offering evidence that is clear, cogent, and convincing. *McGuigan* v. *Gaines*, 71 Ark. 614, 77 S. W. 52, and other cases cited in West's Arkansas Digest, "Reformation of Instruments" § 45. The Chancellor, after hearing the witnesses, found that the Hooblers had failed to offer such required quantum of evidence, saying:

"That defendants introduced oral evidence that the agreement was that defendants should pay $30.00 per month plus the accrued interest on such monthly payment only; however, the sanctity of written instruments should not be modified or changed unless the evidence is clear, cogent, and convincing, which means almost beyond a reasonable doubt, that there was a mistake, error or ambiguity made in the drafting of such instruments; that the evidence in this case is not sufficient to overthrow the clear meaning of the written instruments herein, and the Court does not find them to be ambiguous; . . ."

Some question is raised as to alleged incompetent evidence; but after considering all the admittedly competent evidence, we affirm the Chancery decree.

CITY OF LITTLE ROCK *v.* MCKENZIE.

5-3436 386 S. W. 2d 697

Opinion Delivered February 15, 1965.

Perry V. Whitmore, Wright, Lindsey, Jennings, Lester & Shults, for appellant.

W. J. Walker, for appellee.

GEORGE ROSE SMITH, J. John Harvey Baird, the principal appellant, owns Block 9 in Pleasant Hills Addition to the city of Little Rock. The block was formerly zoned for one-family residential use only. Upon Baird's application the city's Board of Directors, acting upon the unanimous recommendation of nine members of the Planning Commission, rezoned the block to permit its east half to be used for quiet businesses, such as professional offices, beauty shops, libraries, and the like, and the west half for apartments not exceeding three stories in height. This suit was brought by the appellees, neighboring property owners, to set aside the rezoning ordinance. After an extended hearing the chancellor granted the relief sought, holding that the city had acted arbitrarily in changing the classification of the block.

The facts are as nearly undisputed as they are apt to be in a case of this kind. The block in question is about 300 feet square and is bordered on the east by University Avenue. University was formerly a quiet street, but

in 1961 the city completed a renovation by which University became one of the three or four most heavily traveled thoroughfares in Little Rock. It is now a four-lane street, divided by a median strip. Its daily traffic count exceeds 11,000 vehicles, consisting of trucks as well as cars. At night the street is brightly illuminated by mercury-vapor lights.

Block 9 is completely vacant. Almost without dispute the testimony shows that its east half, since the widening of University Avenue, is no longer suited to residential use if the houses to be built are to face University. Several of the protesting landowners candidly admitted this to be true; there is hardly a line of testimony to the contrary.

In an effort to support their contention that the block should not have been rezoned the plaintiffs offered the testimony of Max Mehlburger, a civil engineer. This witness had prepared three proposals for the continued residential use of the block—all involving its replatting. One plan need not be discussed, for it leaves some of the lots still fronting on University. Both the other proposals contemplate that Block 9 would be consolidated with Block 8 to the north, the intervening street being vacated. The owners would then dedicate a new street in the center of the tract, parallel to University, so that the homes would not have to face that busy thoroughfare.

Mehlburger's proposals are not really practical. The defendant Baird does not own Block 8; so both proposals would depend upon the co-operation of the owner of that block. There is no assurance that the intervening street could be vacated, for that is a matter within the discretion of the city directors. Finally, Mehlburger's suggestions would require the owners of the two blocks to give up a forty- or fifty-foot strip of their land for the dedication of a new and otherwise unnecessary street. It cannot be said that the city Planning Commission acted arbitrarily in concluding that Baird ought not to be driven to such dubious extremes in order to put his property to any practical use.

There is persuasive proof that the challenged rezoning ordinance is an instance of sound city planning. What we have already said indicates that the reclassification of the east half of the block, bordering on University, was not a capricious step. According to the witness Barnes the accompanying rezoning of the west half of the block for apartment houses provides a desirable buffer in the transition from the commercial lots along University to the residential area lying west of this block.

Before the block now in controversy was rezoned the city had already rezoned, in exactly the same way, the block that borders Baird's property on the south. At the time of the trial this adjoining block was the site of a new diagnostic clinic, which falls within the "quiet business" classification. This fact alone is sufficient to show that the rezoning of Baird's block was not unreasonable, for we have said that "any attempt on the part of the city council to restrict the growth of an established business district is arbitrary. When a business district has been rightly established, the right of owners of property adjacent thereto cannot be restricted, so as to prevent them from using it as business property." *Little Rock* v. *Pfeifer,* 169 Ark. 1027, 277 S. W. 883.

All the protesting plaintiffs who testified in the court below gave essentially the same reason for their opposition to the rezoning ordinance; namely, that it will depreciate the value of their homes (which were built before University Avenue was widened). We are not insensitive to this hardship. Yet in every case such as this one a similar loss in property values must be suffered by one side or the other. When the change in University Avenue rendered Baird's property unfit for residential use the present conflict became unavoidable. In resolving this conflict we cannot substitute our judgment for that of the zoning authorities. We must uphold their decision unless we can say that it is arbitrary and capricious. *Economy Wholesale Co.* v. *Rodgers,* 232 Ark. 835, 340 S. W. 2d 583. In view of the undisputed facts

before us we cannot conscientiously declare that the city's decision to rezone this block is without any reasonable foundation.

Reversed.

WIDMER *v.* J. I. CASE CREDIT CORP.

5-3456 386 S. W. 2d 702

Opinion Delivered February 15, 1965.

Carl Widmer, Pro Se, for appellant.

Garner & Parker, for appellee.

PAUL WARD, Associate Justice. The decisive question on this appeal is whether the defendant (appellant here) filed his answer in due time.

Appellee, J. I. Case Credit Corporation, filed suit against appellant on a note executed by appellant to the Fort Smith Tractor Company, Inc. and later assigned to appellee. A summons was served on appellant on June 12, 1963. Appellant's answer was filed on July 3, 1963. On August 6, 1963 the trial court entered a default judgment against appellant in the sum of $5,645.84 together with interest on the ground that "said purported answer was not timely filed and was without the time allowed as required by law . . ."

In due time appellant filed a motion to set aside the default judgment. This motion was overruled by the

trial court, and appellant now prosecutes this appeal for reversal.

We have concluded that the trial court was in error in holding appellant's answer was not timely filed. Not counting June 12 as a day [according to Ark. Stats. Ann. § 27-130 (Repl. 1962)] only 21 days elapsed between the date of service (June 12) and the date the answer was filed (July 3). Applying the above factual situation to Ark. Stat. Ann. § 27-1135 (Repl. 1962) we must conclude appellant's answer was timely filed. The pertinent part of the above section reads as follows:

"A defendant to any complaint or cross-complaint must appear or plead either generally or specially the first day after expiration of the periods of time set forth below, as the case may be:

"First. Where the summons has been served twenty (20) days in any county in the state."

So far as our research shows the exact issue above raised has never been directly passed on by this Court, but we think the statutes mentioned bear no other construction than the one indicated. Although this same issue was not before the Court in *Fitzwater* v. *Harris,* 231 Ark. 173, 328 S. W. 2d 501, we used this language:

"... it was mandatory on the Circuit Court to render a default against the defendant since he had failed to file an answer within *twenty-one* days after service ..." (Emphasis supplied.)

In view of what we have said it follows that the trial court erred in refusing to set aside the default judgment, and the cause is remanded for a trial on the merits.

5-3458 386 S. W. 2d 701

Opinion Delivered February 15, 1965.

[redacted]

Powell Woods, for appellant.

John M. Lofton, Jr., for appellee.

SAM ROBINSON, Associate Justice. This is a workmen's compensation case. Appellant appeals from a judgment of the Circuit Court affirming an order of the Workmen's Compensation Commission denying compensation to appellant additional to what he has been paid.

Appellant, Denver L. Wilson, was an employee of the Ozark Poultry Products, Inc. at Siloam Springs, Arkansas. On April 10, 1962, while in the due course of his employment, he slipped on a wet floor and fell on his back. About 30 days later he went to Dr. Stinnett of Siloam Springs, who made a diagnosis of "strained back muscles of the lumbar spine". Wilson made a total of twelve visits to Dr. Stinnett, the last one on June 12, 1962. The treatment consisted of physical therapy, a prescription for B-12, and heat.

On May 15, Dr. Stinnett sent Wilson to Dr. Coy C. Kaylor for X-rays. Dr. Kaylor saw Wilson again on August 10. Wilson was paid workmen's compensation of $165.00 for time lost during this period.

On August 12, 1962, Dr. Wilfred W. Hurst of Joplin, Missouri, examined appellant at the request of Mr. Pinnell. On August 5, 1963, appellant was examined by Dr. Hundley of Little Rock. On September 18, he was again examined by Dr. Hurst, and on February 2, 1964, he was

examined by Dr. Stanton of Ft. Smith. All the doctors, except Dr. Hurst, reported, in effect, that Wilson suffered no disabling injury. Dr. Hurst felt that on August 12, 1962, Wilson was not able to do manual labor, and in his report of September 18, 1963, he felt that claimant had a 10-15 per cent disability to the body as a whole, considered to be of a permanent nature, and that he should not do heavy lifting.

Appellant testified that he is unable to do manual labor because of the alleged injury to his back, and, of course, Dr. Hurst's report corroborates him to some extent. However, the reports of the other doctors are to the effect that claimant has recovered from whatever injury he may have suffered. We cannot say that the testimony of Dr. Hundley, Dr. Stanton, and Dr. Kaylor to the effect that claimant recovered from whatever injury he may have suffered, is not substantial evidence to support the finding of the Commission.

Affirmed.

STIPP *v.* JENKINS.

5-3424 386 S. W. 2d 695

Opinion Delivered February 15, 1965.

Crouch, Blair and *Cypert,* for appellant.

No brief filed for appellee.

JIM JOHNSON, Associate Justice. This is a suit for double damages and attorneys' fees under the provisions of Ark. Stat. Ann. § 75-918 (Repl. 1957) on small property damage claims.

On September 4, 1963, an automobile driven by the wife of appellee Vester Jenkins collided with the rear of the car owned and driven by appellant Horace P. Stipp, who had pulled onto a slick highway ahead of her. Appellee filed suit on January 16, 1964, in Benton Circuit Court, alleging that appellee owned the car driven by his wife, that appellant's negligence in failing to yield the right of way proximately caused damage to appellee's car in the sum of $180.00, that sixty days had elapsed since demand was made for payment, and that appellant had denied liability and refused to pay. The complaint prayed for double damages and attorneys' fees under the provisions of § 75-918, *supra.*

The parties having waived a jury, the cause was tried before the court on April 15, 1964. The court found that appellant's negligence was the proximate cause of the damage, that appellee's automobile sustained damages in the reasonable sum of $130.80, formal demand for damages was made to appellant on October 31, 1963, which he failed and refused to pay within sixty days after written demand; and specifically found that ap-

pellant had no meritorious defense justifying his failure or refusal to pay the claim and appellee is entitled to judgment for double damages plus attorneys' fee and costs. From the judgment appellant has prosecuted this appeal.

Before discussing the questions here involved, we wish to state that this court has been inflicted with a rash of violations of our Procedural Rule 12(d). In an effort to remedy this, we remind the Bar that: "Where evidence is offered by depositions, by requests for admissions, or by interrogatories: in making up the record, the answers must follow immediately after the questions to which they are responsive."

In the case at bar, appellant's first point urged for reversal is that "there is no substantial evidence to sustain the trial court's findings, and the trial court should have directed a verdict in favor of appellant, on the following grounds:

"(A) Appellee Vester Jenkins was not the proper party in this suit since his son was in fact the owner of the vehicle involved in the collision."

Appellee and his wife in their testimony referred to the damaged car as their son's car, however they both testified that title was in appellee's name and appellee testified that he had bought and paid for the car. With such uncontroverted testimony, ownership of the car properly became a question for determination by the trier of fact.

"(B) The measure of damages to the Jenkins vehicle was not sufficiently proved by the evidence."

Appellee testified that the car was worth $2,400 before the accident and the value immediately after the accident was $2,220. He testified what damage was done to the car (i.e., what parts were damaged) and introduced into evidence without objection repair estimates from three garages. This testimony amounted to substantial evidence in compliance with Ark. Stat. Ann. § 75-919 (Repl. 1957). See *Beggs* v. *Stalnaker,* 237 Ark. 281, 372 S. W. 2d 600.

The next point urged by appellant is that the trial court erred in finding that appellant was liable for double damages and attorneys' fees when there was no evidence that demand had been made upon appellant as required by Ark. Stat. Ann. § 75-918.

Appellee called appellant as a witness and on direct examination asked appellant to identify a paper as a carbon copy of a letter appellee had written appellant on October 30, 1963. Appellant identified it as such, and the carbon copy was introduced into evidence. The carbon copy was dated October 30, 1963, and contained all the information necessary to comply with the provisions of Ark. Stat. Ann. § 75-918 *et seq.* Appellant never denied its authenticity. We cannot say there is no substantial evidence from which the court could have found the requisite sixty day notice.

Appellant's final contention is that the trial court erred in considering the lowest repair estimate introduced into evidence by appellee when, in fact, the Jenkins vehicle was never repaired. This contention is without merit. The question here is the damage or injury to appellee's personal property. Repair of that damage or injury is immaterial.

The point saved in *Ford* v. *Markham,* 235 Ark. 1025, 363 S. W. 2d 926, on entitlement to double damages and attorneys' fee in the case of a partial recovery, although initially raised, was stricken from the briefs in the case at bar and is therefore again not before us.

The findings of the trial court being supported by substantial evidence, the judgment is affirmed.

HALES & HUNTER CO. *v.* WYATT.

5-3308 386 S. W. 2d 704

Opinion Delivered February 15, 1965.

Pollard & Hastings, By: *Odell Pollard,* for appellant.

Lightle & Tedder, By: *J. E. Lightle, Jr.,* for appellee.

FRANK HOLT, Associate Justice. The appellant and appellees were in the business venture of raising turkeys.

Pursuant to their written contract the appellant furnished appellees five thousand young turkeys, the necessary food products for them and insurance coverage for the year 1961. As these items were furnished by the appellant, the appellees signed delivery receipt notes, bearing 6% interest, payable to the appellant to cover the financing. This account was to be paid as the turkeys were marketed.

After all the turkeys were marketed the appellant brought suit alleging that a balance of $7,081.69 of the $18,818.04 open account was due and unpaid. Appellees answered alleging the affirmative defenses of fraud and breach of contract and that such resulted in $10,000.00 damages to the appellees.

The trial court held there was no fraud in the procurement of the contract and treated appellees' answer as a counterclaim for damages based upon the allegation that appellant wrongfully refused appellees' request to sell the turkeys when the market was favorable. The court submitted to the jury as separate issues whether appellees were indebted to appellant on the account and, also, whether appellees were entitled to recover damages from the appellant upon the counterclaim. The jury returned its verdict in two forms, both being favorable to appellant. By one form the jury awarded $2,500.00 to appellant upon its complaint and by the other form, found for the appellant upon appellees' counterclaim. From the judgment on these verdicts the appellant brings this appeal.

For reversal appellant contends that the lower court should have sustained its motion for judgment non obstante veredicto. After the verdict but before entry of the judgment, the appellant filed a motion for judgment non obstante veredicto. The court rejected the motion for a judgment of $7,598.14, which represents the amount of the account plus accrued interest, finding that there was substantial evidence to support the verdict of $2,500.00 and that the court was not empowered to take from the jury the right to determine the preponderance

of evidence on this issue. Appellant argues that the court was in error in permitting the jury to consider as a fact question the correctness of appellant's itemized and verified account, contending the appellees had never denied the correctness of the account by either their pleadings or evidence.

Appellees filed an answer verified by their attorney in which they denied "each and every material allegation contained and set forth in the complaint". In an amended verified answer the appellees stated "further" denials. Thus, by their pleadings appellees denied the correctness of appellant's verified account of the indebtedness. Appellant's verified account is only prima facie evidence that it is correct and its accuracy was made a factual issue by appellees' verified answer. *Chicago Crayon Co.* v. *Choate,* 102 Ark. 603, 145 S. W. 197. There we said that the prima facie accuracy of a verified account can be denied by an affidavit, a verified answer, or by the defendant under oath when he testifies as a witness. We also said:

"* * * When such denial of the correctness of the account is made by the defendant under oath in either of these ways, then the burden rests with the plaintiff to prove by *other evidence* the correctness of the account thus denied." [Emphasis added.]

Further, in the case of *Oil Fields Corp.* v. *Cubage,* 180 Ark. 1018, 24 S. W. 2d 328, we recognized that:

"While the common law has been relaxed to the extent that a defendant may have a judgment notwithstanding the verdict in a proper case, still such a judgment can be rendered only when the pleadings entitled the party against whom the verdict is rendered to a judgment."

Therefore, the court was correct in denying appellant's motion for judgment non obstante veredicto since the account was denied by the pleadings. Furthermore, we construe appellees' evidence to have the effect of denying the alleged account.

The appellant also contends for reversal that the trial court erred in not directing a verdict for the plaintiff. The burden of proof was upon the appellant to prove the open account. In *Spink* v. *Mourton,* 235 Ark. 919, 362 S. W. 2d 665, we said:

"* * * the motion for judgment n.o.v. was properly denied unless it can be said that the trial court should have directed a verdict in favor of the plaintiffs. * * *

Owing to the fact that the plaintiff has the burden of proof—that is, the burden of persuading the jury that he is entitled to win the case—a directed verdict for the plaintiff is a rarity. As we said in *Woodmen of the World Life Ins. Soc.* v. *Reese,* 206 Ark. 530, 176 S. W. 2d 708: 'A verdict upon an issue of fact should not be directed in favor of the party who has the burden of proof with respect thereto, unless such fact is admitted, or is established by the undisputed testimony of one or more disinterested witnesses and different minds cannot reasonably draw different conclusions from such testimony.' "

As indicated, we think a disputed issue of fact was presented for the jury's consideration by the pleadings, which included a counterclaim, and the evidence. Furthermore, the only witness offered to prove appellant's verified account was the testimony of its District Manager, Leweke. It is a well settled rule that the testimony of a party to litigation is not to be regarded as undisputed when testing the legal sufficiency of the evidence. In the case of *McDaniel* v. *Johnson,* 225 Ark. 6, 278 S. W. 2d 657, we said:

"* * * we have repeatedly held that the testimony of a party to a suit, *or even one interested in the result of the litigation,* is not to be treated as undisputed in testing the legal sufficiency of the evidence." [Emphasis added.]

The trial court correctly denied appellant's motion for a directed verdict in the case at bar.

Neither can it be said that the jury verdict of $2,500.00 instead of the $7,598.14 sought is so inconsistent

with the pleadings and proof that the verdict is subject to appellant's motion for judgment non obstante veredicto. We have held that where the jury renders a verdict based upon substantial evidence for more than a nominal amount, although inconsistent with either theory of the case, then the trial court does not have authority to award a larger sum than that determined by the jury. *Fulbright* v. *Phipps,* 176 Ark. 356, 3 S. W. 2d 49.

In the recent case of *Alexander* v. *Mutual Benefit Health & Accident Assn.,* 232 Ark. 348, 336 S. W. 2d 64, the court said:

"* * * In this situation we have recognized in *Fulbright* v. *Phipps,* 176 Ark. 356, 3 S. W. 2d 49, and similar cases, that the partial award may be the result of a compromise in the jury room. It is plain enough that if we undertook to tamper with such a verdict the arguments in favor of increasing it would be equally balanced by those in favor of decreasing it."

Thus, the trial court was correct in refusing to disturb the jury award .

The appellant next urges for reversal that the court erred in refusing to permit the jury to consider certain delivery receipt notes which the appellees signed and gave to the appellant. The court properly excluded these instruments when first offered for, as stated by the trial court, this was a suit upon an open account and not a suit upon the notes. Furthermore, we do not consider the exclusion as being prejudicial since the appellant was later permitted to introduce the notes into evidence for other purposes.

Appellees question the validity of the contract. We cannot consider this contention since appellees never filed any notice of appeal. A timely notice is a jurisdictional prerequisite to the perfection of a cross-appeal. Ark. Stat. Ann. § 27-2106-1 (Repl. 1962); *General Box Co.* v. *Scurlock,* 223 Ark. 967, 271 S. W. 2d 40.

The judgment is affirmed.

Cox *v.* Tillman

5-3476 386 S. W. 2d 939

Opinion delivered February 22, 1965.

[redacted]

Jeff Mobley and *William R. Bullock,* for appellant.

McMath, Leatherman, Woods & Youngdahl, for appellee.

Carleton Harris, Chief Justice. On June 26, 1961, at Russellville, appellee, Wanda Lee Tillman, was a passenger in an automobile operated by her husband, appellee Roy Tillman, Jr. While stopped at an intersection, the automobile was struck in the rear by a car driven by appellant, Mrs. A. B. Cox. Subsequently, Mrs. Tillman instituted for alleged injuries sustained, and Mr. Tillman sought damages for loss of consortium. On trial, the jury returned a verdict for Mrs. Tillman in the amount of $7,500.00, and for Mr. Tillman in the amount of $1,500.00. From the judgments entered thereon, appellant brings this appeal.

Only one point is argued for reversal, *viz,* that there was no substantial evidence to support the jury's verdicts, and the judgments should accordingly be reversed and the cause dismissed.

According to appellant's evidence, Mrs. Cox drove up behind the Tillman car, which had stopped at a stop sign, and she (Mrs. Cox) came to a complete stop herself. She testified that she looked around to the back seat to check on her two young sons, who were asleep, and that, apparently, her foot slightly released the brake, and the

car started "creeping" and struck the rear of the Tillman vehicle. Mrs. Cox testified that she got out of the car, and looked at the Tillman rear bumper, but could find no damage; neither was there damage to the front of the Cox vehicle. She stated that Mr. Tillman said that no one was hurt, and that Mrs. Tillman made no complaint of injury.

Vernon Ferguson, a patrolman with the Russellville Police Department, testified that there was minor damage to each vehicle, but that no report was made of the occurrence, since the accident was minor, and the parties agreed that they could settle it among themselves. He stated that there was slight damage to the Tillman bumper. Proof established that the bumper damage was repaired at a cost of approximately $43.00.

Since the only question before us is whether the verdict was supported by substantial evidence, there is no need, of course, to set out in detail evidence offered by appellant, for we are only concerned with whether the evidence offered by appellees, and upon which the verdict was based, was of a substantial nature.

We think the evidence was more adequate to present a jury question. Mrs. Tillman testified that the impact from the rear was unexpected, and that a few minutes after the occurrence she suffered a severe headache, which started in the neck and went up to the back of the head; that she took aspirin for about a week, but the headache continued to grow worse, and she then consulted Dr. Lane at Dover, who treated her approximately two weeks. This treatment consisted of heat and medication. Thereafter, she consulted Dr. Balkman, whose treatment consisted of physical therapy, message, and heat. Later, ultrasonic treatment was given by Dr. David Williams, who also prescribed a cervical collar, which she wore about five months. She was then referred to an orthopedic surgeon, Dr. Thomas M. Durham of Hot Springs, whose testimony will be subsequently discussed. Mrs. Tillman testified as to extreme nervousness, tenseness, intense pain, and dizzy spells, which caused a loss of the

sense of balance. She stated that none of these symptoms were present prior to the alleged injury complained of.

Mr. Tillman verified that his wife had suffered intense pain, and testified that she was placed in the hospital by Dr. Durham, and remained there for three weeks; that she went back a second time for two weeks, and returned to the hospital a third time for another week. He testified as to the hospital, medical, and drug bills, and also mentioned that it had been necessary to employ extra help for the house work.[1] These bills totalled $3,052.91. He said that his wife remained in traction for three or four months.

Dr. David Williams testified that on examining Mrs. Tillman, he found a considerable tenderness along the cervical spine, and a considerable amount of muscle spasm. The doctor treated her with muscle relaxants, pain relieving drugs, and ultra-sound equipment. After a few days, he prescribed the cervical collar, which eliminates or relieves excessive motion in any direction, particularly forward and backward. He made a diagnosis of traumatic myositis, and testified that Mrs. Tillman had what is commonly known as a whiplash injury. Dr. Williams explained a whiplash injury as follows:

"Well, technically, it's based upon the fact that an individual, whatever speed they may be traveling, whether it's parked, moving or whatever it is, are struck from behind for the most part. Actually, it is the opinion of some at least that injuries of similar nature could be sustained, not necessarily from behind, but from any direction, but that moving force; that is, moving at a speed, in excess of that which individual is, whether he's sitting still, is struck from behind."

"* * * it is very obvious that any time an individual is sitting or occupying a position wherein they are struck from behind by any moving object that carries impact to any degree at a rate of speed in excess of that

[1] This particular item was listed at $391.75.

which the person is traveling, could create a similar injury."

He testified that Mrs. Tillman's progress, up until the time of prescribing the cervical collar, was very discouraging.

Dr. Thomas M. Durham, to whom Dr. Williams referred Mrs. Tillman, by deposition, testified that, at the first examination, he found that appellee had suffered a loss of approximately twenty percent of motion in the neck in all planes, and some paravertebral muscle tightness. He stated that the symptoms which Mrs. Tillman indicated, and his findings, were consistent with a rear end type collision. Testifying further, the doctor stated that Mrs. Tillman was admitted to St. Joseph's Hospital on August 30, 1961, and remained there through September 20, 1961; that she received cervical traction for about eight hours a day, was given physical therapy treatment twice daily, and drug medication. He next saw her on September 26 in his office, and also on October 10, and on this occasion, although noting some improvement, found there was more tightness on the right side of her neck. Her range of motion was improved, except for bending to the right side. On October 24, she was again examined, and because of the increase in symptoms along the right side of the neck and shoulders, was readmitted to the hospital. She was thereafter discharged on November 6, and was again examined on November 20, at which time she showed improvement. Mrs. Tillman was subsequently examined on December 20, and was next seen in the office on January 22, 1962. On this date, she was re-hospitalized because of a further flare-up. Appellee remained in the hospital until February 1, 1962, and again visited Dr. Durham at his office on February 16. On that date, her neck complaints had subsided, though she was still wearing the collar most of the time. Because of pain in the upper part of her back, a tailor-type corset was prescribed. This corset extends from the hips to the shoulders. Straps applied around the shoulders tend to hold the patient erect and prevent flexion at the upper part of the back. Further examinations were made

on March 16, April 25, and June 6. The range of motion of the neck was not entirely normal, but definitely improved, and she continued to wear the brace. Mrs. Tillman complained of pains in the left breast area, and it was the opinion of Dr. Durham that this pain was casually connected to her cervical spine injury. She continued wearing the corset until August 8, 1962, at which time, the doctor felt, for the first time, that her neck motion was essentially normal. On cross-examination, Dr. Durham testified that he felt the long period of illness and of convalescence of the patient was entirely consistent with a rear end collision in which the damage to the vehicle would range somewhere from $20.00 to $40.00. According to Dr. Durham's evaluation, appellee had a five percent disability to the body as a whole.

The deposition of Dr. John M. Hundley of Little Rock was introduced on behalf of appellant, and he likewise found tenderness in the neck, and tenderness of the dorsal spine throughout the upper dorsal spine area. Extending or bending the neck backward was 75% normal, accompanied by pain in the upper part of the neck. Dr. Hundley stated that he found no objective evidence of an injury, which would give rise to the condition of the patient, but he considered her complaints as being real; it was his view that the pain complained of could be due to a congenital condition of Mrs. Tillman's spine. He said that she was very tense and nervous, and was rather "jumpy." On cross-examination, the doctor stated that a parked automobile struck in the rear by another vehicle can produce an injury to the cervical spine, sometimes referred to as a whiplash injury, of the passenger in the stoped car. He also testified that there is not necessarily any relationship between the injury a patient receives and the speed of the vehicle if the patient does not know that the car is going to be hit; likewise, the doctor said there is no particular relationship between the damage to the vehicle and the injury to the patient. According to Hundley, some symptoms of such an injury may be delayed for quite some period of time.

Appellant's contention is that the impact of her car against the Tillman car was too slight to have caused the injuries complained of, and appellant feels that Mrs. Tillman's condition was not due to this occurrance. However, it will be noted that both Dr. Durham and the physician whose testimony was offered by appellant (Dr. Hundley) testified that the type of collision described could cause a whiplash injury of the severity sustained. Whether the injury was received at the time that the Cox car struck the Tillman vehicle was entirely a question for the jury to determine, and there was ample evidence to sustain the jury verdict.

Affirmed.

George Rose Smith, J., not participating.

McCormick *v.* Sexton

5-3429 386 S. W. 2d 930

Opinion delivered February 22, 1965.

Thomas L. Cashion and *Wright, Lindsey, Jennings, Lester* and *Shults,* for appellant.

Phillip Mansour, Greenville, Miss., and *William H. Drew* and *John F. Gibson,* for appellee.

Ed. F. McFaddin, Associate Justice. Although there were a number of other parties in the Trial Court, only five are before us on this appeal. The appellants are Walter D. McCormick, and his employer, Ramsey Towing Company.[1] The appellees are Emory D. Sexton, Mrs. Mary Allday, and Mrs. Martha Allday.

Emory D. Sexton, appellee, driving his Buick automobile, had crossed the Greenville Bridge over the Mississippi River, and was proceeding toward Lake Village, Arkansas. His wife was in the car with him. Walter D. McCormick, driving a Chevrolet station wagon (and admittedly on a mission for Ramsey Towing Company) was following the Sexton Buick. He was alone. James D. Allday, driving the Plymouth of his daughter-in-law, Mrs. Allday, was proceeding from Lake Village to cross the Greenville Bridge; and he was accompanied by his daughter-in-law, Mrs. Mary L. Allday. There is a dispute as to the sequence of events resulting in the traffic mishap. One party contends that the Plymouth driven by Allday crossed the center line and collided with the Buick driven by Sexton, and that the front of the Chevro-

[1] The name of the company was originally McCormick-Ramsey Towing Company, but the name was changed during the course of the litigation and for brevity we use the name as it existed at the time of the trial below.

let driven by McCormick subsequently struck the rear of the Buick. Another party contends that the Chevrolet driven by McCormick first struck the rear of the Buick and caused it to cross the center line and strike the Plymouth. At all events, there was a three-car traffic mishap in which Mr. Allday and Mrs. Sexton were killed and damages suffered by some of the other parties. Then this litigation began.

Mr. Sexton, driver of the Buick, filed action against Mr. McCormick, driver of the Chevrolet; also against the estate of James D. Allday, driver of the Plymouth, and Mary Allday, owner of the Plymouth. Sexton sought damages for the death of his wife, for his own personal injuries, and for property damages. He alleged that Allday, driver of the Plymouth, crossed the center line and struck the Sexton Buick, and that McCormick in the Chevrolet simultaneously struck the rear of the Sexton Buick.[2] Thus, Sexton claimed that there was concurrent negligence by McCormick and Allday, and sought recovery from both McCormick and the estate of Allday.

Mary L. Allday denied all negligence and cross complained against Walter D. McCormick and Ramsey Towing Company, claiming: (a) that Walter D. McCormick was at the time and place of the mishap, a servant and in the scope of the employment of the Ramsey Towing Company; (b) that Walter D. McCormick ". . carelessly and negligently and with great force and violence struck the rear of the Buick (Sexton automobile) and knocked it into the path of the (Plymouth) vehicle driven and operated by James D. Allday." Joining in the said cross complaint against McCormick and the Ramsey Towing Company were Mrs. Martha Allday, widow of James D. Allday, and also the children of James D. Allday, all of

[2] The exact allegation made by Sexton was: ". . and simultaneously with the Plymouth automobile striking his automobile from the front, the 1962 Chevrolet following behind plaintiff struck plaintiff's automobile from the rear, demolishing plaintiff's automobile." The allegation as to McCormick's negligence was: "Walter D. McCormick was negligent in following too close behind the plaintiff's automobile, contrary to law; was negligent in failing to keep a proper lookout; was negligent in failing to keep his automobile under proper control, and failing to yield the right-of-way to vehicles in front."

them seeking damages against McCormick and the Ramsey Towing Company.

Walter D. McCormick answered the complaint of Sexton with a general denial; and joined with Ramsey Towing Company in answering the cross complaint of the Alldays with (*inter alia*) general denial of all negligence. In the course of the proceedings it was shown that there was no administration on the estate of James D. Allday, and for that reason all claims for or against his estate were dropped.[3]

Trial of the three-cornered lawsuit to a jury resulted in verdicts and judgment thereon as follows:

For Emory D. Sexton against W. D. McCormick	$90,000.00
For Mrs. Martha Allday against W. D. McCormick and Ramsey Towing Company	$15,000.00
For Mrs. Mary L. Allday against Walter D. McCormick and Ramsey Towing Company	$ 300.00

From the said judgment entered on these verdicts there is this appeal by Walter D. McCormick and Ramsey Towing Company in which five points are urged:

"I. Appellants were entitled to judgment in their favor and against all Appellees, as a matter of law.

"II. The court erred in admitting certain testimony that was in the nature of a reconstruction of the sequence of events from physical facts.

"III. The Court erred in admitting certain testimony on the issue of damages.

"IV. The Court erred in giving certain instructions requested by Appellees.

"V. The Court erred in refusing certain instructions requested by Appellants."

[3] There was an attempted removal to the United States District Court for the Eastern District of Arkansas; but that tribunal ordered a remand to the Chicot Circuit Court.

I.

In the first point the appellants claim that there was no evidence of any negligence by Walter D. McCormick and that they were entitled to an instructed verdict in their favor. With this contention we cannot agree. Mr. Sexton testified that he would estimate that the Plymouth car was 50 to 75 yards in front of him when he was struck from the rear; and that at such time he lost consciousness. Thus, Mr. Sexton testified in the trial that his car was first struck from the rear by the McCormick car when the Allday Plymouth was still 50 to 75 yards in front of him. If that testimony be true then the first act of negligence was that of McCormick. The evidence of other witnesses tended to show that the Sexton car, struck on the right rear, was projected forward to the left. The pictures of the damage to the left front position of the McCormick car and the right rear of the Sexton car show the force of the impact. Whether the collision occurred in the traffic lane of the Allday car or in the traffic lane of the Sexton car, was a disputed issue. There was testimony both ways. But the effect of Sexton's testimony was that the negligence of McCormick in striking the car from the rear triggered the entire collision. With such evidence in the record, the Trial Court was correct in refusing to give an instructed verdict for McCormick and the Towing Company. The case at bar differs from that of the Superior Forwarding Company[4] case in that Sexton's testimony definitely related to the vehicle following him. Sexton's testimony was bitterly assailed; but it was for the jury, and not the Court, to decide as to the weight and effect of such testimony. The Trial Court was correct in refusing to give an instructed verdict for McCormick and the Towing Company.

II.

In their second point the appellants claim the Court committed error in allowing certain testimony to go to

[4] See *Superior Forwarding Co.* v. *Garner*, 236 Ark. 340, 366 S. W. 2d 290.

the jury from the witnesses, H. L. McKensey and Roy Hogg. We find no merit in this contention as regards either of these witnesses; but in view of the likelihood of a new trial (because of our holding on Point IV) we discuss the evidence.

(a) H. L. McKensey (called as a witness by Sexton) testified that from 1933 to 1954 he was employed in a body shop repairing wrecked cars; that from 1954 to the present he had been employed as an automobile damage appraiser; that from 1933 to the present he has examined about 800 damaged cars each year; that he examined the damages to the Sexton Buick; that the damage to the rear end of the Buick was $653.97 and the damage to the front end was $1800.00; that he inspected the interior of the Sexton car; and that he found the front seat torn loose and the front seat track bent backwards. Then he was allowed to testify as an expert that such damage to the front seat would be caused by a blow from the rear of the car and not from a blow to the front. The objection goes to this testimony as an opinion expert, and appellants claim that such opinion evidence was improper under these cases: *Casey* v. *Hudspeth,* 229 Ark. 735, 318 S. W. 2d 137; *Henshaw* v. *Henderson,* 235 Ark. 130, 359 S. W. 2d 436; *Waters* v. *Coleman,* 235 Ark. 559, 361 S. W. 2d 268; and *Reed* v. *Humphreys,* 237 Ark. 315, 373 S. W. 2d 580. We disagree with the appellants. The cited cases are on an attempted reconstruction of the mishap by an expert when eyewitnesses are available. What the witness McKensey did was to testify to the damage to the front seat and give his opinion as an expert as to what caused such damage. This was proper. *Lee* v. *Crittenden County,* 216 Ark. 480, 226 S. W. 2d 79.

(b) The witness Roy Hogg—a State Policeman called by Sexton—testified that he investigated the mishap and saw the vehicles at the scene. He was allowed to testify as to skid marks on the pavement and, over appellants' objection, was allowed to say that some of the skid marks were made by a flat tire. It had been shown that one of the tires on appellants' vehicle had a

blowout in the mishap. It was shown that this officer had been investigating traffic collisions for five years and had attended various schools of instruction on such matters. His testimony was proper as to the skid marks and as to the difference in a mark made by a flat tire and that made by an inflated tire. What we have said about the testimony of the witness McKensey applies also to the witness Hogg.

III.

The appellants' third point relates to admitting testimony on the matter of damages. Since we are reversing (because of Point IV) it is well that we point out that Mr. Sexton could recover for the funeral expenses he paid for his wife, since it is the duty of the husband to pay such expenses. (*Beverly* v. *Nance,* 145 Ark. 589, 224 S. W. 956; *Barry* v. *Brittain,* 223 Ark. 613, 268 S. W. 2d 12; and see annotation in 82 A.L.R. 2d p. 873: "Liability for funeral expenses of married women.") But Mrs. Allday could not recover for the part of the funeral bill and monument expense which she paid for Mr. Allday, because it is not the duty of the wife to pay such expenses. Such expenses for Allday's estate could be recovered only by an administrator. (*Ry. Co.* v. *Sweet,* 57 Ark. 287, 21 S. W. 587; see also annotation in 57 A.L.R. 400: "Wife's liability for husband's funeral expenses"; and see 27 Am. Jur. p. 59: "Husband and wife" § 460.)

IV.

In their fourth point appellants object to instructions; and we find one instruction that was fatally erroneous. It was the Instruction No. 13 requested by appellee Sexton and given by the Court. We copy it:

"The court instructs the jury that as a matter of law in this case, Emory D. Sexton, plaintiff, was not negligent nor at fault nor to blame for his injuries; and if you believe from a preponderance of the evidence in this case that his injuries were due to the negligence of both Walter D. McCormick and James D. Allday, deceased, then it is your sworn duty to find for plaintiff against

Walter D. McCormick for the whole injury, even though you may believe from the evidence that the negligence of either James D. Allday of Walter D. McCormick was greater than that of the other.''

In this instruction the Court told the jury that Sexton was free of negligence. That instruction was entirely erroneous. McCormick testified that he did not hit the Sexton Buick until after Sexton's car had collided with the Allday car. The witness Kolb testified that he saw Sexton's car cross the center line and into the traffic lane of the Plymouth car. The jury could have inferred from the testimony of Kolb that Sexton's car crossed the center line before the collision. With such evidence in the record, it should have been left to the jury to say whether Sexton, as the driver of the Buick, was guilty or negligence in crossing the center line before the McCormick car struck him.

As we have heretofore said, there was a dispute as to exactly where the collision took place. There were skid marks testified to by the witness Hogg from which the jury could have found that the traffic collision occurred in the lane of the Plymouth car; and there was the testimony of Kolb from which the jury could have found that the Sexton vehicle crossed over the center line into the traffic lane of the Allday car *before* the McCormick car struck the Sexton car. Certainly with the testimony in conflict, the Trial Court should have refused to give an instruction that Sexton was entirely free of all negligence. His negligence was a jury question, just like the negligence of McCormick was a jury question; and this Instruction No. 13 necessitates a reversal of this cause.

Since the cause is reversed and will be remanded for a new trial, we also think it proper to call attention to the language in the instruction which says, ''. . it is your sworn duty to find . .'' The use of words ''sworn duty'' should not be contained in an instruction like this. The jury had been sworn according to law. A court can remind them of their duties in a separate instruction; but to emphasize in an instruction like this that it is the

jury's "sworn duty" to find for the plaintiff, is to use words that tend to indicate the court has a deep feeling in the matter. It would unduly prolong this Opinion to discuss the other assignments concerning other instructions given or refused. We believe from what we have said herein that on a retrial instructions may be framed so that any errors, if there by any, regarding such instructions, are not likely to occur.

For the error of the Court in giving the Instruction No. 13, the judgment is reversed and the cause is remanded.

RILEY *v.* JOHNSON.

5-3479 386 S. W. 2d 942

Opinion delivered February 22, 1965

Pearson & Pearson, for appellant.

Dickson, Putman, Millwee & Davis, for appellee.

GEORGE ROSE SMITH, J. This is an action by the appellant, Paul Riley, for personal injuries and property damage sustained when his station wagon, which was being driven by his brother Guy, collided with the appellee's Car. Before trial the defendant below took the discovery depositions of the Riley brothers and, on the basis of the facts so elicited, filed a motion for a summary judgment for the defendant. In reviewing such a judg-

ment for the defendant. In reviewing such a judgment we consider the testimony in the light most favorable to the party resisting the motion. *Russell* v. *City of Rogers,* 236 Ark. 713, 368 S. W. 2d 89.

This collision took place at night in the rain upon a rural highway. The defendant, intending to enter the highway, had stopped his car in his driveway a few feet from the edge of the pavement. The defendant's bright lights were burning as the Rileys approached him. Owing to a curve in the road Guy Riley, who was blinded by the lights thought that the other vehicle was moving toward him. Guy dimmed his own lights as a signal for the other driver to dim his, but the defendant ignored this signal. Guy Riley, still thinking that he was meeting an oncoming car, kept edging to his right until he left the pavement. When he finally realized that the other vehicle was standing beside the highway it was too late for him to avoid the collision.

The trial judge, in granting the motion for a summary judgment, quite properly followed our decision in *Wilson* v. *Holloway,* 212 Ark. 878, 208 S. W. 2d 178. That case is directly in point. There the defendant's truck was parked on the shoulder on the wrong side of the highway. The driver failed to dim his bright lights, which blinded the driver of the plaintiffs' car and led him to believe that he was meeting an oncoming vehicle. That driver, as in the case at bar, kept inching to his right and eventually collided with the parked truck. We reversed a judgment for the plaintiffs and dismissed their case, holding as a matter of law that the driver of the truck was free from negligence.

Upon re-examining the question we are unwilling to adhere to the ruling in the *Wilson* case. In that opinion we made no reference to, and apparently overlooked, the statutory requirement that any lighted headlamps on a parked vehicle be dimmed. Ark. Stat. Ann. § 75-707 (Repl. 1957). Similarly, one who operates a vehicle on a roadway or, as here, upon a shoulder adjacent thereto is required to dim his lights for oncoming traffic. § 75-714.

The violation of such a stautory safety provision is evidence of negligence. *Brand* v. *Rorke,* 225 Ark. 309, 280 S. W. 2d 906. This principle is applicable to statutes similar to the one involved here. Blashfield, Cyclopedia of Automobile Law & Practice (Perm. Ed), § 860.

In the case at bar a jury would be justified in finding from the testimony that the defendant's failure to dim his lights was the proximate cause of the collision. We certainly cannot say that fair-minded men could not reach that conclusion. In fact, we consider it to be a matter of common knowledge that not infrequently traffic accidents are the result of a motorist's having been blinded by the glare from bright headlights upon an approaching car. The *Wilson* case, to the extent that it is in conflict with this opinion, is disapproved.

Reversed.

SMALLEY *v.* CITY OF FORT SMITH.

5-3521 386 S. W. 2d 944

Opinion delivered February 22, 1965.

Wayland Parker, Van Taylor and *Donald Poe,* for appellant.

Warner, Warner, Ragon & Smith and *Bradley D. Jesson,* for appellee.

PAUL WARD, Associate Justice. This appeal stems from an effort to annex 1,594.97 acres of land to the City of Fort Smith. The annexation petition was signed (and filed in the County Court of the Fort Smith District) by residents and landowners of the affected lands. The proceedings were pursuant to Ark. Stat. Ann. § 19-301 et seq. as amended (Repl. 1956 and Supp. 1963). There is no dispute as to any procedural steps taken except as hereafter pointed out.

The County Court granted the annexation. In due time appellants (those opposing annexation) filed a petition in the Sebastian Circuit Court, Fort Smith District, contending the proceeding was contrary to the State Consitution; that the petition was not signed by the required number of property owners; that the land was not suitable for city development; that the "area" was not contiguous to the City of Fort Smith; and, that the County Court erred in refusing to allow certain signers to withdraw their names from the petition. The Circuit Court, after a full hearing, dismissed the petition and affirmed the County Court's order of annexation. On ap-

peal appellants urged for a reversal several separate points which we discuss below.

Appellants first contend "the petition must have a majority of the *resident* land owners in the area of annexation as well as a majority of the land owners who live in the Greenwood District". Appellants then point out there is no showing that the petition is signed by a majority of the land owners residing in the affected area. We do not agree with appellants in this contention. Apparently this interpretation is based on the wording of § 79 of Act 1 of 1875. We point out, however, that that section of the act was changed by § 1 of Act 142 of 1953 [now Ark. Stat. Ann. § 19-301 (Repl. 1956] which reads as follows:

"Whenever a majority of the real estate owners of any part of a county, contiguous to and adjoining any city or incorporated town, shall desire to be annexed to such city or town, they may apply by petition in writing to the county court of the county in which said city or town is situated, and shall name the person or persons authorized to act on behalf of the petitioners.

"The 'majority of real estate owners' referred to above shall mean a majority of the total number of real estate owners in the area affected, provided such majority of the total number of owners shall own more than one-half of the acreage affected."

It is undisputed that there are eight-one persons who own property and that forty-nine of them signed the petition. Eight of the signers asked to remove their names from the petition after it was filed in the County Court, but the court refused their request. This is also assigned as reversible error. We bypass a decision on the merits of that point because appellees still would have had sufficient names on the petition if the court had ruled otherwise.

In addition to other things appellees rely to some extent on Act 88 of 1963 (which plainly gives the Fort Smith District the express authority to annex the *area*

here involved) to sustain the trial court, but appellants say said act is unconstitutional because it is local legislation and therefore violates Amendment 14 to the State Constitution. For two reasons we find no merit in appellants' contention. We think the act makes a reasonable classification under our holding in *LeMaire* v. *Henderson,* 174 Ark. 298 S. W. 327. Also, legislation relating to the administration of justice is not local. See *Waterman* v. *Hawkins,* 75 Ark. 120, 86 S.W. 844, and *Buzbee* v. *Hutton,* 186 Ark. 134, 52 S.W. 2d 647.

It is also urged that the lands in the *area* are not suitable for annexation, but we cannot say there is not substantial evidence in the record to sustain the trial court's ruling. *Cantrell* v. *Vaughn,* 228 202, 306 S. W. 2d 863 lays down the rule of substantial evidence. The record shows that much of the *area* has already been platted for city residential development—to the extent of some two thousand platted lots covering most of the acreage; that the Fort Smith School District has already acquired a tract for school purposes; that arrangements are being made for a shopping center and for churches. Appellants seem to complain that other developed areas nearby were not included—but we know of no such statutory requirement. The annexation of any particular area depends on the facts of each individual case. The undisputed evidence shows the *area* here is contiguous to the City of Fort Smith.

The final question raised by appellants has given us some concern—that question is: Does Fort Smith (situated in the Fort Smith District of Sebastian County) have the constitutional right and power to annex property which lies wholly within the Greenwood District of Sebastian County?

Article 13, § 5 of the State Constitution reads:

"Sebastian County *may* have two districts and two county seats, at which county, probate and circuit courts shall be held as may be provided by law, each district paying its own expenses." (Emphasis supplied.)

It seems to be appellants' position that the present districts (Fort Smith District and Greenwood District) are to all intents and purposes the same as two separate and distinct counties, with the result that the courts of one district could have no jurisdiction over lands in the other district. We are not convinced, however, by that argument, for several reasons. It is noted the constitution does not compel Sebastian County to have two districts, nor does it specify the division line in case two districts were created. It is noted also that the preceding section of the constitution (§ 4) clearly indicates the legislature has the right to form new counties—i.e. to form new county lines. If it can change county lines it could undoubtedly change district lines—as by annexation. The case of *Williams* v. *State,* 160 Ark. 587, 255 S. W. 314, clearly shows that districts and counties are not alike in all respects. There it was held that Art. 2, § 10 of the Constitution providing that the venue in criminal prosecutions may be changed to any other county in the district, was not authority to change the venue from Greenwood District to the Fort Smith District (both in Sebastian County).

It is therefore our conclusion that the judgment of the trial court must be and it is hereby affirmed.

Affirmed.

McFaddin, J., dissents.

Ed. F. McFaddin, Associate Justice (dissenting). I cannot reconcile the holding in the present case with our holding in *Scaramuzza* v. *McLeod,* 207 Ark. 855, 183 S. W. 2d 55, so I dissent from the present holding.

After referring to Act No. 88 of 1963, the Majority says the question is this: "Does Fort Smith (situated in the Fort Smith District of Sebastian County) have the constitutional right and power to annex property which lies wholly within the Greenwood District of Sebastian County?" I think the Scaramuzza case shows that the correct answer to this question is the negative.

In the said Scaramuzza case we quoted Article 5, Section 13 of the Constitution of Arkansas, and of that constitutional provision we said:

"The effect of this provision of the Constitution is not to establish two county, probate and circuit courts in Sebastian county, but is rather to establish courts for each district of the county, so that the Ft. Smith District has a county court, and so also has the Greenwood District, and each has jurisdiction over its respective area. The county court of the Greenwood District has the same jurisdiction within that district that the county court of another county would have in that county, and so also with the county court of the Ft. Smith District."

If the annexation here involved is permitted (as the Majority is approving), either that portion of the City of Fort Smith involved in this annexation will still remain under the jurisdiction of the Greenwood District, or a portion of the Greenwood District will be taken away from it and given to the Fort Smith District. I think such result violates the holding in *Scaramuzza* v. *McLeod, supra.* At all events, under the order here affirmed, the Fort Smith District is allowed to make an order affecting lands in the Greenwood District. I cannot agree with the Majority holding and therefore I respectfully dissent.

LOVEGROVE *v.* HANNA.

5-3462 386 S. W. 2d 947

Opinion delivered February 22, 1965.

Warner, Warner, Ragon & Smith, for appellant.

Fines Batchelor, Jr., J. Sam Wood and *David O. Partain,* for appellee.

SAM ROBINSON, Associate Justice. The appellant in this case, R. L. Lovegrove, filed this action alleging that there is a public road adjacent to 40 acres of land he owns; that the appellees, Jewel C. and Verna M. Hanna, have constructed a chain link fence across the road in question, and asked that they be enjoined from obstructing the road. Defendants defended on the theory that the road had been abandoned more than seven years prior to the filing of this action and was, therefore, no longer a public road. After considering all the evidence, the Chancellor held that the road in question had been abandoned and denied the petition for an injunction. The plaintiff, Lovegrove, has appealed.

Appellant bought the 40 acres in 1960. However, he had farmed it some 20 years ago. He does not live on the property. At one time there was a dirt road on the property now owned by appellee which had been acquired as a road by prescription. The road ran east and west along the south border of plaintiff's 40 acres and at the southeast corner of appellant's property the road turned south. It is about 90 feet from the southeast corner of appellant's property south to Highway 64-71. There is a graded gravel road extending along the west border of appellant's property which connects with Highway 64-71.

Prior to 1930 Highway 64-71 had been constructed by the State. It is a hard surfaced road; it runs in the same general direction, but at somewhat of an angle, to the old dirt road which was adjacent to appellant's property. The testimony on behalf of appellees is that the dirt road was abandoned after the construction of the hard surfaced road. The dirt road was acquired by prescription and was subject to abandonment. The court said in *Meek* v. *Love,* 197 Ark. 394, 122 S. W. 2d 606,

quoting from *McLain* v. *Keel,* 135 Ark. 496, 205 S. W. 894: ". . . it is also equally well settled that the right to a public highway once established by limitation or prescription may be abandoned by non-user, and if so abandoned for a period of more than seven years, the right of the owner of the fee to re-enter and to thereby exclude the public from the use of the highway is restored."

There was testimony on the part of appellant that there never has been an abandonment, but we cannot say that the finding of the Chancellor that there has been an abandonment is contrary to the preponderance of the evidence.

In addition to the oral testimony in the case, there are numerous pictures which show that the old road has not been used in a long, long time. Morever, there was introduced in evidence a profile survey made by the Highway Department in 1951 when Highway 64-71 was widened. This survey shows all the details of the land and improvements at the point where the old road was originally located and no road is shown on the 1951 plan of the survey. We are of the opinion that if the dirt road had been in existence in 1951 it would have been shown on the plan of the 1951 survey.

When the pictures and survey are considered in conjunction with all the oral testimony, we cannot say the Chancellor's finding is contrary to a preponderance of the evidence.

Affirmed.

5-3451 386 S. W. 2d 938

Opinion delivered February 22, 1965.

John L. Anderson, for appellant.

Roscopf & Raff, for appellee.

JIM JOHNSON, Associate Justice. This is a suit on a business interruption insurance policy for loss sustained following damage to a boiler in a hosiery mill.

Appellee Hartford Steam Boiler Inspection and Insurance Company insured the boiler of appellant Waldridge Hosiery Mill, Inc., against various kinds of damage. The policy in effect on October 19, 1959, contained a prevention of business endorsement insuring appellant against business production loss in the sum of $200 per day up to a limit of $20,000 should appellant's business be shut down by virtue of, among other things, boiler explosions. Appellant's boiler was damaged on October 19, 1959, and the business was interrupted during repairs. Appellee denied liability under the policy endorsement claiming that the business loss was caused by fire, not explosion, citing two exclusions in the endorsement as follows:

"The Company shall not be liable for payment for any prevention of business . . .

c. Resulting from fire concomitant with or following an Accident or from the use of water or other means to extinguish fire;

d. Resulting from an Accident caused directly or indirectly by fire or from the use of water or other means to extinguish fires; . . ."

Appellant filed suit in Phillips Circuit Court on October 10, 1961, praying judgment for $2,000 for ten days' business interruption, plus the statutory penalty and attorney's fee. The trial court sitting as both judge and jury heard the case on March 6, 1964. The court found "that the damages and prevention of business experienced by appellant resulted from fire concomitant with and following an accident and is included within exclusion 'C' under the terms and conditions of the policy sued on." From judgment dismissing its complaint, appellant has prosecuted this appeal.

For reversal appellant contends that the policy of insurance was in full force and effect at the time of the time of the explosion of the boiler and appellee failed to prove that it was of such a nature as to come within the exclusions or exceptions of the policy.

This being an appeal from circuit court (as opposed to chancery) our function on appeal is to determine whether there is substantial evidence to support the judgment of the trial court. The parties stipulated that the policy sued on was in full force and effect and a specimen copy was introduced. The question here then is whether there is substantial evidence to support the trial court's finding that appellant's business interruption was caused by fire, which was excluded by the policy, rather than by explosion, which was covered.

There were three witnesses in this case. Appellant's president, who is long experienced in the plumbing and heating business, and the head of the firm that repaired appellant's boiler both testified on behalf of appellant that the damage was caused by explosion. A state boiler inspector who has been in appellee's employ for 28 years

testified on behalf of appellee that the damage was caused by fire. The latter two witnesses were both unusually well qualified in this field and obviously respected each other's professional opinion, although they reached opposite conclusions. The testimony is well balanced and while, where we sitting as a jury we might have reached a different conclusion, we cannot say that the judgment of the trial court, who saw, heard and questioned these witnesses, is not supported by substantial evidence. *Missouri Pacific Transportation Company* v. *Sharp,* 194 Ark. 405, 108 S. W. 2d 579.

Affirmed.

PETTY *v.* CITY OF PINE BLUFF.

5-3459 386 S. W. 2d 935

Opinion delivered February 22, 1965

McMath, Leatherman, Woods & Youngdahl, by *John P. Sizemore,* for appellant.

George N. Holmes, for appellee.

JIM JOHNSON, Associate Justice. This appeal arises from suspension of a firemen for moving his residence outside the city which employed him.

Appellant Bobby Petty was employed by appellee City of Pine Bluff as a fireman in 1951. In 1952 an ordinance requiring all city police and fire department employees to reside within the city limits, without exception, was repealed and the city council passed ordinance § 3133 requiring that all members of these departments "must be residents of the city or live within such close proximity of the city as to not interfere with the proper performance of their duties." The ordinance also provided that in the case of non-resident employees of the city, the department chief (police or fire) shall "indicate by letter whether in his opinion the employee lives within such proximity as to be able to properly perform his duties."

On June 1, 1963, appellant wrote the chairman of the Pine Bluff Civil Service Commission, with a copy to Fire Chief Edwards, stating in essence that it was an economic necessity for him to sell his house in the city and move into his house at Sulphur Springs, six miles outside the city limits. The letter asked for the position of the commission and the fire department on such a move, and for an exception to the policy, if there was any policy against it. On September 18, 1963, the fire chief advised appellant by letter that he had violated ordinance No. 3133 and that his salary would be discontinued as of 6:00 P.M. that day, and further that appellant was also suspended indefinitely for insubordination for violating orders not to move out of the city limits. Appellant appealed his suspension to the Civil Service Commission. A public hearing was held September 22, 1963, at which appellant was present with his counsel and introduced evidence and testimony on his behalf. On October 23, 1963, the Commission advised appellant that it sustained Fire Chief Edwards in his indefinite sustained Fire Chief Edwards in his indefinite suspension of appellant for violation of orders and denied his appeal.

Appellant then appealed the Commission's decision to the Jefferson Circuit Court. The case was heard before the court on the record before the Commission

and in addition testimony of various witnesses on behalf of appellant and appellee. The circuit court in its judgment of July 1, 1964, sustained appellant's suspension, from which appellant has prosecuted this appeal.

All the proceedings in this case have been conducted under the provisions of Ark. Stat. Ann. § 19-1605.1 (Supp. 1963) which sets out the procedure for discharge or reduction in rank of police and fireman under civil service. The original statute, enacted in 1949, provided for appeal from the Board of Civil Service Commissioners to the Circuit Court, and trial before the court would be on the transcript of the civil service commission hearing and "such other evidence that the parties desire to introduce, provided same is legal, relevant and competent." In considering this statute in 1951 in *City of Little Rock* v. *Newcomb,* 219 Ark. 74, 239 S. W. 2d 750, this court said that "the Legislature . . . intended to provide for a de novo hearing by the circuit court" and concluded this statement with: "and that this court [the Supreme Court] should hear the matter de novo on the entire record before the circuit court, as in chancery cases."

The Legislature amended this statute in 1959, part of the amendment reading as follows:

"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. A right of appeal is also given from any action from the Circuit Court to the Supreme Court of the State of Arkansas, and such appeal shall be governed by the rules of procedure now provided by law for appeals from the Circuit Court to the Supreme Court."

In 1960 the question of right of trial de novo in circuit court again arose in *Campbell* v. *City of Hot Springs,* 232 Ark. 878, 314 S. W. 2d 225, and in affirming this right this court quoted with approval from *City of Little*

Rock v. *Newcomb, supra,* including the phrase quoted above, "and that this court should hear the matter de novo . . ." without further discussion. Although the question of right of trial de novo in the Supreme Court had not been directly raised, this court in *City of Little Rock* v. *Tucker,* 234 Ark. 35, 350 S. W. 2d 531 (1961), cited *City of Little Rock* v. *Newcomb, supra,* as authority for "on an appeal from the decision of the circuit court, the matter is presented here de novo on the entire record and is viewed as chancery cases are here," and recently in *McNeal* v. *Civil Serv. Comm. of City of Little Rock,* 237 Ark. 301, 372 S. W. 2d 614 (1963), we stated: "In a proceeding of this kind we review the evidence de novo, as in chancery. *City of Little Rock* v. *Tucker,* [*supra*]." Despite this dista, the question of right of trial de novo in the Supreme Court in such cases has been squarely presented here for the first time since the 1949 law was amended. In the tradition of our efforts to clarify ambiguities as they are discovered, suffice it to say the 1959 amendment to § 19-1605.1 (*supra*) continues to provide for trial de novo in circuit court but not in the Supreme Court. On appeals from circuit court, the Supreme Court determines whether the verdict or trial court's finding of fact is sustained by substantial evidence. *Duty* v. *Gunter,* 231 Ark. 385, 331 S. W. 2d 111. The words of the statute, "such appeal [to this court] shall be governed by the rules of procedure now provided by law for appeals from the Circuit Court to the Supreme Court," permits no other interpretation.

Thus the question here presented is whether there is substantial evidence to support the de novo finding of the circuit court that appellant's suspension should be sustained.

After passage of ordinance No. 3133 in 1952, the policy of the civic service commission was to permit exceptions to the ordinance where, in the opinion of the department chief, the nonresident employee lived close enough to properly perform his duties. Appellant began to build a home at Sulphur Springs and before it was completed in 1956, the commission reversed its policy

and would allow no new exceptions to the ordinance. Appellant testified that at the time of this commission ruling, one of the other firemen was able to move into his unfinished house in time to be excepted, but that appellant's house wasn't far enough along for that. This admittedly was the start of appellant's private feud with the city. Appellant completed his house after the ruling went into effect and, after giving the fire department his brother's Pine Bluff address as his own in direct violation of a fire department rule, proceeded to move into the Sulphur Springs house and remained there until Fire Chief Alford discovered the fact and suspended him on May 1, 1959. This suspension was lifted by letter of May 7, 1959, on condition that appellant move back into the city, requiring him to notify the chief in writing the date and location he moved to, and expressly stipulating that: "You will also be required to remain in the City as long as you are employed in or on the Fire Department or until you are given permission to move out." Appellant signed a statement that he was a resident of Pine Bluff as of that date, May 7th, and gave a Pine Bluff address. Appellant moved out to Sulphur Springs again in 1960. Chief Edwards testified that he learned this when he took office succeeding Chief Alford and wrote appellant on January 31, 1961 that he lived too far out. Appellant apparently moved back into the city again at that time.

Since Chief Edwards' promotion to that office, there is evidence that he has allowed no exceptions to the nonresident ordinance other than the two existing at the time he took office. (These two exceptions are firemen who live outside the city limits, one a block and the other a mile, and have for a number of years, one of them since before passage of the ordinance.) It is uncontroverted that Chief Edwards refused in 1961 to permit a firemen to move across the street, where the street was the city limit and the move would have placed him outside the city.

From the evidence presented, the requirements of the ordinance, the policy of the commission, the position

of the chief and the determination of appellant to flout them all are quite clear. We cannot say there is no substantial evidence to support the finding of the circuit court sustaining appellant's suspension for insubordination.

Affirmed.

CITY OF LITTLE ROCK *v.* GARDNER.

5-3452 386 S. W. 2d 923

Opinion delivered February 22, 1965.

[Rehearing denied March 29, 1965]

Joseph C. Kemp, City Attorney, by *John B. Plegge* and *Perry V. Whitmore,* Assistant City Attorneys, for appellant.

Moses, McClellan, Arnold, Owen & McDermott, by *James R. Howard,* for appellee.

FRANK HOLT, Associate Justice. The appellee owns and lives on her property at 1723 Broadway Street in Little Rock, Arkansas. She applied to the Little Rock Planning Commission for the rezoning of her property from "D" Apartment District to "F" Commercial District. Upon her application being denied, she appealed to the Board of Directors of the city and again her request was denied. The appellee then filed this action to enjoin the appellant

from denying her the right to use her property for "F" Commercial purposes.

Appellee alleged that the refusal of the appellant to rezone her property was arbitrary and placed unreasonable limits upon the use of her property; that the limitations upon the use of her property "bears no definite relationship to the health, safety, morals, and general welfare of the inhabitants of the area concerned; that the area surrounding the plaintiff's property is no longer suitable for residential use because of heavy traffic, the existence of large shopping centers in the immediate vicinity, the deterioration, decay and bad repair of the structures in the area and the obsolescence of such structures, and because of the removal of population groups within the city." Appellee also alleged that she had been deprived of her property in violation of the Fourteenth Amendment of the U. S. Constitution and Article 2, §§ 8 and 22 of the Constitution of Arkansas. The chancellor found that the refusal of the city authorities to rezone plaintiff's property from "D" Apartment to "F" Commercial is "arbitrary, unlawful and discriminatory" and enjoined the appellant from denying appellee the right to use her property for "F" Commercial purposes. From this decree appellant brings this appeal.

For reversal appellant primarily contends that the chancellor's finding that the action of the appellant was arbitrary in refusing to rezone appellee's property is not supported by a preponderance of the evidence. We cannot agree.

In the very recent case of *City of Little Rock* v. *Andres,* 237 Ark. 658, 375 S. W. 2d 370, the property in question was located at 2115 Broadway, or 3½ blocks from the property in the case at bar. There we affirmed the chancellor's holding that the action of the city authorities was arbitrary in refusing to rezone that property from "C-2 Family District" to "F" Commercial. We are of the view that the case at bar is controlled by our opinion in the *Andres* case and the decisions cited therein.

The appellant introduced into evidence as an exhibit "Future Land Use and Zoning Plans, Census Tract 6". The area of this tract is "bounded generally by Fourteenth Street on the north, Roosevelt Road on the south, Cumberland Street on the east and Chester Street on the west." An examination of this exhibit indicates that both the Andres' and the appellee's property are located approximately within the center of the area designated on Broadway between Fourteenth and Twenty-fifth Streets. The Andres' property is located at 2115 Broadway, or four blocks from the south end of this area which is zoned Commercial. Appellee Gardner's property is located at 1723 Broadway, or three blocks from the north end of this area where commercial zoning also exists. The Andres' and appellee Gardner's property are only three and one-half blocks apart and in the instant case appellant has offered no evidence that sufficiently distinguishes it from the *Andres* case. In fact, in the *Andres* case the property was zoned "C-2 Family District" and on appeal we approved the right of the property owner to use his property for "F" Commercial purposes. In the case at bar the property is zoned "D" Apartment. Thus, since "F" Commercial zoning is sought, the degree of transition requested is actually less of an impact upon rezoning than that sought in the *Andres* case. See footnote in *City of Little Rock* v. *Garner,* 235 Ark. 362, p. 363, 360 S. W. 2d 116, for definition of zoning classifications.

The appellant presented as witnesses three property owners within close proximity to appellee's property. Two of these witnesses testified that they owned old houses similar to appellee's and they had economically converted them into apartment houses. Another witness testified as the owner of an apartment building located two blocks from appellee and one block from commercial zoning, a filling station at Fourteenth and Broadway, which appears to have no detrimental effect upon the value of the apartment building. These and also expert witnesses presented by the city offered evidence that appellee's property could be economically converted into

and used for an apartment house and that to allow appellee to use her property for commercial purposes would have an adverse effect upon the use of the surrounding property for rental purposes.

The appellee presented evidence, however, that the homes in her neighborhood have deteriorated to such an extreme degree, coupled with the usually heavy traffic upon Broadway as a four-lane thoroughfare of national highways, that her property is no longer suitable for "D" Apartment use. Appellee presented Mr. Andres as a witness in support of her position. According to him, a residence on Broadway valued at $12,000.00 increases in value to $25,000.00 upon being zoned "F" Commercial; that a shopping center is located at the corner of Twenty-fifth and Broadway and across the street is a lamp shop and filling station; that a house at 2100 Broadway had been vacant for a long time and that other houses in this general area were vacant; that rental houses were occupied mostly by transients or for one to two months; that most of the structures were old and lacked modern facilities and that it is too expensive to convert these older residences into apartments as a profitable venture; that no parking facilities exist, other than on the regular size lots, since parking is not allowed on Broadway or in the adjacent alleys; that he was unable to sell his property before it was rezoned although he had listed it with realtors and that now he has received attractive offers to sell as commercial property.

Another witness, Mr. Lewis, an attorney and experienced in the realty business, testified that he owned property at 2123 Broadway; that his house had been divided into rental units and was for sale; that during the four or five years he had owned the property he had experienced much difficulty in renting it and had to reduce the rent several times in order to attract tenants; that he had been unsuccessful in his efforts to sell his property; that some of his clients on Broadway had also been unable to sell their property because of the existing zoning classification and that in his opinion the best

use of his and appellee's property would be for commercial purposes.

The appellee testified that her property was a seventy-five-year-old two-story frame home with 11 rooms and 2 baths located on a lot 100x140 feet which she had owned the past twenty-three years; that she was unable to maintain it in good repair; that four different realtors had been unable to sell it the past ten years although she had reduced the price considerably; that some of the houses in the area of appellee's property, and according to pictures as exhibits to her testimony, are in a deteriorated condition; in fact, a sign on one reads "Structure Closed, Unfit For Human Habitation, City Health Department"; that a house nearby is being razed and it appears from her testimony that in her neighborhood when a house is demolished or razed there is no new construction of a residence or apartments. She had ascertained that it would cost approximately $90,000.00 to convert her residence into a twelve-unit apartment building and that such would be impossible for her as well as a questionable financial venture for anyone. Further, the lack of schools and play grounds in the area, the traffic count of 15,000 vehicles per day on Broadway as a four-lane thoroughfare, made it impractical to use her property for multiple apartment units.

In the case at bar, as we said in the *Andres* case, the property would have a reasonable and satisfactory value as commercial property according to the undisputed evidence. There we said:

"* * * If a lot becomes vacant because the house is condemned or is destroyed by fire, it has no value unless the property can be rezoned as commercial. An apartment house could not be built and rented successfully because no parking is permitted on Broadway and one lot would not be large enough to take care of the required parking."

One of the main purposes of zoning and rezoning is to stabilize property values in a neighborhood, thus encouraging the most appropriate use of the land.

Appellant next contends that the chancellor erred in refusing certain testimony offered by appellant. On appeal we try chancery cases de novo. When we consider all of the competent evidence in the case at bar we cannot say that the finding of the chancellor that the city authorities acted arbitrarily in refusing to rezone the property in question is contrary to the preponderance of the evidence.

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

CARLETON HARRIS, Chief Justice (dissenting). I do not feel that the proof in this case justifies a holding that the city authorities were arbitrary in refusing to rezone the property involved from the designation of "D" Apartment District to "F" Commercial District. The majority apparently depend almost entirely upon the recent case of *City of Little Rock* v. *Andres,* 237 Ark. 658, 375 S. W. 2d 370. That opinion contains language which would appear to hold that no part of Broadway is now suitable for residential purposes, but since *Andres* only actually involved a small area on Broadway, I have considered the "sweeping language" as to the entire street to be nothing more than *dicta.* If all of the language employed in the *Andres* case is to be considered a precedent, it appears to me that the City of Little Rock is wasting time in opposing any requests for commercial zoning along Broadway.

I respectfully dissent.

ED. F. MCFADDIN, Associate Justice (dissenting). This case is the logical sequal to *City of Little Rock* v. *Andres,* 237 Ark. 658, 375 S. W. 2d 370, in which this Court allowed rezoning. I dissented in that case, and I dissent in this one.

There is no need to review the evidence *in extenso;* but I mention it briefly. Mrs. Hutto lives at 1719 Arch

Street, directly across the alley from the property in question. Mrs. T. J. Reynolds owns property at 18th and Broadway, less than a block from the property in question. Mr. Petty lives at 2020 Broadway; Mr. Harding manages his mother's property which is located at 1520 Broadway, two blocks from the property in question. All of these witnesses testified as opposed to this rezoning petition.

There was other testimony in addition to these property owners: Mr. Cooper, as an engineer of the State Highway Department, testified as to the traffic volume on Broadway; Mr. East, a real estate broker, testified against the rezoning; Mr. DeNoble, the Director of Community Development of the City of Little Rock, testified at length against rezoning and gave most cogent reasons. Mr. Eurman, as the City Planner of the Metropolitan Area Planning Commission, testified against the rezoning of this property. All of the witnesses for the appellant offered strong evidence against this "strip zoning" which is being accomplished in this case. I think the Chancery Court decided this case against the preponderance of the evidence. But it appears that the Arkansas Supreme Court has rather clearly indicated an intention to rezone Broadway in Little Rock which will result in "strip zoning," a practice disapproved by all authorities.

For the reasons herein stated, I respectfully dissent.

WARD, J., joins in this dissent.

5-3484 387 S. W. 2d 322

Opinion delivered March 1, 1965.

Featherston & Featherston, for appellant.

Jerry Witt, for appellee.

CARLETON HARRIS, Chief Justice. This litigation involves the validity of a deed. Appellant, Noles Bryant, and her former husband, Dr. Robert L. Bryant, were

named grantees in a deed conveying a certain forty-acre tract in Montgomery County, said deed being executed by the widow and surviving heirs[1] of Dr. Bryant's deceased father. Dr. Bryant and his wife took title as an estate by the entirety. The granting clause recites that the widow, Lou Bryant, and heirs,

"for and in consideration that the grantees are to provide a place for Mrs. Lou Bryant to live for the remainder of her life, and of the sum of THIRTY FIVE HUNDRED ($3500.00) DOLLARS, in hand paid receipt of which is hereby acknowledged, do hereby grant, bargain and sell to Robert L. Bryant and Noles Bryant his wife, GRANTEES, and unto their heirs and assigns forever, the following land lying in Montgomery County, Ark.: * * *"

It is undisputed that Dr. Bryant did provide a home for the mother, Mrs. Lou Bryant, which was located on a one-acre tract, and that she was still living there at the time of this litigation.[2] Dr. Bryant, however, did not convey the property to his mother.

Dr. Bryant and appellant were divorced on May 1, 1953. The divorce decree sets out the property that each is to receive, but the particular forty acres here involved is not mentioned. The one acre, upon which the home was provided for Mrs. Lou Bryant, was awarded to Dr. Bryant. In August of the same year, Dr. Bryant married Gerry Matsuko in Honolulu, Hawaii. On August 24, 1954, Dr. Bryant and the second wife executed a deed conveying the forty acres to Jerry Witt, an attorney; also a deed was executed conveying the one acre. On the next day, Attorney Witt and his wife conveyed the properties back to Dr. Bryant and Gerry. The doctor and his wife lived together until his death on May 29, 1955. Within a week, the second Mrs. Bryant deeded both pieces of property to Mrs. Lou Bryant.

Appellant instituted suit, contending that she was the sole owner of the forty-acre tract by virtue of being

1 Brothers and sisters of Dr. Bryant.

2 From the briefs, it appears that Mrs. Bryant subsequently died, apparently still living on this one acre.

the survivor of the estate by the entirety. Appellees answered, contending that the $3,500, mentioned as part of the consideration in the deed, was never paid, and they prayed that their deed to Dr. Bryant and appellant be cancelled. On hearing, the court held,

"that the deed executed by the defendants [appellees] to Robert L. Bryant and Noles Bryant on the 9th day of August, 1954 [52], and recorded in deed record books B-41, Pages 366-368 conveying the following lands herein described as follows: [here appears description of the forty acres] should be cancelled and set aside for the reason that the consideration in said deed wholly failed and that said deed should be removed as a cloud on the title of the defendants * * *"

Title to the property was quieted and confirmed in appellees. From the decree so entered, appellant brings this appeal.

We think, under our cases, that this decree must be reversed. In 1856, this court held that where a deed acknowledges payment of a consideration, the expressed consideration cannot be disproved for the purpose of defeating the conveyance, unless it be on the ground of fraud. The court went on to say that, for the purpose of ascertaining damages for which a plaintiff might be entitled, due to breach of covenant, the true consideration might be shown. *Vaugine, et al,* v. *Taylor, et al,* 18 Ark. 65. In 1955, this court said: "The recital of consideration in a deed may be varied by parol for every purpose except to show that the deed was without consideration," *United Loan & Investment Co.* v. *Nunez,* 225 Ark. 362, 282 S. W. 2d 595. In *Rebsamen Motors* v. *Moore,* 231 Ark. 249, 329 S. W. 2d 155, we reiterated:

"* * * It has been decided by this court in numerous cases that, though the recitals as to consideration in a deed cannot be contradicted by parol evidence *for the purpose of defeating the conveyance,*[3] it is competent to prove by such evidence that the consideration has not

[3] Emphasis supplied.

been paid as recited or to establish the fact that other considerations not recited in the deed were agreed to be paid, when it does not contradict the terms of the writing."

In 26 C.J.S., Deeds, § 21, Page 618, we find:

"While it has been recognized that failure of consideration for a conveyance is sufficient ground to warrant a rescission, at least where it is total, as a general rule a deed which is otherwise valid will not be invalidated by reason of a total or partial failure of consideration, and will nevertheless operate to convey title. So, in the absence of statutory authorization, or an express provision for a forfeiture or reconveyance, a deed will not be avoided or canceled because the consideration agreed on is not paid, or because the grantee fails to perform a promise forming the whole or part of the consideration therefor; nor will failure to perform such a promise ordinarily give rise to a lien or charge against the land; nor is a party entitled to have his deed set aside and canceled simply because he has not received full consideration."

An Arkansas case, *Wheeler* v. *Wendleton,* 209 Ark. 601, 191 S. W. 2d 952, is cited. There, this court stated:

"The fact that the consideration for this agreement was not paid would not revest the title in Hunt, but would only give him a right to enforce collection of the amount due him for his improvements and taxes." * * *

We are firmly of the opinion that, even if failure of consideration were established, appellees would not be entitled to cancellation of the deed because of that fact alone. There is an exception to the general rule, *viz,* that when a deed is executed in consideration of future support and maintenance—then, if the provision is not fulfilled by the grantee, the grantor may sue at law for damages, or may sue in equity to cancel the deed for failure of consideration. In *Fisher* v. *Sellers,* 214 Ark. 635, 217 S. W. 2d 331, this court commented:

"* * * Our cases hold that when a deed is executed in consideration of future support and mainte-

nance—as here—then, if the grantee fails to fulfill the provisions of the deed, the grantor may sue at law for damages, or may sue in equity to cancel the deed for failure of consideration."

Appellees here contend that the $3,500 was for support of the mother, and that accordingly, the chancellor properly cancelled the dead.

Let us look to the circumstances herein, commencing with an examination of the deed. First, that instrument does not recite that the $3,500.00 is to be paid to the mother; rather, the wording of the conveyance indicates that this sum of money had been received by all grantees.[4] It will be noted that there is no provision in the deed requiring Dr. Bryant to provide support in the future; in fact, there is nothing to indicate that the $3,500 lump sum payment (shown as paid) was to be used for support. Of course, if the money had been paid to the mother, she would have been privileged to use it for support or whatever else she desired. The point is that there was no obligation on Dr. Bryant to do anything *in the future* for his mother except provide a place for her to live for the remainder of her life—which was done. Be that as it may, we do not feel that appellees have established by the necessary quantum of proof either that the $3,500 represented support money for Lou Bryant, or even that Dr. Bryant failed to pay the $3,500. In *Kirkham* v. *Malone,* 232 Ark. 390, 336 S. W. 2d 46, we said:

"At the outset it must be recognized that the law is firmly established that to justify the setting aside of a deed for failure of consideration, the evidence of such failure must be clear, cogent and convincing."

Appellant offered witnesses who testified that the $3,500 had been paid. On the other hand, appellees offered testimony to the effect that it had not been paid. It is evident that Dr. Bryant considered that the transaction had been consummated, else he would not have conveyed the property to his attorney and then obtained a conveyance back to himself and second wife. By virtue

[4] It might be mentioned that no lien was retained in the deed.

of this act, it would appear that the doctor recognized that his first wife still had an interest in the tract at that time.

The testimony of appellees is conflicting as to who was to receive the $3,500. For instance, Lou Bryant, the mother, testified that the $3,500 was to be paid to her and the children; that it was to be divided equally between all of them. A daughter, Heddie Tucker, likewise testified that the money was to be paid to the mother and the heirs (meaning the children); that she (the witness) was to receive a part of the money. Mae Kilby, another daughter, also testified that, in addition to her brother providing a place for the mother to live, $3,500 was to be paid to the mother and to the children for the property. At another point in her testimony, the witness stated that "Mother would have money to live on." Anna Barber, a daughter, testified that Dr. Bryant "was supposed to support my mother, but he did not." Wesley Bryant, a son, stated, "It was my understanding that Dr. Bryant was to deposit the purchase price of this land in the bank, and it was agreed that my mother would be supported by this deposit until her death, and any money left at her death would be divided among the heirs." Oda Rogers, a daughter, testified that her brother was supposed to put $3,500 in the bank to be used by the mother. All of the appellees who testified stated that no part of the $3,500 was paid to any of them; this testimony, of course, could mean nothing more than that they had not individually received any money.[5]

It is obvious that appellees themselves were not in agreement as to who would receive the money, which means that they certainly were not in agreement that it was to be paid solely to the mother, or that it was to be used for her support. Appellees alleged fraud in the procurement of the deed, but the chancellor made no finding of fraud, nor would the proof support such a finding. In fact, we think the testimony falls far short

[5] The various heirs lived in different cities and states, and, in fact, in obtaining the deed, Dr. Bryant traveled to the homes of several of them, who lived out of state, for instance, Nebraska, California, Washington. Several did not testify.

of establishing by clear, cogent, and convincing testimony that the $3,500 was to be used for the support of the mother, or that the money was not paid, though there was more evidence concerning the latter than the former.

The decree is accordingly reversed, and the cause remanded to the Montgomery County Chancery Court, with directions to enter a decree cancelling the following deeds to the forty-acre tract involved in this litigation:

Dr. Robert L. Bryant and wife, Gerry Matsuko Bryant, to Jerry Witt and wife;

Jerry Witt and wife to Dr. Bryant and Gerry Matsuko Bryant;

Gerry Matsuko Bryant to Lou Bryant.

It is so ordered.

McFaddin, J., dissents.

ED. F. MCFADDIN, Associate Justice (dissenting). I respectfully dissent. The deed here involved is a *support deed*[1] and the Chancery Court correctly cancelled the deed for failure of the grantees to provide and furnish the contracted support. The deed sought to be cancelled was dated July 9, 1952, and was from Mrs. Lou Bryant and her children to Robert L. Bryant and Noles Bryant, his wife, and the recited consideration was: ". . . . for and in consideration that the grantees are to provide a place for Mrs. Lou Bryant to live for the remainder of her life and of the sum of $3,500.00 in hand paid, receipt of which is hereby acknowledged . . ." I call attention to the fact that the appellant in this case was one of the grantees.

The first point I desire to make is that the real consideration in any deed can always be shown by parol evidence. This Court so held as far back as *Pate* v. *Johnson*,

[1] The term "support deed" is used in the case of *Euin* v. *Faubus*, 217 Ark. 238, 229 S. W. 2d 244, and its meaning is there shown.

15 Ark. 275; and has continued to so hold in a case as recent as *United Loan & Inv. Co.* v. *Nunez,* 225 Ark. 362, 282 S. W. 2d 595. In the last cited case we said:

"The recital of consideration in a deed may be varied by parol for every purpose except to show that the deed was without consideration. *Davis* v. *Jernigan,* 71 Ark. 494, 76 S. W. 554; *Mewes* v. *Mewes,* 116 Ark. 155, 172 S. W. 853; and other cases collected in West's Ark. Digest, 'Evidence,' § 419 (2)."

The second point I desire to make is that the evidence in the case here established—as the Chancellor found—that the real consideration in this deed was that Dr. Bryant and Noles Bryant would pay $3,500.00 for the support of Mrs. Lou Bryant, the mother of Dr. Bryant. Here is some of the testimony:

Mrs. Lou Bryant testified:

"Q. Now did he furnish you any money for a living?

"A. No, sir."

And again:

"Q. So that then, Mrs. Bryant, this one acre there that Dr. Bryant gave you as a place to live was just one of the considerations, . . . the other thing was to pay you $3,500.00, wasn't it?

"A. Yes, sir, and he never paid a penny of it."

Mrs. Oda Rogers, one of Mrs. Lou Bryant's daughters, testified:

"Q. Would you please tell the Court what he told you there with reference to when you signed the deed here, what was the consideration, what was he to pay for this land?

"A. Well, he was supposed to pay $3,500.00 to my mother.

"Q. Was he to put that in the bank to be used by your mother for her support as long as she lived, is that what he was to do?

"A. Yes."

And again the witness testified:

"Q. . . . has Noles Bryant ever paid you anything?

"A. No.

"Q. Never offered to pay you anything?

"A. No.

"Q. Never paid your mother anything?

"A. Not a penny."

Mrs. Hettie Tucker, another daughter of Mrs. Lou Bryant, testified as to the consideration:

"A. He promised to pay $3,500.00 when I signed the deed.

"Q. Who to?

"A. To mother and her heirs."

Mrs. May Kilby, another daughter of Mrs. Lou Bryant, testified:

"Q. Now, then, you understood when you signed the deed that your mother and all of her children were to get $3,500.00 in addition to providing a place for your mother to live?

"A. Yes . . .

"Q. Will you tell the Court whether or not Dr. Bryant or Noles Bryant ever paid any part of the $3,500.00?

"A. No, not a penny."

Some of the witnesses differed as to the ultimate disposition of the money; that is, whether it was to be used solely for the support of Mrs. Lou Bryant; or whether what was left after her death would go to her heirs; but those that I have mentioned were unanimous to the effect that the money was to be for the support of Mrs. Lou Bryant and that such support money had

not been paid.[2] In other words, the support from the $3,500.00 had never been performed by Dr. R. L. Bryant and Mrs. Noles Bryant. Thus, we have a case before us wherein the real consideration was to include $3,500.00 for the support of Mrs. Lou Bryant, and that consideration has not been fulfilled. Not only were the grantees to supply a home—but they were also to supply support —and the performance of one (a home) was only a partial performance; and that is not sufficient. See *Euin* v. *Faubus,* 217 Ark. 238, 229 S. W. 2d 244.

The third point I desire to make is that when a deed is executed in consideration of future support, as here, and all such support is not provided, then the deed may be cancelled outright, just as the Chancery Court did in the case at bar. These support deeds are different from other deeds in that respect. In *Goodwin* v. *Tyson,* 167 Ark. 396, 268 S. W. 15, this Court quoted from *Edwards* v. *Locke,* 134 Ark. 80, 203 S. W. 286, as follows:

" 'The rationale of the doctrine is that an intentional failure upon the part of the grantee to perform the contract to support, where that is the consideration for a deed, raises the presumption of such fraudulent intention from the inception of the contract, and therefore vitiates the deed based upon such consideration. Such contracts are in a class peculiar to themselves, and, where the grantee intentionally fails to perform the contract, the remedy by cancellation, as for fraud, may be resorted to, regardless of any remedy that the grantor

[2] In addition, Mrs. Gerry Matsuko Bryant, the widow of Dr. R. L. Bryant, testified, without objection, as to what Dr. R. L. Bryant told her some time after their marriage in 1953:

"Q. Did your husband discuss with you this particular deed, which you held in his lifetime, while you lived together, that was made in 1952, to the 40 acres of land, did he discuss it with you during his lifetime?

"A. Yes.

"Q. All right, what did he say, and where was it said?

"A. Well, I imagine it was at home, he said he'd like to buy it and he wanted to get everybody to sign it, but then we didn't have the money, so he didn't buy it.

"Q. In other words, the conversation you had with him was about some land that he would like to buy, was going to buy, but had not bought?

"A. That's right."

may have had also at law. See *Salyers* v. *Smith,* 67 Ark. 526; 4 R.C.L., p. 509, § 22; *Russell* v. *Robins,* 247 Ill. 510; *Stebbins* v. *Petty,* 209 Ill. 291; *Spangler* v. *Warborough,* 23 Okla. 806; see also *Bruer* v. *Bruer,* 109 Minn. 260; *Abbott* v. *Sanders,* 80 Vt. 179; *Glocke* v. *Glocke,* 113 Wis. 303. See also case note 43, L.R.A. (N.S.), 918-925.' "

To the same effect see *Brimson* v. *Pearrow,* 218 Ark. 27, 234 S. W. 2d 214; *Euin* v. *Faubus,* 217 Ark. 238, 229 S. W. 2d 244; and *Fisher* v. *Sellers,* 214 Ark. 635, 217 S. W. 2d 331.

So I maintain that the deed from Mrs. Lou Bryant and her children to Dr. R. L. Bryant and Noles Bryant was a support deed; that the $3,500.00 has not been paid or performed; and that the Chancery Court was correct in cancelling the deed.

WARD *v.* HARWOOD.

5-3478 387 S. W. 2d 318

Opinion delivered March 1, 1965.

Harper, Harper, Young & Durden, for appellant.

Hardin, Barton, Hardin & Jesson, for appellee.

ED. F. MCFADDIN, Associate Justice. The cause of this litigation is a tract of approximately 90 acres in,

or on the banks of, the Arkansas River in Fort Smith. The appellants call the tract "Slough Island"; and for convenience we will refer to it by that name, although one of the undecided questions is whether the land is in fact an island or an accretion. Another question, and the decisive one, is whether a 1901 enactment of the Arkansas Legislature was repealed by a 1917 enactment.

In 1962 appellants, Claude C. Ward and J. P. Hendricks, pursuant to statutory procedure,[1] obtained a deed from the Arkansas State Land Commissioner to the so-called Slough Island.[2] Shortly after appellant's deed was placed of record two suits were filed against them. In one suit appellee Harwood claimed to be the owner of certain described lands, and prayed that the island deed to Ward and Hendricks be removed as a cloud on Harwood's title. In the second suit appellee Ingram claimed to be the owner of certain lands and prayed that the island deed to Ward and Hendricks be removed as a cloud on Ingram's title. In the course of the litigation the grantees of some of Harwood's interests and some of Ingram's interests were made parties. Ward and Hendricks defended on the basis of their island deed. The two cases were consolidated and a lengthy trial resulted in a decree adverse to Ward and Hendricks. The Chancellor delivered a written opinion[3] which has been helpful to this Court.

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[1] The present statutory procedure is set out in Act No. 452 of 1959, which may be found as § 10-601 *et seq.* in the 1963 cumulative pocket supplement to the 1965 Replacement Volume of the Arkansas Statutes.

[2] The said deed to Slough Island says: "Pt. W ½ W ½ Frl. Sec. 33 and Pt. E ½ E ½ Frl. Sec. 32 in Frl. T 9 N, R 32 W; and Pt. NE ¼ NE ¼ Frl. Sec. 5, Frl. T 8 N, R 32 W; all near the Right Bank or Southerly side of the Arkansas River in Sebastian County, Arkansas; . . ." (and then follows a long metes and bounds description, the copying of which is not essential to this opinion).

[3] Pertinent excerpts from the Chancellor's opinion are: "It appears to the Court, in view of the facts established by the evidence, that it is unnecessary for the Court to determine whether Slough Island is in fact an island, since whatever it is, it was formed within the original boundaries of plaintiffs' land. Ark. Stat. Anno. 10-202. The defendants concede that the undisputed testimony shows that Slough Island did form within the original boundaries of plaintiffs' predecessors in title. But defendants contend that this section of the statute is not available to plaintiffs for the reason that this section

From the decree adverse to them, Ward and Hendricks prosecute this appeal and urge two points:

"I. The Chancellor erred in finding and holding that, even if the lands are an island, appellees are the owners thereof entitled to possession for the reason that the same had formed within the boundaries of lands belonging to appellees and their predecessors in title, thus erring:

"In holding that Section 10-202, supra (Act 127 of the Acts of Arkansas for 1901) had not been repealed by Act No. 282 of the Acts of Arkansas for 1917, as amended by Act No. 452 of the Acts of Arkansas for 1959. (Section 10-601.)

"II. The Chancellor erred in failing to find and hold that the lands in question were in fact an island at the time of the deed thereof to appellants from the Commissioner of State Lands, and that appellants were the owners thereof and entitled to possession, and in denying their prayer that appellees' claims of title thereto be cancelled as clouds upon appellants' title."

I.

Appellants' first point presents the question whether Act No. 127 of 1901 was repealed by Act. No. 282 of 1917, as amended by Act No. 452 of 1959. Our present holding on that question is decisive of this litigation. The south boundary of the Arkansas River here involved was meandered and surveyed in August 1827, and said

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was repealed by the enactment of Sec. 10-601 Ark. Stat. 1947 Anno. (1956 Replacement), . . .

"The question presented is simply did Act 282 of 1917 (Ark. Stats. § 10-601, et seq., 1956 Replacement) repeal by implication Act No. 127 of 1901 (Ark. Stats., Anno. 10-202, 1956 Replacement. . . .

"To hold that this statute was repealed by implication might result in confusion as to well established titles on navigable streams. There are no notes by the compiler of Annotated Statutes that Sec. 10-202 was repealed by the 1917 Act. So the Court finds and holds that the 1901 Act (Ark. Stat. Anno. 10-202, 1956 Replacement) is still in full force and effect. It is the further judgment of the Court that Slough Island having formed within the original boundaries of plaintiffs' land, title to said land is in plaintiffs, subject to the mineral interests above set forth, and that the State Deed should be cancelled and removed as a cloud on the title of plaintiffs."

survey showed that Sections 32 and 33 were on the south bank of the river. Section 33 was shown to be a complete section of 640 acres; and the area of Section 32 then in existence was shown to be 187.95 acres. The appellants claim that after the survey of 1827 the river cut into the south bank and by erosion took most of Section 32 and 33; that in later years the river then worked to the north and that Slough Island was formed as an island in the river. Appellants candidly admit that Slough Island as it now exists is within the land lines of appellees in Sections 32 and 33, but claim that Slough Island is a new island formed in the Arkansas River, even if it is within the land lines of the original Sections 32 and 33, as shown by the survey of 1827. In effect, appellants concede that if Ark. Stat. Ann. § 10-202 (Repl. 1956) is still the law in this State then the appellants must lose this litigation. So the decisive question is whether Ark. Stat. Ann. § 10-202 (Repl. 1957) is still in full force and effect. That section comes to us from Act No. 127 of 1901, and reads as follows:

"All land which has formed or may hereafter form, in the navigable waters of this State, and within the original boundaries of a former owner of land upon such stream, shall belong to and the title thereto shall vest in such former owner, his heirs or assigns, or in whoever may have lawfully succeeded to the right of such former owner therein."

The history of the section is interesting. In 1896 this Court decided the case of *Wallace* v. *Driver,* 61 Ark. 429, 33 S. W. 641, which held that an island formed in a navigable stream belonged to the State, even though the island was a reappearance of land within the boundaries of the original owner. There was a vigorous dissent by Chief Justice Bunn. To overcome the effect of the holding in *Wallace* v. *Driver, supra,* the Legislature of 1901 adopted Act No. 127; and the preamble to that Act[4] is enlightening. We copy it:

[4] We have considered Act No. 127 in a number of cases, and some of them have been subsequent to 1917. See: *Bush* v. *Alexander,* 134 Ark. 307, 203 S. W. 1028; *Gray* v. *Malone,* 142 Ark. 609, 219 S. W. 742; *Mills* v. *Protho,* 143 Ark. 117, 219 S. W. 1017; *Simpson* v. *Mar-*

"Whereas, Owners of land along navigable rivers often suffer by having such land washed away; and

"Whereas, Under existing laws if such land re-forms as an island in a navigable stream though within the original boundary of the former owner, it belongs not to him but to the state; . . ."

In 1917 the Arkansas Legislature adopted Act No. 282 which stated that all islands formed in navigable streams belonged to the State, and gave the procedure whereby the Land Commissioner might have the island surveyed and sold.[5] In the excellent brief filed herein the appellants claim that the effect of the 1917 legislation was to entirely repeal the 1901 legislation, arguing that the 1917 legislation said that "all islands" formed in navigable streams belonged to the State; and that such language was entirely inconsistent with the 1901 Act which said that lands formed in the bed of navigable streams belonged to the former owners of surveyed lands.

After a thorough study of the question we reach the conclusion that the 1917 Act did not repeal the 1901 Act. The 1917 Act did not expressly repeal the 1901 Act; and repeals by implication are not favored. It is our duty to reconcile legislative enactments and permit both to stand if possible; and since there was no express repeal of the 1901 legislation we hold that the effect of the 1917 legislation was to say that in all cases wherein islands are formed in navigable streams *and not within the boundary lines of former owners,* then the State may sell the island. Such construction prevents an implied repeal. We are led to this holding by a number of factors, one of which is that several cases[6] have been decided since the 1917 legislation and there is no

tin, 174 Ark. 956, 298 S. W. 861; *Jones* v. *Euper*, 182 Ark. 969, 33 S. W. 2d 378; *Knight* v. *Rogers*, 202 Ark. 590, 151 S. W. 2d 669; and *Wunderlich* v. *Cates*, 213 Ark. 695, 212 S. W. 2d 556.

[5] We had occasion to consider this Act in *Rankin* v. *Williams*, 221 Ark. 110, 252 S. W. 2d 551. The procedure set out in Act No. 282 of 1917 has been changed by Act No. 452 of 1959, but the changes are only procedural.

[6] See those listed in Footnote (4), *supra.*

language in any of them indicating that the 1901 legislation was repealed.

Also of great persuasion to us is the direct holding on this point made by the United States Circuit Court of Appeals, 8th Circuit, in 1946 in the case of *Anderson-Tully Co.* v. *Murphree,* 153 F. 2d 874.[7] The same question here presented was before that Court; that is, whether the Act of 1901 was repealed by the Act of 1917, and the Court held:

"The Act of 1917 (Pope's Digest Section 8739 *et seq.*) is not so in conflict with the Act of 1901 as to require a holding that the 1917 Act repeals the prior Act. The logical method of effecting a repeal of the 1901 Act, if that were intended, would have been the enactment of an express provision to that effect. It is well settled in Arkansas and elsewhere, that repeals by implication are not favored. *Bartlett* v. *Willis,* 147 Ark. 374, 227 S. W. 596; *City Realty Co.* v. *Robinson Contracting Co.,* 8 Cir., 183 F. 176. It is equally well settled that statutes relating to the same general subject must be construed together and, if possible, effect must be given to each in order to effectuate the legislative intent. *McFarland* v. *Bank of State,* 4 Ark. 410; *Thompson* v. *Road Improvement District,* 139 Ark. 136, 213 S. W. 386; *Pace* v. *State, for the use of Saline County,* 189 Ark. 1104, 76 S. W. 2d 294.

"Section 1 of the 1917 Act declares that islands formed in navigable streams in the state are the property of the state. Subsequent sections provide for a survey of the islands and prescribe a procedure for their sale and conveyance. Section 1 may reasonably be construed as applying only to islands not affected by the Act of 1901 and as constituting a logical prelude to the real purpose of the enactment, that is, to prescribe a method of selling State owned islands so as to get them on the tax rolls and have them put to productive use. We are referred to no case suggesting that the 1917 Act had the

[7] This case has been subsequently cited on this point in the following: *Anderson-Tully* v. *Chicago Mill & Lbr. Co.* (8th Cir.), 175 F. 2d 735; *Bryant* v. *Chicago Mill & Lbr. Co.,* 120 F. Supp. 463, (8th Cir.), 216 F. 2d 727; and *Kimble* v. *Willey,* 98 F. Supp. 730.

effect of repealing the Act of 1901. On the contrary, the cases seem to assume that no such repeal was intended. See, for example, *Mills* v. *Protho, supra,* 1920; *Bush, Rec'r.* v. *Alexander,* 1918, 134 Ark. 307, 203 S. W. 1028; *Simpson* v. *Martin,* 1927, 174 Ark. 956, 298 S. W. 861."

Holding, as we do, that the 1917 Act did not repeal the Act of 1901, it becomes unnecessary for us to consider the appellants' second point as to whether "Slough Island" is in fact an island, because if it is in fact an island the appellants cannot prevail, as we have just shown; and if it is an accretion the appellants concede that they are not entitled to prevail.

Affirmed.

CUPP, ADM'R *v.* FRAZIER'S HEIRS.

5-3439 387 S. W. 2d 328

Opinion delivered March 1, 1965.

Huie & Huie, Otis Turner and *J. E. Still,* for appellants.

John W. Simmons, for appellee.

George Rose Smith, J. This proceeding to determine the heirs of Clara McFadden Frazier presents two questions—to some extent novel ones—about the devolution of ancestral property under our statutes of descent and distribution.

The facts are stipulated. Clara's mother, Mamie McFadden, a widow, owned the land in question, as a new acquisition, at her death intestate in 1933. The property was inherited in equal undivided half interests by Mamie's two daughters, Clara and Algerina. Later on Algerina died intestate, without issue, and her half interest passed to Clara. In 1961 Clara died intestate, without issue. She was survived by cousins on her father's side, but the most diligent search has failed to produce any collateral kindred on her mother's side. In this situation the trial court held that all the property passed to the appellees, the heirs of Clara's husband, Sam Frazier, who died intestate in about 1934.

We consider first the half interest that Clara inherited directly from her mother in 1933. Here the question is this: In the complete absence of collateral heirs on the decedent's maternal side of the family, does property held by the decedent as a maternal ancestral estate

cross over to her heirs on the paternal side of the family or does it pass to the heirs of her deceased husband under Ark. Stat. Ann. § 61-107 (Supp. 1963)? We have not previously considered a case involving a total failure of the favored ancestral line, but the statutes and the decisions are so clear that we have no serious doubt about the accuracy of the trial court's decision to award the half interest now in question to the heirs of the deceased spouse.

The statute provides that in the absence of descendants "if the estate come by the father, then it shall ascend to the father and his heirs; if by the mother, the estate shall ascend to the mother and her heirs." Ark. Stat. Ann. § 61-110 (1947). Of course it is settled that the search is not really for the heirs of the father or mother; it is for the decedent's heirs on the paternal or maternal side of the family. *Oliver* v. *Vance,* 34 Ark. 564.

Our entire scheme of descent and distribution was painstakingly analyzed in *Kelly's Heirs* v. *McGuire,* 15 Ark. 555. The conclusions announced in that opinion have become rules of property to such an extent that no provision in the statutes can be interpreted by itself; it must be read along with what the court had to say in the *Kelly* case.

The court stated unequivocally in the *Kelly* opinion that an ancestral estate cannot cross over to the opposite side of the family. We first observed, at page 586, that at common law the paternal heirs "shall never inherit" maternal ancestral property, and vice versa. We then went on to declare, at page 591, that under our own statutes an ancestral estate goes to the line from which it came, "not in postponement but in exclusion" of the opposite line. These words cannot be misunderstood.

The statute itself confirms the court's holding. Two sections indicate the legislative intent. Section 61-111 provides that in certain cases if either line be extinct the entire estate goes to the opposite line; but, significantly, this provision "does not apply to ancestral estates."

The other pertinent provision, § 61-107, is even more persuasive in that it refers to kindred who are not "capable of inheriting." This section originally provided that if there were no descendants, parents, "or any paternal or maternal kindred capable of inheriting," the estate should go to the surviving spouse, if any; otherwise it would escheat to the State. In 1959 this section was amended to narrow the possibility of an escheat by providing that in the absence of a surviving spouse the property would go to the heirs of the decedent's deceased spouse. This is the section relied upon by the court below.

This reference to kindred who are "not capable of inheriting" provides a clear indication of the legislative intent. "Kindred" must refer to blood kin, not only because that is the ordinary meaning of the term but also because the original statute dealt exclusively with blood kin, there being no provision for inheritance by the decedent's in-laws. Yet in most instances blood kin, no matter how distantly related, are capable of inheriting. § 61-101. It is only in the simple instance of ancestral property that blood kin might be incapable of inheriting. Thus the reference to kindred who are not capable of inheriting must refer to an absence of heirs capable of taking ancestral property, for otherwise the words are meaningless surplusage. It is our duty to give effect to every word in the statute if possible.

The appellants' only real argument against the trial court's holding upon this first point is that it would be inequitable for Clara's property to pass to the heirs of her deceased husband rather than to her blood relatives on the paternal side. There is a quick answer to this argument. For more than 120 years—from the enactment of the Revised Statutes in 1838 until the amendment of § 61-107 in 1959, by which the heirs of a deceased spouse were permitted to inherit—a surviving spouse would take ancestral property if the favored line proved to be extinct. It cannot be seriously contended that a man's surviving widow is demonstrably less deserving of his estate than persons who might be extremely re-

mote blood relatives on the non-ancestral side of the family. Thus the inequity of which the appellants complain comes not from the original statute but from the 1959 amendment. We cannot refuse to give effect to the plain language of the 1959 amendment merely because we think it brings about an inequitable result in this particular case.

The second question in the case concerns the half interest that Clara inherited from her sister Algerina. This second issue differs from the first one in that it involves two intestacies instead of one. That is, Clara received half the property directly from her mother; so the maternal ancestral kindred were necessarily those of Clara's heirs who were related by blood to Clara's mother. The second half interest, however, passed successively from Mamie to Algerina and from Algerina to Clara. The question is this: Is Clara's mother still the stock of descent for the favored line or may the class be enlarged to include Algerina's blood kin as well? In the latter case the appellants would be capable of inheriting.

At common law, as modified by our statutes and by our earlier decisions construing those statutes, the inheriting class would be limited to the blood kin of Mamie McFadden. This is because in the search for that ancestor who would be regarded as the stock of descent the rule was to disregard those who had received the property by descent, as Algerina did in the case at bar. The search continued up the ancestral line until it reached the first person who had acquired the property in any way other than by descent. That person, referred to as the first purchaser (or the last purchaser, if all prior purchasers be considered in chronological order), became the stock of descent, to whom the decedent's heirs had to be related by blood in order for them to inherit ancestral property. This rule of the first purchaser was fully explained in *West* v. *Williams,* 15 Ark. 682; see also Meek, A Memorandum on the Law of Descent and Distribution, par. 20, reprinted in the Arkansas Bar Association Desk Book (1961).

In *Johnson* v. *Phillips,* 85 Ark. 86, 107 S. W. 170, the court actually reached the right result, in that the decedent's grandfather, who appears to have been the first purchaser, was held to be the stock of descent. The opinion, however, did not discuss the rule of the first purchaser.

Some uncertainty in the law was created by our holding in *Carter* v. *Carter,* 129 Ark. 7, 195 S. W. 10. There the court referred briefly to the last purchasing ancestor, but the opinion actually ignored the rule by finding the stock of descent to be Fannie Murphey, who had received the property by descent rather than by purchase. On rehearing (129 Ark. 573, 195 S. W. 1184) the court adhered to its position and, with no mention of the rule of the first purchaser, overruled *Johnson* v. *Phillips, supra.*

We consider the *Carter* decision to be unsound. Despite the passing reference to the last purchasing ancestor we think it clear that the court overlooked the requirement that the stock of descent be a purchaser. Such an oversight is indicated by the court's failure to state the substance of the rule and by its failure to express any dissatisfaction whatever with the rule. We are not overruling the *Carter* case retroactively, as it involved a rule of property, but the case will not be followed with respect to estates that may vest in the future.

The appellants insist that, under the *Carter* decision, Algerina must be treated as the stock of descent with respect to the half interest that she inherited. The holding in the *Carter* case did not in fact go that far, and we are unwilling to extend beyond its own facts a ruling that we consider to be erroneous.

Carter v. *Carter* dealt with a child's inheritance from its mother; so the maternal line, as distinguished from the paternal line, was actually involved. The flaw in the opinion was simply that the court selected the wrong person in the maternal line to be the stock of descent. In the case at bar, however, Algerina and Clara were sisters of the whole blood. If we should hold that Algerina was the transmitting ancestor whose blood is

to determine the course of descent, the fundamental conception of ancestral property is disregarded. This is true because full sisters have exactly the same blood, which makes it impossible to say that property which one inherits from the other comes from one side of the family rather than from the other. We realize that the relationship between sisters may be said to be ancestral within the meaning of our curtesy statute, as in *George* v. *Alexander,* 229 Ark. 593, 317 S. W. 2d 124, but we think it clear that the statutes of descent and distribution did not contemplate the possibility that an ancestral estate might arise from a transfer of property from one full sister to another.

We conclude that, with respect to the half interest that Clara inherited from Algerina, the stock of descent was Mamie McFadden. In this view there is no distinction between the two moieties, and the trial court was right in treating them both in the same way.

Affirmed.

ROBINSON, J., dissents.

SAM ROBINSON, Associate Justice (dissenting). There is no rule of property established by *Kelly's Heirs* v. *McGuire,* 15 Ark. 555, that keeps the cousins of the intestate from inheriting in the case at bar. Sections 10 and 12 of the 49th Chapter of the Revised Statutes of 1838, Ark. Stat. Ann. §§ 61-110 and 61-112 (1947) were applicable to the facts, and controlling, in *Kelly's Heirs* v. *McGuire* on the point under consideration. Neither of the aforesaid sections of the statute are applicable to the facts in the case now before the court.

In *Kelly's Heirs* v. *McGuire,* Clinton Kelly had two half sisters, Elizabeth and Emeline. They had the same mother as Clinton, but Clinton's father, Charles Kelly, was not the father of the girls. Clinton inherited real property from his father and then died at age 17 without issue and intestate. One of the questions before the

court was whether the half sisters inherited from Clinton the ancestral property he had inherited from his father, or did the property go to Greenberry Kelly, the grandfather of Clinton. Revised Statutes, Chapter 49, Section 10, Ark. Stat. Ann. § 61-110 provides that if the estate came by the father it shall ascend to the father and his heirs. There were heirs of the father, therefore the statute was applicable. Hence the estate ascended to grandfather Greenberry Kelly and descendants of his daughter, Mrs. Elkelburner, the aunt of Clinton.

The other statute which had to be considered in reaching a decision was Section 12 of Chapter 49 of the Revised Statutes, Ark. Stat. Ann. § 61-112. It provides that relations of the half blood inherit equally with those of the whole blood. But this provision did not help Elizabeth and Emeline because the same section provides that it does not apply to ancestral property.

The decision in *Kelly's Heirs* v. *McGuire,* on the point involved here, was based squarely on the two aforesaid statutes. Neither statute applies here. In the first place, no heirs of the half blood are involved. In the second place, Section 10, Ark. Stat. Ann. § 61-110, does not apply because here there are no heirs in the mother's line whence came the estate. Of course the estate cannot descend or ascend to nonexisting heirs; therefore, Section 10 is not applicable. The phrase used by the court in Kelly, the heirs took "not in postponement, but in exclusion" was applicable to the facts in that case but is not applicable to the facts in the case at bar.

The law of descent and distribution is regulated by statute in this state and, of course, as pointed out by the majority, statutes must be read in the light of judicial construction. With this concept of the law in mind I am firmly of the opinion that in the case at bar the blood kin of Clara—her cousins on her father's side—should inherit the property Clara owned in fee simple at the time of her death; and that the remote relatives of her deceased husband (he died more than thirty years ago) should not inherit from Clara under the provisions of our statutes.

Our statutes constitute the controlling law. The statutes governing descent and distribution were adopted in 1838, Revised Statutes of Arkansas, Chapter 49, Sections 1-22 inclusive. There have been no amendments affecting the principle involved in the case at bar, although a 1959 amendment mentioned by the majority added heirs of a deceased spouse to those who might inherit to prevent an escheat to the state. The amendment does not affect the right of the blood kin of the intestate to inherit. If the cousins of the intestate could inherit under the provisions of our statutes as they existed prior to the 1959 amendment, the amendment did not cut out that right.

It necessarily follows that we must look to the statutes to determine who inherits the property owned by Clara in fee simple. Do her blood kin—her cousins on her father's side—inherit it? Or do distant unknown relatives of her deceased husband inherit it? The answer is supplied by Section 1 of Chapter 49 of the Revised Statutes, Ark. Stat. Ann. § 61-101. The applicable part of this statute provides:

"When any person shall die, having title to any real estate of inheritance, . . . and shall be intestate as to such estate, it shall descend and be distributed, . . . Second: If there be no children, then to the father and mother in equal parts, or, if one parent be dead, then the whole to the surviving parent; if no father or mother, then to the brothers and sisters [or their descendants], in equal parts."

It will be noticed that the above statute applies to "real estate of inheritance."

There can be no question about the property owned by Clara being "real estate of inheritance" within the meaning of the statute. It is said in *Kelly's Heirs* v. *McGuire*:

". . . And every estate, interest and right, legal and equitable, in lands and tenements and hereditaments, excepting only leases for years, and estates for the life of another person, are thus inheritable and descendable;

or, as the 1st section expresses it [§ 61-101] 'having title to any real estate of inheritance,' constitutes an inheritable estate, . . ."

Clearly, under this statute, the cousins inherit the property if there is no other statute preventing such inheritance. I respectfully submit there is no such statute.

The majority bases its decision that paternal heirs cannot inherit from the intestate on Ark. Stat. Ann. § 61-110 (Revised Statutes of 1838, Chapter 49, § 10), the pertinent part of which provides:

"In cases where the intestate shall die without descendants, if the estate come by the father, then it shall ascend to the father and his heirs; if by the mother, the estate shall ascend to the mother and her heirs; . . ." Section 10, Chapter 49, Revised Statutes, Ark. Stat. Ann. § 61-110, does not limit Section 1, Chapter 49, Revised Statutes, Ark. Stat. Ann. § 61-101 *in the case at bar,* because although the estate came by the mother, she is dead and there are no heirs of the mother, hence the estate cannot go to the mother or her heirs. Therefore, Section 10 has no application whatever to the facts in the case at bar. The statute could only apply if there was a living mother or living heirs of the mother. Here, neither exist.

The majority holds that under Ark. Stat. Ann. § 61-107—the escheat section of the descent and distribution statutes—the property goes to heirs of the deceased husband of the intestate. In referring to this section the majority say:

". . . This section originally provided that if there were no descendants, parents, 'or any paternal or maternal kindred capable of inheriting,' the estate should go to the surviving spouse, if any; otherwise it would escheat to the State."

It appears that due consideration was not given to a part of Ark. Stat. Ann. § 61-107 (Supp. 1963) not appearing in the majority opinion. The statute in full is as follows:

"Descent in absence of kin—Escheat.—'If there be no children, or their descendants, *father, mother, nor their descendants,* or any paternal or maternal kindred capable of inheriting, the whole shall go to the wife or husband of the intestate. If there be no such wife or husband, then the estate shall go to the heirs of such wife or husband, and if there be no such heirs of either wife or husband, then the estate shall go to the State.' " [Emphasis supplied.]

Section 61-107 is clearly an escheat statute. The property would go to the *husband's heirs* only as a last resort and then only to prevent an escheat to the State. But before the *heirs of the husband* can inherit the property there must be no descendants of the father of the intestate. Here, there are descendants of the father. The majority appears to attach considerable importance to the inclusive words of the statute "or any paternal or maternal kindred capable of inheriting," as if this phrase prevented the father of the intestate or his heirs from inheriting, but the phrase does not do away with the right of anyone to inherit. It merely emphasizes that before the heirs of the *husband* can inherit there must be no one else that could inherit under Section 1. In no way does the majority explain just how the quoted language limits the preceding language giving the father's descendants the right of inheriting. Certainly, under Section 1, cousins are capable of inheriting, and here the intestate had cousins.

No doubt, the only reason the escheat statute was enlarged to include heirs of a deceased spouse was because it was thought that before the amendment the statutes gave collateral heirs, if any, the right to inherit in a case of this kind. But if there were no collateral heirs and no surviving spouse of the intestate, the estate would escheat to the State. Hence, the amendment to prevent an escheat where there are no collateral heirs and no surviving spouse.

The majority say that it is not an inequitable construction of the statute to hold that a total stranger to the intestate can inherit in preference to his blood kin—

his cousins—because for 120 years the surviving spouse was allowed to take in a situation of this kind. In no case has this court ever held that in a situation of this kind a surviving spouse was permitted to inherit where there were blood relatives—first cousins—of the intestate.

In *Kelly's Heirs* v. *McGuire,* the court said that it is the universal rule that the sense of an act must be collected from the whole act. I thoroughly agree and respectfully submit that it was never the intention of the General Assembly to permit total strangers to inherit from an intestate in preference to his first cousins where, in many instances, the cousins would be actually as close to the intestate as a brother or sister.

The intestate in the case at bar had an estate of inheritance, Ark. Stat. Ann. § 61-101. There is no doubt that this section gives the estate to the collateral heirs unless it is superseded by some other statute; it is so stated in *Kelly's Heirs* v. *McGuire.* There, the court said:

"The 1st section [Ark. Stat. Ann. § 61-101] is general and comprehensive, embracing all lands, whether ancestral or newly acquired, subject to certain exceptions and qualifications hereafter more particularly noticed, and these exceptions refer to real estate alone. This section also constitutes the table, by which real estate is to descend and personal property be distributed. As, by its express language, it relates to both real and personal property, it was manifestly the design of the Legislature, when there were descendants of the intestate, to send down both to them *per capita,* if in equal degree, and *per stirpes,* if in unequal degree, without any regard to the fact as to how the property had been acquired."

There is no statute applicable to the facts in the case at bar that supersedes Ark. tSat. Ann. § 61-101. Under our statutes, where the property came by the mother it should go to the heirs of the mother, if any. But where there are no such heirs, as in the case at bar, it cannot be said that § 61-110 supersedes § 61-101. In these cir-

cumstances, § 61-101 applies and heirs of the intestate should inherit regardless of whether they are kin on the mother's side or on the father's side.

Under our statutes the blood kin of the intestate should inherit. Therefore, I respectfully dissent.

DUNBAR *v.* DUNBAR.

5-3471 387 S. W. 2d 340

Opinion delivered March 1, 1965.

Gardner & Steinsiek, for appellant.

Elbert S. Johnson, for appellee.

PAUL WARD, Associate Justice. This is an appeal by appellant, Marie F. Dunbar, to set aside a decree of divorce on the ground that the trial court had no jurisdiction. There is no dispute about the essential facts which are hereafter summarized.

Appellant and appellees, Donald R. Dunbar, being residents of Scotland, were married July 27, 1957 and lived together until April 30, 1960. To the union two children were born, a son four years old and a daughter one year old. On March 28, 1962 appellee filed a complaint for divorce alleging, in addition to the above facts, that appellant willfully abandoned and deserted him and remained away from him one entire year without cause and against his will and consent; that said children are in the care and custody of appellant who is a fit and

proper person to have their custody; and appellee is supporting and will continue to support said children. It was further alleged by appellee that there are no property rights to be adjudicated and that for more than sixty days prior to filing of the complaint he has been a resident of the Chickasawba District of Mississippi County, Arkansas.

The cause was submitted on the pleadings by both sides and on the depositions and oral testimony presented by the plaintiff, from all of which the court found: the plaintiff appeared in person and by his attorney but the defendant appeared not either in person or by her attorney, Ed B. Cook; the answer of the defendant was filed on May 4, 1962 by her attorney, Ed B. Cook; on the same day the defendant by her attorney requested expense money and attorney's fees; on June 1, 1962 plaintiff was ordered and directed to pay $200 to Ed B. Cook as attorney's fee for the defendant. Thereupon the court, on November 26, 1962 granted appellee an absolute divorce from the defendant on the ground of willful desertion for a period of more than one year without just cause; by decree entered December 4, 1962 the care and custody of the two children were given to the defendant provided the plaintiff will have the right of visitation at all reasonable and proper times; and, the plaintiff was ordered to pay the sum of $60 per month for their support and maintenance, same to be paid in the form of a government allotment by reason of plaintiff's being in the military service of the United States.

On May 4, 1964 appellant, through the services of the attorneys presently representing her, filed a petition to set aside the divorce decree. Among other things it was said that at all times herein mentioned appellant has been a resident of Scotland "and that by the time notice had been received by her and arrangements made for local counsel the thirty (30) days had expired for answer and that an appropriate pleading was filed and that thereafter, this matter proceeded to trial without her attorney being present or notice to him of its being called up and her pleadings were erroneously struck by

the court"; that said matter proceeded to final decree with her pleadings being ignored; that the decree should set aside for the further reason that no report of the attorney ad litem was filed, which is jurisdictional; that because of the above mentioned facts and circumstances the decree should be set aside and the cause heard upon its merits.

To the above petition appellee filed a response which in essence stated: the defendant employed legal counsel who filed an answer on her behalf on May 4, 1962; on June 1, 1962 the defendant was awarded $200 attorney's fees; thereafter the defendant neither in person or through her attorney appeared or offered any further defense to the cause of action; and, on November 26, 1962 a decree of divorce was properly granted by the court. On June 19, 1964 appellee's response was amended to state: immediately upon the rendition of the divorce decree on November 26, 1962, appellee served a certified copy of the decree upon appellant by certified mail and delivered a copy of same to her attorney of record, Ed Cook of Blytheville, Arkansas; that at no time following the date of the decree did the defendant make any attempt to appeal the decree rendered on November 26, 1962 or to have the same set aside until her petition was filed on May 4, 1964. The prayer was that defendant's petition be denied.

After a hearing on the above petition and response the following order was entered:

"Now on the 19th day of June, 1964, comes on for hearing the Petition of Marie F. Dunbar to vacate this Court's Decree of November 26, 1962, and same is submitted upon said Petition, with amendment thereto; Response of plaintiff . . . ; Amendment to Response; evidence introduced; argument of counsel for both parties, from all of which the Court doth find:

"That the Petition of Marie F. Dunbar to vacate this Court's Decree of November 26, 1962, should be denied.

IT IS THEREFORE BY THE COURT CONSIDERED, ORDERED AND DECREED that the Petition of Marie F. Dunbar to vacate this Court's Decree of November 26, 1962, be and the same is denied and said Petition dismissed."

From the above order appellant presents this appeal and for a reversal relies upon two points: *One.* The decree of divorce is void for lack of jurisdiction. *Two.* The doctrine of laches and estoppel (based on appellant's delay in filing her petition) does not apply in this case. After careful consideration we conclude that the order of the trial court must be affirmed on the first point. Hence it will be unnecessary to discuss the second point.

It is undisputed that appellant's attorney, on May 4, 1962, filed a motion for attorney's fees and expenses and also filed an answer. The motion and answer, as indicated by the record, were filed by the attorney, not as an attorney ad litem, but as a hired attorney for appellant. The record indicates that appellant's attorney was paid a fee as attorney for the defendant and not as attorney ad litem and this fact is further corroborated by an exhibit introduced into the record. This exhibit shows that on December 17, 1962, an air mail letter in regard to the case of *Dunbar* v. *Dunbar,* addressed to Ed B. Cook, Attorney, Blytheville, was written by A. B. and A. Matthews, Solicitors, with offices in the British Linen Bank Buildings, Newton Stewart, Scotland. In this letter they acknowledge receipt of the letter from Attorney Cook dated December 12, 1962, notifying them that the decree of divorce had been rendered. In the letter they refer to Attorney Cook as representing the defendant's interest. The letter concludes with this paragraph:

"We do not have sufficient information as yet to make representations to the judge in this case and we look to you to do so meanwhile bearing in mind what we have already stated regarding the question of *fees.*" (Emphasis supplied.)

It is true that the divorce decree recites that appellant's answer was stricken. However, the court in its "opin-

ion'' [June 19, 1964] states that this was an error on the part of the scrivener. We think there are certain facts and circumstances which strongly indicate that the trial court never in fact struck the answer. In the first place, on the same day that the answer was filed the trial court acted upon a motion filed by appellant and allowed an attorney's fee. Nowhere in the record does it appear that appellant's attorney attempted to offer any pleading or evidence which was refused by the trial court.

In view of the above we are led to conclude that appellant was represented by an attorney of her own selection; that he was paid for his services; that he filed appropriate pleadings in her behalf; that the court accordingly had jurisdiction to render the decree it did on November 26, 1962; and that appellant's only remedy thereafter was to prosecute an appeal to this court within the time allowed by law which she failed to do.

Affirmed.

CABOT INDUSTRIAL DEVELOPMENT CORP. *v.* SHEARMAN CONCRETE PIPE CO.

5-3444 387 S. W. 2d 336

Opinion delivered March 1, 1965.

Smith, Williams, Friday & Bowen, By *Herschel H. Friday* and *John C. Echols,* for appellant.

Griffin Smith, for appellee.

SAM ROBINSON, Associate Justice. Appellee, Shearman Concrete Pipe Company, sold and delivered to Harold W. Smith, 2,883 feet of sewer pipe valued at $2,400.35. Smith used the pipe to lay a sewer line in the City of Cabot, but he failed to pay for the pipe. Shearman filed suit against the City of Cabot, Cabot Industrial Development Corporation, and Aire-Line Mobile Homes Corporation, alleging that the pipe was bought and used by Smith for their use and benefit. Sherman also asked for a lien on property owned by the City of Cabot or the Cabot Industrial Development Corporation and leased by Aire-Line Mobile Homes. The Chancellor held in favor of Sherman, rendered a judgment against appellants, and imposed a lien in favor of appellee on the property occupied by Aire-Line.

It is clear from the record that Smith entered into a contract with the City of Cabot whereby the parties agreed that Smith would furnish the material and labor and lay an extension to the sewer line in the City for a stipulated price of $6,842.00. It is also clear that Smith was an independent contractor in connection with putting in the sewer line. Since Smith was an independent contractor, there is no liability on the part of the City to Shearman for the pipe purchased by Smith. *Marion Machine, Foundry & Supply Co.* v. *Colcord,* 174 Ark. 90, 294 S. W. 361.

But Shearman contends that the pipe was used to improve certain property owned by the City or Cabot Industrial Development Corporation and leased to Aire-Line Mobile Homes; that the property in question is, therefore, subject to a materialmen's lien under the provisions of Ark. Stat. Ann. § 51-601 (1947).

There appears to be some controversy about who owned the property in question at the time the sewer line was constructed. None of the line was laid on the

property. It makes no difference as to who owned the property because of the preponderance of the evidence shows that the sewer line was not put in as an appurtenance to the property in question. It was simply an extension of the sewer system in the City of Cabot. True, the line was laid to a point that would make it accessible to the property in question, but it was not constructed as an appurtenance to that property. The sewer line constitutes a public service, available to all property owners who wish to connect therewith.

Appellee relies largely on *Speer Hardware Co.* v. *Bruce Bros.*, 105 Ark. 146, 150 S. W. 403, but the Speer case is distinguishable from the case at bar. In that case, the pipe was appurtenant to the property involved. Here, the sewer line is not appurtenant to the property on which Shearman seeks a lien. The owner of the property has no control over the sewer line and has no more right to use it than any other property owners whose property is so located that a connection can be made with it. In fact, at the time of trial of this case, five other property owners had connected their property with the sewer line.

Reversed and dismissed.

MARTIN *v.* AETNA CASUALTY & SURETY CO.

5-3464 387 S. W. 2d 334

Opinion delivered March 1, 1965.

Fuller Highsmith, Smith, Williams, Friday & Bowen, Robert V. Light, for appellant.

Gentry & Gentry, Clayton Freeman, for appellee.

JIM JOHNSON, Associate Justice. This is a suit against a hospital and its employee for injuries to a patient sustained while in the hospital.

Appellant Clay E. Martin was admitted to St. Vincent Infirmary on November 3, 1961, after suffering a fractured femur when his horse fell on him. The broken leg was set surgically and instead of a cast, a steel plate or bar was attached to the bone to hold the fracture site rigid. Thereafter, while appellant was in the hospital, this metal bar was broken and the leg re-injured.

On March 14, 1963, appellant filed suit in Pulaski Circuit Court, Third Division, against appellees Aetna Casualty & Surety Company, the hopsital's insurer, under the provisions of Ark. State. Ann. § 66-3240 (Supp. 1963), and Evelyn Willis, a hospital employee. The complaint alleged two separate re-injuries, the first on November 22, 1961, when the leg rest of a wheel chair in which appellant was seated collapsed, throwing his leg to the floor, resulting in displacement of the bone fragments and a breaking of the metal plate attached to the femur. The second injury occurred ten days later

while appellant was in traction when allegedly appellee Willis, the admitted agent of St. Vincent Infirmary, handled his broken leg so roughly or carelessly a further re-injury and displacement of the bone fragaments was caused.

The case was tried to a jury on February 10, 1964. The jury returned a verdict signed by nine jurors, which found for appellee Aetna Casualty & Surety Company. Appellant brings this appeal from judgment on the verdict dismissing his complaint.

For reversal appellant contends that the trial court erred in refusing to give his offered Instruction No. 9 which would have submitted the case to the jury on the theory of *res ipsa loquitur*.

The doctrine of *res ipsa loquitur* is a rule of evidence that comes into play when:

"And where the defendant owes a duty to plaintiff to use care, and an accident happens causing injury, and the accident is caused by the thing or instrumentality that is under the control or management of the defendant, and the accident is such that in the ordinary course of things it would not occur if those who have control and management use proper care, then, in the absence of evidence to the contrary, this would be evidence that the accident occurred from the lack of that proper care. In such case the happening of the accident from which the injury results is *prima facie* evidence of negligence, and shifts to the defendant the burden of proving that it was not caused through any lack of care on its part." *Southwestern Tel. & Tel. Co.* v. *Bruce*, 89 Ark. 581, 117 S. W. 564.

Appellant's testimony about the first re-injury was that he was placed in a hospital wheel chair, taken to the physiotherapy department where he underwent the prescribed physiotherapy, was returned to the wheel chair and taken back to his room by an orderly. The orderly left the room and before other hospital personnel came to put him back into bed, the leg rest which was extended straight out to hold up his leg suddenly

dropped, causing his leg to fall violently to the floor. The patient sharing the room then called the nurse. Appellant testified that he did not make any attempt to release the mechanism that held up the leg rest and had no idea, even at time of trial, how the mechanism was operated.

In harmony with this and other testimony, appellant offered his Instruction No. 9, as follows:

"If you find from a preponderance of the evidence in the case that Clay E. Martin sustained injuries as a result of collapse of the leg rest of a wheel chair occupied by him, and which was the property of St. Vincent Infirmary and maintained at the hospital for the purpose of furnishing it for use of its patients, and if you further find that the mechanism controlling and supporting the leg rest was located at a place on the chair making it concealed from the view of Clay E. Martin and if you further find that Clay E. Martin did not inspect or tamper in any way with this mechanism or any other part of the chair which control or affect the function of the leg rest, then you are instructed that this mechanism remained in the practical exclusive control of St. Vincent Infirmary during the times pertinent to this suit. You are further instructed that if you find that injury was caused to Clay E. Martin by a thing or instrumentality that was under the control or management of St. Vincent Infirmary, and the injury is such that, in the ordinary course of things, would not occur if those who had such control or management used proper care, the happening of the injury is prima facie evidence of negligence, and shifts to the defendant Aetna Casualty & Surety Company the burden of going forward with evidence that it was not caused through lack of care on the part of St. Vincent Infirmary."

Tested by the guide-lines laid down in *Southwestern Tel. & Tel. Co.* v. *Bruce, supra,* the evidence in the case at bar clearly contains every element necessary to entitle him to the benefit of the doctrine of *res ipsa loquitur.*

The summary of the court in *Pierce* v. *Goodling Amusement Co.,* 55 Abs. 556, 90 N. E. 2d 585 (Ohio App.,

1949), involving injury sustained on a merry-go-round, is particularly apt:

"All of the elements of the doctrine appear in this record. The instrumentality which produced the injury was under the sole control and management of the defendant. The means of explaining the accident, if it occurred as testified by the plaintiff, was within the knowledge of the defendant and the extent, sufficiency and timeliness of inspections of the device obviously could be known only to the defendant. Upon the facts adduced the accident is one which the jury could have found would not have occurred had the defendant used ordinary care to maintain the merry-go-round in a safe condition. The plaintiff, therefore, was entitled to the benefit of the inference of the negligence of defendant which the jury may have drawn by the showing of the happening of the accident and the manner in which it occurred."

It follows, therefore, the trial court erred in refusing to give appellant's Instruction No. 9, and for that error it is necessary that the entire case be reversed and the cause remanded for new trial.

HOFFMAN *v.* DAVIS.

5-3466 387 S. W. 2d 338

Opinion delivered March 1, 1965.

Cockrill, Laser, McGehee & Sharp, for appellant.

Francis T. Donovan, for appellee.

FRANK HOLT, Associate Justice. The appellee brought this action against the appellant to recover damages for personal injuries sustained by her as a result of an accident while riding as a passenger in a car being driven by appellant. When the case was submitted to the jury the court ruled there was no evidence of the alleged wilful and wanton negligence. However, the court submitted to the jury the fact question as to whether the appellee occupied the status of a passenger or a guest and gave the proper instructions. The jury returned a verdict for the appellee in the amount of $8,360.00 and from a judgment on that verdict appellant brings this appeal.

For reversal appellant contends only that there is no substantial evidence that appellee occupied any other status than that of a guest in appellant's vehicle at the time of the accident and, therefore, she was not entitled to recovery upon proof of only ordinary negligence. Ark. Stat. Ann. § 75-913—915 (Repl. 1957) precludes recovery from the owner or operator of an automobile for personal injuries received by a guest except for wilful and wanton misconduct or unless there has been "payment" for the transportation by the passenger. Appellant does not challenge the sufficiency of the evidence as to ordinary negligence but argues that as a matter of law appellee was a guest and no fact question existed for the jury as to whether appellee was a guest or a passenger.

The appellant and his six passengers, including the appellee, are college students at Conway, Arkansas. Appellant and each of the other occupants lived in or near St. Louis and were returning to their respective homes for the Christmas holidays. These students left Conway

about 4:30 A.M. with appellant driving his father's automobile. A few hours later appellant lost control of the automobile and ran into a bridge near Alicia, Arkansas resulting in injuries to appellee. There was evidence that appellant dozed or went to sleep, thus causing the accident. It appears undisputed that the six passengers understood and expected to pay appellant $5.00 which would be a total of $30.00 for this round trip. In fact, appellant admits that, although he would not have refused them a ride, it was the custom and he expected to be remunerated to this extent for his car expenses. None of the passengers ever made any payment for this trip. The previous month, during the Thanksgiving holidays, appellant had transported a load of fellow college students on a similar trip to St. Louis, receiving remuneration from them to defray his car expenses. On that occasion appellee was a passenger and had actually paid appellant $5.00.

Ordinarily, whether or not a passenger is a guest is a question of fact for the jury. *Corruthers* v. *Mason,* 224 Ark. 929, 277 S. W. 2d 60; *Whittecar* v. *Cheatham,* 226 Ark. 31, 287 S. W. 2d 578; *Brand* v. *Rorke,* 225 Ark. 309, 280 S. W. 2d 906; *Simms* v. *Tingle,* 232 Ark. 239, 335 S. W. 2d 449. The guest statute is in derogation of the common law and we must construe it strictly. *Ward* v. *George,* 195 Ark. 216, 112 S. W. 2d 30. There we said that if a passenger's "carriage tends to the promotion of mutual interests of both himself and the driver and operator for their common benefit * * * he is not a guest within the meaning of such enactments". Certainly the carriage of six passengers who expected to contribute and from whom appellant expected to receive a total of $30.00 on a round trip of 400 miles, coupled with the fact that appellee had previously paid $5.00 on such a trip presented, at least, a question of fact for the jury to determine whether the appellee was a guest or a fare-paying passenger within the meaning of our guest statute.

In *Hartsell* v. *Hickman,* 148 F. Supp. 782, the court held that a triable issue was raised as to whether the

passenger paid the driver for expenses on a fishing trip and whether the payments were of such a character as to constitute him a fare-paying passenger. The court said:

"[2] Whatever may be the law in other jurisdictions, see Annotation, 10 A. L. R. 2d 1351, it seems to be well settled in Arkansas that payments by a passenger to the driver raise a fact issue for the jury (or for the Court in an action tried without a jury) as to whether the passenger is a guest under the Arkansas Guest Statute, Ark. Stats. §§ 75-913 to 75-915, or is a fare-paying passenger."

The evil sought to be corrected by this statute is to prevent collusive litigation. *Ward* v. *George, supra; Whittecar* v. *Cheatham, supra;* 1 Ark. L. Rev. 50 and 3 Ark. L. Rev. 101. In the case at bar we think the court was correct in submitting to the jury as a factual issue the status of appellee as a guest or a fare-paying passenger within the meaning of our statute.

Affirmed.

JONES, SECURITIES COMM. *v.* HILL.

5-3610 387 S. W. 2d 342

Opinion delivered March 1, 1965.

Bruce Bennett, Atty. General, By *Berl Anthony,* Asst. Atty. Gen., for appellant.

Warner, Warner, Ragon & Smith, for appellee.

Per Curiam. The Sebastian Chancery Court has ordered Clint Jones, Securities Commissioner of the State of Arkansas, to deliver into the registry of the Sebastian Chancery Court fifteen (15) stock certificates evidencing 5506 shares of stock of the American Foundation Life Insurance Company, which certificates are in his custody and possession; and from that order the said Clint Jones, Securities Commissioner of the State of Arkansas, has appealed to this Court and filled herein a motion for stay of said Chancery Court order pending final determination of this appeal.

As a condition for granting said stay, this Court does hereby enjoin and restrain the said Clint Jones, Securities Commissioner of the State of Arkansas, from surrendering or releasing from his custody and possession in any way, until the further orders of this Court, the said fifteen (15) stock certificates evidencing 5506 shares of stock of the American Foundation Life Insurance Company; and because of this injunction we do hereby stay any further proceedings against the said Clint Jones, Securities Commissione of the State of Arkansas, in the Sebastian Chancery Court, regarding the said certificates.

CLINE *v.* MILLER.

5-3465 387 S. W. 2d 609

Opinion delivered March 8, 1965.

Edgar E. Bethell and *William M. Stocks, J. Marvin Holman,* for appellant.

David J. Burleson, for appellee.

CARLETON HARRIS, Chief Justice. John J. Cline was a resident of Clarksville, Arkansas, and, during his lifetime, owned substantial timber acreage in Madison County. This acreage included approximately 760 acres, which is the subject of the present litigation. On July 25, 1961, a suit was filed in the Madison County Chancery Court in behalf of Cline to quiet title to approximately 2,040

acres of land in that county. The pleading was amended on August 8 of the same year to allege that a warranty deed appeared of record, purportedly executed by Richard B. Morris, a real estate broker of Huntsville, conveying the 760 acres of land (heretofore mentioned) to Tom M. Miller, a resident of Graham, Texas.[1] This deed was dated November 19, 1960, and had been filed for record on December 8, 1960. Cline prayed that Morris and Miller be made parties to the suit, and he sought cancellation of the deed as a cloud on his title. Miller and Morris were summoned by constructive service.

Richad B. Morris filed no answer, and was completely in default. On June 29, 1962, a demurrer to Cline's petition was filed by Tom M. Miller. On March 22, 1963, a general denial was filed by Miller. On August 7, 1963, John J. Cline departed this life. An order of revivor was thereafter entered on December 30. On January 30, 1964, Miller amended his answer to allege that Richard B. Morris was a real estate broker, and that John J. Cline had listed his lands for sale with Morris; that Morris acted as Cline's agent, and that Cline knew of the deed from Morris to Miller, and had acquiesced therein; that accordingly, Cline, and those claiming through him, were estopped to deny the validity of the sale of the lands to Miller by Morris.

It appears from the evidence that Miller's negotiations and transactions were probably entered into with P. W. Morris, father of Richard B. Morris, though Miller testified that he never had any reason to think that he was dealing with anyone other than Richard B. Morris, until after the acquisition of the lands. At any rate, Morris (P. W. or Richard) signed the name of the son to the deed, and delivered the deed to Miller at his home in Texas on November 22, 1960, where appellee gave Morris a check in the amount of $7,965.00. According to Miller, Morris was not to cash the check until "he got the abstract and title opinion to me." A few days later,

[1] Miller's wife, Vinnie Miller, was likewise a grantee in the deed, and a party to the litigation. For convenience, since she did not testify we shall refer to appellees in the singular.

according to Miller, Morris called him, and told appellee that he (Morris) had deposited the check in the bank, first stating that he had done so "yesterday," and subsequently stating that it might have been "two or three days ago." On December 8, the deed was placed of record, and on the same date, payment on the check given by Miller was refused by the First National Bank in Graham, Texas. Miller thereafter covered the check, which was paid on December 12. According to Miller, he made a trip to Huntsville, apparently some time between November 19 and December 12. "I demanded of Mr. Morris again to get me those abstracts, and my title opinion, or else refund me my check, or if he had cashed it, to refund my money; and I wanted to get something done on it then, because I didn't appreciate being done that way." With Miller was a friend from Bryson, Texas, by the name of M. H. Williams. Miller testified that he met with Morris and John Cline; that he told Morris that he had talked with the District Attorney in Graham, and the United States District Attorney at Fort Worth, "because I got my money and paid him my money in Graham, Texas, that's where Morris got my money, * * *. And I was going to start proceedings immediately unless they dug up my money or dug me up those abstracts that that check had paid for." Miller was not permitted to testify to any conversations with Cline (dead man statute), but Williams testified that the man introduced as Cline stated to Miller, "You have no reason to worry about the title to this land. I own that land and know the title is good." This testimony (of Miller and Williams) was apparently decisive, for the court found in favor of Miller, the decree reciting:

"that the defendants Miller paid to defendant Morris the full agreed price for said conveyance in the amount of $7,695.00.

"The Court further finds that John J. Cline had knowledge of the said sale of the said lands to defendants Miller by his agent Morris, and that John J. Cline acquiesced in the said sale of the lands owned by him which were included in the conveyance from defendant Morris

to defendants Miller; and that those claiming said lands through John J. Cline are estopped from denying the validity of the said sale."

The decree quieted and confirmed title in Miller and wife, as against the John J. Cline estate. In April, appellant filed a motion for a new trial, asserting that no meeting ever took place between Miller and Cline in the presence of Morris and Williams, and that Cline did not ratify or acquiesce in the execution of the deed by Morris to the Millers. Affidavits of P. W. Morris and Fred O. Gallaway were presented in support of the motion. The latter formerly served as manager of the Gallaway Lumber Company, of Clarksville, a company of which John Cline was president. Affidavits of Jack M. Cline and J. Marvin Holman were also attached. It was asserted that the new evidence was not, and could not have been, known to appellant at the time of trial, though he had acted with diligence. The court rendered a lengthy opinion denying the motion. Appellant appeals from the decree entered, and also from the order over-ruling the motion for new trial.

The record in this case is rather large, and is very confusing. This is partly occasioned by the fact that two Morrises are involved, though only Richard B. Morris was made a party to the litigation. Though it appears, from the overall evidence, that the man with whom Miller was dealing was P. W. Morris, rather than Richard B. Morris, and even though his own testimony indicates that he learned this to be true after the filing of the law suit, Miller, throughout his testimony, continued to refer to the party that he was dealing with as Richard Morris. For instance, Miller was asked:

"Q. Did you have any discussion with him (Morris) about how the deed was made out? In other words, if he owned the land or anything about who owned the title to it.

A. Yes Sir.

MR. HOLMAN: Now, I object to any statement made by Mr. Morris at that time; it would be hearsay.

MR. BURLESON: Your Honor, he is a party to this law suit.

THE COURT: Overruled. You may answer.

A. Now, state your question.

Q. Did you have any discussion with Mr. Morris about the condition of the title, about who owned the land at the time he brought this deed to you?

A. Yes, Sir, I did.

Q. As I understand it, the deed purports to convey title from Richard B. Morris and his wife to you and your wife?

A. That's correct.

Q. It covers all of the land which is involved in this lawsuit, some 760 acres, plus some other parcels?

A. That's correct.

Q. What discussion did you have about the title?

A. About the price?

Q. About the title?

A. He told me—

MR. HOLMAN: I want to object again, Your Honor, to anything Mr. Morris told him; Mr. Morris is not a party to this lawsuit.

THE COURT: Yes, he is. He was served by publication, warning order, and attorney ad litem appointed.

MR. HOLMAN: Which Morris is he talking about?

A. Richard B. Morris is the one I'm talking about. The only Morris I knew. The man that sold me this land, the United Farm Agency."

Likewise, appellee, in his brief, treats the matter as though Richard B. Morris is the man that Miller dealt

with. Of course, if Miller's transaction was with P. W. Morris, evidence of what that individual said to appellee is inadmissible, P. W. Morris not being a party to the law suit. A large part of Miller's testimony dealt with conversations and various transactions with Morris, and if these conversations and transactions were inadmissible, appellee's case is considerably weakened. It is difficult to understand why the proper identities of P. W. Morris, and son, Richard B. Morris, cannot be clearly and firmly established when it appears that they lived in Huntsville for some time, and operated a real estate agency there. Logic compels the conclusion that both should have been known to numerous persons in Madison County.

There is also confusion in Miller's testimony, relative to whether he made the check given to Morris (which had been turned down because of insufficient funds) good before or after the meeting allegedly attended by John J. Cline, Morris, Miller, and Williams. Miller testified that this meeting occurred in Huntsville some time between November 22, 1960, when the check was given, and December 12, 1960, when the check was paid. It would seem that evidence could be offered which would more accurately fix this date. At any rate, Miller's testimony indicates that Cline approved the transaction before paying the check; however, he testified, as previously mentioned, that he went to Huntsville for the purpose of either obtaining his title opinion and abstracts, or to get Morris "to refund my money."

Several other facets of the case are likewise confusing, and we have concluded that, because of the state of the record, justice would be better served by remanding this case for additional testimony. While the general practice is to make a final determination of chancery cases that come before this court on appeal, we have on numerous occasions, directed the trial court to reopen a cause for the purpose of taking additional evidence. In *Wilborn* v. *Elston,* 209 Ark. 670, 191 S. W. 2d 961, this court said:

"We try chancery cases *de novo,* and the usual practice on appeal is to end the controversy here by final judgment, or by direction to the trial court to enter a final decree. There are, however, exceptions to this practice, and it rests in the discretion of this court to determine whether, upon reversal of a cause, the same should be opened for a new trial. If the cause is heard and determined by the chancellor on an erroneous theory, or if it is not sufficiently developed in the trial court, this court may remand for further hearing on the whole case, or on certain issues. *Carmack* v. *Lovett,* 44 Ark. 180; *Long* v. *Chas. T. Abeles & Company,* 77 Ark. 156, 93 S. W. 67; *Gaither* v. *Gage,* 82 Ark. 51, 100 S. W. 80; *Carlisle* v. *Corrigan,* 83 Ark. 136, 103 S. W. 620."

In *Wear* v. *Boydstone,* 230 Ark. 580, 324 S. W. 2d 337, we said:

"While ordinarily, Chancery cases are decided upon the record before us, we have on several occasions, remanded where it appeared that in the interest of justice, the cause should be more fully developed. *Carlile* v. *Corrigan,* 83 Ark. 136, 103 S. W. 620. The record leaves unanswered possible pertinent questions, * * *."

See also *General Box Co.* v. *Scurlock, Comm. of Rev.,* 224 Ark. 266, 272 S. W. 2d 678; and *Ark. State Highway Comm.* v. *Elliott,* 234 Ark. 619, 353 S. W. 2d 526.

Evidence was offered, but refused, which might be most pertinent in determining the controversy. For instance, counsel for appellee offered into evidence several letters, one of which, according to counsel, dealt specifically with this transaction. The court held that the letters were inadmissible, under the "dead man's statute,"[2] and refused to permit their introduction. This ruling constituted error. In *Josephs, Executor,* v. *Briant,* 115 Ark. 538, 172 S. W. 1002, Justice Hart quoted the Wisconsin Supreme Court, which had passed upon this same point. The court said:

"* * * The statute forbids the examination of a party, in his own behalf, in respect to any transaction or

[2] Arkansas Constitution, Schedule, Section 2.

communication had personally by such party with a deceased person, against parties who are executors, administrators, etc., of the deceased. [Citing Wisconsin statute] The case does not seem to come within the letter of the statute, and yet the communication was in some sense personal. But the personal transaction or communication of the statute, no doubt, means a transaction or communication face to face, or by the parties in the actual presence and hearing of each other. In every such case the statute excludes the testimony of the living party, upon the obviously wise and just ground that his adversary, whose cause of action or defense survives, and who was possessed of equal knowledge, and was equally capable of testifying to what the transaction or communication really was, has been removed by death, and so can not confront the survivor, or give his version of the affair, or expose the omissions, mistakes or perhaps falsehoods of such survivor. The temptation to falsehood and concealment, in such cases, is considered too great to allow the surviving party to testify in his own behalf. The law has, therefore, wisely excluded him. But this reason for the exclusion is not applicable to the present case, at least not fully applicable. Could we know that Mr. Fox, if living, would testify that he never wrote the letter in question—that it was a forgery—then indeed there would seem to be strong reason for excluding the testimony. But we do not and can not know this, and it is only by assuming the suppositious character of the letter, and that Mr. Fox would have so testified, that any appearance of hardship exists."

See also *Green* v. *Green,* 231 Ark. 218, 329 S. W. 2d 411. Of course, whether the letter (letters) was actually written by Cline is a matter that would be resolved by the proof.

This litigation has another unusual aspect in that two of appellant's attorneys withdrew after the trial had started, because of the fact that they deemed it necessary to tesify in the case. Attorney Hall withdrew on the first day, before any testimony was taken, and Attorney

Stewart withdrew after appellee had completed his case, this attorney testifying on rebuttal.

As stated, because of the confusing state of the record, we reverse the decree, and remand the case with directions that it be reopened for further proceedings. Let it be understood that, in making this order reversing the decree, we are not indicating that appellee should not prevail. Our intention is only to place the parties in equal status, unprejudiced by prior findings of the trial court. The present record remains a part of the proceedings, but the Chancellor should permit appellant and appellee to offer any additional competent evidence, either in the form of additional evidence from witnesses who have already testified, or evidence by new witnesses; also, the litigants should be permitted to join as parties plaintiff or defendant any person who should properly be made a party. In such event, of course, any additional party should be given the opportunity to object to any evidence taken at the last trial, and presently constituting a part of the record, which he feels is not admissible as to him.

It is so ordered.

BOYD *v.* MATTHEWS.

5-3484 388 S. W. 2d 102

Opinion delivered March 8, 1965.

[Rehearing denied April 12, 1965.]

John G. Moore, for appellant.

Ike Allen Laws, Jr., for appellee.

ED. F. MCFADDIN, Associate Justice. This appeal involves rulings of the Probate Court arising in the administration of the estate of Wilson R. Sproles, who died intestate, a resident of Pope County, Arkansas, on July 1, 1961.

Mr. Sproles was survived by two living sisters and a number of nieces and nephews and one grand-nephew, being the descendants of five deceased brothers and/or sisters who had predeceased Mr. Sproles. Thus, the estate is to be divided into seven principal shares, five of which are subdivided among the descendants of the deceased brothers and/or sisters.

On proper petition the Probate Court of Pope County on July 7, 1961, issued letters of administration to E. C. Bradley (husband of Mrs. Ethel Bradley, a living sister of the deceased), and to A. O. Matthews (husband of Mrs. Esther Matthews, a living sister of the deceased). The inventory of the estate was filed on January 18, 1962, and showed, after payment of all claims except the one of Ada Boyd here involved:

"Land per inventory not needed for payment of debts vested in heirs *per stirpes*	$15,200.00
Cash and personal property	10,444.05."

From the cash on hand the Probate Court directed the payment of administrators' fees, attorneys' fees, and court costs (all totalling approximately $1,600.00), and on June 1, 1962, the administrators distributed to the

heirs in cash an amount in excess of $8,300.00 and prayed that the estate be closed.

There was pending the claim of Ada Boyd for $2,-638.47; and on September 7, 1962, the Probate Court disallowed this claim as not having been presented in due time; and the Probate Court ordered the estate closed and that the administrators distribute the remaining bal- on hand of $160.00. This said order closing the estate was made by the Honorable W. W. Bean, the Probate Judge. His term expired and he was succeeded by Honorable Richard Mobley as regularly elected Probate Judge. The administrators thought the probate estate was closed; but Mary Boyd and Ada Boyd subsequently filed a motion that the order of September 7, 1962 be set aside and that the estate be reopened.

Even though the said motion remained pending the heirs took charge of the real estate and proceeded to have a partition suit; and in that partition suit (appealed to this Court in Case No. 3486 this day decided by us) the Chancellor on exchange (Honorable Paul X. Williams) ordered the administrators to go back to the Probate Court and dispose of the motion of Ada Boyd pending therein before the Chancery Court would complete the partition proceedings. The Chancellor on exchange then presided over the Probate Court, and on June 10, 1964, heard and denied the motion and execeptions. E. C. Bradley had departed this life and A. O. Matthews, really in his capacity as trustee for the owners of the real estate, had received since the closing order of 1962 an amount of $200.00 as oil and gas lease rentals on the land. The Probate Judge directed that this amount be paid by A. O. Matthews to the Clerk of the Chancery Court to go with the proceeds of the sale of the land to be distributed to the heirs in the partition suit.

From the said order of June 10, 1964, Ada Boyd, alone, brings this appeal and urges six points:

I. The Court erred in holding the several accounts filed by the Administrators to be correct and in approv-

ing them especially the order of September 7, 1962 shows that administration of the estate had not been completed.

"I. The Court erred in directing the Administrator, or Trustee A. O. Matthews, to turn over to the Chancery Clerk the oil lease rental received by him for the estate.

"III. The Court erred in approving the sale of the jewelry to the wives of the Administrators, when a like amount had been bid by someone else.

"IV. The Court ordered that the $160.00 be distributed to the various distributees in the estate, and then dismissed the co-administrators and their bondsmen in the same order. This was error.

"V. The Court erred in approving the disallowance of the claim of Ada Boyd for the sum of $2,638.47 without hearing testimony as to the validity thereof.

"VI. All orders made by Judge Paul X. Williams in the Probate Court are void for want of jurisdiction or authority to act, no exchange agreement having been executed and recorded as provided by law."

First we will discuss appellant's sixth point, which relates to the absence from the transcript of an exchange agreement between the regular Probate Judge, Honorable Richard Mobley, and the presiding Probate Judge, Honorable Paul X. Williams, who made the order of June 10, 1964, here challenged. The record before us does not contain any exchange agreement between the Honorable Richard Mobley, the regular Probate Judge, and Honorable Paul X. Williams, the presiding Judge. Because of the absence of such agreement from the record, the appellant insists that all of the proceedings of June 10, 1964, are void, but the record before us does not show that any such contention was made in the Probate Court on June 10, 1964, or at any other time. In designating the record the appellant, Ada Boyd, listed seven points on which she claimed error; and this absence of the exchange agreement was not one of those points. In short, the point is raised in this Court for the first time.

Our holding in *Gordon* v. *Reeves,* 166 Ark. 601, 267 S. W. 133, is directly in point and is ruling here. We there said:

"There was no question raised below as to the regularity of the agreement for exchange of circuits between Chancellor LeCroy and Chancellor Martineau, and the authority of the latter to hold the court cannot be questioned here for the first time, the presumption being indulged conclusively that the exchange was regular and in compliance with the statute."

Gordon v. *Reeves* has been cited with approval in subsequent cases on this point, some of which are: *Strahan* v. *Atlanta Bank,* 206 Ark. 522, 176 S. W. 2d 237; and *Harris* v. *Byers,* 212 Ark. 1026, 208 S. W. 2d 990. We find no merit in appellant's sixth point.[1]

Appellant's fifth point relates to the disallowance of the claim of Ada Boyd. She was one of the distributees of the estate (being a niece of the decedent), and had also filed a claim of $2,638.47 claimed to be due her for rent of an apartment by decedent. The claim was resisted by the administrators as not having been filed within the time and manner required by statute (Ark. Stat. Ann. §§ 62-2601 and 62-2604 [Supp. 1963]). Evidence was heard by the Probate Court on this resistance on April 9, 1962, and resulted in an order of that date disallowing the claim. The only evidence in the record now before us is the evidence given at that hearing on April 9, 1962. Ada Boyd prayed an appeal to the Supreme Court from the 1962 order, but never perfected the appeal. She contented herself with a motion to set aside the order disallowing her claim. When the Court, in September 1964, refused to set aside the order disallowing her claim, she now appeals from that order as well as the one of 1962. Of course, she is too late to appeal from the order of April 9, 1962, because an order disallowing a claim is a final and appealable order. *Southern Furn. Co.* v. *Morgan,* 214 Ark. 182, 214 S. W. 2d 905. Her time for appeal has long since expired. Furthermore, Ada Boyd has not shown that the Probate Court committed error in its 1964

[1] In this connection we call attention to Ark. Stat. Ann. § 22-342 (Repl. 1962).

order wherein the Court refused to set aside the 1962 order; so we find no merit in appellant's fifth point.

We now consider appellant's Points 1 to 4, inclusive. As aforesaid, appellant is a distributee of the estate of Wilson Sproles. The record shows that she is entitled to one-third of one-seventh of the estate. As such distributee she urges these four points which relate to the orders of the Probate Court in regard to the administration of the estate. We find that Ada Boyd has failed to establish any error committed by the Probate Court adverse to her rights in any of these matters.

(a) In the order of September 7, 1962, the Court closed the estate and directed the administrators to distribute the balance on hand. Of course, the balance on hand should have been distributed and so reported before the estate was closed; but the error in this regard was cured by the order of June 1964 which showed full disposal of all assets.

(b) After the order of September 7, 1962 closing the estate, Mr. E. C. Bradley died. Mr. Matthews, who had been the other administrator, continued as a sort of trustee for the heirs to receive delay rental money from an oil and gas lease on the land. The Court had never directed the administrators to take charge of the land.[2] Since the administrators' inventory of July 27, 1961, showed the lands had been delivered to the heirs, this delay rental money belonged to the heirs as co-tenants of the land. In July 1964, when Mr. Matthews informed the Probate Court that he had some delay rental money, the Probate Court ordered him to pay it into the Registry of the Chancery Court wherein the partition suit was pending. Certainly no prejudice resulted to Ada Boyd in this order. Mr. Matthews was a trustee for the co-tenants in receiving the money and the partition suit was the proper place for such trust money.

(c) Appellant's third point has given us considerable concern. The decedent, Mr. Sproles, had two rings

[2] See Ark. Stat. Ann. § 62-2401 (1947); *Cranna* v. *Long*, 225 Ark. 153, 279 S. W. 2d 828; and *Calmese* v. *Weinstein*, 234 Ark. 242, 351 S. W. 2d 437.

and a stickpin. On August 16, 1962, the Court entered the following order regarding these items:

"Now on this 16th day of August, 1962, comes on for hearing the petition of E. C. Bradley and A. O. Matthews, co-administrators of the estate of Wilson R. Sproles, deceased, asking that they be allowed to sell the following property of the estate:

"Diamond stickpin—to Mrs. Esther Matthews for $50.00.

Diamond Solitaire ring—to Mrs. Ethel Bradley for $50.00.

Diamond wedding ring—to Mrs. Ethel Bradley for $25.00.

"The court being well and sufficiently advised in the premises doth order:

"That the co-administrators give notice by copy of this order to the persons interested in the estate of Wilson R. Sproles, deceased, by ordinary mail. That if no objection is filed in this cause to the sales accompanied by a deposit of cash for a greater amount than those set forth above within fifteen (15) days from this date, that petitioners sell the articles and take credit therefor upon their accounting."

No higher bid was received by the administrators, although Ada Boyd says she later offered the same amount for the three items. She now complains that her aunts purchased these family keepsakes instead of allowing her to purchase them. Even though the entire matter was handled with full knowledge of the Probate Court, nevertheless this point has given us serious concern. We have held an executor or administrator cannot buy at his own sale, and the spouse of such person cannot buy.[3] In some jurisdictions there are exceptions to this, as where (a) only personal property is concerned; or (b) where the executor or administrator is himself an

[3] *Gibson* v. *Herriott*, 55 Ark. 85, 17 S. W. 589; *Crider* v. *Simmons*, 192 Ark. 1075, 96 S. W. 2d 471. § 62-2708 Ark. Stats. does not apply here.

heir and the sale is not to pay debts but to make a distribution.[4] Regardless of all these exceptions, we prefer to adhere to our well recognized rule that an executor or administrator cannot purchase at his own sale and his spouse cannot purchase either.

However, it will be noticed, here, that the sale was made and approved on August 16, 1962; and this appeal was not filed in this Court until October 6, 1964. If Ada Boyd had appealed within due time from the 1962 order we probably would have ordered a resale; but, as previously stated, Ada Boyd has waited too late to raise this point. The proceeds of the sale have been distributed by order of the Probate Court and, for all that this record shows, Ada Boyd has accepted her part of the proceeds of the sale; so, all things considered, we find no merit in this point at this late date.[5]

(d) Appellant's fourth point is likewise without merit. In September 1962 the Court closed the estate and at the same time ordered the administrators to distribute the $160.00 on hand. As previously stated, whatever error might have been in this order was cured by the order of 1964, and appellant in continually reiterating the point is only raking over old ashes.

Affirmed.

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[4] See 21 Am. Jur. p. 733, "Executors and Administrators" § 625; 34 C.J.S. p. 563, "Executors and Administrators" § 599; and 24 C.J. p. 219, "Executors and Administrators" § 738.

[5] We express no opinion as to whether a suit might have been brought in equity, as was done in *Crider* v. *Simmons*, 192 Ark. 1075, 96 S. W. 2d 471.

BOYD *v.* BRADLEY.

5-3486 388 S. W. 2d 107

Opinion delivered March 8, 1965.

[Rehearing denied April 12, 1965.]

John G. Moore, for appellant.

Ike Allen Laws, Jr., for appellee.

ED. F. MCFADDIN, Associate Justice. This appeal stems from a partition suit between the heirs of Wilson R. Sproles, who died intestate, a citizen and resident of Pope County, Arkansas, the admitted owner of the real estate herein involved; and this appeal from the Chancery Court is a companion case to *Boy* v. *Matthews,* No. 3485, this day decided, which is an appeal from the Probate Court.

On October 10, 1963, Ethel Bradley and Esther Matthews filed this partition suit, alleging, *inter alia*:

"1. That the Plaintiffs and Defendants are the owners as tenants-in-common of the following described lands located in Pope County, Arkansas, to-wit:

"Tract No. 1: The S ½ of the *S* ¼ of the NW ¼, containing 40 acres and the North 19.87 acres of the NE

¼ of the SW ¼ all in Section 5, Township 7 North, Range 18 West, containing in all 59 acres, more or less.

"Tract No. 2: The N ½ of the SW ¼ of Section 9, Township 7 North, Range 18 West, containing 80 acres more or less.

"Tract No. 3: The E ½ of the NW ¼ of Section 11, Township 7 North, Range 18 West, containing 80 acres more or less.[1] . . ."

The complaint stated the interest of each of the parties, plaintiff and defendant, in the lands, and also that no person, other than the plaintiffs and defendants, was interested in the lands. Some fifteen parties were named defendants as co-tenants with the plaintiffs. Three of the defendants (Mary Boyd, Ada Boyd, and Steve Etheridge) filed an answer resisting the partition suit until there was a final settlement in the Probate Court of the estate of Wilson Sproles. This administrtaion angle of the case is settled by our Opinion in *Boyd* v. *Matthews,* No. 3485, this day decided.

On June 13, 1964, after hearing the evidence, the Chancery Court entered a decree which (a) stated that all the heirs of Wilson Sproles were present or duly summoned in the cause; and (b) that the lands could not be divided in kind and the Commissioner should sell the lands after due notice, and then report his actions to the Court. On July 9, 1964, Ada Boyd gave notice of appeal from the said decree; but such appeal was never perfected within the time allowed (Ark. Stat. Ann. § 27-2127.1 [Repl. 1962]) and no extension is shown in the record; so there is no valid appeal from the decree ordering partition and it is too late now for the appellants to attack that portion of the decree of June 13, 1964 which found that all of the heirs of Wilson Sproles were present or duly summoned.

The reference to Tract No. 1 as first appeared herein shows that there was a typographical error in that it

[1] Attention is called to our emphasis in Tract No. 1. The other real estate of Wilson Sproles consisted of mineral rights which were vested in the parties in their respective interests and were not sold in the partition suit.

said the S ½ of the S ¼ of the NW ¼. On July 10, 1964, the Chancery Court entered an order[2] correcting the description of Tract No. 1 to be S ½ of *S* ½ of NW ¼.

On July 15, 1964, the Commissioner filed his report of sale which showed that on the 13th day of July, 1964, the sale had been conducted and that Mary Boyd became the purchaser of the three tracts as follows:

Tract No. 1	$ 5,000.00
Tract No. 2	7,600.00
Tract No. 3	2,000.00
Total	$14,600.00

Ada Boyd filed exceptions[3] to the report of sale, and on August 6, 1964, the Court heard the report and the excep-

[2] "Now on this 10th day of July, 1964, comes on to be heard the Motion of the Plaintiffs to correct the description of Tract No. 1 as it appears throughout the pleadings in this cause and the court being well and sufficiently advised, doth find:

"That the correct description of Tract No. 1 should read as follows:

"The South (S ½) of the South Half (S ½) of the Northwest Quarter (NW ¼), containing 40 acres, and the North 19.87 acres of the Northeast Quarter (NE ½) of the Southwest Quarter (SW ¼), all in Section 5, Township 7 North, Range 18 West, containing in all 59 acres, more or less.

"IT IS THEREFORE CONSIDERED ORDERED AND DECREED BY THIS COURT that all pleadings in this cause should be changed to reflect the correct description."

[3] Ada Boyd's exceptions were as follows:

"1. Not all the owners of said lands are parties to this suit, either by personal service, entry of appearance or by warning order; and hence a conveyance by the Commissioner of this Court would not convey good title.

"2. Said lands were wrongfully and erroneously described in all the original pleadings, the original decree of this Court and the publication of notice of sale in the newspaper. No order of this Court could change the publication of notice.

"3. No order of this Court can change the complaint of plaintiffs filed on the 10th day of October, 1963.

"4. The only method of which good title could be conveyed to any purchaser is by the filing of pleadings properly describing said lands and procuring an order of sale thereof according to law, and the advertisement of said lands for sale by proper notice as required by law.

"5. Mary Boyd, the purported purchaser of said lands at said sale, is a party to this suit only by publication of warning order and cannot be reached for personal judgment, hence, a resale of said lands is the only remedy."

Exception No. 1 is an attack on the decree of June 13, 1964; and since there was no timely appeal from the said decree, its findings, as to all parties being before the Court, are final.

Exceptions 2 to 5, inclusive, will be discussed in Topic I, *infra*.

tions and denied the exceptions and approved the report of sale and ordered the deed delivered to Mary Boyd upon payment by her of her bid of $14,600.00. From this order denying her exceptions and approving the report of sale, Ada Boyd gave notice of appeal on September 4, 1964. The record was filed in this Court on October 6, 1964, so Ada Boyd's appeal from the order denying her exceptions and approving the report of sale is duly before us.

On August 18, 1964, Ethel Bradley *et al.* filed "Motion for Judgment" wherein it was stated: (a) that Mary Boyd refused to pay the $14,600.00 for the lands purchased and had stopped payment on her check; and (b) that the land should be resold and judgment rendered against Mary Boyd for all expenses and losses on resale and such judgment should be a lien on Mary Body's interest in the partition. On September 2, 1964, the Court granted the motion for judgment and ordered a resale,[4] after hearing testimony. Although the record attorney for Ada Boyd and the present attorney for Mary Boyd was present at the hearing and cross-examined the witnesses, there was no notice of appeal from the order of September 2, 1964; and that is a most siginicant fact in this case.

On October 22, 1964, the Commissioner filed his report of sale, stating that in pursuance to the court order of September 2, 1964, the lands had been again offered for sale and that the highest and best bidder at such resale for all of the lands was Reece Allewine at a bid of $10,000.00. On October 30, 1964, Mary Boyd and Ada Boyd filed exceptions to that report of sale. These exceptions are:

[4] Before entering a formal decree the Court said: "There will be a judgment against Mary Boyd for $14,600.00, with 6% interest from the—8/13—that would be 30 days after date of sale, so interest will start running on the 13th, so 30 days will 8-13-64. We will give her ten days in which to satisfy that with interest. If she does not do so, it will be readvertised and sold by the commissioner under exactly the same terms and conditions as the previous sale and the net proceeds of the second sale, after the payment of all costs incident to the sale, including an additional commissioner's fee on it, will be applied to the satisfaction of this judgment . . ."

"1. This cause is now pending on appeal in the Supreme Court, and no action thereon should be taken by this court.

"2. They formally object to the order of sale as made September 2, 1964 for the same reason as given in No. 1 above.

"3. Not all the heirs of the said Wilson R. Sproles, deceased, are made parties to this suit.

"4. Not all claims against the estate of the said Wilson R. Sproles, deceased, have been determined by the Probate Court of Pope County.

"5. Raymond Webb, one of the parties hereto and an heir of the said Wilson R. Sproles, deceased, died during the process of this litigation, and neither the suggestion of his death filed herein, nor the order of revival suggests whether the said Raymond Webb died testate or intestate. If he died testate, the beneficiaries of his will would be necessary parties.

"6. These defendants are informed and believe, and upon such information and belief allege that nothing has been paid on the purchase price of said lands."

On November 16, 1964, the Chancery Court overruled the exceptions to the report of sale and confirmed the deed to Reece Allewine, which deed was exhibited, acknowledged, approved, and delivered, and to the order of November 16, 1964, Mary Boyd and Ada Boyd gave notice of appeal; and a supplemental transcript was filed in this same cause in this Court by stipulation of the parties in December 1964. So the exceptions of October 30, 1964, as above copied, are before us on this appeal by supplemental record, as also are the exceptions filed by Mary Boyd and Ada Boyd on August 6, 1964. The appellants, Ada Boyd and Mary Boyd, have listed four points on this appeal, which are:

"1. The first and main point to be relied upon on this appeal is the fact that the complaint does not properly describe the lands, and the lands were never adver-

tised for sale by correct description in partition proceedings.

"2. Not all of the alleged and known heirs of Wilson R. Sproles were served with any kind of process in this action.

"3. This action was never properly revived in the lower court as to the heirs of Raymond Webb, who is shown to have died while the partition proceedings were in process.

"4. The probation of the estate of Wilson R. Sproles has never been properly completed."

I.

The matter of the description regarding a portion of Tract No. 1 is entitled to first consideration. This is not a collateral attack, but is a direct attack. The complaint, and also the notice of the first sale[5] described the tract as "S ½ *S* ¼ NW ¼ . . . "; but on July 10, 1964 (three days before the first sale of the property) the Court entered an order correcting the description to be "S ½ *S* ½ NW ¼ . . ." The evidence before us shows that the mistake in the description was called to the attention of all the bidders before the Commissioner conducted the sale. There were a number of bidders at the sale: the Commissioner testified that there fifty-eight bids. In possession of full notice of the correction of the description before the sale, Mary Boyd bid $5,000.00 for Tract No. 1 and filed no exceptions to the Commissioner's report of sale to be approved and confirmed. It is true that Ada Boyd filed exceptions to the report of sale because of the matter of the description, but she did not show that she or any other person was misled or hurt, or that the price was affected in any way. In short, Ada Boyd did not show that her rights were adversely affected; and since the description was corrected three days before the sale, we hold that the Court committed no error in the order approving the sale to Mary Boyd. See *Cooper* v. *Ryan*, 73 Ark. 37, 83 S. W. 328; *Knight* v.

[5] On the second sale the tract was correctly described.

Equitable Life Society, 186 Ark. 150, 52 S. W. 2d 977; and 169 R.C.L. p. 134, "Judicial Sales" § 97. In 35 C.J. p. 23, "Judicial Sales" § 32, the holdings are summarized in this language: ". . . but in some cases the court has refused to set aside a sale for irregularities in the notice, where such irregularities were in no way prejudicial to either the parties or the purchaser, especially where the price realized was adequate . . ."

II. and III.

We have already disposed of appellants' second point in calling attention to the fact that the decree of June 13, 1964 stated that all of the heirs of Wilson Sproles were before the Court; and there has been no timely appeal from that decree. See *Cooper* v. *Ryan, supra.*

Appellants' third point relates to the death of Raymond Webb. This point is not presented in time because the decree of June 13th found that the widow and heirs of Raymond Webb were before the Court and there was no timely appeal from that decree. But even if the point had been presented in a timely appeal, still there is no merit to it. On June 10, 1964, Mrs. Raymond Webb filed a sworn pleading stating the death of her husband, Raymond Webb, and stating that he was survived by a wife, Mrs. Raymond Webb (also named Willard Webb), and three children, being Mary Saver, Katie Murdock, and Rita House. In the said pleading, it was asked that the cause be revived; Mrs. Willard Webb entered her appearance as special administrator; she and the three named children on the same day filed their appearances; and an order was made *that day* accomplishing the revivor; so there is no merit to the appellants' third point.

The appellants' fourth point is the claim that the estate was still pending in the Probate Court and therefore there should be no partition suit. There is no merit to this point, even if it had been raised in due time. The lands were released to the heirs early in the probate proceedings and there was no claim that the lands were ever

needed for the payment of debts. See Ark. Stat. Ann. § 62-2401 (Supp. 1963); *Cranna* v. *Long,* 225 Ark. 153, 279 S. W. 2d 828; and *Calmese* v. *Weinstein,* 234 Ark. 237, 351 S. W. 2d 437.

Finding no error, the decree is affirmed.

TOLL, ADM'X *v.* JACKSON.

5-3500 387 S. W. 2d 605

Opinion delivered March 8, 1965.

David Solomon, for appellant.

Dinning & Dinning, for appellee.

GEORGE ROSE SMITH, J. In 1960 litigation was concluded by which the appellants, as the personal representatives of the estate of Richard F. Toll, obtained a judgment against Phillips Cooperative Gin Company for Toll's wrongful death. *Phillips Cooperative Gin Co.* v. *Toll,* 232 Ark. 236, 335 S. W. 2d 303. A writ of execution was issued under the judgment. At the execution sale the appellants bought in the 1.6-acre tract to which the gin company had record title.

It was then discovered that the gin company had been occupying and using a slightly larger tract of land than that described in its deed. The appellants brought this suit to quiet their title to the larger tract, asserting that the gin company had acquired title to the excess by adverse possession. This appeal is from a decree dismiss-

ing the complaint for want of equity and confirming the record title of the appellees, C. J. and Ella Jackson.

The key question is whether the gin company's possession of the overage now in dispute was adverse or permissive. Upon this issue we do not find the decree to be against the weight of the evidence.

There is actually not a great deal of conflict in the testimony. The appellee C. J. Jackson formerly owned a cotton gin that burned down. In 1948 he took the lead in organizing the Phillips cooperative gin. Out of a 5-acre tract that Jackson owned he sold the co-op the 1.6-acre gin site, for $400 cash. There is testimony that the co-op intended to buy two acres, but if so there is neither any indication of what the boundaries of the larger tract would have been nor any contention that the gin company ever had an enforceable claim to more land than it received.

Jackson served as president of the co-op from its organization in 1948 until it went out of business in 1959. C. H. Martin, who died before the trial, managed the company's business. The main gin building was constructed upon the land described in the co-op's deed from Jackson. During the years of its active life the co-op expanded its possession beyond the limits of its record ownership. Its encroachments, which are not all shown to have existed for more than seven years, included the construction of a concrete loading dock next to the gin itself, the erection of a pump house that was jointly used by Jackson and the gin company, the construction of a building for burning hulls at a safe distance from the gin, and the use of somewhat vaguely defined areas as roadways for the convenience of the co-op's patrons.

We think the appellants failed to sustain their burden of proving adverse possession. Their principal witnesses were men who had helped organize the co-op and had served on its board of directors. They testified—and the appellees concede that the gin company physically occupied the property we have mentioned. But these witnesses were not actively managing the business from day to day. They had no particular reason to know the

circumstances that attended the co-op's use of land that it did not own. Their testimony fails to establish the essential element of *hostile* possession.

Jackson's statements that he allowed the cooperative to use his property in furtherance of its business are, in our judgment, reasonable and worthy of belief. Certainly the president of the concern did not intend to exercise hostile dominion over his own land. There is not much proof to indicate that Martin, the manager, had such an attitude either. We think it a fair conclusion that the co-op's possession was merely permissive and thus not of such a nature as to ripen into title by adverse possession. *Britt* v. *Berry,* 133 Ark. 589, 202 S. W. 830; *Fry* v. *Grismore-Hyman Co.,* 151 Ark. 44, 235 S. W. 373. While it is true, as the appellants point out, that Jackson owed a fiduciary duty to the co-op, we do not perceive that this duty was violated by his simply allowing the company to occupy part of his property in the course of its business. Upon the whole record we conclude that the chancellor reached the right decision.

Affirmed.

JEFFERSON SQUARE *v.* HART SHOES.

5-3501 388 S. W. 2d 902

Opinion delivered March 8, 1965.

[As amended on Denial of Rehearing May 3, 1965.]

Coleman, Gantt, Ramsay & Cox and *William C. Bridgforth,* for appellant.

Bridges, Young & Matthews, for appellee.

PAUL WARD, Associate Justice. The essence of this litigation is the construction or interpretation of one paragraph in a lease agreement.

Jefferson Square, Inc. (appellant), an Arkansas Corporation, owns and operates a shopping center in Jefferson County within the city limits of Pine Bluff, known as Jefferson Square. Under date of July 11, 1960 appellant (as lessor) entered into a lease agreement with James V. Thomas (as lessee) under which the latter leased a designated store space in Jefferson Square for a period of fifteen years with option to renew for another five years. In this lease agreement lessee was bound to pay a minimum of $540 per month in advance. In addition lessee agreed to pay 5% of all gross sales in excess of $129,600 during each lease year. Lessee agreed to use the designated store space as a retail *Family Shoe Store,* selling "all styles of shoes, rubber footwear, tennis shoes, hosiery, bags, findings, and all other kindred items usually sold by a family shoe store".

The lease also provided lessee could assign its lease "to a wholly owned subsidiary, or to a corporation formed, or to be formed. . . ." On June 9, 1961 lessee assigned the above described lease agreement to "Hart Shoes, Inc.", the appellee herein.

On July 18, 1960 a lease *similar to the one above described* had been entered into by appellant (as lessor) and the "Dan Cohen Company" (as lessee). The latter company operated a "family shoe store" in the Jefferson Square shopping center until July, 1963 when it went into bankruptcy and it was allowed to cancel its lease. On August 1, 1963 appellant permitted "Holiday, Inc."

to assume the provisions of the Dan Cohen Company's lease.

Paragraph 26 of the lease agreement between appellant and appellee reads as follows:

"Lessor covenants that it will not lease to another family shoe store (with the exception of the Dan Cohen Company) in the shopping center as shown on Exhibit A. This instrument will not prevent the sale of shoes in a ladies' ready-to-wear, junior department store, major department store, variety store, Herbert Cox Corrective Shoes or women's specialty shoes in a higher price bracket than generally carried by International Shoe."

On November 29, 1963 appellee instituted suit against appellant, alleging (among other things) that appellant had violated the provisions of paragraph 26 of its lease agreement.

Under the view we take of this case (as hereafter expressed) we think it is important to understand the exact issue raised by appellee, and therefore we set out verbatim the pertinent parts of the complaint.

"Under Paragraph 26 of said Agreement of Lease the defendant covenanted that it would not lease to another family shoe store with the exception of the Dan Cohen Company in the Jefferson Square Shopping Center.

"The retail shoe business operated by the Dan Cohen Company specialized in lower priced merchandise which was not competitive with the retail selling business of the plaintiff. The provisions of said Paragraph 26 were a substantial part of the consideration contained in said lease on the part of lessor and induced this plaintiff to assume the obligations of Lessee by assignment.

"The Dan Cohen Shoe Company has now vacated the premises in Jefferson Square and over the objections and protests of plaintiff the defendant is renting said space to Holiday Shoes City, a family shoe store which competes directly with the retail shoe business maintained by the plaintiff."

The prayer was (a) that the defendant (appellant be restrained "from continuing to violate the provisions of said lease" and (b) that appellee be given damages "sustained up to date of the trial of this cause". In an amendment to the complaint appellee alleged it had been damaged in the amount of $3,587 "in loss of profits resulting from damage to its business operation caused by the defendant's violation of paragraph 26 of the lease between the parties."

The pertinent part of appellant's answer is:

"Further answering, this defendant states that in paragraph 26 of the agreement of lease mentioned in plaintiff's complaint wherein lessor covenanted that it would not lease to another family shoe store, with the exception of Dan Cohen Company, it referred to a class or type of shoe store; that the Dan Cohen Company was declared a bankrupt and Holiday, Inc., which operates the shoe store known as Holiday Shoe City, is a comparable operation to the Dan Cohen Company; and that the operation by Holiday Shoe City is not in violation of the plaintiff's lease."

The trial court entered a decree (a) restraining appellant "from continuing in effect the lease of space in the Jefferson Square Shopping Center to Holiday, Inc. . . ." and (b) denying appellee damages from violation of the lease by appellant. In a comprehensive and written opinion the trial court made this comment relative to part (a) of the decree: ". . . the main issue before the court is whether said paargraph 26 is ambiguous and if it is ambiguous, did the defendant's evidence establish that the lease had not, as a matter of law, been violated". Relative to part (b) of the decree, the trial court found the evidence was conflicting and did not show any loss of business suffered by appellee.

Appellant prosecutes this appeal relying on two points for a reversal, and appellee prosecutes a cross-appeal on the question of damages. Having concluded the case must be reversed on the point raised by appellant, it will not be necessary to discuss the other points.

Appellant's point is expressed in these words:

"Paragraph 26 of the lease between Jefferson Square, Inc. and James V. Thomas that was assigned to Hart Shoes, Inc. is ambiguous and parol testimony should have been allowed to clear up this ambiguity."

We point out that we do not entirely agree that the trial court erred in refusing to allow the introduction of certain pertinent testimony offered by appellant. In fact we have searched the briefs in vain to find where any objections were made by appellee to any testimony offered by appellant. After diligently searching the somewhat voluminous record we find where appellee did object to certain testimony by witness Farris on the ground of hearsay (R. 153) and also objected when the same witness attempted to state his "intentions". This testimony was clearly inadmissible and the trial court so ruled. While the records also show a few other objections, we find much other testimony in the record introduced by appellant which was not objected to and much testimony introduced by appellee. Under the view we take, it is immaterial that the trial court refused, over proper objections by appellee, to allow certain competent testimony to be introduced. This is true because the record contains other testimony introduced by both appellant and appellee which, we think, reveals the true meaning of paragraph 26. That meaning is, we think, that there were to be two, and only two *Family Shoe Stores* in the shopping center. We are inclined to think the language used in paragraph 26 is susceptible of no other reasonable interpretation—that is, that the words "Dan Cohen Company" referred to a "type" of shoe store and did not mean that no other company of the same "type" could ever sell shoes in the place set aside for Cohen. It admitted that the lease (to Thomas) gave Thomas the right to assign it, and that it was assigned to appellee; and, it is revealed by the record that the lease to Cohen could also be assigned. The result is that appellee is now in the position it would have been if Cohen had assigned its lease to Holiday, Inc. Any other interpretation of paragraph 26 would probably mean that the spot assigned to Cohen would have to re-

main vacant for the rest of the lease period—or about thirteen years. The record further shows that all the parties here involved (appellee, Cohen and Holiday) operated a Family Shoe Store. It is certainly reasonable to assume that all these parties and also appellant knew full well the character and meaning of a Family Shoe Store. That being true, it would appear presumptuous for this Court or a trial court to distinguish between them on conflicting and confusing testimony relative to bulk sales, net profits, and overlapping prices charged for different types of shoes.

The facts and circumstances mentioned above, together with many other similar facts and circumstances revealed in the record, too numerous to mention, make clear the meaning of paragraph 26. Under numerous decisions of this Court all the above matters can be considered in arriving at the meaning of this paragraph. See *Boyd* v. *Lloyd*, 86 Ark. 169, 110 S. W. 596; *Arkansas Amusement Corporation* v. *Kempner*, 182 Ark. 897, 33 S. W. 2d 42. In the *Kempner* case we said:

"It is the settled rule in this state that parol evidence of conversations and negotiations leading up to the execution of a contract, as well as the relation of the parties thereto and the attendant circumstances to explain and aid in the interpretation of uncertainties and ambiguities contained in writing may be admitted."

In reaching the result previously indicated we have not overlooked the rule well established by this Court (as in *Arkansas Power & Light Company* v. *Murry*, 231 Ark. 559, 331 S. W. 2d 98) that where there is any doubt or ambiguity about the meaning of a contract it will be resolved against the party who prepared it—and it is conceded that appellant prepared the lease contract here under consideration. However, the rule just mentioned is not to be applied until and unless a "doubt" exists after the court has given consideration to the parol evidence referred to in the *Kempner* case, *supra*. After considering the language in paragraph 26 together with the facts and circumstances revealed by the record, we take the position that no reasonable doubt exists.

In accordance with what has heretofore been said, we conclude that the decree must be reversed and the cause of action dismissed. It is so ordered.

Reversed.

HARRIS, C.J., not participating.

MCFADDIN, J., dissents.

BUTLER *v.* REYNOLDS & DRAPER LBR. CO.

5-3497 387 S. W. 2d 607

Opinion delivered March 8, 1965.

Dickey & Dickey, By: *Jay W. Dickey, Jr.* for appellant.

Bridges, Young & Matthews and *Eugene S. Harris,* for appellee.

SAM ROBINSON, Associate Justice. Shortly before dusk on June 7, 1963, appellant's agent (hereinafter called appellant) drove a tractor-trailer truck out of Stuttgart, Arkansas in route to Pine Bluff. Some four miles later tire trouble developed. Appellant pulled over onto the shoulder of the road but left the truck partly on

the main portion of the highway. Several hours later, appellee's agent (hereinafter called appellee), while proceeding in the same direction in a similar truck, struck the rear of appellant's truck. Appellant brought suit for the damages to his trailer and appellee cross-complained of the damages to his truck.

The Trial Court, sitting as a jury, found both parties equally at fault and accordingly dismissed the complaint and cross-complaint. There is no appeal from the dismissal of the cross-complaint. Appellant, on appeal, contends that the evidence is insufficient to sustain the findings of the Trial Court as trier of the facts.

After parking his truck and upon discovering a flat tire, appellant caught a ride to Stuttgart, procured a jack, and returned to the tractor-trailer truck. While attempting to jack the trailer up, the jack began to sink, and the driver was forced to procure a board to go under the jack in to remove the tire. When the tire was removed, it was discovered that appellant had a "busted rim". He placed reflector flares at the scene and returned to Stuttgart to obtain this part. Between 11:00 and 11:30 P.M. appellant returned to the scene and found that the truck had been struck from the rear by appellee's truck.

Ark. Stat. Ann § 75-647 (Repl. 1957) prohibits the parking of any vehicle upon the main or travelled portion of any highway outside a business or residence district when it is practicable to park the vehicle off such part of the highway. Disabled vehicles are excluded from the prohibition if it is impossible to avoid leaving them in such a position. The Trial Court found that it was neither impossible nor impracticable under the facts of this case.

Appellant testified that his truck protruded onto the highway at least two feet. According to Trooper Cavins, it extended onto the highway three feet. The trooper further testified that the highway was twenty-four feet wide, plus asphalt shoulders of approximately seven or eight feet. Appellant's truck was eight feet in width. Though

appellant stated he failed to move further off the highway for fear of "bogging down", it readily appears that he could easily have moved a few more feet and still have remained entirely on an asphalt surface. If he feared the jack would bog down he had solved that problem with the plank. If he feared the entire truck (which was loaded with soybean meal) would bog down, certainly it would be a jury question as to the reasonableness of that belief and his subsequent actions in light of all the facts and circumstances.

In determining the sufficiency of the evidence to support a verdict, all of the evidence must be viewed, with every reasonable inference derived therefrom, in the light most favorable to the appellee. Further, it is well settled law in this state that the findings of the Trial Court, as trier of the facts, have the verity and binding effect of a jury verdict and will be sustained if they are supported by any substantial evidence. *Zullo* v. *Alcoatings, Inc.,* 237 Ark. 511, 374 S. W. 2d 188.

In the case at bar, appellant deprived a heavily travelled twelve foot trafic lane of some three feet when apparently he could have greatly relieved the situation, as the Trial Court found, by moving further off the highway onto the remaining feet of asphalt shoulder. This perilous condition was allowed to exist from dusk until at least 11:00 P.M. Since most of this time was during the night, the danger was even greater.

It cannot be said there is no substantial evidence to sustain the findings of the Trial Court sitting as a jury.

Affirmed.

HARRIS, C. J., not participating.

BUFFINGTON *v.* WRIGHT.

5-3473 388 S. W. 2d 100

Opinion delivered March 8, 1965.

[Rehearing denied April 12, 1965.]

Trantham & Knauts, for appellant.

Frierson, Walker & Snellgrove, for appellee.

JIM JOHNSON, Associate Justice. This is an action for personal injuries sustained by three passengers in a car that overturned.

The Corning Business and Professional Women's Club had entered a team in the Women's International Bowling Tournament at Memphis on April 14 and 15, 1963. There were vacancies on the club team when tournament time approached and appellants Carolyn Buffington and Rebecca Waldon Dortch of Corning and Mary Jane Riley of Paragould, who were not club members, were recruited to fill the complement of the club team for the tournament. The club president, Mrs. R. O. Smith, was the team captain and appellee Notra Wright was a team member. Mrs. Smith drove to Memphis for the tournament and picked up appellant Riley on the way. Appellants Buffington and Dortch were two of appellee's passengers to Memphis. Mrs. Smith, the team captain, paid the team's expenses at Memphis including a meal, lodging, entry fees, a team photograph, team shirts, and bought gasoline for appellee's return trip to Corning. After the tournament on April 15th, all the appellants and another team member were to be driven home by appellee, at the behest of Mrs. Smith, who planned to remain in Memphis another night.

The parties had an anxious drive through Memphis, according to appellants' testimony, including misdirections, wrong lanes and courteous drivers who yielded at the last moment, appellants each eagerly offering to drive in appellee's place. After leaving Memphis the drive was uneventful until appellee passed a tractor-trailer near Gilmore. As appellee was pulling back into the right lane after passing the vehicle, she lost control of the car, went off the road to the left and turned over, resulting in injuries to the passengers including appellants.

Appellants filed suit in the Western District of Clay Circuit Court on January 23, 1964, against appellee for their injuries and other damages. The cause came on for trial on April 6, 1964. At the close of appellants' case the trial court granted appellee's motion for a directed

verdict on the ground that appellants were guests in appellee's vehicle. From judgment dismissing the complaint, appellants have prosecuted this appeal.

The question here is whether there has been sufficient evidence presented to make appellants' status as guests a matter for jury determination.

We are dealing here with the so-called guest statutes, Ark. Stat. Ann. §§ 75-913—75-915 (Repl. 1957), which prohibit a guest from suing the owner or operator of a motor vehicle unless there was willful misconduct or willful and wanton operation of the vehicle. § 75-914 defines the term "guest" to "mean self-invited guest or guest at sufferance."

This court has quoted or cited with approval on several occasions, *inter alia, Ward* v. *George,* 195 Ark. 216, 112 S. W. 2d 30; *Simms* v. *Tingle,* 232 Ark. 239, 335 S. W. 2d 449; *Whittecar* v. *Cheatham,* 226 Ark. 31, 287 S. W. 2d 578; Blashfield's summary of the law on geusts as follows:

"One important element in determining whether a person is a guest within the meaning and limitations of such statutes is the identity of the person or persons advantaged by the carriage. If, in its direct operation, it confers a benefit only on the person to whom the ride is given, and no benefits, other than such as are incidental to hospitality, companionship, or the like, upon the person extending the invitation, the passenger is a guest within the statutes; but, if his carriage tends to the promotion of mutual interests of both himself and the driver and operator for their common benefit, or if it is primarily for the attainment of such objective or purpose of the operator, he is not a guest within the meaning of such enactments. Of course, a passenger for hire is not within their operation, regardless of whether the passenger or some one else pays or promises to pay for the transportation." Blashfield, Cyclopedia of Automobile Law and Practice, § 2292.

Ordinarily the issue of whether one is a guest is a question of fact. *Brand* v. *Rorke,* 225 Ark. 309, 280 S. W.

2d 906. "Viewed in the light most favorable to the party against whom the verdict is [to be] directed, . . . if there is any conflict in the evidence, or . . . 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." *Smith* v. *McEachin,* 186 Ark. 1132, 57 S. W. 2d 1043; *Spence* v. *Vaught,* 236 Ark. 509, 367 S. W. 2d 238. Review of the record in the case at bar reveals the testimony of appellants about their recruitment for the club's tournament team and the trip to Memphis to promote that end, together with the payment of appellee's gasoline by the team captain, fair-minded men could easily as not conclude the carriage tended to promote the mutual interests of both the passenger and the operator for their common benefit, as well as that payment for the transportation. The state of the record being thus, the trial court erred in directing a verdict at the close of appellants' case.

Reversed and remanded for new trial.

HARRIS, C. J., dissents.

GRAY *v.* OUACHITA CREEK WATERSHED DIST.

5-3454 387 S. W. 2d 605

Opinion delivered March 8, 1965.

E. V. Trimbmle, for appellant.

Smith, Williams, Friday & Bowen, By: *Ben Allen,* for appellee.

FRANK HOLT, Associate Justice. The appellant brought this action to enjoin the appellee from using his property in its watershed construction project. The chancellor sustained appellee's plea of res judicata, holding that the same issue between the same parties was previously before this court in *Gray* v. *Ouachita Creek Watershed Dist.,* 234 Ark. 181, 351 S. W. 2d 142. On appeal we do not reach the merits of the case since there is a failure by appellant to comply with the requirements of Rule 9 (d) of this court.

The abstract cannot be said to be a condensation or abridgment of the record as required since it contains a copy in full or is a mere reproduction of the entire transcript. *Sellers* v. *Harvey,* 222 Ark. 804, 263 S. W. 2d 86. A considerable part of the matter reproduced is not material to the issue raised nor necessary to an understanding thereof. The object sought by Rule 9(d) is to confine the abstract to only that part of the record as is necessary to give this court a clear understanding of the issue or issues presented.

Affirmed.

YOUNG, ADM'R. *v.* DODSON.

5-3516 388 S. W. 2d 94

Opinion delivered March 15, 1965.

[Rehearing denied April 12, 1965.]

W. F. Denman, Jr. and *Basil H. Munn,* for appellant.

McKay, Anderson & Crumpler, for appellee.

CARLETON HARRIS, Chief Justice. Appellant, Melvin A. Young, was severely injured, and his wife, Fay, was killed in a head-on collision on May 4, 1963, on U. S. Highway No. 82, in Columbia County. The collision (according to the complaint filed in the Circuit Court by Young) occurred when a gravel truck, operated by Dalton Dodson, attempted to go around an International truck with attached trailer, which had stopped upon the highway, and within the mouth of a concrete underpass. The latter vehicle was operated by George Burns, an employee of Elk Roofing Company, owner of the International truck and trailer. In his complaint, Young alleged permanent injuries, and likewise sought damages because of the death of his wife. The complaint asserted negligence on the part of Dodson in operating the loaded gravel truck at an excessive and reckless rate of speed; in failing to observe the stopped truck (and the automobile of a non-party to this litigation, which was stopped behind the Elk truck), and also asserted that Dodson was driving without adequate brakes.

It was alleged that Elk Roofing Company and its agent and employee, George Burns, were negligent in voluntarily stopping the International truck on the traveled portion of the highway, and at a point within the narrow confines of the highway tunnel, or underpass. Appellant asserted that the collision and resulting damage were due to the "sole, joint, combined and concurrent carelessness and negligence" of each of the defendants. Subsequently, appellant filed his "Request for Admission" on each of the parties sued, and the latter filed their responses. Based on these responses, Young sought a summary judgment against appellees, but this was denied. Thereafter, the case proceeded to trial, and the jury returned a verdict of $31,800.00 against Dodson, but found for appellees Burns and Elk Roofing Company. From the judgment entered in accordance with the jury verdict, Young brings this appeal. For reversal, appellant relies upon five separate points, which we will refer to in the order listed.

It is first asserted that the trial court erred in failing to grant appellant's motion for summary judgment. Appellant, on February 17, 1964, directed certain Requests for Admission to each of the appellees, and it is contended that their responses had the legal effect of admitting most of the requests, leaving no genuine issue as to any material fact relating to liability on the part of the appellees.

It is true that most of the responses were inadequate and deficient. For instance, Elk Company and Burns responded to twenty-one requests, with the answer, "The defendant refuses to admit this statement is true." These responses were improper, and do not constitute a denial. The procedure adopted by appellant is authorized under Ark. Stat. Ann. § 28-358 Subsection (a) (Repl. 1962), which is identical with Rule 36, Federal Rules and Civil Procedure, 28 U.S.C.A. In *Southern Ry. Co.* v. *Crosby,* 201 F. 2d 878, under Rule 36, a very similar response was held insufficient. There, instead of making a denial under oath of the truth of the matter requested, the defendant replied, "You will please take notice that the defendant denies the accuracy of the statements contained in your notice, and refuses to admit the truth thereof." Chief Judge Parker, in an opinion for the United States Court of Appeals (Fourth Circuit), stated:

"It is manifest that a denial of the accuracy of a statement is not a denial of its essential truth and certainly a refusal to admit does not amount to a denial. [Citing cases] Parties may not avoid the failure to deny matters necessarily within their knowledge by giving any such evasive answer as was given here. The rule requires a sworn statement denying 'specifically' the matters of which an admission is requested of a statement 'setting forth in detail' the reasons why an admission or denial cannot truthfully be given."

The court held that the effect of this response was to admit the truth of the particular request. It is thus apparent that the twenty-one responses, made by Burns, and Elk Company, can only be characterized from a

legal standpoint as admissions of the truth of the statements contained in the requests. Dodson responded to numerous requests with the statement, "Not having any information, he denies." This, too, is an improper response. In *White River Limestone Products Co.* v. *Mo-Pac Rd. Co.*, 228 Ark. 697, 310 S. W. 2d 3, this court said:

"The Request for Admission included eight different items, the first being as follows: 'That the total costs of defendant, Missouri-Pacific Railroad Company's repossession of the materials covered by Exhibit "A" attached to the Complaint and Cross-Complaint was $1,350.53, itemized as follows: * * *' Number 2, 3, 4, 5, 6, 7, and 8 were objected to on the grounds that they were wholly immaterial and irrelevant to the issue. To Number 1, appellant answered, 'Plaintiffs are without knowledge of the correctness or exactness of defendant's request Number 1 as to costs of repossessing materials as per Exhibit "A". We hold the court's action in ruling that this response, in effect, amounted to an admission insofar as item one is concerned, was correct. The statute requires a sworn statement denying specifically the matters of which an admission is requested, or setting out in detail the reasons why same cannot be admitted or denied, or written objections thereto."

The responses, under the rule, are not limited to matters within the personal knowledge of the respondent. In *Dulansky* v. *Iowa-Illinois Gas and Electric Company,* 92 Fed. Supp. 118, it was said:

"The rule dealing with requests for admission is not limited in its application to matters within the personal knowledge of the respondent and the respondent may be required to make an investigation of third persons in order to acquire sufficient knowledge to comply with the request if the truth can be ascertained by reasonable inquiries made of third persons."

This is also the better view, as expressed in Volume 2A, Federal Practice and Procedure (Barron and Holtzoff), Chap. 9, Sec. 833, Page 509, where it is said:

"Some cases have held that a party should not be required to admit or deny facts which are not within his knowledge, although the means of acquiring knowledge are readily at hand. The better view, consistent with the purpose of Rule 36, is that a party must answer a request for admission, even though he has no personal knowledge, if the means of information are reasonably within his power."

It appears that several of these requests could have been answered from personal knowledge, and the proper information on others could have been ascertained by reasonable inquiry. For instance, Request for Admission No. 27 through No. 31 (with possible exception of No. 30) should have been answered without great difficulty, since these dealt with matters that Dodson could have personally observed. On the other hand, Nos. 32, 33 and 34 could hardly have been properly answered, and, for that matter, do not appear to be of any value. These requests, in order, read, "That Burns knew of said gravel road"—"That Burns knew gravel road was maintained"—"That Burns knew there was no tunnel on said gravel road by-pass." Dodson responded to each of these with the statement, "Not being informed as to Questions 32, 33, and 34, he therefore denies them." In the first place, Dodson could certainly not have responded from personal information, and he could only have responded by seeking the answer from another defendant. These requests were also made of Burns, who was the proper party to respond. Of course, even if Dodson had admitted these requests, such admissions would not have been binding on Burns or Elk Company.

While most commentators agree that the purpose of the rule is to eliminate from controversy matters which will not be disputed, and also concur that one of the main purposes of Rule 36 is to ascertain whether an opposing party admits or disputes certain facts, we call attention to the case of *Benton* v. *McCarthy,* 23 FRD 235, where the court commented that Rule 36 "is not intended to be used to cover the entire case and every item of evidence."

Actually, in the case at hand, we think, and find, that all responses to requests for admissions are improper and inadequate, because of the fact that the responses were sworn to by the attorneys for the respective parties, rather than the parties themselves. This question has not hereofore been passed upon by this court, and though there are some cases to the contrary, the greater weight of authority favors the practice of requiring the *party* to swear to the response. Volume 2A, Federal Practices and Procedures (Barron and Holtzoff), in a discussion of Rule 36, Sec. 834, Page 516, states that "the party, rather than his attorney, *must*[1a] make the verification." Volume 4, Moores' Federal Practice (Second Edition), Sec. 36.05, Page 2717, states, "This statement *should*[1b] be sworn to by the party himself." We think it better practice, inasmuch as many of the admissions sought will be actually within the personal knowledge of the party (rather than the attorney), that the response should be sworn to by the litigant himself. Appellees, Elk Roofing Company and George Burns,[2] contend that the response could be sworn to by the attorney under the provisions of Ark. Stat. Ann. § 27-1107 (Repl. 1962), but we think it evident that both this section and 27-1108 apply only to verification of pleadings and affidavits. Accordingly, from what has been said, it is apparent that the responses given by all parties were inadequate and deficient, and should have been considered as admissions. However, this is not to say that the trial court erred in not granting a summary judgment, for, as pointed out by appellees, even with all requests being admitted, absolute liability on the part of any appellee had not been established. The most that had been established was that Burns and/or Dodson was guilty of violating a statute. For instance, it is a violation of the law to stop within a highway tunnel (although there are exceptions),[3] but we have held, on several occasions, that a law violation *does not constitute negligence per se, but is only evidence of negligence. Rogers* v. *Stillman,*

1a 1b Our emphasis.

2 No brief has been filed on behalf of Dodson.

3 Ark. Stat. Ann. § 75-649 (Repl. 1957).

223 Ark. 779, 68 S. W. 2d 614, and cases cited therein. In addition, the matter of proximate cause of the injuries sustained by appellant remained to be decided by a jury. It follows that the refusal to grant a summary judgment was not error.

It is urged that the trial court erred in failing to determine, and to set out, the facts about which there was no genuine issue or controversy (as established by the "Request for Admissions"). This point has reference to the provisions of Ark. Stat. Ann. § 29-211 (d) (Repl. 1962), which is the same as Federal Rule 56, and which requires that the court shall make an order specifying the facts that appear to be without substantial controversy. The statute further provides that, upon trial, the facts so specified shall be deemed established, and the trial conducted accordingly. We agree that the court committed error in neglecting to follow this section, and so find.

The next alleged error refers to the failure of the court to proceed according to Section 29-211, relative to the motion for summary judgment. We have already stated, under Point 1, that appellant was not entitled to a summary judgment, and there is accordingly no need to discuss this point further.

Appellant asserts that the trial court erred in allowing appellees, Elk Company, to amend its answer to an interrogatory, propounded to it by appellant, relative to the height of the Elk truck at the time of the collision. Elk Company first answered that the truck was 13 feet and 10 inches high, but subsequently amended its answer to show that the height of the truck was 13 feet and 2 inches. This interrogatory was served upon the Elk Company pursuant to the provisions of Ark. Stat. Ann. § 28-355 (Repl. 1962), which correspond to Rule 33 of the Rules of Federal Procedure. In Volume 2A, Federal Practice and Procedure (Barron and Holtzoff), Section 777, Page 380, it is stated:

"Answers to interrogatories may be amended in the discretion of the court."

Certainly, the amendment here could not have been made without the approval of the court, and we find no abuse of discretion, for it is not shown how appellant was prejudiced. Of course, the jury would be entitled to know that a change had been made, and to know the nature of the change. In *McInerney* v. *Wm. F. McDonanld Const Co.*, D.C. 35 F. Supp. 688, 689, the court made a statement which seems entirely logical, as follows:

"Speaking generally, there is no apparent reason why a witness should not be permitted to correct or amend his testimony, and that occurs frequently at trial before a court or jury; no good reason has been shown for not permitting the same practice where the witness is being examined under deposition, and quite naturally the trier of the facts must be apprized of the exact change in testimony, so that the apparent reasons for such change may be given due weight in the appraisal of that witness' testimony in its entirety."

Finally, it is urged that the court committed reversible error by commenting on the weight of the evidence in the presence of the jury. We agree that the remarks of the trial court plainly constituted reversible error, but inasmuch as we are reversing this judgment for reasons already pointed out, and, since it appears that the error complained of is not likely to occur again in a second trial, nothing would be accomplished by elaborating on this point, and any discussion would only serve to prolong this opinion.

For the reasons herein set forth, the judgment is reversed in its entirety, and the cause is remanded to the Columbia County Circuit Court for further proceedings.

5-3441 388 S. W. 2d 8

Opinion delivered March 15, 1965.

Macom and Moorhead, Jimason J. Daggett, for appellant.

George E. Pike and *Milton G. Robinson,* By *Milton G. Robinson,* for appellee.

ED. F. MCFADDIN, Associate Justice. A traffic mishap, involving a farm tractor and two automobiles, resulted in the death of three persons and injuries to three others; and this litigation resulted. Appellees were the plaintiffs, and appellants were the defendants.

At about 9:30 A.M. on February 6, 1963, Mr. H. E. Cox was driving his automobile north on State Highway No. 11 enroute to Stuttgart, and in the car with him were his wife, and Mr. and Mrs. Charles Atkins. Also going toward Stuttgart, and in front of the Cox car, there was a farm tractor owned by Clarence Cobb and being driven by his employee, Archie Earls. Mrs. Wanda Callison was driving her car south from Stuttgart and in the car with her were her two children, Pamela and Sue Callison. The testimony is in hopeless conflict as to exactly how the traffic mishap occurred; but by its verdict

the jury found that as Mr. Cox started to pass the tractor it swerved to the left and struck the Cox car and caused the car to turn over and rest on its left side; and while the Cox car was in that position it was struck by the Callison car. The result of the mishap was that Mr. and Mrs. Cox and Mrs. Atkins were killed; Mr. Atkins sustained severe injuries; and Mrs. Wanda Callison and her daughter Pamela were both injured; and Mrs. Callison's car was damaged.

Two actions for damages were filed against Mr. Cobb, the owner, and Archie Earls, the driver of the farm tractor. In one of these actions the plaintiff was Mr. Atkins; and in the other the plaintiffs were Mrs. Callison and her daughter Pamela. In both actions it was alleged that Archie Earls was driving the tractor as the servant of Mr. Cobb and in the scope of his employment; that Earls was driving the tractor in a negligent and dangerous manner; that as the Cox car undertook to pass the tractor on the left side of the road the tractor swerved to the left and struck the Cox car and caused it to overturn and rest on its left side in the path of the approaching Callison car, resulting in the collision and damage; that neither the driver of the Cox car nor the driver of the Callison car was negligent; and that all the negligence was that of the driver of the tractor.

Against the Callison complaint the defendants answered with a general denial; and against the Atkins complaint there was a general denial and also a plea of contributory negligence. The two actions were consolidated and tried to a jury, resulting in verdicts and judgments against the defendants in favor of the plaintiffs; and from these judgments Mr. Cobb and Archie Earls bring this appeal, listing five points,[1] which we will discuss in the order listed.

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[1] Appellants' five points are:

"I. The Court erred in permitting the jury to consider the question of whether a lookout was kept by Archie Earls since no evidence was offered relating thereto.

"II. The Court erred in denying the defendants' motion to strike from the complaint and from the jury's consideration the allegation that the tractor was being driven in the middle of the road in such manner as to prohibit cars traveling in the same direction to pass it.

I.

The Callison complaint alleged: "The driver of the tractor failed to observe traffic conditions or keep a lookout for same, and disregarded same." The Atkins complaint alleged: "The driver of the tractor was keeping no look out whatever for the safety of this plaintiff or others."

At the close of the plaintiffs' case in chief the defendants moved that the foregoing allegations be stricken, insisting that the plaintiffs had offered no evidence to sustain the allegations. The Court denied the motion to strike and the correctness of that ruling is presented in appellants' first point. We hold that the ruling of the Trial Court was correct. Mr. Atkins had testified: that Mr. Cox blew his horn four or five times before attempting to pass the tractor; that the tractor was going back and forth across the middle line of the road; that Archie Earls in driving the tractor was "going so fast it was bouncing him up and down"; that the tractor would swerve from one side to the other; and "sometimes he was over in the right lane and sometimes he was over in the left lane." The testimony as to such driving would certainly be sufficient to take the case to the jury on whether the driver of the tractor was observing traffic conditions.

It is true that Atkins said of Archie Earls: "He looked over that way at us"; but whether a mere glance over the shoulder at a vehicle attempting to pass constitutes a sufficient lookout, is a question for the jury to decide. We like what the Supreme Court of Iowa has

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"III. There is no substantial evidence of any negligence on the part of Archie Earls and the Court erred in refusing to instruct a verdict in favor of the defendant in both cases.

"IV. Conceding, for argumentative purposes, that the tractor did weave across the center line; as testified by Atkins, this act was not a proximate cause of the accident and the trial court should have instructed a verdict in favor of the defendants.

"V. The Court erred in refusing to submit the Atkins case to the jury upon the interrogatories requested by defendants (Transcript 217) and although instructing the jury on the issue of contributory negligence he thereby precluded the jury in arriving at its verdict from giving consideration to the issue of comparative negligence."

said concerning a proper lookout in automobile cases. In *Mueller* v. *Roben,* 82 N. W. 2d 98, the Iowa Court said:

"With reference to motor vehicle operation 'lookout' is that watchfulness which a prudent and reasonable person must maintain for his own safety and the safety of others, taking into consideration the circumstances with which he is immediately concerned or confronted." In *Ehrhardt* v. *Ruan,* 61 N. W. 2d 696, the Iowa Court said:

"... proper lookout means more than to look straight ahead, or more than seeing the object; that it implies being watchful of the movements of his own vehicle as well as the movements of the things seen; that it involves the care, prudence, watchfulness and attention of an ordinarily careful and prudent person under the circumstances."

We find no merit in the appellants' first point.

II.

Both the Callison and the Atkins complaints alleged that the tractor was being driven in the middle of the road "in such manner that cars traveling in the same direction were unable to pass the tractor." At the close of the plaintiffs' case in chief the defendants moved to strike these allegations, insisting that there was no evidence to support them. The Trial Court denied the motion to strike; and we hold that the ruling was correct. The testimony that we referred to in Topic I *(supra)* is applicable here; and also there is positive testimony of Mr. Atkins regarding the tractor: ". . . sometimes he was over in the left lane." If the tractor was in the left lane, certainly there was no room left for cars to pass.

III.

Appellants' third point is an insistence that there was no substantial evidence that Archie Earls was guilty of negligence and that the Trial Court should have in-

structed a verdict for the defendants in both cases. But here, again, the evidence of Mr. Atkins made a jury case. He testified:

"Q. Now as you started to pass the tractor on which side was your car with reference to the white line?

"A. We were on the west side of the white line.

"Q. Where was the tractor with reference to the white line?

"A. When we started to pass the tractor, he was on the east side but when we got on the west side of the highway the left rear wheel of the tractor came across the line to the west side and that is what hit us.

"Q. When he wobbled or when the tractor wheel crossed the center line over to the west side that is when it hit you or the car you were in?

"A. That is correct.

"Q. And again at the time the tractor wheel struck the car you were in on which side of the highway was it?

"A. The tractor wheel came across the center of the highway to the west side and that is what struck the car.

"Q. Are you sure that you were on the west side of the highway in your proper lane?

"A. I am sure we were.

"Q. And are you sure when he wobbled he wobbled into your lane or was he still in his own lane?

"A. He wobbled over into our lane and hit us. He was moving back and forth.

"Q. Over the center of the highway?

"A. Yes, sir.

"Q. What actually hit the car?

"A. Well it was the lugs on the tractor tire.

"Q. What happened when the lugs hit the car?

"A. It turned our car over in the road."

The copied evidence was sufficient to take the cases to the jury on the question of the negligence of the driver of the tractor. The appellants vigorously attacked the testimony of Mr. Atkins; but the verity of his testimony was a matter for the jury to decide. The Trial Court was correct in refusing the motion for an instructed verdict.

IV.

The appellants' fourth point is a claim that the proximate cause of the accident was not the striking of the Cox car by the tractor; but we are unable to follow the appellants in such argument in view of the Atkins testimony as above copied. There was enough evidence to take the case to the jury and to support the verdict, that the proximate cause of the mishap was the tractor crossing over the center line and striking the Cox car. Furthermore, the physical facts support the verdict because the top of the Cox car was torn back, thus indicating that the Cox car was on its side when struck by the Callison car.

V.

The appellants' fifth point relates to the refusal of the Trial Court to submit the case to the jury on special interrogatories. There were four of these special interrogatories requested: the first was whether the defendants were guilty of any negligence; the second was whether Mr. Atkins was guilty of any negligence; the third was the percentage of negligence of Atkins and the defendant Earls; and the fourth was the amount of damages sustained by each defendant. The Trial Court refused these special interrogatories and submitted the case to the jury for a general verdict. The appellants call our attention to the panel proceedings as found in Arkansas Law Review, Volume 10, Page 94, *et seq.*, and say:

"We are quite aware that the mandatory provisions of the original 1955 'Comparative Negligence Act' (Act 191) were repealed by the 1957 Act (Act 296), and the

1961 Act (Act 170). This does not mean, however, that when a proper request is made for the use of interrogatories in connection with the current act that the trial court can arbitrarily ignore it and thereby preclude the jury's consideration of a properly presented defense." There was a short period of time—when Act No. 191 of 1955 was in force—that it was mandatory for the court to submit the case to the jury on special issues when such request was made. But that legislative enactment was repealed by Act No. 296 of 1957 (see *St. L. S. W. Ry.* v. *Robinson,* 228 Ark. 418, 308 S. W. 2d 282); so that now the Trial Court has discretion as to whether to submit on a general issue or on special issues. It is often advisable to submit the case to the jury on special issues; but in the case at bar, after reviewing the record and the instructions given, we cannot say that the Trial Court abused its discretion. The appellants have not so demonstrated.

Affirmed.

WARNER *v.* ESLICK.

5-3475 388 S. W. 2d 1

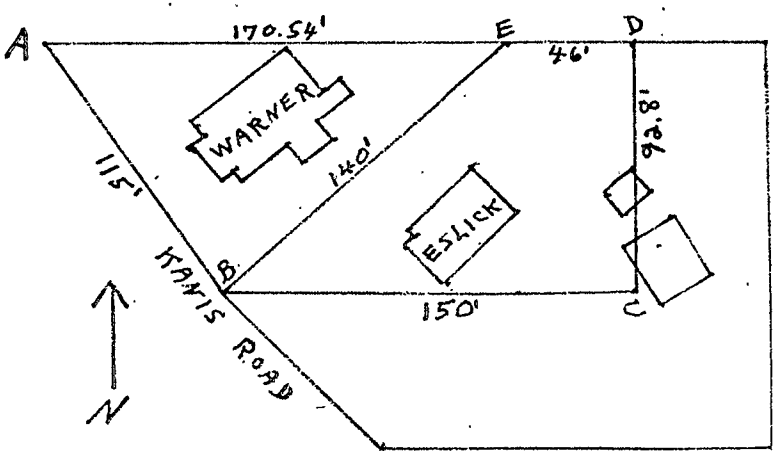
Opinion delivered March 15, 1965.

Josh W. McHughes, for appellant.

C. Richard Crockett and *Burl C. Rotenberry,* for appellee.

George Rose Smith, J. In December of 1959 the plaintiffs below Matt Warner, Jr., and his wife, bought from the principal defendants, Elmer Eslick and his wife, a piece of property on Kanis Road, near Little Rock. About two and a half years later, in July of 1962, the Warners brought this action in ejectment to obtain possession of part of the property lying within the description contained in their deed. The Eslicks filed a counterclaim asking that the description in the deed be reformed, on the ground of mutual mistake. The case was transferred to equity, where the chancellor entered a decree granting the Eslicks' prayer for reformation. The only question we need to consider on appeal is whether the decree is supported by clear and convincing evidence, which is conceded to be the standard of proof required in a case of this kind. *Beneaux* v. *Sparks,* 144 Ark. 23, 221 S. W. 465.

For convenience we insert a simplified plat, taken from one of the exhibits in the record, showing the western part of the three-acre tract that was owned by the Eslicks when they sold part of their land to the Warners in 1959:



The deed that was executed actually described the tract having as its four corners the points ABCD. The Eslicks contend, however, and the chancellor found, that the parties really intended that only the triangular tract ABE be conveyed.

The testimony of the litigants is in sharp conflict. At the time of the sale the Eslicks were living in the house marked "Eslick," which sits back some 40 feet from Kanis Road. According to Eslick, when Warner approached him about buying part of his property he took a tape and measured the 115 feet of frontage along Kanis Road, between points A and B. Beginning at point B there was a chain link fence that extended for about 60 feet along the line BE. Eslick testified that he pointed along the line of this fence and told Warner that he would sell the land lying north and west of that fence for $2,500. At that time there was a small garage or service station on the triangular tract ABE. Eslick says that Warner accepted his offer to sell.

Eslick, who cannot read or write, went to an abstract office and attempted to describe the property that he meant to sell. On the basis of Eslick's information the abstractor prepared a deed describing tract ABCD. The Eslicks executed that deed. Warner made a down payment of $500 and gave a mortgage for the unpaid balance. The Eslicks continued to occupy their home and, in fact, were still living there when the case was tried in 1964. Their daughter and son-in-law were occuping a second house on the land and using a shed, both of which are crossed by the line CD.

Warner testified that he agreed to buy, and Eslick agreed to sell, a tract having a frontage of 115 feet on Kanis Road and a depth of 150 feet. He states that he intended to buy whatever was described in the deed, but he admits that he did not know where the boundary lines were and that he had no intention of buying the Eslicks' home. After receiving his deed he constructed a home and a grocery store on the triangular tract, at a cost of about $12,000. He and his wife moved into

their new home a few months after the sale and were living there at the date of trial. This litigation, filed in 1962, was the immediate result of Eslick's having attempted to extend the fence to point E. Warner then consulted a lawyer and brought suit to obtain possession of all the land described in his deed.

We try the case *de novo*. Although the evidence to justify a reformation for mutual mistake must be clear and convincing, it need not be undisputed. *Foster* v. *Richey,* 192 Ark. 683, 93 S. W. 2d 1258. Hence the bare fact that Warner insists that he meant to buy whatever was described in the deed is not in itself necessarily sufficient to preclude a finding that a mutual mistake occurred. We must arrive at our conclusion from a study of the testimony as a whole.

In our judgment the overwhelming impact of the proof supports the chancellor's decree. To begin with, the significance of the 115-foot frontage on Kanis Road is simply that that was the distance from the northwest corner of the Eslick property to the chain link fence. We can think of no reason why the parties took the trouble to measure the exact distance to the fence if the fence was to be of no importance whatever. On the other hand, if the fence line was to be the boundary between the two properties, as it is reasonable to believe, then the precise location of that line was an essential fact to be determined.

Warner took possession only of the property that lay north and west of the fence line. He spent $12,000 in improving the triangular tract, but there is no indication that he asserted any claim to the land lying on the other side of the fence line. To the contrary, the Eslicks and their daughter and son-in-law continued for more than two and a half years to occupy their houses. Warner himself frankly admits that some sort of mistake occurred, for he concedes that he had no thought of purchasing the Eslicks' home. We can readily understand how Eslick, an illiterate man, made a blunder in attempting to supply a description of the land that he was sell-

ing. We cannot understand why the Warners, if they really meant to acquire a rectangular tract at least 115 by 150 feet in size, were content for years to confine their possession to a much smaller area. In our opinion the proof offered by the appellees fully satisfied their burden of proving by clear and convincing testimony that a mutual mistake took place.

Affirmed.

BLACK, ADM'X *v.* AINSWORTH.

5-3496 388 S. W. 2d 3

Opinion delivered March 15, 1965.

Shaver, Tackett & Jones, for appellant.

Dennis K. Williams, Larey & Larey, for appellee.

PAUL WARD, Associate Justice. This case involves a joint bank account. The money belonged to Mrs. J. S. Ainsworth and was deposited in her name and the name of her daughter-in-law. The question for decision is: At the death of Mrs. Ainsworth does the money belong to the daughter-in-law or to the estate of the deceased? The essential facts which gave rise to this litigation are hereafter summarized.

Mrs. J. S. Ainsworth's husband was a railroad man who retired on a pension. After his death in 1938 the

pension was paid monthly to his wife. Mrs. J. S. Ainsworth died on August 24, 1962. We may hereafter refer to her as the deceased. She was survived by five sons and daughters. The deceased lived in her own home with her son (C. R. Ainsworth) and his wife Viola from 1936 until she sold her home in 1948. After that she lived with C. R. and Viola in their home until her death.

On March 19, 1936 Mrs. J. S. Ainsworth made a deposit of $510 in The State National Bank of Texarkana in an account designated

"Mrs. J. R. Ainsworth, Sr. and Mrs. Viola S. Ainsworth or either of them or the survivor"

—as shown by the original bank book, introduced into the record as Exhibit "2". This book reveals numerous deposits and withdrawals up to February 10, 1949 when it showed a balance of $3,537.02. Exhibit No. "1", introduced in the record, is an original bank book with the same bank, showing the same joint account. In this book the first deposit dated January 28, 1950 shows the above mentioned balance ($3,537.02) plus $35.45—designated as interest—or the sum of $3,572.47. This book also reveals numerous deposits and withdrawals until the account was closed on January 2, 1963, showing a withdrawal in the amount of $6,783.64. It is admitted that Viola Ainsworth withdrew the money and claims it as her own by virtue of the joint account heretofore mentioned.

On May 8, 1963, one of the deceased's daughters (Mrs. J. K. Black) as administratrix of her mother's estate filed suit in chancery court against C. R. Ainsworth (a son of the deceased) and his wife Viola to require them to turn over to her (as administratrix) "all of the money, property, and effects left by Mrs. J. S. Ainsworth at the time of her death." It is conceded that the deceased left no property except the aforementioned joint bank account. Admittedly this sole question is properly presented: Does the joint bank account belong to the deceased's estate or to Viola Ainsworth?

The above question was presented to the trial court

on the facts above set out, on certain exhibits, and on testimony of witnesses presented only by the administratrix. In ruling against the administratrix (appellant herein) the trial court, in a memorandum opinion, found that the joint account agreement was properly signed by the deceased and Viola Ainsworth; that thereupon title to the money in said account vested in Viola; and, that there is "no substantial evidence in the record" to show the deceased intended for said money to be distributed among her children.

After a careful study of the record, the able arguments, and the pertinent authorities, we conclude the trial court is right and that its findings are in accord with the weight of the evidence. In many respects the case of *Von Tungeln* v. *Chapman,* 233 Ark. 219, 343 S. W. 2d 782, is similar to the one here under consideration both as to the facts and the law. In that case we said:

"Reviewing the evidence on trial *de novo* here, we find the record utterly bare of evidence to overcome the *prima facie* intent which we hold the signature card creates as to the existence of a joint tenancy."
Although, as pointed out by this Court in the above cited case, there was testimony that Mrs. Reed (who stood in the position of Viola here) did give some of the money to certain heirs, and although the deceased indicated at one time she wanted a certain daughter to have some money, yet, we said this:

"We find such testimony insufficient to overcome the clear intention expressed on the signature card and the savings certificates both of which are made out to Mrs. N. C. Chapman or Mrs. Bertha Reed. The signature card, which is signed by both Mrs. Chapman and Mrs. Reed, declares an intent to create a joint account."
In the case under consideration there cannot be the slightest doubt a *prima facie* case is established showing it was the intent of the deceased and Viola to form a joint account with the right of survivorship. Each deposit book (Exhibits "1" and "2") contains a section 5 which reads:

"If any account is opened in the name of two persons, payable to either or the survivor, either person may, during his life, on production of the pass-book, draw the whole or any part of the moneys in said account, and at the death of either, the sum remaining in such account shall be the sole property, absolutely, of the survivor, and be subject to his or her order as herein provided for all other depositors."

Not only so, but the signature card (dated March 19, 1936) signed by "Mrs. J. S. Ainsworth and Mrs. Viola S. Ainsworth" contains this language:

"We agree each with the other, and with the State National Bank of Terarkana, Ark., that all sums heretofore or hereafter deposited by said depositors or either of them, with said Bank, to their credit as such joint depositors, shall be owned by them jointly, with right of survivorship and be subject to the check or order, or receipt of either of them or the survivor of them . . ."

It would serve no useful purpose, we believe, to set out at length the testimony in order to show there was no sufficient evidence to overcome this clear *prima facie* case. The essence of Mrs. Black's testimony was that she did see the "book" but didn't see Viola's name on it, but she admitted that she didn't pay much attention to it and didn't examine it carefully. Viola, who was called as a witness by appellant, asserted emphatically she understood the money was to go to the survivor. She did admit that on occasions she had offered to divide some of the money with the other children (as was done in the Von Tungeln case) but this could well be interpreted to mean she owned the money and had a right to do as she pleased with it.

In fairness to all it must be pointed out that this litigation is not the sordid picture of greedy children putting the love of money over and above love and respect for their mother—it is nothing more than a legitimate attempt to solve a legal problem. The record is replete with evidence that some of the children wanted nothing; that some wanted Viola to have it all regardless

of the legal aspect; that Mrs. Black (appellant) visited and attended her mother twice a day, and washed her clothes for two or three years and wanted no pay for it, and that she thought Viola had done a wonderful job taking care of Mrs. Ainsworth (her mother-in-law) in her home for more than a dozen years.

In view of the conclusion we have reached it is unnecessary to discuss other questions raised by appellant.

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

Affirmed.

CENTRAL INVESTMENTS *v.* POLK.

5-3509 388 S. W. 2d 381

Opinion delivered March 15, 1965.

[Rehearing denied April 19, 1965.]

Shackleford & Shackleford, for appellant.

Paul K. Roberts, for appellee.

SAM ROBINSON, Associate Justice. On December 29, 1961, this suit was filed in the Bradley Circuit Court by

appellees, Norman and Kay Polk, to recover $1,000 paid to the defendants as the purchase price of certain corporate stock. The suit was brought under provisions of the Securities Act of 1959, Ark. Stat. Ann. § 67-1256 (1947). Paragraph "e" of this section provides: "No person may sue under this section more than two years after the contract of sale . . ."

All of the defendants moved to quash service of summons, alleging that the Bradley Circuit Court had no jurisdiction of the parties. In addition, the defendant, Central Investments, Inc., among other defenses, pleaded the statute of limitations. There was a verdict and judgment for the plaintiffs. Defendants have appealed. Several points are argued, but we reach only the question of whether the cause of action is barred by the aforesaid statute of limitations.

When the suit was filed in the Bradley Circuit Court summons was issued for each defendant, including Central Investments, Inc., and directed to the Sheriffs of Union and Nevada Counties. No summons was placed in the hands of the Sheriff of Bradley County. The individuals against whom suit was filed and officers of the defendant corporation live in Union and Nevada Counties and were served with summons in those counties.

The contract for purchase of the corporate stock was made in January, 1960. The suit can not be maintained if commenced more than two years after the date of the contract. Here, the two year period expired in January, 1962. The question is whether suit was commenced within the meaning of the statute prior to that time.

On the 25th day of May, 1962, appellants had a new summons issued for Central Investments, Inc. by the Bradley Circuit Court, directed to the Sheriff of Bradley County. On that same date, the sheriff of that county served summons on J. E. Goodwin, Manager of the Warren Motel, owned and operated by Central Investments, Inc. There is no question about the validity of the service on Goodwin as a proper agent of Central.

The question is whether, in the circumstances, the suit against Central was commenced within the two year period allowed by statute. Of course if the cause of action against Central is barred by statute, the judgment against the other defendants cannot stand because Central was the only defendant served with summons in Bradley County. Ark. Stat. Ann. § 27-615 (Repl. 1962).

Ark. Stat. Ann. § 27-301 (Repl. 1962) provides: "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 suit was not commenced against Central on December 29, when the complaint was filed and summons placed in the hands of the Sheriffs of Union and Nevada Counties, it is barred because more than two years had expired when a new summons was issued and placed in the hands of the Sheriff of Bradley County.

The suit filed in Bradley County was on a transitory cause of action. To give the Bradley Circuit Court jurisdiction of the parties it would be necessary to serve one of the defendants in Bradley County. Neither the Sheriff of Union nor Nevada County was the proper officer to serve summons in Bradley County. Hence, the summons was not placed in the hands of the sheriff of the proper county; there was no commencement of the action within the meaning of the statute. *Wilkins* v. *Worthen*, 62 Ark. 401, 36 S. W. 21; *Sims* v. *Miller*, 151 Ark. 377, 236 S. W. 828.

When summons was obtained and placed in the hands of the sheriff of the proper county—Bradley County—the time in which this kind of action could be brought had expired.

Reversed and dismissed.

BARNHILL *v.* STATE.

5112 388 S. W. 2d 99

Opinion delivered March 15, 1965.

[Rehearing denied April 12, 1965.]

[redacted]

E. L. Holloway, for appellant.

Bruce Bennett, Atty. General, By *William L. Patton, Jr.,* Asst. Atty. General, for appellee.

JIM JOHNSON, Associate Justice. This is an appeal from a conviction for involuntary manslaughter. Appellant Roy C. Barnhill was charged by information in Clay Circuit Court, Western District, with the crime of involuntary manslaughter following an automobile collision which resulted in a death on April 29, 1963. After trial on January 21 and 22, 1964, the jury returned a verdict of guilty of involuntary manslaughter and fixed the punishment at three years in the penitentiary. From judgment on the verdict comes this appeal.

Appellant filed no motion for new trial. In the absence of a motion for new trial, this court will only determine whether there is error on the face of the record. *Howell* v. *State,* 180 Ark. 241, 22 S. W. 2d 47; *Whelehon and Pepper* v. *State,* 233 Ark. 229, 343 S. W. 2d 563. We have examined the record and find no error apparent on the face of the record. The judgment is therefore affirmed.

Opinion delivered March 15, 1965.

Smith, Sanderson, Stroud & McClerkin, for appellant.

Larey & Larey, and *Shaver, Tackett & Jones,* for appellee.

FRANK HOLT, Associate Justice. This is an action for a declaratory judgment to determine appellant's liability under the terms of its insurance policy in a pending damage suit action. The suit for damages was instituted by appellee Raymond M. Oliver against appellee Carolyn S. Dellinger to recover for personal injuries and property damage sustained in an automobile collision. In that action the answer was filed four days after the statutory limit. A few days after this late answer was

filed on behalf of appellant's insured, appellee Dellinger, the appellant filed the present action against appellees Dellinger, Oliver, and its soliciting agent, Charles O. Wade, Jr., for a declaratory judgment contending that the insurance policy issued by it to appellee Dellinger did not cover the particular Dellinger vehicle involved in the collision and, therefore, the appellant insurance company should be relieved from any responsibility to the insured as the defendant in the pending action. The appellees filed an answer insisting that the insurance policy covered the automobile being driven by appellee Dellinger at the time of the collision.

The court, sitting as a jury, held that appellee Dellinger had substantially complied with the requirements of the appellant insurance company as to notice of any change of vehicle and, thus, the appellant was obligated to defend the pending suit for damages. Upon refusal by appellant to accept the responsibility to defend appellee Dellinger pursuant to the terms of the policy, the court then proceeded to grant appellee Oliver's motion to strike the late answer in the pending damage suit and rendered a default judgment in his behalf against appellee Dellinger. Appellant does not appeal from the action of the court in striking the late answer and rendering a default judgment. This appeal is from the action of the court finding substantial compliance by the insured with the terms of the insurance policy.

Appellant ably summarizes its three points for reversal by stating it is appellant's contention that the trial court erred in finding that appellee Dellinger had substantially complied with requirements of the liability insurance policy as to securing an endorsement for a newly acquired or substituted vehicle and that the court further erred in finding that appellant was obligated to defend the damage suit action filed by appellee Oliver against appellee Dellinger.

We review the judgment of the circuit court in a declaratory judgment proceeding in the same manner as any other judgment. Ark. Stat. Ann. § 34-2506 (Repl.

1962). Therefore, if there is any substantial evidence to support the finding upon which the judgment is based we must affirm.

The policy provided no coverage on a substituted vehicle until the endorsement change was actually issued. None was ever issued. However, appellant's own forms, "Request for Change of Policy," supplied to its soliciting agent, appellee Wade, provided *inter alia* that it was understood that a change of car endorsement "will be effective at date on envelope forwarding this request." Appellee Dellinger testified that she had completed such a request on appellant's form and both appellee Wade and an employee testified that the form was forwarded to appellant about two weeks before the accident involving the substituted vehicle. Appellant denied receiving the form request. Appellant's own witness, however, admitted the standard procedure was that when such a form was received by appellant that the date on the envelope controlled the date of coverage rather than the date of the issuance of the endorsement. Appellant admitted it had previously recognized such requests forwarded by appellee Wade, appellant's soliciting agent. Although appellant had knowledge of the accident before the damage suit was filed and disclaimed any coverage because its insured was driving a vehicle not "named" in the policy, appellant proceeded to have a late answer filed on behalf of its insured.

It is well settled that any condition inserted in a policy for the benefit of the insurer can be waived by it. *So. Farmers Mutual Ins. Co.* v. *Garrett,* 212 Ark. 577, 206 S. W. 2d 463; *Service Fire Ins. Co.* v. *Payne,* 218 Ark. 499, 236 S. W. 2d 1020.

We think there is substantial evidence to support the finding of the trial court that appellant's insured, appellee Dellinger, complied with appellant's requirements respecting the endorsement coverage of a substituted or newly acquired automobile. The finding of a trial court, sitting as a jury, has the verity and binding effect of a jury verdict and is conclusive of an issue of

fact. *Zullo* v. *Alcoatings, Inc.*, 237 Ark. 511, 374 S. W. 2d 188.

By their counter claim the appellees urge that they should be awarded the statutory penalty and attorney's fee as provided in Ark. Stat. Ann. § 66-3238 (Supp. 1963) since they were required to defend appellant's action for a declaratory judgment. While an attorney's fee may be allowed in a case of this nature, Ark. Stat. Ann. § 66-3239 and *Maryland Casualty Co.* v. *Turner*, 235 Ark. 718, 361 S. W. 2d 646, nevertheless, we think justice is fully served by denying an attorney fee in this particular case.

Affirmed.

WALKER *v.* STATE.

5116 388 S. W. 2d 13

Opinion delivered March 15, 1965.

Harold L. Hall and *Howell, Price & Worsham,* for appellant.

Bruce Bennett, Atty. General, By *John P. Gill,* Asst. Atty. Gen., for appellee.

Oscar Fendler, Special Associate Justice. Appellant, James Dean Walker, was charged in the Pulaski Circuit Court with the crime of First Degree Murder. It is alleged that on April 16, 1963, he murdered Jerral Vaughan by shooting him with a pistol. Appellant entered pleas of not guilty and not guilty by reason of insanity. He was committed to the Arkansas State Hospital for Nervous Diseases for observation. On May 5, 1964, appellant was tried and convicted of First Degree Murder as charged in the information. The trial court, on May 18, 1964, sentenced him to death by electrocution. He has appealed to this court.

On the night of April 15, 1963, the appellant and his companion, Russell Freeman Kumpe, together with two young women, Linda Ford and Mary Louise Roberts, visited several Little Rock night clubs. Walker and Kumpe were apparently involved in some trouble in one of the downtown clubs. Several hours later the men checked out of their motel, and accompanied by only Linda Ford, drove their automobile to North Little Rock and out on the England Highway (Arkansas Highway No. 130). They were followed by Miss Roberts in a taxicab that she had hired since she had been excluded from the group. Miss Ford contended that she had been forced at gunpoint to accompany the men.

It is undisputed that Kumpe was driving; that Miss Ford was sitting on the front seat next to him, and that Walker was on the same seat to her right and next to the

door. The car was traveling at a reasonable speed when it was stopped by a police officer from North Little Rock, Gene Barrentine. The deceased, Jarrel Vaughan, in a separate police car, assisted in stopping Kumpe's vehicle. Both Barrentine and Vaughan, and other police officers who came to this location within a matter of minutes of each other's arrival had received word by radio to intercept and stop a white Oldsmobile. The Oldsmobile promptly pulled over on the shoulder of the highway and stopped when Kumpe saw the red light on the police car.

Kumpe got out of his car by order of Officer Barrentine, and came to the rear of the Oldsmobile; he leaned against Barrentine's police car while the officer searched him. As this was being done, Officer Vaughan approached the passenger side of the Oldsmobile from the rear; as he reached the car door, gunfire broke out. Kumpe ran off to the side of the highway. Officer Barrentine fired twice at Kumpe and fired four rounds into the Oldsmobile. He then got on the radio in Vaughan's car and asked for help because he knew Vaughan had been shot. As he reloaded his pistol, he saw Walker's head come up again and he fired one more shot through the rear view glass of the Oldsmobile at Walker. Walker had also shot at Barrentine through the same window.

More police arrived; they went to the Oldsmobile and found Walker lying outside that car on the passenger side, and Officer Vaughan lying fatally wounded two feet from him. Walker was in a semi-conscious state, having been wounded. He had a .38 S & W Snub nose revolver in his hand that had not been fired. When the officers rolled Walker over they found he was lying on a .38 Smith & Wesson 4-inch barrel pistol that was empty. A third gun (4-inch barrel .38 colt revolver) was found on the front floor board under the driver's (Kumpe's) seat. Vaughan's gun was lying there on the ground. The three guns and empty shells that presumably belonged to Walker and Kumpe were sent to State Police Headquarters for paraffin and ballistic tests.

A surgeon removed the bullet from the deceased Vaughan, which was identified as having been fired by the .38 S & W 4-inch barrel pistol, which was found beneath Walker's body. This bullet was directly overlying Vaughan's heart. Death was almost immediately after the bullet entered Vaughan's body.

Walker had been shot in the right upper arm, right chest, right lower abdomen, and upper right leg; there were five bullet wounds in him. No testimony was offered by the State of the results of ballistic tests on the bullets removed from Walker's body.

The defendant did not testify. Linda Ford, who was sitting in the front seat with Walker, said that he had a pistol in his hand and started firing when the door was opened. She did not know who opened the door, but the door was not open when Officer Vaughan walked up. Thomas Gerald Short, the cab driver, who was also present with the police, testified that Vaughan had bent over looking into the Oldsmobile window and said a few words. Short also stated that when the door came open, Vaughan was doing a little dance-like jig, trying to get away from the car and backed up on the side of the bank; that there was a shot and Vaughan fell on his chest; that he heard several shots; that he did not see any shots fired. He said that Vaughan had just got his gun out when he was shot.

At the conclusion of all testimony, appellant moved for the court to reduce the charge from first degree murder to that of second degree, contending that the State had not proved premeditation, deliberation and intent. The motion was overruled. The trial court gave instructions defining murder as follows:

"All murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate, malicious and premeditated killing, or which shall be committed in the perpetration of, or in the attempt to perpetrate, arson, rape, robbery, burglary or larceny, shall be deemed murder in the first degree.

"All other murder shall be deemed murder in the second degree."

The court then gave the State's Requested Instruction No. 2, as follows:

"I will now give you the law defining the charge in this information.

"Murder is the unlawful killing of a human being, in the peace of the State, with malice aforethought, either expressed or implied.

"The manner of the killing is not material, further than it may show the disposition of mind, or the intent with which the act was committed.

"Malice, or expressed malice, is the deliberate intention of mind unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof.

"Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing manifests an abandoned and wicked disposition.

"The killing being proved, the burden of proving circumstances of mitigation that justify or excuse the homicide shall devolve on the accused, unless by proof on the part of the State it is sufficiently manifest that the offense amounted only to manslaughter or that the accused was justified or excused in committing the homicide. However, the burden of proof is on the State on the whole case to convince you beyond a reasonable doubt of the guilt of the defendant."

Then the court, over appellant's objection, gave State's Requested Instruction No. 9, as follows:

"The punishment for murder in the first degree is death or life imprisonment.

"If you find the defendant, James Dean Walker, guilty of murder in the first degree and you wish to fix his punishment at death in the electric chair, your verdict will be: 'We, the jury, find the defendant guilty of mur-

der in the first degree as charged in the Information.' On the other hand, if you wish to fix his punishment at life imprisonment, you will say: 'We, the jury, find the defendant guilty of murder in the first degree and fix his punishment at life imprisonment in the State Penitentiary.

"If you find the defendant not guilty by reason of insanity, your verdict should be: 'We, the jury, find the defendant not guilty by reason of insanity.

"If you find the defendant not guilty, or if you have a reasonable doubt of his guilt, then you will say: 'We, the jury, find the defendant not guilty.

"In either event, you will sign the verdict by one of your members as Foreman, and the verdict must be unanimous."

The defendant objected specifically to the action of the court in giving State's Requested Instruction No. 9, as follows:

"The defendant specifically objects to that instruction because the second degree murder charge is not defined and made a part of that. The burden is on the State, and it makes a question for the jury to find the defendant was guilty of intent, premeditation and deliberation. That would be the jury's question, to be decided by them, as to whether it would be first or second degree."

"THE COURT: Overruled. Save his exceptions."

Subsequently, the court refused to give Defendant's Instruction No. 7, which would have allowed the jury to decide the degree of murder. Defendant's Requested Instruction No. 7 is as follows:

"You are instructed that if you have a reasonable doubt as to whether the defendant is guilty of murder in the first or second degree, then you must find him guilty only of murder in the second degree. If you have a reasonable doubt as to whether the defendant is guilty of murder in the second degree or manslaughter. If you

have a reasonable doubt as to his guilt in the whole case, then it is your duty to acquit him and find him not guilty."

In giving the forms of verdicts to the jury, the court said:

"Gentlemen of the jury, I will now give you the forms of your verdict. If you believe the defendant is guilty and you wish to invoke the death penalty, you will say: 'We, the jury, find the defendant, guilty of murder in the first degree, as charged in the information.' That carries the death penalty with it automatically.

"On the other hand, if you wish to sentence the defendant to life imprisonment in the penitentiary, which is your choice, you will say, 'We, the jury, find the defendant guilty of murder in the first degree, as charged in the information, and fix his punishment at life imprisonment in the State Penitentiary.'

"If you feel like the defendant is insane, you will say: 'We, the jury, find the defendant not guilty by reason of insanity.'

"If you feel he is not guilty, or if you have a reasonable doubt of his guilt in the whole case, you will say: 'We, the jury, find the defendant not guilty.'

"This verdict must be unanimous and signed by one of you gentlemen as foreman. You may retire to consider your verdict."

The Arkansas General Assembly adopted an Act relating to murder on December 17, 1838, which is divided into three sections in Ark. Stats. 1947. These are as follows:

"41-2205. MURDER IN FIRST DEGREE DEFINED. All murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate, malicious and premeditated killing, or which shall be committed in the perpetration of or in the attempt to perpetrate, arson, rape, robbery,

burglary or larceny, shall be deemed murder in the first degree."

"41-2206. MURDER IN SECOND DEGREE. All other murder shall be deemed murder in the second degree."

"43-2152. MURDER CASES—DEGREE OF OFFENSE FOUND BY JURY. The jury shall, in all cases of murder, on conviction of the accused, find by their verdict whether he be guilty of murder in the first or second degree; but if the accused confess his guilt, the court shall impanel a jury to examine testimony, and the degree of crime shall be found by such jury."

This court, after carefully studying the record in this appeal, concludes that there is testimony from which the jury could logically infer that Walker was guilty of a lower degree of homicide than first degree murder. It was, therefore, the duty of the trial court to instruct the jury on that degree of the offense of murder. The history of the 1838 Act referred to above has been often discussed in the opinions of this court. See *Walton* v. *State,* 232 Ark. 86, 334 S. W. 2d 657; *Smith* v. *State,* 222 Ark. 650, 262 S. W. 2d 272; *Jones* v. *State,* 204 Ark. 61, 161 S. W. 2d 173; *King* v. *State,* 117 Ark. 82, 173 S. W. 852.

We have long recognized that there are two classes of first degree murder: (1) Those committed in the perpetration of or attempts to perpetrate named crimes; (2) those committed wilful, deliberate, malicious and premeditated killing.

Where there was no testimony tending to prove that a defendant was guilty of any offense lower than first degree murder, the trial court has not been required to instruct on any other grade of homicide. "The reason is that; if there is no evidence whatever tending to establish a lower degree of homicide whatever tending to establish a lower degree of homicide than murder in the first degree, it is the jury's duty to take the court's exposition of the law, and the court shall decline to give the jury instructions as to any lower degree of homicide.

On the other hand, if there is any testimony from which the jury might legitimately infer that the defendant was guilty of a lower grade of homicide than murder in the first degree, it would be the duty of the court to instruct on that degree of the offense." *King* v. *State,* supra.

In this record, appellant Walker is not charged with killing in an attempt to commit other crimes, but the information charges murder of Vaughan by Walker shooting him with a pistol, "unlawfully, feloniously, wilfully, and with malice aforethought and after premeditation and deliberation." Although many of our decisions which require the giving of an instruction on second degree murder have dealt with cases where defendants pleaded guilty to a charge of murder in the first degree, this court feels that the same obligation, under Ark. Stat. Ann. § 43-2152 (Repl. 1964), is imposed on the trial court when a defendant pleads not guilty and there is testimony from which the jury can reasonably infer that the accused might be guilty of a lower offense than murder in the first degree.

In this case there is testimony that Walker was shot five times and all on his right side; that Linda Ford sat next to him on his left side and was not shot; that Vaughan did shoot his gun, although we are not told how many times, and we are not informed as to what gun and whose gun fired those five bullets into Walker. Expert medical testimony indicates Vaughan died almost immediately from the one bullet in his body. It can be reasonably inferred that Vaughan shot Walker several times before Walker's one bullet killed Vaughan. The position of Walker's bullet holes negative his being shot by Officer Barrentine, but if the State possesses evidence as to whose gun shot Walker, such can be offered at the second trial. These are only a few of the facts from which the jury could have found a lesser offense of homicide. This is not to say, however, that the evidence is not sufficient to support a conviction of first degree murder.

During the testimony in chief given by the State's witnesses, and prior to any evidence adduced by appel-

lant Walker, the trial court, over specific objections of Walker's counsel, allowed Ray Vick, Chief of Police in North Little Rock, to testify that Officer Vaughan was "a very efficient officer, well liked, and did his work without any complaints." He said that in 1961 Vaughan had won an award from a civic club for courtesy.

Prior to this testimony, Walker's counsel, in chambers, advised the court that the State planned to call Vaughan's widow and he objected to her being placed on the stand because she knew nothing about the alleged homicide; that the only purpose in using her was to prejudice the jury and sway it against the accused. The court asked the prosecuting attorney why he proposed to use the widow and he replied "to show her husband's age and certain things about him . . ." The court overruled appellant's objections. First, Chief Vick was called, then Mrs. Mada Vaughan was placed on the stand. She testified that Vaughan was 32; that they had been married 12 years and had two children—a little girl 8 years old and a little boy, 16 months old. The prosecutor asked:

"Q. Was he a good father and husband?"

"Mr. Hall: I object, your Honor."

"A. He was a wonderful husband."

"Mr. Hall: I object your Honor. I made an objection in chambers which I would like to renew at this time."

The court sustained the objection, but never told the jury to disregard the answer. The prosecutor then asked the widow what she was doing at this time. The objection was sustained. The widow, on being excused, went to the waiting room near the Judge's and Clerk's offices and fainted. One juror apparently saw her faint. Walker's counsel called this episode to the court's attention. The prosecutor told the court he brought the widow to show the type of character Vaughan was, because counsel for Walker in his opening statement told the jury there was a question as to who fired the first shot.

The admission of this testimony offered by the State was error. This evidence was introduced by the State before the accused had offered any testimony. The accused had not attacked the fact that this young police officer was a man of good reputation. Our court has held in several cases that such evidence offered by the prosecution should not be admitted until the accused has undertaken to attack the character of the deceased in that respect. *Bloomer* v. *State,* 75 Ark. 297, 87 S. W. 438; *Bridges* v. *State,* 169 Ark. 335, 275 S. W. 671; See also *Mode* v. *State,* 235 Ark. 46, 350 S. W. 2d 675; Wharton's Criminal Evidence, Vol. 1, 12th Ed., Sec. 160, and cases cited there.

How many children officer Vaughan had, their ages, whether he was a kind and loving husband, his efficiency on the police force, and any matters relating to his good character are irrelevant facts in this case. The Alabama Court in *Knight* v. *State,* 142 So. 2d 899, said that to hold such evidence not prejudicial to the defendant was to disregard the realities of trial atmosphere and the emotional frailties of human nature. In view of a second trial, we are bound to call this error to the trial court's attention.

Walker was committed to the State Hospital by the trial court under authority of Initiated Measure 1936, No. 3, Sec. 11, (Ark. Stat. Ann. § 43-1301), which provides:

". . . A written report prepared by the physician or physicians employed by the State Hospital shall indicate separately the defendant's mental condition during the period of examination, and his probable mental condition at the time of the alleged offense. . . ."

In this case a hospital report was introduced in evidence by the State.

The trial court, over appellant's objection, gave State's Requested Instruction No. 6 that reads:

"You are further instructed that whenever a defendant is committed to the State Hospial pursuant to

Initiated Act 3 of 1937 for a sanity test that under the language of said state law, a written report prepared by the physician or physicians employed by the State Hospital shall indicate separately the defendant's mental condition during the period of examination, and his probable mental condition at the time of the alleged offense. This report shall be certified by the superintendent or supervising officer of the State Hospital, under his seal, or by an affidavit duly subscribed and sworn to by him before a notary public who shall add his certificate and affix his seal thereto."

The instruction should not have been given because it singles out and calls the jury's attention to particular evidence. See *Scott* v. *State,* 109 Ark. 391, 159 S. W. 1095. Article 7, Sec. 23, Constitution of 1874 of Arkansas.

The trial court, in anticipating the need for additional jurors, prior to the opening trial on May 5, 1964, opened Special Panel Lists Nos. 4 and 5. The judge was in the Clerk's office with his Bailiff, a deputy clerk, the clerk's assistant, and the court reporter. The defendant Walker and his counsel were not present. Walker's counsel objected to the use of jurors on these lists because the lists were not opened in "open court". Arkansas Statutes 1947, amended, Sec. 39-221, requires that the trial court order the clerk to open the panel of special jurors in *open court.* The better practice would be to follow the statute strictly in that respect.

Other errors complained of by appellant Walker are unlikely to be repeated in a new trial. For that reason, we deem it unnecessary to discuss them.

For the errors described herein, the judgment will be reversed and the cause remanded for a new trial.

HOLT, J., not participating.

5-3515 388 S. W. 2d 92

Opinion Delivered March 22, 1965.

[Rehearing denied April 12, 1965.]

[redacted]

Mann & McCulloch, for appellant;

Harold Sharpe, for appellee.

CARLETON HARRIS, Chief Justice. This appeal involves the question of a homestead exemption. On January 11, 1962, M. C. Hambleton, Jr., instituted suit against appellees, Curtis Coopwood and wife, Alice Coopwood, on a promissory note, dated December 31, 1958. On February 15, 1962, Hambleton obtained a judgement against the appellees in the amount of $1,559.00, plus attorney's fee, interest, and costs. In January, 1964, appellant indicated that he planned to have a writ of execution issued against appellees, and to levy on a certain forty-acre tract, owned by the Coopwoods. The latter contended that the forty-acre tract was a part of their homestead;[1] filed their Schedule of Exemptions, and requested a hearing by the St. Francis County Circuit Court. After hearing the evidence, the court granted the homestead exemption, and from the judgment so entered, appellant brings this appeal.

[1] Article 9, Section 4, Arkansas Constitution of 1874.

The record reflects that Coopwood and his wife own two forty-acre tracts of land, both being located in Township 5 North, Range 1 East, St. Francis County, Arkansas. The Coopwoods first purchased one of the forty-acre tracts on March 29, 1950, which we will term "the forty-acre tract—Section 22." In December, 1951, appellees purchased an additional forty-acre tract, which we will call "the forty-acre tract—Section 23." The first tract mentioned, in Section 22, is the forty involved in this litigation. Both lie adjacent to each other for a distance of 1.320 feet, and have a common boundary line. Admittedly, there is a dirt road, which has been cleared of trees and bushes, between the two tracts. No house has ever been constructed on the forty in Section 22, and it has no improvements, has not been cleared of timber, and is not under fence. In 1960 or 1961, the Coopwoods moved onto the forty in Section 23, and presently make their home there. The sole question in this litigation is whether the forty acres located in Section 22 is a part of appellees' homestead, and thus exempt from execution, as well as the forty in Section 23. The last is not in dispute in this litigation.

Appellant mainly depends upon the fact that the two tracts must be contiguous in order for both to constitute a part of the homestead, and appellant asserts that these two forties are not contiguous, because they do not "touch," but are separated by a "public county road." It is also pointed out that the forty in question (in Section 22) has not been cultivated; has not been fenced, and appellees have not lived on it. The forty in Section 23 has been fenced. The evidence does reflect however that Coopwood has gotten wood (for fuel) off the forty in Section 22 and has sold ties.

The parties are in disagreement as to the status of the road. Appellant contends that the road is a public road, which is maintained by the county, but appellees dispute this. As previously stated, there admittedly is a dirt road of forty to fifty feet in width between the two forty-acre tracts, and the proof reflects that the county grades it once or twice a year.

It is not necessary that we determine whether this passage-way constitutes a "public road," for this fact is not controlling. In *Stuckey v. Horn,* 132 Ark. 357, 200 S.W. 1025, this court pointed out that the homestead law should be liberally construed to effect its benign purpose, and then commented that a homestead right to the whole of a tract is not destroyed by a grant of a right-of-way to a railroad company. This case is cited in 73 A.L.R., Page 146, as recognizing the Arkansas rule that lots or parcels of land constituting a homestead must be contiguous, but that contiguity does not cease because of a railroad easement through the property. *Gibbs v. Adams,* 76 Ark. 575, 89 S.W. 1008, relates to the question of whether certain property in an incorporated town constituted a homestead. We said:

"Now, a homestead in an incorporated town is, by our Constitution, limited to one acre. Art. 9, § 5. The burden was on the homestead claimant to show, either that this land across the street from the dwelling, and which she now claims, was a part of the homestead upon which she lived, or that it had been impressed as a homestead after the sale of the other homestead. *The mere fact that the land was separated from the dwelling house by a street is not conclusive of the question,* [2] but that fact may be considered in connection with other evidence * * *."

In 40 C.J.S., § Page 506, we find:

"Both in jurisdictions where a homestead may be claimed in noncontiguous tracts and in jurisdictions where it may not, it is commonly held that an owner of land may claim a homestead in a lot or tract divided by a highway, street, or alley, railroad right of way, stream of water, quarter-section line, fence, or garden, provided the value does not exceed the limit fixed by constitutional or statutory provision; but it is essential, for this purpose, that the whole shall be used for purposes of a homestead, and hence if a part is used merely for purposes of profit by renting it to tenants, the part so rented cannot be considered as within the homestead exemption. The contigu-

[2] Emphasis supplied.

ity or compactness of tracts is commonly regarded as not affected by division of lands in the modes previously set forth, * * *"

Of course, even if the dirt road in question can be considered a public road, the public only has an easement, with the fee remaining in the Coopwoods. [3]

The Coopwoods only own eighty acres, and the use of the forty in question has not been incompatible with their claim that it is a part of the homestead. This is not a case wherein the two forties are a mile or so apart, but rather, the two are actually contiguous, since, from the evidence, it appears that appellees own the land in both forty-acre tracts, even if members of the public have an easement to travel over the dirt road.

Affirmed.

KANSAS CITY SO. RLY. CO. *v.* BEATY

5-3467 388 S. W. 2d 79

Opinion Delivered March 22, 1965.

[3] We do not mean to imply that, if the fee to the land constituting the road had been held by the county (or other proper highway authority), Coopwood would not have been entitled to claim the forty in Section 22 as part of his homestead. That question is not before us, and we do not pass upon it.

Hardin, Barton, Hardin & Jesson, for appellant;

Rober Shaw & Nabors Shaw, Donald Poe, for appellee.

ED. F. MCFADDIN, Associate Justice. Six cases against the appellant were consolidated in the Trial Court; and from jury verdicts and judgments in favor of the plaintiffs, there is this appeal. The entire litigation stems from a forest fire which occurred in late October 1963 and caused considerable damage to forest lands and destruction of personal property. The plaintiffs alleged that the fire was caused by a locomotive negligently operated by appellant; that because of appellant's negligence in allowing rank vegetation the fire quickly spread from the railroad right-of-way to adjacent lands and inflicted the damages which the plaintiffs sought to recover. On appeal, appellant urges three points:

"I. The trial court erred in refusing to grant appellant a directed verdict and in refusing to give appellant's requested preemptory instruction No. 2.

"II. The trial court erred in giving court's Instruction 7-A over the objection of appellant.

"III. The damages awarded by the jury on the Grady Beaty, Houston Beaty, Finkenbinder and Denniston tracts are excessive and are not supported by substantial evidence and the court should order a remittitur as to them."

I.

Appellant's first assignment necessitates a discussion of the governing law as well as the sufficiency of the evidence. We will commence with the law, as this is the first time we have considered Act 320 of 1955.

Our reports contain numerous cases wherein a landowner has sought damages against a railroad company for fire caused by sparks from the locomotive. Long prior to 1907 we had such cases, some of them being *St. L.I.M. & S. v. Coombs* (decided in 1905), 76 Ark. 132, 88 S.W.

595; and *Tilley v. St. L.S.F. Ry.* (decided in 1887), 49 Ark. 535, 6 S.W. 8. In all such cases, prior to 1907, the plaintiff suing the railway for damages was required to both allege and prove negligence on the part of the railroad company as the proximate cause of the fire. But the 1907 Legislature adopted Act No. 141 of 1907, which relieved the plaintiff from proving negligence. This Act No. 141 of 1907 became §8569 of Crawford & Moses' Digest, §11147 of Pope's Digest, and Ark. Stat. Ann. §73-1014 (1947). Under the 1907 Act a plaintiff seeking to recover damages was required to show that the fire was caused by the railroad company, but was not required to show that the railroad company was negligent in causing the fire. Some such cases so holding are: *St. L. S.F. Ry. Co. v. Shore,* 89 Ark. 418, 117 S.W. 515; *Evins v. St. L. S.F. Ry. Co.,* 104 Ark. 79, 147 S.W. 452; *Cairo etc. Ry. Co. v. Brooks,* 112 Ark. 298, 166 S.W.; and *Mo. Pac. v Fowler,* 183 Ark. 86, 34 S.W. 2d 1071.

The statutory law continued unchanged on this point from 1907 until 1955. Then came Act No. 320 of 1955 which expressly repealed the Act No. 141 of 1907 and substituted [1] the language, as now found in Ark. Stat. Ann. §73-1015 (Repl. 1957). The effect of the 1955 Act is to require the plaintiffs in cases such as the present ones to prove that the railroad company was guilty of *negligence.* Thus, the law on this matter applicable today is just as it was before Act No. 141 of 1907. With that point understood, cases decided before the 1907 Act provide the applicable rules now governing; and from the cases decided before 1907 we point to *St. L., I.M. & S. Ry.* v. *Coombs,* 76

[1] Here is the germane portion of Act No. 320 of 1955: "All corporations, companies or persons, engaged in operating any railroad wholly or partly in this State, shall be liable for the destruction of, or injury to, any property, real or personal, which may be caused by fire resulting from the negligence of such corporation, companies or persons, or resulting from the negligent operation of any locomative, engine, machinery, train, car, or other thing used upon said railroad, or which may result from, or be caused by the negligence of any employee, agent, or servant of such corporation, company or person in the discharge of his duty as such upon or in the operation of such railroad; and the owner of any such property, real or personal, which may be destroyed or injured in the manner set forth hereinabove may recover all such damage to said property by suit in any court, in the county where the damage occurred, having jurisdiction of the amount of such damage."

Ark. 132, 88 S.W. 595, and *Tilley* v. *St. L. S.F. Ry.*, 49 Ark. 535, 6 S.W. 6. In the Coombs case we said:

> "In order for the railroad company to be held liable for the damage, the fire must have been communicated by sparks from the engine, and the escape of the sparks must have resulted from negligence on the part of the company or its servants, either in the construction or operation of the engine. This Court held that, from proof that an engine passed near inflammable material immediately before the discovery of fire, there being no evidence to explain its origin, the jury may infer that the fire originated from sparks from the engine. *Railway Company* v. *Dodd,* 59 Ark. 317. In that case the court said: 'The cotton was liable to take fire from these trains, and communicate it to the depot. One of them passed ten or fifteen minutes before it was destroyed. The cotton caught fire, and the depot was consumed by it. These were facts from which the jury might have inferred that the fire originated in sparks from the engine of the train which had just passed, there being no evidence to explain its origin upon any other theory. All these facts tended to show that the property of appellees was destroyed through the negligence of appellant, and are sufficient to sustain the verdict of the jury in this court.' This enunciation is in line with many adjudged cases on the subject."

An interesting case is *Mo. Pac. Ry. Co.* v. *Johnson,* 198 Ark. 1134, 133 S.W. 2d 33. Even though this case was decided in 1939, nevertheless the plaintiff could not claim any advantage of Act No. 141 of 1907 and the case was tried under the law as it existed before 1907. In *Mo. Pac.* v. *Johnson* we quoted from an earlier case:

> " 'Where fire is discovered shortly after a train has passed, and the proof does not establish some other origin of the fire, the jury is justified in finding that fire originated from sparks from the engine . . . There is thus made a case of *prima facie* negligence, not rebutted by other evidence to the effect only that the spark arresters were in good condition . . ."

With the law thus stated and understood, we turn to the facts in the appeal now before us to ascertain whether the appellant was entitled to an instructed verdict on the claim that the plaintiffs had failed to show the railroad company and its employees were guilty of negligence. It was shown that the appellant's passenger train had to go over a steep grade in going from Mena, Arkansas, to Heavener, Oklahoma; that the crest of the grade was the Rich Mountain crossing; that the train passed the Rich Mountain crossing at about 11:45 A. M. on October 30, 1963; that three men who worked for the Forestry Service had been up on Black Fork Mountain putting out a small fire and had returned to the Rich Mountain crossing; that another witness, Mr. Stites, was also at the crossing; that two of the foresters were on one side of the railroad right-of-way and Mr. Stites and the other forester were on the other side; and that immediately after the train passed the Rich Mountain crossing these men observed two fires on the right-of-way about 100 yards toward Mena on the side where the train had been going upgrade. One of the Forestry Rangers at the Rich Mountain crossing was Basil D. Barr, and he testified that after the fire had been brought under control he went back to the place where he had seen the fire start on the railroad right-of-way:

"Q. What did you observe or what did you find along the railroad there to call your particular attention to?

"A. I found various particles which appeared to be carbon.

"Q. Had you had previous occasions to know what burnt carbon is?

"A. Yes.

"Q. And you say you found particles of substances that appeared to be burnt carbon?

"A. Yes, sir.

"Q. Where did you find those particles?

"A. At the site where these two fires occurred that we put out."

It was shown that there had been a long drought; that the railroad had cut some of the vegetation and left it on the right-of-way uncollected, and that some of the dry vegetation was still standing and was as much as four feet high. There was an extremely strong wind. The two fires observed on the right-of-way, as previously mentioned, spread so rapidly that Mr. Stites and the three forestry men were unable to stop the fires which went for miles. It was 72 hours before the fires were controlled and in that period of time the fires burned the property of these appellees. Besides Mr. Stites and the three forestry men, all of whom testified, there were two other disinterested witnesses: Mrs. Gilbert, who lived near the right-of-way of the railroad company, about a mile from the Rich Mountain crossing; and Mrs. Davis, who lived 100 yards from the south side of the railroad. Both of these witnesses testified that before the train passed there had been no one on the right-of-way and no evidence of fire; and that as soon as the train passed each witness observed the fires. Testimony offered by the plaintiffs made a *prima facie* case of negligence within the purview of our holdings prior to 1907, and the burden then shifted to the railroad company to prove itself free of negligence. The railroad company offered no evidence whatsoever on this issue of negligence. We hold that the Trial Court was correct in denying the defendant's motion for an instructed verdict.

II.

Appellant's second point relates to Instruction No. 7-A which the Court gave, and which reads:

"If you find by a preponderance of the evidence that the defendant railroad company or its employees, while acting in line and discharge of their duties, carelessly and negligently allowed or permitted sparks or fire to escape from its engine or train setting fire to its right-of-way, or carelessly and negligently allowed or permitted its right-of-way to become vegetated or covered

with easily inflammable or combustible matters and that this coupled with the operation of their train, caused a fire to start, and further, that as a proximate cause of such negligence, if any, a fire was created which burned the respective plaintiffs' properties, then your verdict should be for the plaintiffs."

The objection that the appellant offered to the said instruction was:

"With reference to Instruction No. 7-A, we submit that the instruction is erroneous since it would allow the jury to find negligence upon the part of the defendant for allowing any vegetation to grow upon the right-of-way as we understand that would not be sufficient upon which to base a verdict; that there is no evidence to support the instruction; that the plaintiff did not introduce evidence to show any negligence upon the part of the defendant, consequently it is abstract and it is binding."

We hold that the appellant's point is without merit. This instruction is in line with the holdings in our cases prior to 1907, as previously mentioned. See *Mo. Pac.* v. *Johnson,* 198 Ark. 1134, 133 S.W. 2d 33, decided under the law prior to 1907.

In 18 A.L.R. 2d 1081, there is an annotation entitled: "Liability of one on whose property accidental fire originates for damages from spread thereof"; and on Page 1090 of that annotation, cases from various jurisdictions are cited to sustain this statement:

"Where a railroad company fails to use due care to keep its right-of-way free from combustible material, and a fire is started thereon by sparks from a locomotive, the company is liable for the damages sustained by the fire spreading to other property, although there is no negligence in equipping and operating the locomotive."

III.

The appellant's third point relates to the amount of the damages. There were six actions consolidated against

the railway company for the fire damage, and a verdict was rendered for the plaintiff in each action. One of these verdicts was in favor of Messrs. Shores, *et al.,* for the destruction of personal property, and there is no claim that this verdict is excessive. Another of the verdicts was in favor of Mrs. Blalock for the destruction of the timber growing on her lands, and there is no claim that this verdict is excessive. But in the other four cases, the appellant claims the verdict and judgment in each case is grossly excessive and asks for a remittitur.

The Court instructed the jury on the correct measure of damages in the following instruction:

> "If you find for the plaintiffs on the question of liability you must then fix the amount which will reasonably and fairly compensate them for the following elements of damage proven by the evidence to have resulted from the negligence of the defendant. "As to the landowners: The difference in the fair market value immediately before and immediately after the fire . . .
>
> "Whether any of these elements of damage has been proved by the evidence is for you to determine."

It would unduly prolong this Opinion and serve no useful purpose for us to detail the amount of the judgments, how the evidence bore on each element of damage, and the various other matters that are urged by the appellant and resisted by the appellees. It is sufficient to say that we have carefully considered the evidence and had the benefit of oral argument of learned counsel for each side in this Court; and we have concluded that the appellant's claim for remittiturs should be denied. It therefore follows that the judgments are in all things affirmed.

5-3522 388 S. W. 2d 88

Opinion Delivered March 22, 1965.

Rex W. Perkins and *Walter R. Niblock* for appellant.

Thomas Pearson and *James R. Hale,* for appellee.

GEORGE ROSE SMITH, J. J. L. Jones died testate in April, 1963, leaving his homestead in Prairie Grove to the trustees of two cemeteries. Ten months after Jones's will was probated the appellants, Ken Morton and his wife, filed this suit in equity against the cemetery trustees and the executor of Jones's will, asking for specific performance of an oral contract, made in 1960, by which Jones had agreed to leave the property in question to the Mortons in return for their taking care of him for the rest of his life.

This appeal is from a decree finding that the Mortons failed to prove their case by clear and convincing evidence.

The cemetery trustees first contend that the Mortons are barred by the statute of nonclaim, having failed to assert any cause of action against the executor until more than six months after the publication of the notice to creditors. Ark. Stat. Ann. § 62-2601 (Supp. 1963). This contention was rejected in *Fred* v. *Asbury,* 105 Ark. 494, 152 S.W. 155, where we said: "The statute of nonclaim is urged as a bar to the relief sought. This statute provides that all claims against estates of deceased persons shall be barred unless they are properly authenticated and presented to the executor or administrator within one year after the grant of letters; but this is not a proceeding to enforce a claim or demand against the estate of Jacob Fred, deceased, but is one to determine the rights of the parties to this suit to the property in question. The statute of nonclaim does not refer to claims of title or for the recovery of property for the reason that claims of such a character can not in any just sense be said to be claims against the estate of the deceased."

In this respect the law has not been changed by the Probate Code, which provides: "A valid agreement made by a testator to convey property devised in a will previously made shall not revoke the previous devise, but such property shall pass by the will subject to the same remedies on the agreement against the devisee as might have been enforced against the decedent if he had survived." Ark. Stat. Ann. § 60-412 (Supp. 1963). Under this statute the appellants' remedy is not against the estate but against the devisees. A court of equity is the proper forum for their suit for specific performance. *Merrell* v. *Smith,* 226 Ark. 1016, 295 S.W. 2d 624.

On the merits the Mortons insist that the chancellor erred in holding that their testimony about the oral agreement was inadmissible under the dead man's statute, because, they argue, the executor is not a necessary party to the case. We need not explore this connection, for we think that even without this testimony the making

and performance of the contract were established by clear and convincing proof.

The Mortons called the executor as their own witness, as they were entitled to do under the dead man's statute; for if he was in fact a necessary party his testimony was rendered admissible by the fact that he was called as a witness by his adversary. Ark. Constitution, Schedule, § 2. The executor had long been a friend of the decedent and does not appear to have had the slightest reason for misrepresenting the facts. He testified that Jones told him that he had decided to give the Mortons the property "to take care of him at home." The executor also identified a codicil, signed by the testator, in which he directed that the home property be conveyed to the Montons "for their taking care of me in my declining days." The codicil was ineffective, because there were no attesting witnesses, but it was admissible as a statement against interest made by the appellees' predecessor in title at a time when he was the owner of the land. *Pitts* v. *Pitts,* 213 Ark. 379, 210 S.W. 2d 502.

There is an abundance of disinterested proof that the Mortons did take care of Jones in the last years of his life. Inasmuch as the Mortons were not related to Jones and had no duty to look after him the fact that they did faithfully care for him is a circumstance strongly corroborating the existence of the oral agreement. The defendants below offered no testimony at all; so the plaintiffs' persuasive evidence stands uncontradicted. We consider it sufficiently clear and convincing to satisfy the Mortons' burden of proof.

Reversed.

5-3504 388 S. W. 2d 85

Opinion Delivered March 22, 1965.

[redacted]

Mark E. Woolsey and *Thomas B. Keys,* for appellant.

Opie Rogers and *Carl S. Whillock,* for appellee.

PAUL WARD, Associate Justice. This is an eminent domain action brought by the Arkansas Highway Commission (hereafter referred to as appellant) to acquire approximately 1.2 acres of land belonging to Wallace Lay, who is now incompetent, and who will hereafter be referred to as appellee. The land, which was at the junction of highways 19 and 65, is located in Van Buren County about a mile from Clinton.

Other parties mentioned as defendants in the suit, but who have no particular interest in this appeal, are a Mr. Dempsey, guardian of appellee, and a Mr. Keeling who held (at the time this action was begun) a 19 month lease on appellee's property for which he was paying $50 per month.

Based on a jury verdict the trial court rendered judgment vesting title to the property in appellant, and giving appellee judgment in the amount of $16,975. The only points raised by appellant on appeal are: *One.* The trial court erred in not striking the testimony of two witnesses for appellee; and *Two.* The trial court erred (a) in refusing to give appellant's requested Instruction No. 1, and (b) in giving its own Instruction No. 5. The pertinent testimony relative to the points raised will be summarized as each point is hereafter discussed.

One. (a) Appellee's first witness who testified as to the value of the condemned land was Ray Wheeler. His pertinent testimony, in substance, was: I am 41 years old; have been a real estate broker for 19 years — 15 years having been spent in Van Buren County; I have completed approximately 1300 real estate transactions; and am acquainted with real estate values in this county; I am familiar with the condemned land and the improvements thereon. In my opinion its highest and best use is for commercial, tourist, and resort property, and I value it at $24,250. During his testimony the witness referred to the fact that there was an existing lease on the property and, in effect, his testimony was not clear as to the length or value of the lease. At this point appellant moved to strike the witness' testimony as to value because it did not reflect appellee's interest in the property—*i.e.,* it did not reveal the value of the lease. The trial court's ruling was:

> "The court is overruling the motion, subject to the condition that later on in the case there will be evidence from which the leasehold rights may be determined, the motion is being overruled on that condition."

This ruling appears to have satisfied appellant because there was no further objection at that time.

The court ruled correctly, and, also, we think the deficiency in the testimony was supplied by the witness next mentioned.

(b) Farrish Fraser, a witness for appellee, testified in substance: I am 65 years old, in the insurance business, live, and own property, in Clinton; I have also bought and sold real estate in Van Buren County; I am familiar with the subject property; the property is now leased to a Mr. Keeling for $50 per month and the lease has about 19 months yet to run. In my opinion the rental value of the property is $175 per month, and I think someone should pay Mr. Keeling the difference between $175 and $50 per month for the rest of the lease, but I understand Mr. Keeling accepted $850 from appellant. At this point appellant moved to strike the testimony on the ground that the witness did not correctly reduce the estimated rental value to the present day dollar value. The motion was overruled by the trial court, and we think correctly so.

Conceding that the witness did not make the proper deduction, we still think the court was right in not excluding all his testimony. Any possible prejudicial error was purely mathematical and could have been avoided by a requested instruction or by argument to the jury. Furthermore, it appears any prejudicial error was cured by appellant's own witness who stated Keeling had been satisfied by the payment of $850 for the balance of his lease. Appellant does request that $850 be deducted from the judgment.

It will be noted we have not discussed the testimony of appellant's witnesses who fix the value of appellee's property as low as $8,400. Appellant makes no contention there is no substantial evidence to sustain the jury's verdict if (as we hold) the jury is permitted to consider the testimony given by Wheeler and Fraser.

Two. Likewise, we find no reversible error alleged under this point.

(a) At the close of all the testimony appellant moved for a directed verdict as follows:

> "We ask for a directed verdict based on the fact that the highest and best testimony in the record is $8,400.00 as of the date of the taking, November 1, 1963."

In view of what we have already said under point one, it is now obvious that the trial court was correct in denying this motion.

(b) Finally, appellant argues it was reversible error for the court to give Instruction No. 5 which reads:

> "Whenever private property is approximated as incident to the taking for a public purpose the owner is entitled to just compensation for the lands taken. In this case the just compensation which the owner is entitled to receive is the fair market value of *his interest* in the lands as of the date of the taking which was Nov. 1, 1963."

(Emphasis added.)

Again, appellant's objection is based upon a former contention which we have already (under point one) resolved against it. Stress in appellant's argument is placed on the two words emphasized in the instruction—*"his interest"* —contending there was no competent evidence from which the jury could arrive at appellee's *interest*—that is, the value of the fee less the value of the lease. As indicated, we have already resolved that issue in favor of appellee. Pertinent to the issues discussed herein is the well established rule, stated in *Wallis* v. *Stubblefield,* 216 Ark. 119, 225 S.W. 2d 322, as follows:

> "In determining whether there is substantial evidence to support the judgment, we must, therefore, give the evidence adduced on behalf of appellee the strongest probative force that it will reasonably bear."

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

Affirmed.

McFaddin, J., not participating.

DODSON *v.* MULDREW

5-3506 388 S. W. 2d 90

Opinion Delivered March 22, 1965.

[redacted]

Pope, Pratt & Shamburger, By Don Ryan and Walter Davidson, for appellant.

U. A. Gentry, for appellee.

SAM ROBINSON, Associate Justice. Appellants' clear and concise statement of the case is as follows:

"This is a proceeding arising out of the condemnation of lands located in North Little Rock by the Urban Renewal Agency of North Little Rock, in which the sole controversy is the right to the proceeds thereof. The lands were formerly owned by one Mary Collier, a common ancestor of all the parties, who died intestate in 1933 survived by four children, named James Collier, John Collier, Louise (Collier) Dodson and Gaines Collier. The Appellee is the illegitimate child of James Collier, deceased, and the sole surviving beneficiary of his will. The Appellants are the children (or their descendants) of Mary Collier.

"The Appellants claim title as co-tenants with the Appellee as descendants of Mary Collier and the Appellee claims title through a will of his father and by adverse possession. The Appellee is a minor and claims possession was held adversely by his mother in his behalf.

"Mary Collier acquired the lands in 1920. Prior to her death in 1933, the lands were forfeited to the State for delinquent 1929-30 taxes, and were quieted in the State by a Decree entered in 1938. In 1941 a tax deed from the State was made to one W. F. Atwood for $86.63, and in that same year W. F. Atwood quit-claimed the lands to James Collier for a recited consideration of $55.00. James Collier, father of the Appellee, was in possession of the lands upon his death and his common law wife, Cora Muldrew, with her minor son, the Appellee, and other children have remained in continuous possession of the property by living thereon until the property was condemned by the Urban Renewal Agency.

"The issue of the validity of the Will of James Collier was formerly before this Court in the case of *Corean Muldrew, Guardian* v. *Louise Collier Dodson, et al,* 237 Ark. 852, 376 S.W. 2d 672.

"In the proceeding now on appeal the trial court concluded that the parties were not co-tenants, that the appellee took title to the entire property through the will of his father, and that he otherwise held title by adverse possession. The Appellants designated a partial record and listed points to be relied upon and this appeal followed."

It is not necessary to go into the question of whether the purchase by James Collier from W. F. Atwood was a redemption by a co-tenant that inured to the benefit of all co-tenants because we agree with the trial court on the other point that Nathaniel Muldrew has acquired the property by adverse possession by holding through his mother adversely to the co-tenants.

The rule is that before a co-tenant can acquire title by adverse possession, knowledge of his adverse claim must be brought home to his co-tenants directly or by such notorious acts of unequivocal character that notice may be presumed. *Singer* v. *Naron,* 99 Ark. 446, 138 S. W. 958; *Griffin* v. *Solomon,* 235 Ark. 909, 362 S.W. 2d 707. But when it is shown that co-tenants knew, or should have known, that another co-tenant is claiming ownership by

adverse possession, the statute begins to run. *Johnson* v. *James,* 237 Ark. 900, 377 S.W. 2d 44.

There is no question about appellee having possession. The only question is: Was Nathaniel Muldrew's claim of ownership brought home to appellants in such manner that they knew that appellee was claiming ownership of the entire property? The trial court answered the question in the affirmative. We agree.

Appellee and his mother moved onto the property to live with James Collier in 1946 and have lived there since that time. James Collier died on the 19th day of March, 1947, leaving a will in which he devised the property to his two illegitimate children, appellee Nathaniel Muldrew, and his sister, Rosetta Muldrew. The sister died in 1960 without issue. The evidence is convincing that appellants knew that Cora Muldrew was holding the property for her children, claiming that they owned it under the terms of the will of James Collier, who held the record title. Adverse possession can be established in this manner. 2 C.J. S. 517; 1 Am. Jur. 801.

On November 12, 1947, appellants, Louise Dodson, Gaines Collier, Josephine Carter, Ada Tanner, Mary McFarlin, Anna McKinnis, Beatrice Nelson, Verna Nicholson, Ida Moss, Ruby Gentry, Raymond Collier and Otis Collier, filed suit in the Pulaski Chancery Court naming as defendants John Collier, one of the appellants in the case at bar, and appellee herein, Cora Muldrew, mother of Nathaniel and Rosetta Muldrew (illegitimate children of James Collier), alleging that the plaintiffs, along with John Collier, owned the property involved herein; that Cora Muldrew occupied the house on the property and refued to move, notwithstanding that she had no title or interest in the property; and that the two illegitimate children of James Collier, namely Rosetta Muldrew and Nathaniel Muldrew, were devised the interest of the said James Collier in his will. It was asked that a Writ of Assistance be issued requiring the defendant Cora Muldrew to surrender possession of the property.

It was shown in the aforesaid 1947 action that Cora Muldrew is the mother of Nathaniel Muldrew and Rosetta Muldrew (now deceased), the illegitimate children of James Collier, and as mother of these minor children she was holding the property for them; that they claimed title under the will of James Collier. It was shown that James Collier did leave a will in which he devised the property to Nathaniel and his sister, Rosetta.

The allegations contained in the Amended Complaint filed by appellants in 1947, a short time after the death of James Collier, show that appellants knew that James Collier had left a will in which he devised the property to his illegitimate children; that Cora Muldrew was holding the property under the will for the children. The original suit was dismissed. Cora Muldrew did not surrender possession, but continued to hold the property for her illegitimate children. No further attempt was made to dispossess her, or Nathaniel Muldrew, until the case at bar was filed in 1963, some 16 years later. In the meantime, a sufficient period of time had elapsed to give Nathaniel title by adverse possession.

Affirmed.

CITY OF JONESBORO *v.* KIRKSEY

5-3493 388 S. W. 2d 78

Opinion Delivered March 22, 1965.

Frierson, Walker & Snellgrove, for appellant.

Ward & Mooney, for appellee.

JIM JOHNSON, Associate Justice. This is an action to declare certain property dedicated to the public use for street purposes. Appellant City of Jonesboro filed its declaration judgment complaint in Craighead Chancery Court, Jonesboro District, on January 23, 1964, against appellees Claude G. Kirksey and Mildred Kirksey, his wife, Jonesboro landowners, contending that a part of their property had been dedicated for the public use as a street. The case was tried on August 17, 1964, and at the close of appellant's case, on appellees' motion the court dismissed appellant's complaint on the grounds "that all of the evidence on behalf of [appellant], when given its most favorable probative interpretation, failed to establish a prima facie case in favor of [appellant]."

For reverse appellant urges that its evidence was sufficient to establish a prima facie case of appropriation of property by appellees and acceptance thereof by appellant, thereby completing the dedication of such property, and relies primarily on *Hankins* v. *City of Pine Bluff,* 217 Ark. 226, 229 S.W. 2d 231. There we said in part:

"On this testimony the chancellor correctly held that there had been a dedication of the road, which inured to the city when it annexed this territory. The two essential elements of a dedication are the owner's appropriation of the property to the intended use and its acceptance by the public. No specific duration of the public user is required to complete the dedication. *Ayers* v. *State,* 59 Ark. 26, 26 S.W. 19. Nor need the dedication be evidenced by a deed. *Conner* v. *Heaton,* 205 Ark. 269, 168 S.W. 2d 399. It is quite

possible that Hankins did not realize that the effect of his agreement was to give the public a permanent easement across his property, but there was nothing in his conduct to put the county on notice that his offer was in any way conditional. On the contrary, the county judge testified that the county would not have accepted the right-of-way had such a condition been attached."

Reviewing the evidence in the case at bar first on the element of "the owner's appropriation of the property to the intended use" (and giving appellant's evidence its strongest probative force in support of its case, *Werbe* v. *Holt,* 217 Ark. 198, 229 S.W. 2d 225), there is evidence that local businessmen wanted to extend Washington Avenue across appellees' property to Caraway Road, a state highway, that appellees approached the president of the chamber of commerce and offered right of way across their property and $500 toward obtaining the rest of the necessary right-of-way, that the city made a survey in January, 1956, of the proposed street extension which shows that a metal building and a work shop were in the path of the proposed street, further evidence that these buildings along with a small solid concrete retaining wall were removed by appellees, and that the north line of the proposed street on the survey was a line prescribed by appellees.

On the second element, acceptance by the public, there is testimony that early in 1960 when appellees asked the mayor to repair a wooden bridge (which appellees had built and maintained theretofore), the city tried to keep the bridge passable and finally in June or July of 1960 the city built a concrete bridge to replace the wooden bridge in line with the right-of-way specified by appellees. When the bridge was completed in about a week, the city immediately started grading the street and put in drainage tile following the curb. (This drainage expense ran some $5,-500 including two bridges.) The street was graveled in 1962. Prior to that it was used by the public as a dirt road and have never been closed since it was opened by the city.

This suit was commenced after appellees "ran off" the city water and light crew sent to install a sewer line and refused to allow the sewer to be installed.

Having presented appellant's evidence in the light most favorable to appellant, solely to determine whether it established a prima facie case of dedication by appropriation and acceptance, we find that the trial court erred in granting appellees' motion to dismiss at the close of appellant's evidence. *Werbe* v. *Holt, supra.* The case is therefore reversed and the cause remanded for further development.

MASON *v.* PECK

5-3498 388 S. W. 2d 84

Opinion Delivered March 22, 1965.

D. Pat Moran and *W. E. Billingsley,* for appellant.

W. G. Wiley, for appellee.

FRANK HOLT, Associate Justice. The appellant and appellee are adjacent landowners. The appellee brought this action to enjoin and restrain the appellant from interfering with her use of a spring allegedly upon her lands. In appellant's answer he contended the spring was located

upon his lands. The chancellor found the issue in favor of the appellee and permanently enjoined and restrained the appellant from trespassing upon her lands. On appeal appellant questions the sufficiency of the evidence.

Appellant first argues that "The Certificate of Survey by the County Surveyor, Mr. Coleman, was filed for Record and is prima facie correct and the court should have so held." It is true that the certified copy of the record of a county surveyor is prima facie evidence of the correctness of a boundary line as it appears from the survey. Ark. Stat. Ann. § 12-1220 (Repl. 1956). However, this is a rebuttable presumption and any duly qualified surveyor may testify as to its correctness. *Russell* v. *State,* 97 Ark. 92, 133 S.W. 188; *Walters* v. *Meador,* 211 Ark. 505, 201 S.W. 2d 24. See, also Ark. Stat. Ann. § 12-1221 (Repl. 1956). The appellee presented as her witness a duly qualified surveyor, Mr. Roberts, who testified the spring is located upon appellee's property.

Appellant next contends that Mr. Roberts' survey upon which he based his testimony is not sufficient to overcome the prima facie correctness of the certificate of appellant's surveyor. We cannot agree. The appellee introduced into evidence deeds reflecting her to be the owner of certain lands. Mr. Roberts surveyed her lands according to these deeds. He confirmed his survey by a church deed to land adjacent to appellee's property. A plat prepared by surveyor Roberts was also introduced into evidence. Mr. Roberts unequivocally testified that the spring in question is located upon appellee's property. His testimony was corroborated by several witnesses who live in the community. They testified that for many years the spring was generally known as "the Peck spring."

During approximately sixteen years that appellant and appellee had lived on their respective lands as neighbors, the appellee had utilized the spring. Appellant's recent attempt to exercise acts of ownership resulted in this litigation. Appellant presented his surveyor, Mr. Coleman, to corroborate his evidence of ownership. Mr. Coleman testified that according to his survey the spring was on

appellant's lands by a few feet and that he had offered to resurvey appellant's property to determine if he or appellee's surveyor had made the mistake in the disputed surveys, however, appellant refused because of the expense. As to which surveyor made the mistake, Mr. Coleman testified: "I don't know whether I made it or whether he did."

The location of a boundary line is to be determined by a preponderance of the evidence. *Buffalo Zinc & Cooper Co.* v. *McCarty,* 125 Ark. 582, 189 S.W. 355. It is well settled that on appeal we do not disturb the finds of the chancellor unless against the preponderance of the evidence.

In the case at bar we cannot say that the finding of the chancellor that the spring in question is located upon appellee's lands and subject to her exclusive control and ownership is against the preponderance of the evidence.

Affirmed.

Opinion Delivered March 29, 1965.

George Howard, Jr., for appellant.

Bruce Bennett, Atty. Gen., *By: Russell J. Wools,* Asst. Atty. Gen., for appellee.

CARLETON HARRIS, Chief Justice. Jessie A. Jones was charged by the city of Forrest City with Driving While Intoxicated, Resisting Arrest, and Assaulting an Officer. After being convicted on all counts in the Munipical Court, Jones appealed to the Circuit Court, where he was tried before a jury. The cases were consolidated for trial, and, after hearing the evidence, the jury brought in a verdict of guilty, as follows:

Driving while intoxicated—fine of $250.00, 30 days in the county jail, and 1 year's revocation of driver's license;

Resisting arrest—$500.00 fine, and 90 days in the county jail;

Assaulting an officer—$500.00 fine, and 90 days in the county jail.

Judgment was entered in accordance with the verdict, and it was ordered that the sentences run consecutively. From such judgment comes this appeal.

It is first urged that the court erred in overruling appellant's motion to quash the petit jury panel, because of alleged racial discrimination in the selection of jurors in St. Francis County. A large portion of appellant's brief deals with this contention, but since the case must be reversed on other grounds, we see no reason to discuss this particular point.

We think the court committed error in permitting the introduction of evidence concerning a sobriety test administered to appellant. The evidence reflects that Jones was arrested by officers Dave Parkham and Jack Jones, and taken to the city jail. There, according to the officers, he voluntarily agreed to take a sobriety test. This particular test related to ascertaining the alcoholic content in the urine and blood. Officer Jones stated that he took appellant to the bathroom, and handed him a bottle for the purpose of obtaining a urine specimen; that he (the officer) then labeled the bottle, by placing the name, "Jessie Jones," on it, and left it in the bathroom. Officer Jones testified that the bottle was approximately of one-half pint size, "the type they use at the hospital," and the witness stated that no other specimens were in the room when he left. Subsequently, Robert C. Smith, Jr., a laboratory and X-ray technician at Crawley-Cogburn Clinic, was called by someone, and Smith went to the Police Station, picked up a bottle containing a specimen in the bathroom, and there after ran a test which showed 4.4 milligrams of alcohol per CC. According to the explanation given by Smith, the analysis reflected that Jones was drunk and disorderly. [1] Smith's testimony was objected to by appel-

[1] From the testimony: "Mr. Smith, according to your learning and your teaching, tell the jury what the different stages are and how they are corolated with alcohol in the urine?" A. "At the lower readings, 1.5, a man's reflexes are supposed to be slowed enough that it will affect his driving, in other words, he is just where he thinks he can have a good time, he is feeling pretty good; from 2.5 to 3.5 he is pretty well what we

lant, but the objection was overruled. We are of the opinion that this evidence was erroneously admitted, first, because the prosecution is required to establish all necessary links in the chain of evidence, which would clearly identify the urine analyzed as coming from the body of the accused. In *State* v. *Reenstierna* (New Hamp.), 140 A. 2d 572, Chief Justice Kenison, speaking for the court said:

"* * * The State is required to establish the essential links in the chain of evidence relied on to identify the blood analyzed as being the blood taken from the accused. * * *

"In this case the blood sample taken from the defendant has not been identified with and traced to the analysis made by the State Department of Health. However likely it may be that they are one and the same, the State has failed to prove it."

In *People* v. *Lesinski,* 171 NYS 2d 339, two members of the Buffalo Police Department arrested the defendant about 11:15 P.M. A urine sample was taken about 11:40 P.M., and a salt solution was placed in the bottle which the officer witness placed in his pocket. The witness then took the bottle to his home, and placed it beneath a vanity dresser in his bedroom, and next morning picked up the bottle and delivered it to a police chemist. The testimony reflected that the witness' wife, mother, and father-in-law lived with him at the home, where the bottle had been kept all night. The case was reversed on this point and another, and the court said:

"Identify and unchanged condition must be first established before a specimen may be allowed in evidence together with the chemist's testimony or his report. Where material evidence for a conviction of driving while intoxicated is the alcoholic content of a blood or urine specimen, it is essential to show the chain of possession of the sample and the unchanged condition of the container from the time it is taken from the defendant until it is delivered to the chemist."

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call or consider drunk." Q. "What you call drunk?" A. "Yes, sir." Q. "Over 3.5 what is his condition?" A. "The literature says he is drunk and disorderly and at 5 or 6, he is out."

In *Novak* v. *District of Columbia,* 160 F. 2d 588, the United States Court of Appeals for the District of Columbia reversed the trial court judgment, holding that the evidence of a chemist, as to an analysis of a sample of urine taken from a defendant, was inadmissible. The court stated:

"At the trial the officer testified that after he obtained the sample he labeled the flask containing it with appellant's name, the time and place of taking it; that he wrote his own initials on the label and the next day turned the specimen over to the District Health Department laboratories.

"The court then accepted in evidence, over appellant's objections, laboratory records of the Health Department of an analysis made by a chemist formerly employed by the department, and the testimony of another Health Department chemist concerning his later analysis, both made of a sample of urine taken from a bottle labeled with appellant's name. The chemist, at the time of his testimony, had beside him a small bottle, labeled, and containing a liquid which appeared to be urine. His testimony was that he made his analysis from a specimen which he withdrew from the bottle which he had beside him. The bottle was never identified or offered in evidence. According to the laboratory records, both analyses showed an alcoholic content of .24 of 1 per cent.

"The District of Columbia then called an expert witness who testified that in his opinion, a chemical analysis of the sample of urine showing .24 of 1 per cent alcohol indicated that the defendant was under the influence of intoxicating beverage at the time of his arrest.

"It is our holding that the laboratory records and the chemist's testimony respecting the analysis were not properly admissible in evidence because the District of Columbia failed sufficiently to identify the sample from which the analyses were made as being that sample taken from appellant. The police officer who secured the sample was present in court and testified to the manner in which he labeled the flask containing appellant's urine and how he

placed his initials on the label. The chemist, when he testified, had beside him the bottle of urine on which he had made an analysis. But no effort was made to hand to the police officer, who was present in court, the bottle and chemist had used to see if he could identify it as the bottle he had labeled and initialed. There is missing a necessary link in the chain of identification. The judgment is reversed and the case remanded * * *''

In the instant case, let us summarize the evidence as to whether it firmly establishes that the analysis was made from the specimen taken from appellant. Officer Jones testified that the specimen was taken in the bathroom of the jail, and that he placed a cap on it, labeled it with the name of the appellant, and left it in the room; that no other specimens were in the room at the time. He then took appellant Jones back to the booking room. From the record on cross-examination:

''Q. This specimen you took, I understand you left it in a room?

A. Yes, sir.

Q. Who was in the room when you left it?

A. Nobody.

Q. Can you swear that the specimen this technician examined is the same specimen you allegedly took from the defendant?

A. I say I left the specimen he gave in the little room with the cap on it,

Q. You don't know whether the technician got that one specific specimen or not?

A. I did not see him get that one, no.''

The record does not reflect who called Smith to come to the jail. Officer Jones stated that ''somebody'' called the chemist, and that he (Officer Jones) did not see Smith when he arrived. In other words, the officer did not turn the specimen over to Smith—or to anyone else. Smith testified that he was called to the Police Station in the ''early

morning'' of July 19 to run a urinalysis; that he found a specimen with a name on it in the bathroom of the Police Station, and he made an analysis of the urine, and thereafter prepared his report. Smith never did say who called him to come down to the jail. From the evidence:

''Q. Mr. Smith, even though the bottle was labeled, you can't swear that that specimen was taken from this defendant, can you?

A. No.

Q. You don't know where it came from?

A. No.

Q. When you walked in there the bottle was sitting there?

A. Yes.

Q. That is all you know?

A. Yes.''

There is no testimony that the bottle was sealed, and, of course, there was no ''hand to hand'' or direct transmittal of the specimen to Smith. The bottle containing the specimen was apparently not retained, and, as shown by the quoted testimony, *no one* could definitely testify that the speciman examined by Smith was the specimen taken from appellant.[2] To use the language of Chief Justice Kenison, ''However likely it may be that they are one and the same, the state has failed to prove it.''

There is yet another reason why the evidence of Smith was inadmissible. Ark. Stat. Ann. § 75-1031.1 (Supp. 1963) deals with presumptions arising from the chemical analysis of a defendant's blood, urine, breath, or other bodily substance. Sub-section (C) provides, ''The chemical analysis referred to in the above paragraphs shall be made by a method approved by the Director of the Arkansas State Board of Health and/or the Director of Arkansas State Police.'' There is nothing in this record to show that the chemical analysis made by Smith was carried out by a

[2] If Officer Jones hand handed the specimen to the jailer, and he, in turn, had handed it to Smith, the chain would have been complete. To make the identification even more positive, on trial, Jones and the jailer, respectively, could have identified the bottle as the one handled by them.

method approved by either of these officials; according to his testimony, the test was run in conformity with tests given by the Forrest City Police Department, but there is likewise no evidence that this method had been approved by either of the state officials referred to. In its brief, the state asserts, "This is no error as the record does not reflect any testimony pertaining to this issue." We do not agree, for the burden was upon the state to establish that the test given had been approved by the Director of Health or the Director of Police. A similar requirement is prescribed in Nebraska, and in *Otte* v. *State,* 108 N.W. 2d 737, the Supreme Court held that, *inter alia,* it was error to admit testimony as to a blood analysis where there was no evidence that the analysis had been made according to a method approved by the Department of Health.

Appellant asserts that the court erred in giving an oral instruction, requested by the city, such instruction quoting pertinent parts of Section 75-1031.1. This was no error. In *Gentry* v. *State,* 201 Ark. 729, 147 S.W. 2d 1, we said:

"Appellant next complains because of the action of the trial court in giving Instruction No. 5 on behalf of the state. This instruction is a copy of § 3001 of Pope's Digest on the question of self-defense. This court has repeatedly ruled that instructions which follow the wording of the statute, and are applicable to the facts in the particular case, are always proper."

It is finally contended that the court erred in its refusal to give appellant's requested Instruction No. 5.

In its instruction, just referred to (75-1031.1), the court included Sub-section 3, as follows:

3. If there was at that time 0.15 percent or more by weight of alcohol in the defendant's blood, urine, breath or other bodily substance, it shall be presumed that the defendant was under the influence of intoxicating liquor."

Certainly, appellant was entitled to an instruction, which told the jury that the provision of Sub-section 3 was *only* a presumption, and was subject to being rebutted by proof on the part of the appellant. Appellant's tendered

instruction was very close to being correct, though it could have been better worded. In *St. Louis I.M. & S. Co.* v. *Waters,* 105 Ark. 619, this court disapproved the latter portion of an instruction defining a drunken condition. After removing that part of the instruction, the court approved the definition of drunkenness, as follows:

"For one to be in a drunken and intoxicated condition as defined by the law, he must be under the influence of intoxicating liquors to such an extent as to have loss of normal control of his bodily and mental faculties."

As previously stated, the cases were consolidated for trial, and the court told the jury that all charges were based on the same set of facts and circumstances. We are unable to say that the testimony of Smith did not influence the jury in their disposition of the charges of resisting arrest and assaulting an officer, particularly since Smith testified that the alcoholic content (determined from the urine analysis) reflected that the defendant was "drunk and *disorderly.*" In *Moore, et al* v. *State,* 227 Ark. 544, 299 S.W. 2d 838, we said:

"Where the effect of an erroneous instruction or ruling of the trial court might result in prejudice, the rule is that the judgment must be reversed on account of such ruling, unless it affirmatively appears that there was no prejudice."

That language is applicable in the case at Bar.

Accordingly, because of the errors heretofore set out, the judgment (s) is reversed, and the cause (s) remanded.

MILLER *v.* SOUTHERN MACHINE & IRON WORKS

5-3499 388 S. W. 2d 391

Opinion Delivered March 29, 1965.

Howell, Price & Worsham, by *Dale Price,* for appellant.

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

ED. F. MCFADDIN, Associate Justice. This is a workmen's compensation case; and the question is whether the claim for death benefits and funeral expenses was filed within proper time. The Referee, the Full Commission, and the Circuit Court held that such claim was barred; and the claimant prosecutes this appeal.

Myron P. Miller (husband of the claimant-appellant, Mrs. Ruth Miller) was employed by the Southern Machine and Iron Works, and on September 5, 1961, he suffered a heart attack while at work. He was promptly hospitalized but died in the hospital on October 5, 1961. The death certificate showed that he died as a result of the heart condition. [1] Mrs. Miller's claim "for death benefits and funeral expenses" was filed on June 13, 1963; and the employer promptly and duly made the plea of limitations based on the provisions of Ark. Stat. Ann. § 81-1318 (a) (3) (Repl. 1960), the germane portion of which reads:

"A claim for compensation on account of death shall be barred unless filed with the Commission within one year of the date of such death."

In the hearing before the Refree, the claimant added to the death claim the additional claim for temporary total disability and for medical and hospital expenses from

[1] The death certificate gave the cause of death as "coronary thrombosis with recent myocardial infarct."

September 6, 1961, to October 5, 1961, the date of death. The applicable statute for such claim is Ark. Stat. Ann. § 81-1318 (a) (Repl. 1960), the germane portion of which reads:

"A claim for compensation for disability on account of an injury . . . shall be barred unless filed with the Commission within two years from the date of the accident."

The Referee disallowed both claims;[2] the Full Commission held that the death claim was barred by the one year statute but that the disability claim was governed by the two year statute and could still be heard. The claimant appealed from the holding of the Full Commission that the death claim was barred; the Circuit Court affirmed the Commission; and Mrs. Miller brings this appeal, insisting that the death claim is not barred since the disability claim is not barred. Her able counsel cite Ark. Stat. Ann. § 81-1318 (b) (Repl. 1960), which reads:

"In cases where compensation for disability has been paid on account of injury, a claim for additional compensation shall be barred unless filed with the Commission within one year from the date of the last payment of compensation, or two years from the date of accident, whichever is greater."

This last quoted section is called the "Additional Compensation Section" and from that section Mrs. Miller argues that she has a pending claim before the Commission for disability benefits from September 6th to October 5, 1961, and if such claim should be allowed and benefits paid to her, she would then have one year after the date of the last payment on such claim, within which to file the death claim. In other words, her position is that the filing of the temporary total disability claim within two years of death was timely; and that if such claim be allowed and compensation paid her, then she would have one year after the date of the last payment under such claim in which to file her claim for death benefits and funeral expenses. She

[2] There was a prior heart condition date of April 1961 that influenced the Referee's Opinion.

insists that we have frequently held that if there be any doubt as to which of two or more statutes of limitations applies to a particular action or proceeding, and it is necessary to resolve the doubt, it will generally be resolved in favor of the application of the statute containing the longer limitation period, citing *Jefferson* v. *Nero,* 225 Ark. 302, 280 S.W. 2d 884, and *Reynolds Metals* v. *Brumley,* 226 Ark. 388, 290 S.W. 2d 211.

We are unable to agree with the appellant. What she is attempting to do is to treat a pending claim for temporary compensation as a payment of compensation, and thereby, put the death benefit claim at the end of the additional compensation claim. The section on additional compensation is applicable only when a claimant had received compensation and then sought additional compensation. That is not the situation here.

The plain wording of Ark. Stat. Ann. § 81-1318 (a) (3) (Repl. 1960) is: "A claim for compensation on account of death shall be barred unless filed with the Commission within one year of the date of such death." That is as particular and specific a statute of limitation as it is possible for one to be. In *Scott* v. *Greer,* 229 Ark. 1043, 320 S.W. 2d 262, we were asked to decide which of two provisions in a statute was applicable, and we quoted our earlier cases to this effect: "Where general terms or expressions in one part of a statute are inconsistent with more specific or particular provisions in another part, the particular provisions will be given effect as clearer and more definite expressions of the legislative will." The same general principle was applied in *Kimpel* v. *Garland Anthony,* 216 Ark. 788, 227 S.W. 2d 932, in which one death claim was held filed in time and another was held filed too late. Our specific statute of limitations regarding a death claim is too clear to admit of dispute.

The Pennsylvania Court had a situation like this before it in *Segal* v. *Segal,* 191 A. 2d 858, and said: "The claim filed by the widow in the death case was filed beyond the time allowed by statute. 'The legislature made the filing of the claim petition within the specified time an ex-

press condition of the right to obtain an award of compensation and intended that the failure so to do should operate as an absolute bar of the right.' *Thorn* v. *Strawbridge* . . . 155 A. 2d 414.'' In some States there are statutes which would tend to support the delay of the appellant in this case; but our statute is too clear to admit of dispute. Unfortunately, Mrs. Miller failed to consult an attorney in time to file the death claim; and all she may now pursue is the claim for temporary total disability and medical and hospital benefits, just as determined by the Commission.

Affirmed.

TULLIS *v.* MINCHEW

5-3488 388 S. W. 2d 393

Opinion Delivered March 29, 1965.

Clifton Bond, for appellant.

Coleman, Gantt, Ramsay & Cox, Smith & Smith, for appellee.

GEORGE ROSE SMITH, J. This is an appeal from a probate court order finding that the appellant, Ezra Tullis, was in fact mentioned in the will of his grandfather, J. M. Minchew, and is therefore not entitled to share in the estate as a pretermitted heir. The appellant contends that the trial court erred in concluding that a reference in the will to ''J. R. Tullos'' actually meant the appellant, Ezra Tullis.

Minchew was survived by two sons, a daughter, and the appellant, the son of another daughter who prede-

ceased the testator. There were other grandchildren, but Ezra is the only one who should have been mentioned in the will, for the parents of the others were living at the testator's death. Ark. Stat. Ann. § 60-607 (Supp. 1963).

By the will the bulk of Minchew's estate was left in equal parts to his two sons. In effect Minchew disinherited his living daughter, Dolly Winchew Tullis (whose name was misspelled as "Tullos"), by leaving her only fifty dollars. This is the provision giving rise to the present dispute: "I devise and bequeath unto my grandson, J. R. Tullos, the sum of Twenty-five ($25.00) Dollars to be paid out of the proceeds of my estate."

We think the trial court was right in finding that the reference to J. R. Tullos was intended to mean Junior Tullis. Ezra's father's name was Ezra Benjamin Tullis. Although there is some conflict in the evidence, the preponderating testimony shows that Ezra was often called "Junior" by the members of his family. He himself admits that he was occasionally so called, but he denies that his grandfather, the testator, ever called him Junior. That there is no other testimony by members of the family upon the latter point is understandable, for Ezra saw his grandfather rather infrequently and not at all duing the last five years of his life.

The attorney who prepared the will testified: "[H]e wanted to leave his grandson, the son of his dead daughter, $25.00 . . . I asked him what his name was, and he said it was Junior Tullis. And I asked him how to write it and he said, 'Write it capital J. capital R. Tullis.' So I went ahead and prepared the instrument." (In the record there are periods after the capital J and the capital R, but it is possible that they were inserted by the court reporter.)

In cases similar to this one, where there is uncertainty or ambiguity in the designation of the beneficiary of a will, we have held that extrinsic evidence is admissible for the purpose of identifying the intended beneficiary. *McDonald* v. *Shaw,* 81 Ark. 235, 98 S.W. 952; *Duensing* v. *Duensing,* 112 Ark. 362, 165 S.W. 956. The attorney's testimony, to which there was no tenable objection in the court below,

convinces us that Minchew meant to disinherit this appellant when he left twenty-five dollars to J. R. Tullos. It cannot be doubted that the testator had one of his grandchildren in mind when he used the language in the will, "my grandson, J. R. Tullos." There was in fact no grandson whose initials were J. R. when the will was drafted in 1946. True, there is some evidence that the appellant had a twin brother named Julian Robert Tullis, but it is conceded that this infant died a few hours after his birth in 1925. In view of all the circumstances we cannot say that the probate court's decision is against the weight of the evidence.

Affirmed.

THE HOUSING AUTHORITY OF THE CITY OF SEARCY *v.* ANGEL

5-3526 388 S. W. 2d 394

Opinion Delivered March 29, 1965.

Lightle & Tedder and Darrell Hickman, for appellant.

Van Chapman, for appellee.

SAM ROBINSON, Associate Justice. Appellant, The Housing Authority of the City of Searcy, filed this action to acquire by eminent domain a portion of two lots in Searcy; one belonging to appellees O. H. and Fay Angel, the other to appellees M. H. Phelps and wife. A jury al-

lowed the property owners $2,500 as damages to the remaining portion of each lot. The Housing Authority has appealed contending that the owners were not qualified to express an opinion as to value, and that there is no substantial evidence to support the verdicts.

Both Mr. Angel and Mr. Phelps testified that the difference in the value of their property before and after the taking amounted to more than $2,500, but appellant contends that such evidence given by the property owners is not admissible in evidence, and is not sufficient to sustain the verdicts.

Mr. Angel is 68 years of age and has lived on his property a little over 20 years. He testified that the property was worth between $16,000 and $17,000 before the taking; that he knows the value after the taking to be $10,000. From the record it appears that he is a reasonably intelligent person. We cannot say that a property owner who has lived on a piece of property for such a long time is not qualified to give his opinion as to the value of the property both before and after a portion has been taken in a condemnation proceeding, and in this case we cannot say that such evidence is not substantial as to the damages susstained.

What we have said regarding the Angel testimony is applicable also to the testimony given by Phelps. He had lived on his property 35 years and stated that he had been damaged $3,000 by the taking.

In Arkansas *State Highway Commission* v. *Muswick Cigar & Beverage Co.,* 231 Ark. 265, 329 S.W. 2d 173, we said: "This court has on numerous occasions affirmed the right of the owner of property . . . to testify as to its value. In the case of *Jonesboro, Lake City & Eastern Railroad Company* v. *Ashabranner,* 117 Ark. 317, 174 S.W. 548, we find this statement: 'Plaintiff resided on the land and was familiar with the conditions, and we think the court was justified in allowing her to state her opinion of the extent of the injury to the land and the depreciation in the value thereof.' "

We further said in the Muswick case, citing *Arkansas State Highway Commission* v. *Carder*, 228 Ark. 8, 305 S.W. 2d 330, that a verdict "will be set aside as excessive only when it is not supported by proof, or when it is so excessive as to indicate passion, prejudice or incorrect appreciation of the law applicable to the case." Here, we cannot say the judgments are so extreme as to call for a reversal.

Affirmed.

POLK *v.* POLK

5-3508 388 S. W. 2d 385

Opinion Delivered March 29, 1965.

James P. Baker, Jr., J. Patrick Reilly, for appellant.

David Solomon, for appellee.

JIM JOHNSON, Associate Justice. This case concerns a petition to change custody of a child.

On May 9, 1959, appellant Eva Burke Polk (now Crawford) filed suit for divorce against appellee Edwin M. Polk, Jr., in Phillips Chancery Court. Into the final decree granted June 16, 1959, was incorporated a separation agreement executed by the parties which gave appellant custody of their two minor children, Carole Jane, then fifteen, and John Charles, then five years of age. Subsequently Carole Jane came of age and moved from Helena. On May 1, 1964, appellee filed a petition in the divorce case case seeking custody of John Charles "during reasonable times and especially during the summer months." A hearing was held on June 16, 1964, at which time the court

heard testimony of the parties and their witnesses, and later talked to the boy (then ten or eleven) in chambers. In its order of July 10, 1964, the court found that there was "sufficient change of circumstances concerning custody," and, *inter alia,* granted appellee custody during the months of July and August each year and spelled out visitation rights for both parties.

For reversal appellant contends that the chancellor's decision to modify the original custody decree is not supported by the preponderance of the evidence.

Review of the record reflects that after the divorce appellee moved into his parents' home less than a block from appellant's home. During the succeeding four years the children had the run of both houses and had access to either parent virtually at will, a remarkably fluid and uncritical environment lacking the divisiveness usual following a divorce. Then appellant remarried. There was testimony that after the remarriage Carole Jane moved into appellee's home and that appellant for a while refused to give appellee visitation rights with John Charles. Visitation of one day a week was worked out between the parties with the help of their attorneys. (There is no intimation in the record that appellant's husband has anything less than a real affection and interest in the welfare of John Charles.) After a few more months, appellant moved some twenty miles away to Marianna. The free and easy visitation, already strained, was now impossible at a twenty-mile distance, other than the agreed one day a week, at a time when the boy was reaching an age where he wanted the counsel and companionship of his father in masculine activities and sports. Since divorce is at best a poor situation in which to raise children, where custody of children is concerned and the recorded testimony might appear to be, as here, in equipoise, we give great weight to the conclusions of the chancellor who has the opportunity to observe the demeanor of the witnesses on the stand and to hear and evaluate their testimony. The state of the record being thus, we therefore affirm the chancellor's decree finding sufficient change of circumstances to justify this minor change in custody.

Opinion Delivered March 29, 1965.

[redacted]

Sam L. Anderson, for appellant.

Bruce Bennett, Atty. Gen., *By Jack L. Lessenbery,* Chief Asst. Atty. Gen., for appellee.

FRANK HOLT, Associate Justice. The appellant was charged by an information with the crime of second degree murder as a result of the death of his wife. A jury found him guilty and assessed his punishment at nine years in the State Penitentiary. From the judgment based upon this verdict the appellant appeals, relying upon three points for reversal.

Appellant's first contention questions the sufficiency of the evidence especially with reference to the required element of malice. On this appeal we must review the evidence in the light most favorable to the appellee and if there is any substantial evidence to support the verdict of the jury it must be sustained. *Baker* v. *State,* 237 Ark. 862, 376 S.W. 2d 673.

At about 5 P.M. on the day of the alleged murder the officers responded to appellant's call to come to his residence. They found appellant's wife sitting in a chair partially covered by a quilt. Appellant was in a drunken condition and repeatedly said that a George Andrews had stolen some diamonds. He urged his wife to tell the officers about it. At first she refused to answer his entreaties, however, she finally said: "He didn't steal them, I gave them to him." The officers left advising the appellant to secure a warrant of arrest. About four hours later, or 9 P.M., the officers responded to another call from an unknown source to repeat the investigation at this residence. Upon arrival they found appellant very drunk and he continued his complaint that certain rings were missing. When queried as to the whereabouts of his wife, appellant replied that she was in an adjoining room and undressed. Appellant went into this room and was overheard talking to his wife about the missing jewelry. The officers had observed that the house showed signs of violence. The venetian blind had been pulled off the back door, pieces of furniture were broken, and the house generally was is a state of disorder. The officers also noted that appellant's pants and shoes were bloody. Upon overhearing the appellant talking to his wife about the jewelry, they looked into the room and discovered his wife lying on the floor in a pool of blood. She was groaning and appeared to be unconscious. She died within a few hours after being removed to the hospital. The appellant refused to make any statement except to consistently maintain that he could not remember what happened. No weapon was ever discovered. As a witness, appellant testified on cross-examination that the diamonds would "go" to him.

According to the medical evidence, appellant's wife died as a result of a brutal beating. She had been beaten so severely that her hands were swollen, the top of one hand being denuded, one ear was almost torn off, her face was bruised and very swollen, there was caked or dried blood in both nostrils, the temples on both sides were "soft and boggy," there was a deep crease or wound behind one of the ears, and her ribs were broken on both sides with multiple contusions on her chest, sides and arms. According to the medical evidence these injuries appeared to have been administered with a club, hand or foot and her death resulted from a recent beating. The appellant was sixty-four years of age and his wife, to whom he had been married twelve years, was eighty-nine years of age and infirm.

Appellant erroneously argues that there is insufficient evidence of malice since no weapon was ever found. It is not material as to the manner of the killing further than to show the disposition of mind. Ark. Stat. Ann. § 41-2202 (Repl. 1964). Our statutes also provide that when no considerable provocation appears or all the circumstances of a killing manifest an abandoned and wicked disposition, then malice shall be implied. Ark. Stat. Ann. § 41-2204 (Repl. 1964); *Taylor* v. *State,* 82 Ark. 540, 102 S. W. 367; *Clardy* v. *State,* 96 Ark. 52, 131 S.W. 46. Certainly the cruelty and brutality manifested in the killing of the deceased is sufficient in the case at bar to supply the inference of malice. We have upheld convictions when the accused aggressor used only his fists. *McGaha* v. *State,* 216 Ark. 165, 224 S.W. 2d 534; *Morris* v. *State,* 226 Ark. 472, 290 S.W. 2d 624. ee, also, 22 A.L.R. 2d 854; 26 Am. Jur., Homicide, § 306.

The use of the fists or the act of stomping can be most deadly, especially when the blows are often repeated and applied to vital and delicate parts of the body of a defenseless person. We think the evidence in the case at bar is more than ample to sustain the jury's verdict of second degree murder.

Appellant next contends that the court erred by failing to instruct the jury in regard to circumstantial evi-

dence. We do not find that any objection was made to the instructions given and, further, appellant did not request an instruction on circumstantial evidence. It was the duty of the appellant to offer a correct instruction covering his theory of the case. *Hays* v. *State,* 219 Ark. 301, 241 S.W. 2d 266; *Baker* v. *State,* 215 Ark. 851, 223 S.W. 2d 809.

Appellant further urges for reversal that the trial court erred in permitting the prosecuting attorney to argue certain matters during the closing arguments. The record shows only one occasion where an objection was made by appellant. The trial judge admonished the jury that it should consider only the evidence and disregard any opinion advanced by the attorneys in their argument. The appellant apparently was satisfied since no exception was noted following this admonition. In less than a capital offense it is necessary that both an objection and an exception be noted to an adverse ruling 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.

Finding no errors the judgment is affirmed.

CITY OF EL DORADO *v.* MCHENRY.

5-3520 388 S. W. 2d 554

Opinion delivered April 5, 1965

J. V. Spencer, Jr., for appellant.

Crumpler & O'Connor, Jerry M. Watkins, for appellee.

CARLETON HARRIS, Chief Justice. Appellant, City of El Dorado, owns and maintains Rowell Street, which is adjacent to property owned by appellees, H. W. McHenry and R. B. Wilson. McHenry and Wilson operate the Wright-King Oldsmobile Agency on property here under discussion. There is, beneath Rowell Street, and beneath the Wright-King Oldsmobile building, a drain encased in tile, carrying water from the south to the noth part of the city, and eventually dischaging into a creek there. This drain was installed under the land now

owned by appellees in 1948 or 1949, and the installation was made by one Milton Green (who, at that time, owned the property on which the building is now located) and the City of El Dorado. Green provided the tile, and the city provided the equipment and labor, and made the actual installation. Green subsequently sold the lot to King, and the latter constructed a brick and steel building on the premises. King sold the building to appellees in 1960. This property fronts on Rowell Street, which is paved with asphalt, and improved with curbs and gutters. Proper maintenance of this street has been difficult, because of repeated cave-ins, evidently caused by the type of soil under the street. Appellees have likewise experienced difficulty in that the floor of their building has cracked and settled during the last few years. Apparently the drain tile was laid in a bed of quicksand, and the tile has broken in places, and leaked, causing the soil under the building to wash away.

Appellees requested the assistance of the city to repair the drain under the building, but the city refused the request. In July 1963, a suit was instituted against the city, wherein appellees sought to establish that appellant had installed the drain, and was responsible for the maintenance thereof. Appellant denied responsibility, but the case was never tried, the parties agreeing upon a consent decree. This decree recited that the City of El Dorado "owns no interest in the storm sewer located upon the land described * * * and * * * is not responsible for the maintenance of said storm sewer; * * *." Thereafter, the City Council received information that appellees were fixing to block the drain to prevent the water from flowing under their building, and the Council instructed the City Attorney to advise appellees that they were not to obstuct or "stop up" the drain in any manner. Nonetheless, appellees poured sand and cement into the drain, preventing the flowage of water under the building, and on to the north. The city then instituted suit, seeking an injunction to prevent appellees from obstructing the flow of the water, and further asking that appellees be required to maintain

the drain in a good state of repair. The court granted a temporary restraining order, but on final hearing dissolved this order, and dismissed the city's complaint for want of equity. From the decree so entered, appellant brings this appeal.

For reversal, the city contends that appellees have obstructed a natural water course, and the court erred in refusing to grant the injunction; further, that, even if the drain were an artificial water course, its use, for a long period of time, has the same legal effect as though it were a natural water course. Appellees contend that the city cannot properly assert any rights in the drain because of the consent decree heretofore mentioned, and further, that the city did not sustain the burden of proof necessary to establish the existence of a natural water course. It is appellees' theory that the water, flowing in the drain, was only surface water, and they assert that the case is controlled by *Levy* v. *Nash,* 87 Ark. 41, 112 S. W. 173. Furthermore, it is contended that the city did not show that appellees' act of blocking the drain had been the cause of any damage complained of.

Proof on the part of appellant was to the effect that a natural water course had originally started some distance south of the property here in question, and had run somewhat east of what is now Northwest Avenue. This drain, according to appellant's contention, had been fed by springs, though one of the two witneses, who testified on behalf of appellant, stated that these springs ceased to flow altogether in the '20's. Appellees' witnesses testified that the only flow of water in the vicinity of the property was drainage from rainfall or surface water. We see no need to detail the proof relative to whether the drain constituted a natural water course, for we do not consider that fact to be controlling.[1]

Likewise, under our reasoning, appellant's second point is not germane to the main issue.

[1] The Chancellor did not render an opinion, and the decree only dismisses the city's complaint. We do not know what facts he considered to be controlling, but it might be said that we would be unable to find by a preponderance of the evidence, that the court erred in not holding that the drain was a natural water course.

Appellees' proof was to the effect that only surface water was involved, and they contend that this case is governed by *Levy* v. *Nash, supra,* where the court held that the owner of a city lot has a right to prevent the flow of suface water upon his lot by filling up a ditch, by elevation, or by acting in any other manner that will protect his property against surface water from an adjoining lot. However, as stated, we see no need to pass upon this question.

Admittedly the city installed the drain in question, which is now under appellees' place of business. In doing so, the city diverted the flow of water (surface or otherwise) from its natural route. Whether this was done at the request of the person who owned the property at that time (as contended by appellant) is really immaterial. The fact remains that this defective drain was installed by the city. While the city contends that it *owns no interest* in the drain under the building, and is not responsible for the maintenance of such drain (as entered in the earlier consent decree), it is apparent that it (the city) is asserting an interest of some nature, else it would not have sought injunctive relief. In effect, the city is asserting a *right to use the drain under the building.* The municipality maintains the drain under Rowell Street, and up to the point where it enters appellees' property. In contending that the appellees have no right to obstruct it, the city is, in effect, contending that it has a right to keep the drain open, *i.e.,* that it (the city) has an easement.[2]

As previously stated, appellees purchased this property in September 1960. There is absolutely no evidence in the record that appellees, or either of them, had any knowledge that this drain was under the building,[3] or that the city was asserting any right whatever in connection with the building. In 17A Am. Jur., under "Easements," Section 156, Page 761, the general rule is stated as follows:

[2] Of course, the city could use it power of eminent domain in condemnation proceedings, but it has not elected to do so.

[3] Mr. McHenry testified that he did not learn of the drain until several months after purchasing the building.

"It has often been said that in order to affect the purchaser of a servient estate the easement if unrecorded, must be one that is apparent as well as necessary and continuous, or the marks of the servitude must be open and visible. Accordingly, it is held that if the servitude cannot be discovered by an inspection of the premises, the purchaser is not charged with notice of its existence except in so far as he may be charged with constructive notice under the recording laws. On the other hand, the proposition that a purchaser of real estate is charged with notice of an easement where the existence of the servitude is apparent upon an ordinary inspection of the premises is sound beyond question. Normally, since an easement implied, upon the severance of a tract, from an existing use is a physically obvious servitude, a purchaser of the servient estate will be charged with notice of the easement.

"In this connection, the fact that an easement is an 'apparent easement' is of importance in charging a purchaser of the servient estate with notice of such easement, and 'apparent easements' have been defined in this respect as those which may be discovered upon reasonable inspection. In regard to charging with notice the transferee of the servient estate, apparent easements are not only such as are visible or must necessarily be seen, but such as may be seen or known on a careful inspection by a person ordinarily conversant with the subject. Examples of apparent easements include canals and ditches, chimney flues, ferry landings, light and air, pipes, poles and wires, private ways, privies, supports of encroaching structures, stairways, and water rights. *On the other hand, an underground drain or pipe is not an apparent servitude unless there are physical conditions on the surface which disclose its existence.*"[4]

In *Hannah* v. *Daniel,* 221 Ark. 105, 252 S. W. 2d 548, this court, quoting 17 Am. Jur., Section 130, Page 1018, stated:

[4] Emphasis supplied.

"A purchaser of real estate is charged with notice of an easement where the existence of the servitude is apparent upon an ordinary inspection of the premises."

In *Butterworth* v. *Crawford,* 46 N.Y. 349, 7 Am. Rep. 352, the court held that an underground drain is not an apparent servitude or easement. As stated, there is nothing in the record that indicates that appellees had any knowledge of the tile drain under the building; there is no evidence that anyone told them about it; there is no evidence of any recorded instrument to put them on notice. Certainly, appellees could not be expected to know that a tile drain was buried six to eight feet under their property.

We also agree with appellees that appellant's evidence did not establish the fact that damage to Rowell Street had been occasioned by the plugging of the drain, for the evidence reflects that there had been a number of cave-ins while the drain was still open. The Public Works Director for the City of El Dorado testified that quicksand is three feet deep under the edge of the street; while the sewer tile, according to the witness, is six to eight feet below the surface of the street.

It would appear that this drain, instead of passing under appellees' building, could be carried down Northwest Avenue, which is actually nearer the location of the alleged natural drain than the pipe under the building. According to one of the engineers, the cost to run the sewer down Northwest Avenue would be less than the expenses incurred in maintaining the present drain.

Finally, we think the equities lie with appellees. As stated in 43 C.J.S., "Injunctions," Section 30, Page 462:

"Ordinarily, on application for an injunction, the court will in the exercise of the wide discretion with which it is vested take into consideration the relative inconvenience or injury which the parties will sustain by the granting or refusal of the application for an injunction. The rule is laid down in a large number of decisions that, when the issuance of an injunction will cause great

injury to defendant, and will confer no benefit or very little benefit *in comparison*[5] on complainant, it is proper to refuse the injunction, * * *."

Unquestionably, the damage to the building (if the drain is continued) would be such as to completely ruin the premises for the use of appellees in their business.

We are unable to say that the Chancellor's findings were against the preponderance of the evidence.

Affirmed.

[5] Emphasis supplied.

SHIFLETT *v.* SCOTT COUNTY POULTRY CO.

5-3517 388 S. W. 2d 552

Donald Poe, for appellant.

Daily & Woods, for appellee.

ED. F. MCFADDIN, Associate Justice. This is a workmen's compensation case. Appellant Fred A. Shiflett was employed by the appellee, Scott County Poultry Company. On August 14, 1962 while at his work on a wet slippery floor his feet slipped, and to keep from falling he grabbed a nearby counter and received a strain in the lumbosacral region of his back. The present claim is for temporary total disability.[1]

[1] The Workmen's Compensation Commission stated in its opinion: "The question of permanent partial disability is not now before the Commission."

The Referee heard the claim on February 26, 1963, and disallowed it after finding that the claimant had failed to establish any right to compensability. There was an appeal to the Full Commission, at which the claimant again testified on February 24, 1964. The Full Commission also disallowed the claim on the ground that the claimant had failed to establish that he suffered any temporary total disability as a result of his employment by the Scott County Poultry Company. The Circuit Court affirmed the Commission and the claimant prosecutes this appeal. We have made a most careful study of the entire record and have concluded that there is substantial evidence to sustain the finding of the Commission; so we must affirm the Circuit Court under our well established rule. *J. L. Williams & Sons* v. *Smith,* 205 Ark. 604, 170 S. W. 2d 82; *Rannals* v. *Smokeless Coal Co.,* 229 Ark. 919, 319 S.W. 2d 218.

The testimony of the claimant and his witnesses was to the effect that the claimant was in the Navy of the United States from June 1943 to December 1945, and that at the time of his discharge he had a 10% disability rating due to arthritis; that later this disability rating was increased to 20%; then to 40%; and since 1955 the claimant's disability rating has been 50%. After the Navy service the claimant worked as a bus and mail driver for the Ft. Smith Interurban Line, delivering mail and passengers from Mansfield to Ft. Smith and return. In 1962 he left that employment and became custodian in the Federal Building in Ft. Smith, where he worked for approximately six months, until a disagreement arose with his foreman. He began work for the Scott County Poultry Company in June 1962 and worked regularly until August 14, 1962, when he received the lumbosacral strain, as previously mentioned. The next day the company did not work and the claimant remained in bed. On August 16th, the claimant went to Dr. Jenkins, who treated him on three different occasions and released him to go back to work. He worked 14 hours and 45 minutes and had to quit due to pain. His foreman sent him to Dr. Wright for examination and treat-

ment. Dr. Wright's reports on the condition of the claimant will be later mentioned, as also will be Dr. Wright's testimony. At the time of testifying before the Referee —on February 26, 1963—the claimant was able to milk two cows each day. On February 24, 1964 the claimant testified before the Full Commission that since March 18, 1963 he had been driving a bus and handling mail at weekly wages of $68.00, even though he still suffered pain in his lower back and hip.

We come now to the reports of Dr. Wright to the insurance carrier on the condition of the claimant. On September 4, 1962, Dr. Wright reported that the claimant had received a lumbosacral strain on August 14th and had been treated by Dr. Jenkins until August 25, 1962, when claimant first came to Dr. Wright. Dr. Wright reported: "Patient was able to resume regular work on August 20, 1962." The claimant visited Dr. Wright's office on August 25th, September 1st, September 7th, and September 10th, for diathermy treatments; and on September 10th Dr. Wright advised the insurance carrier that the claimant was capable of doing the same work as before the injury and had been pronounced as able to resume work as of August 20, 1962. On February 9, 1964, the claimant's attorney had the claimant examined by Dr. Kenneth Jones; and Dr. Jones' report is in the record. While it revealed a degenerative disc disease, it did not express any opinion as to the condition[2] being connected with claimant's employment.

[2] Here is Dr. Jones' full report:

"As requested, on February 9, 1964 the above patient was admitted to Memorial Hospital where on February 10, 1964 a myelographic examination was carried out. This examination revealed a marked filling defect in the midline and to the right side at the last mobile segment. A diagnosis in this instance of degenerative lumbar disc disease at the level of the last mobile interspace of the spine would be correct.

"In view of the fact that this patient has suffered symptoms of this disease for a period of one and one-half years and I would anticipate that the future picture will be that of the past, I would anticipate that surgical intervention would reduce the patient's discomfort and permit him to be ambulatory in much more satisfactory manner. However, in view of this patient's age and the one and one-half years duratoin, I am skeptical that surgical intervention would return this patient to an arduous type of employment. I am of the opinion that these factors should be weighed carefully by the patient and all persons involved prior to surgical intervention."

It is true that in his testimony before the Referee Dr. Wright was not as positive in his diagnosis and prognosis as he was in his reports, but he did not disavow the reports or say that they were incorrect. So with the record in this condition, the Commission found that the claimant had failed to prove any temporary total disability after August 20, 1962. The appellant insists that the mere fact that he had a preexisting disability (arthritis) did not, in itself, defeat recovery for his lumbosacral strain, and that if the lumbosacral strain aggravated his arthritic condition then he should recover compensation. The claimant is correct as to the law. *Harding Glass Co.* v. *Albertson,* 208 Ark. 866, 187 S. W. 2d 961; *Reynolds Metal Co.* v. *Robbins,* 231 Ark. 158, 328 S. W. 2d 489; and *Wilson Hargett Co.* v. *Holmes,* 235 Ark. 698, 361 S. W. 2d 634. But these general principles of law do not supply the appellant's deficiency in proof. The Commission found that he failed to prove any temporary total disability after August 20, 1962; and we cannot say that the Commission's findings are without substantial evidence to support them, in view of the reports of Dr. Wright, as previously mentioned.

Affirmed.

FAUBUS, GOVERNOR *v.* FIELDS.

5-3618 388 S. W. 2d 558

Opinion delivered April 5, 1965

Bruce Bennett, Atty. Gen., *Beryl F. Anthony, Jr.,* Asst. Atty. Gen., for appellant.

N. L. Schoenfeld, for appellee.

George Rose Smith, J. At the general election last November the people adopted Amendment 51 to the Arkansas Constitution, creating a permanent system of voter registration. The Amendment empowers the State Board of Election Commissioners to adopt rules and regulations, consistent with the Amendment, for the administration of the registration system. The State Board is also authorized to approve detailed specifications for the Affidavits of Registration, consistent with the Amendment.

In January of this year the State Board met and approved a form for the Affidavits of Registration. In drafting this proposed Affidavit the Board added two items of information not specified by the Amendment: The voter's race and his party affiliation. The Board also provided that the Affidavit might be sworn to not only before the Permanent Registrar or his deputy, as the Amendment directs, but also before any other person authorized by law to administer oaths. The Board later adopted, upon the advice of the Attorney General, a set of rules which recite that the three changes just mentioned will not become effective until enabling legislation has been passed by the General Assembly.

This is a taxpayer's suit brought by the appellees against the State Board of Election Commissioners for a judgment declaring that the three changes made by the Board were unauthorized and void. The Board filed an answer again admitting that "enabling legislation must be provided before the additions to the Affidavits of Registration will be required by law." The chancellor entered a decree finding the first two changes to be invalid but upholding the provision that the oaths might be administered by persons other than the Registrar and his deputies.

We take judicial notice of the fact that while this appeal was pending the General Assembly completed its regular session without enacting the contemplated enabling legislation. In this court the Board has abandoned its former position and now insists for the first time that it had the power to make all three changes without an enabling act.

We are firmly of the opinion that the Board was right in its original limited view of its own powers. Section 6 of the Amendment enumerates in meticulous detail ten items of information that must appear in the Affidavits of Registration. We briefly summarize these requirements:

1. The voter's name and, in the case of a woman, her designation as Miss or Mrs.
2. The voter's exact address.
3. The State or country of the voter's birth.
4. If the voter was foreign born, the manner in which he acquired his American citizenship.
5. The date of his birth.
6. The fact, if it be true, that the voter cannot read or write.
7. The fact, if it be true, that the voter is unable to make a mark or cross on the affidavit or the ballot.
8. The voter's school district and voting precinct.

9. The name and address under which the voter was last registered in Arkansas.

10. The signature of the Permanent or Deputy Registrar.

Section 6 of the Amendment closes with this sentence, upon which the Board strongly relies: "(c) The State Board of Election Commissioners may require blank spaces for additional information, including supplements to the Record of Voting Form."

It is true that if we closed our eyes to the rest of this Amendment and confined our attention solely to the literal meaning of this single sentence, we might with some plausibility uphold what really amounts to a contention on the part of the Board that it has the power to amend this part of the Constitution. It is, however, our duty to consider the Amendment as a whole and to harmonize its various provisions if this can be done. *Smith* v. *Cole,* 187 Ark. 471, 61 S. W. 2d 55. Our endeavor, above all else, must be to ascertain the primary intent of the amendment and to give effect to that intent. *Watkins* v. *Duke,* 190 Ark. 975, 82 S. W. 2d 248. When, as here, two interpretations are permissible, we must not select one which allows the strict letter of the Amendment to defeat the dominant popular will. See *Cockrill* v. *Dobbs,* 238 Ark. 348, 381 S. W. 2d 756.

Section 6 of the Amendment was evidently drafted with much care. It enumerates the ten items of information that are to appear on the face of the Affidavits of Registration. It specifies the oath and the record of voting that are to appear on the back of the Affidavits. In this context we think it plain that subsection (c), upon which the Board relies, was intended merely to give the Board the power to implement the section as a whole, to the end that the designated items of fact might be obtained and set forth with facility and with clarity.

Whether the voter's race should be stated in the Affidavits and whether he should be compelled to disclose his party affiliation are obviously far-reaching

questions of policy that could hardly have been ignored by the draftsmen of the Amendment. Their decision to omit those matters from the Affidavits was approved by the electors who voted to adopt the Amendment. We find it impossible to believe that the people meant to confer upon an administrative board what in reality amounts to a broad power to amend the Constitution. Yet if we should sustain the Board's authority to require a statement of entirely new facts not embraced within the enumeration contained in Section 6 we are unable to perceive the point at which the Board's power would end.

If we had any misgivings about the correct interpretation of the Amendment our doubts would be set at rest by Section 19. That section provides in substance that the legislature may, by a two-thirds vote in each house, amend Sections 5 through 15 of the Amendment, so long as the amendatory legislation is consistent with the Amendment itself. It cannot reasonably be supposed that the people intended to confer both upon the State Board of Election Commissioners and upon the General Assembly the power to amend the Constitution. It cannot reasonably be supposed that the people intended to confer upon a bare majority of the State Board of Election Commissioners a power so drastic, so extreme, that even the General Assembly should be permitted to exercise it only by a two-thirds majority. That Section 19 was inserted in the Amendment proves conclusively, we think, that the Board's authority under Section 6 (c) is one of implementation rather than one of creation.

We are also of the opinion that the Board exceeded its powers in attempting to permit the oaths to be administered by someone other than the Registrar and his deputies. Section 5 provides that eligible voters may register at the office of the Registrar or at any other place designated by him. Section 6 (a, 10) directs that the Affidavit of Registration be signed by the Registrar or his deputy who receives the application. Section 9 (c) empowers the Registrar and his deputies to administer the oaths to the Affidavits of Registration. Section 9 (e)

provides that if the voter is unable to register in person at the Registrar's office by reason of sickness or disability the Registrar or his deputy may register the applicant at his home. We need not determine whether the legislature could, consistently with the Amendment, permit what might be regarded as absentee registration by allowing the oath to be taken before anyone authorized by law to administer an oath. In this case it is enough to say that the State Board is without authority to make this revision in the registration system.

A judgment will be entered in this court declaring all three of the changes in question to be ineffective and void.

ROBINSON and JOHNSON, JJ., dissent.

JIM JOHNSON, Associate Justice (dissenting). From the inception of constitutional forms of government the courts have recognized that the rules of constitutional construction by necessity should be kept as simple as possible. The reason for this is obvious. A constitution is the paramount and fundamental law by which all citizens must be governed. The less complicated the interpretation the more readily the charter can be understood by those who are bound by its provisions.

The cardinal rules of constitutional construction have been stated and restated by this and other courts many times. The most basic of those rules are as follows:

1. "Where the language used in a constitutional provision is plain and unambiguous, the courts cannot seek other aids of interpretation." *Ellison* v. *Oliver,* 147 Ark. 252, 227 S. W. 586.

2. "It is the duty of the court to construe the Constitution as written." *Cannon* v. *May,* 183 Ark. 107, 35 S. W. 2d 70.

3. "Courts must carry out constitutional provisions as indicated by language thereof, regardless of wisdom

or expediency." *Hargraves* v. *Solomon,* 178 Ark. 11, 9 S. W. 2d 797.

Applying these simple rules to the provisions of Amendment 51 to the Constitution of Arkansas, I agree with the majority that the State Board of Election Commissioners exceeded their authority in attempting to permit the registration oaths to be administered by someone other than the Registrar or his deputy. Section 5, Section 6(a) (10), Section 9(c) and Section 9(e) all make it crystal clear that only the Registrar or his deputies are to administer this required oath.

If the majority had applied the same rules to the construction of the remainder of the plain and unambiguous language of the amendment as it applied in its construction on this point there would be no need for this dissent.

Regardless of whether it was wise or expedient the framers of this amendment vested broad powers in the hands of the State Board of Election Commissioners. Some of these powers are enumerated in Section 5(c) as follows:

"The State Board of Election Commissioners is authorized and, as soon as is possible after the effective date of this Amendment, directed to prescribe, adopt, publish and distribute:

(1) Such Rules and Regulations supplementary to this Amendment and consistent with this Amendment and other laws of Arkansas as are necessary to secure uniform and efficient procedures in the administration of this Amendment throughout the State;

(2) A Manual of Instruction for the information, guidance and direction of election officials within the State; and

(3) *Detailed specifications* of the Registration Record Files, *the Affidavits of Registration and other registration forms*, all of which shall be consistent with this Amendment and uniform throughout the State." [Emphasis ours.]

It doesn't take a great deal of imagination to conclude that the State Board of Election Commissioners had, by this amendment, imposed upon them a herculean task requiring the faithful exercise of a large amount of discretion. The framers of this amendment apparently were not satisfied with *one* direction to the State Board of Election Commissioners (in Section 5, *supra*) to prescribe, adopt, publish and distribute detailed specifications of the Affidavits of Registration and other registration forms. They chose to reiterate and emphasize this directive in Section 6(c). There they used these words:

"The State Board of Election Commissioners may require blank spaces for additional information . . ." These are plain and unambiguous words and there is no reason to use other aids of interpretation. In fact we are, under the rules of construction, forbidden to do so. Now the Board not only had the right but the duty to treat these plain and unambiguous words as if they meant what they said. The record shows they did just that. On December 28, 1964, the Board met and to the best of their ability attempted to faithfully discharge their duties under the amendment. They met again on January 5, 1965, to confirm their action, as constitutionally charged by the overwhelming vote of the people. In these meetings they required "blank spaces for additional information." They determined that the listing of race would aid in the proper identification of the voter just as the required designation of the sex of the voter and comparison of signature would tend to verify that the person voting was identical to the person who registered. In addition they determined that the listing of party would be of aid in the proper conduct of an election under a two-party system. These actions were taken and widely publicized prior to the convening of the General Assembly on January 11, 1965, and we take judicial notice of the fact that the "General Assembly completed its regular session without enacting" (or, according to the official journal, attempting to enact) any legislation tending to limit the authority of this Board.

The majority, in my view, summarily concluded that these two authorized requirements "defeat the dominant and popular will." Neither the majority nor appellees attempt to point out just how the dominant and popular will differs from that so unmistakably and clearly expressed in the amendment. Certainly it cannot be said that these requirements are inconsistent with or repugnant to the spirit or the letter of Amendment 51. Nor can it be said that these requirements are not germane to proper registration when it is found that the law of a majority of the states provides for either one or both of these identical requirements.

If the self styled proponents of this amendment (who declined, neglected or refused to even cross appeal from the adverse ruling of the trial court on the oath administration feature of this case) had not wanted these plain and unambiguous words in the constitution, they should have prevailed upon the framers of the amendment to omit them prior to a vote of the people rather than wait until this late date to urge this court to remove the words for them.

A majority of the State Board of Election Commissioners did not amend the constitution. The same cannot be said for the majority opinion of this court.

For the reasons stated I respectfully dissent.

FOSTER & CREIGHTON CO. *v.* JACKSON.

5-3527 388 S. W. 2d 563

Opinion delivered April 5, 1965

Graves & Graves and *Barber, Henry, Thurman, McCaskill & Amsler,* for appellant.

Shaver, Tackett & Jones, for appellee.

PAUL WARD, Associate Justice. On July 12, 1963 George Jackson (appellee herein) was severely injured while on land under the control of Foster & Creighton Company (an appellant herein) by and through its agent and employee, Charlie Howell, (also appellant herein). Hereafter Jackson may be referred to as "appellee", the first mentioned appellant as "company", and Howell as "agent". A brief summary of the essential facts and circumstances pertaining to this case are presently set forth below. These facts and circumstances are either undisputed or they are sustained by substantial evidence.

The company is a Tennessee corporation (authorized to do business in Arkansas) engaged in the business of constructing hard-surface or concrete roads. At all times pertinent the company was engaged (under contract) in constructing Interstate Highway 30 through the City of Little Rock. To facilitate the handling of the large amount of cement required the company leased a portion of a railway yard from the Chicago Rock Island and Pacific Railway Company near the intersection of East Fourth Street and Byrd Street within the City of Little Rock. The company maintained a huge cement

storage bin or tank located some twenty or thirty feet south of the leased railroad spur or track. In order to transfer the cement (from a railroad car placed on the spur) the company maintained an electrically driven underground auger about sitxeen feet long running south from the spur toward the large storage bin. This auger, which had nine inch screw blades, rested in a metal box just beneath the surface of the ground—the box being covered with metal plates approximately fourteen inches wide and sixteen to seventeen inches long. These plates were removable. The company's agent (Howell) was in complete charge of the premises and fixtures just described.

The injury to appellee occurred in this manner—when appellee arrived with a large truck-trailer load of cement for delivery to the company, the agent directed him to back the truck up alongside the spur track where an empty railway car had been placed. The rear portion of the trailer was close to the empty car, about two feet from the auger. When the truck was parked the agent and appellee completed arrangements to pump the cement from the truck to the car on the spur. Then appellee started the pump on his truck, and the agent removed a plate covering the auger and turned on the electric motor on the auger. Thereupon the agent left to get a drink and he heard appellee hollering. The agent hurried back and found appellee's leg was caught in the auger. According to appellee he had walked around the truck, to perform his duty, when his left leg was caught in the auger where the agent had removed the metal plate.

Appellee's leg remained in the auger (which had been stopped by the agent) from forty five to sixty minutes, when it was cut loose with a blow torch. During all this time appellee was conscious and suffered great pain. He was removed to a hospital where his leg was amputated about three inches above the knee. After twelve days appellee was removed to his home near Foreman where he was given further medical treatment.

A trial resulted in a jury verdict and a judgment in favor of appellee in the amount of $125,000. Appellants now seek a reversal on two grounds: *One,* the trial court erred in giving appellee's instruction number 8; *Two,* the judgment is excessive.

One. Instruction number 8 reads as follows:

"In this case, the plaintiff alleges that one or more of the defendants were negligent in one or more of the following particulars:

"(a) In permitting, maintaining and operating an open and unprotected underground auger, so camouflaged and concealed by cement that the openings in the auger encasement were unnoticeable and the auger invisible—knowing, or by the exercise of ordinary care and precaution should have known that persons coming in contact therewith would likely by injured.

"(b) In permitting, and engaging in, hazardous operations upon premises to which the plaintiff and others were exposed without providing safeguard devices for the protection of plaintiff and others.

"(c) In failing to warn plaintiff of the auger operations and the danger of walking in the vicinity of the auger.

"(d) In failing to keep a proper lookout for plaintiff and others properly upon the premises, and

"(e) In permitting and maintaining unsafe premises for plaintiff and others properly upon the premises.

"In order to recover, the plaintiff claiming damages has the burden of proving each of three essential propositions:

"First: That he sustained damages.

"Second: That the party or parties from whom he seeks to recover was negligent, and

"Third: That the negligence of the party, or parties, from whom he seeks to recover, was the proximate cause of the mishap.

"In the defense of the claim of George C. Jackson, each of the defendants denies any negligence on the part of either of them; denies the extent of damages claimed; and alleges that Plaintiff George C. Jackson negligently caused his own injuries in one or more of the following particulars:

"(a) In failing to exercise ordinary care for his own safety.

"(b) In assuming the risk of injury and damages, and

"(c) In failing to keep a proper lookout, knowing, or by the exercise of ordinary care and precaution should have known, that the auger was in operation.

"A party who asserts the defense of negligence on the part of one claiming negligence has the burden of proving this defense."

Appellants objected to the above instruction:

". . . for the reason that said instruction is an incorrect declaration of the applicable law, and is not supported by the evidence introduced during the trial of the case; and further, that it imposes upon defendants a degree of care higher than is required by law."

In addition to giving appellee's requested instruction No. 8 the court gave fourteen other separate instructions requested by appellee and ten separate instructions requested by appellants. Suffice to point out that these several instructions covered the contentions and theories of the case for both sides.

For two reasons we are unable to find any reversible error in the giving of said instruction number 8: (a) The objection was insufficient and (b) The instruction was a correct declaration of the applicable law.

(a) It is obvious that instruction number 8 covers several distinct features of the case and the law, but the objections fail to call to the attention of the trial court any specific objectionable wording, or rule of law. The trial court was entitled to have a specific objection of

this type so that it might make any necessary correction. This well established rule was clearly set forth in the early case of *Missouri & North Arkansas R.R. Co.* v. *Duncan,* 104 Ark. 409, 415, 148 S. W. 647. Among other things it was there said:

"The purpose of making an objection specifically to an instruction is to call to the attention of the trial court the exact error complained of, so as to give it an opportunity to correct the instruction in that particular."

(b) Appellants ably argue in their brief to the effect that instruction number 8, in requiring them "to keep a proper lookout for plaintiff and others properly upon the premises", imposed upon them a greater burden than the law requires. We cannot agree with this contention of appellants, and they cite no authority directly in point to sustain it. The rule which we think is applicable in this case was stated by this Court in the early case of *Hobart-Lee Tie Co.* v. *Keck,* 89 Ark. 122, 128, 116 S. W. 183, as follows:

"In the case of *St. Louis, I.M. & S. Ry. Co.* v. *Dooley,* 77 Ark. 561 [92 S. W. 789], the court said: 'The bare permission of the owner of private grounds to enter upon his premises does not render him liable for injuries received by them on account of the condition of the premises. But if he expressly or impliedly invites, induces or leads them to come upon his premises, he is liable in damages to them—they using due care—for injuries occasioned by the unsafe condition of the premises, if such condition was the result of his failure to use ordinary care to prevent it, and he failed to give timely notice thereof to them or the public.' "

To the same effect, see *St. Louis, I.M. & S. Ry. Co.* v. *Wirbel,* 104 Ark. 236, 149 S. W. 92, and *Alfrey Heading Co.* v. *Nichols,* 139 Ark. 462, 215 S. W. 712. Likewise, in the case of *Armour & Co.* v. *Rose,* 183 Ark. 413, 36 S. W. 2d 70, it was held appellant was required to keep a guard (or lookout) at an unlighted elevator shaft to protect

an invitee. At pages 423-424 of the Arkansas Reports, this Court said:

"The rule is also well established that a licensee who goes upon the premises of another for that other's purpose by that other's invitation, is no longer a bare licensee. He becomes an invitee, and the duty to take ordinary care to prevent his injury is at once raised, and for violation of that duty the owner is liable if injury results to the invitee by reason of the negligence of the owner. [Cases cited.]"

In the case here under consideration there can be no doubt (in fact appellants do not attempt to deny) that appellee was an implied invitee upon the premises; it is not even contended by appellants that appellee was told about the exposed auger, nor is it shown that he by the exercise of due care should have known of the existing hazard. All issues concerning appellee's contributory negligence and assumption of the risk were properly submitted to the jury without objection. It is our conclusion therefore that the trial court did not commit reversible error by giving instruction number 8 number the facts and circumstances heretofore set out.

Two. The only other contention raised by appellants on appeal is that the judgment, in the amount of $125,000, is excessive and should be reduced by us. Again, we cannot agree with appellants, even though the contention (as is usual in such cases) does give us some concern. The rule which we must apply here is the one put into appropriate words by the late Justice Holt, in the case of *Grandbush* v. *Grimmett,* 227 Ark. 197, 297 S. W. 2d 647, where it was stated:

"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 or so grossly excessive as to shock the conscience of the court."

It must be admitted that the above rule is not always easy to apply in all cases with uniformity, because every-

one's conscience may not be equally susceptible to shock, and conscientious judges do not always agree on what constitutes substantial evidence. Nevertheless, we do not seem to be able to frame a better rule because we have subsequently approved almost verbatim the above rule on several occasions. *Beggs* v. *Stailnaker,* 237 Ark. 281, 372 S. W. 2d 600; *Williams V. Clark,* 238 Ark. 447, 382 S. W. 2d 366. See also the case of *Fred's Dollar Store* v. *Adams,* 238 Ark. 468, 382 S. W. 2d 592 where we said:

"The ultimate question is whether the verdict shocks the conscience of the court or demonstrates that the jurors were motivated by passion or prejudice."

Appellants cite several cases where we have reduced jury verdicts, using the same rule above set out. But, as was said in the *Adams* case, *supra,* "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."

We think the testimony sustains the full amount of the judgment. The great weight of the testimony shows that, as a result of the accident and the loss of his leg, appellee's loss in wages (when reduced to its present value) amounts to approximately $76,000. Add to that amount the sum of $2,500 expended (and to be expended) for hospital and medical expenses. It is undisputed that appellee's leg was caught in the auger for forty five to sixty minutes during which time he was conscious and suffered such excruciating pain that he thought he was going to die, and that when released he was taken to a hospital where his leg was amputated three inches above the knee. Not only has appellee already suffered pain as above described, but the testimony shows that he will always suffer what is known as "phantom limb pains". It is difficult to envision a situation where one could suffer more pain and anguish than appellee suffered during the time his leg was in the clutches of the blades of this auger, being conscious and not knowing if he would survive. There is nothing which indicates to us

the jurors (in reaching their verdict) "were motivated by passion or prejudice".

In consideration of what has been pointed out above we are unwilling to say the size of the judgment rendered herein is excessive.

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

Affirmed.

LINDSEY *v.* MID-STATE HOMES.

5-3487-3489, 3490, 3491 and 3492 388 S. W. 2d 551

Opinion delivered April 5, 1965

W. H. Shulze, for appellant.

Russell & Hurley and *Wright, Lindsey, Jennings, Lester & Shults,* for appellee.

SAM ROBINSON, Associate Justice. Jim Walters Corporation, a company engaged in constructing and selling partly finished houses, sold some of such houses to appellants, taking notes secured by mortgages for the unpaid balance of the purchase price. The Walters Company sold the notes to appellee, Mid-State Homes, Inc., at a discount. The appellants herein, makers of the notes,

defaulted in the payments and Mid-State filed suits to foreclose the mortgages. Appellants defended on the theory that a usurious rate of interest was charged. The cases were consolidated; there were decrees in favor of the owner of the notes, and the makers of the notes have appealed.

The issue is whether a usurious rate of interest was charged on the unpaid balance of the purchase price of houses sold to appellants, A. B. Lindsey, et al. Several sales are involved; the facts are the same in each so far as the application of usury laws is concerned.

Jim Walters sold houses to appellants for a certain sum; a small amount was paid on the purchase price, the balance to be paid in monthly installments; a little less than 10% per annum was charged as interest on the unpaid balance. Jim Walters sold the notes for the unpaid balance to Mid-State Homes, Inc., its wholly owned subsidiary, at a discount of 20%. Appellants contend that the transactions amounted to usury under the decision in *Hare* v. *General Contract Purchase Corporation,* 220 Ark. 601, 249 S. W. 2d 973. We said in the Hare case:

"If the seller, whether he has quoted two prices to the purchaser or not, subsequently transfers the title document to an individual or company which is engaged in the business of purchasing such documents, at a price which permits the transferee to obtain more than a return of ten per cent (10%) on its investment, then a question of fact arises as to whether the seller increased his cash price with the reasonable assurance that he could so discount the paper to such individual or finance company. If that reasonable assurance existed, then the transaction is in substance a loan and may be attacked for usury."

The evidence shows that Jim Walters did take the notes, bearing interest just under 10% per annum, knowing it could sell the notes to its subsidiary, Mid-State, at a discount of 20%. Of course, if the principal and interest were finally paid, Mid-State would make on its

investment a good deal more than interest at the rate of 10% per annum. Under the decision in the Hare case, a situation of this kind gives rise to the question of whether the transaction is usurious. The Chancellor held that it was not usurious and we cannot say the Chancellor's finding of fact is against the preponderance of the evidence. Although there is some evidence that Jim Walters charges a little more for houses in Arkansas than it does in Oklahoma because of the "closing cost", the undisputed evidence is that there is only one price on the houses sold in Arkansas. If anyone should pay the entire purchase price in cash, it would be the same as the principal sum if he bought on the installment plan.

We specifically point out that our decision here is based on the fact that the record does not show the findings of the Chancellor to be against the preponderance of the evidence in this case. We do not mean to impair the Hare case, or such cases as *Sloan* v. *Sears, Roebuck & Co.*, 228 Ark. 464, 308 S. W. 2d 802.

Affirmed.

CITY OF FAYETTEVILLE *v.*
FAYETTEVILLE SUBURBAN WATER DIST. No. 1.

5-3505 388 S. W. 2d 548

Opinion delivered April 5, 1965

Bass Trumbo, Smith, Williams, Friday & Bowen, by *Herschel H. Friday* and *John C. Echols,* for appellant.

Dickson, Putman, Millwee & Davis, for appellee.

JIM JOHNSON, Associate Justice. This suit involves a contract between a city and a suburban water district for construction and operation of a water distribution system and the improvement district bonds issued pursuant to the contract.

Appellant City of Fayetteville entered into a contract on April 10, 1950, with appellee Fayetteville Suburban Water District No. 1 of Washington County. The city was to build a water distribution system in the district, to be owned by the city, with construciton to start when the district put up the estimated $82,000 construcion costs. The district issued 86 improvement district bonds in the principal sum of $82,000, maturing over a period of twenty years. The water distribution system was constructed at an approximate cost of $58,000, and once in service, the city paid one-half of the revenue from users within the district back to the district, as provided in the contract, until March 1963. At that time the city, having acquired the outstanding bonds, refused to make further payment to the district of one half of the revenues collected from water users within the district. The district up to that time had paid a number of the bonds as they matured and called others before maturity, so that by September 2, 1959, only two bonds remained outstanding. Bond No. 55 for $500 was due September 1, 1964, and bond No. 86, also for $500, was due September 1, 1970. In 1962 the city purchased the two bonds for about $1,500. In May, 1963, the city attempted to cancel the bonds and "forgive" the indebtedness, for the pur-

pose of ending the city's liability under the contract to pay water revenues to the district. The district refused to accept the bonds or honor the cancellation, with the express intention of requiring the city to pay one-half of the water revenues under the contract until bond No. 86 matured in 1970 or was earlier called.

After the city stopped paying water revenues to the district, the district filed suit on November 27, 1963, in Washington Chancery Court for an accounting of the water revenues, to compel payment of water revenues due at the time suit was commenced and for a declaratory judgment that the city was obligated to continue paying revenues until 1970 or until earlier payment by the district of all its bonds.

In its decree of August 7, 1964, the chancery court ordered, *inter alia,* (1) the city to pay to the district one-half of the water revenues then unpaid but accounted for, (2) accounting and payment of revenues for the quarter ending June 30, 1964, and (3), payment of one-half of the revenues "for all calendar quarters beginning July 1, 1964, until all bonds issued by [the district] are paid or until September 1, 1970, whichever occurs first." The city has appealed from the decree and summarizes the issues on appeal as follows:

(1) whether any bonds of the district are "outstanding and unpaid" within the meaning of the contract;

(2) whether, because of the irregular call used by the district, the obligation of the city to share water revenues is at an end;

(3) the maximum limits of the city's liability under the contract.

Appellant's first contention is that there are no bonds outstanding because the city purchased the only two outstanding bonds, cancelled them and offered them back to the district, thus terminating the city's liability under the contract. Appellant has offered us naked legal negotiable instrument authority in support of its

action cancelling the bonds, but we are not persuaded it controls in this unique contract case. A court of equity, doing equity, could not sanction such a subterfuge by a party to a valid contract to the detriment of other contracting parties and in contravention of the express intention of the contract.

Appellant next contends that "the obligation of the city to share water revenues has terminated because no bonds of the district would be 'outstanding and unpaid' if the district had called its bonds for redemption prior to maturity in accordance with the terms of the contract between the district and its bondholders." In the pledge and on the face of each bond is the provision that any call prior to maturity would be in inverse numerical order. The last bond was No. 86. In 1951, the district called bonds numbered 71 through 85, leaving No. 86 outstanding. There was no objection from any of the then bondholders, and we find no basis on which the city, on becoming a bondholder eleven years later, can now object. There is provision in the contract (*infra*) for calling the bonds at the option of the district, but there is no contract provision for calling the bonds in inverse order. It is clear, therefore, such provision contained in the pledge and bonds here involved was solely for the benefit of the obligor district.

It would be informative here to quote one particularly pertinent paragraph of the contract sued on:

"It is understood between the parties hereto that the funds to be furnished by the District will be derived from the sale of suburban improvement district bonds in the principal sum of $82,000.00 and maturing over a period of twenty years and bearing interest at a rate not to exceed four per cent and that one-half of the revenues due to the District by the City shall be paid so long as any bonds are outstanding and unpaid or for a period of not longer than twenty years, whichever is sooner but the District shall not be obligated to call any bonds prior to maturity and may, if it so desires, refund to those persons entitled thereto, so much of their assess-

ments as the District shall elect out of any surplus revenues of said District, whether derived from unexpended construction funds, collections or assessments of benefits or revenues of said District."

The last matter for our consideration is the maximum limits of the city's liability under the contract. We made reference earlier to "the express intention of the contract." A four-corner perusal of the contract and the whole context of the agreement, particularly the paragraph quoted above, reveal patently that the contract contemplated reimbursement of the district's outlay, but certainly it was never intended for the district to make a profit. The city admits that the district will have paid $95,239.96 in discharging its final total obligation under the bond project. The city properly offered proof that it had paid the district $50,973.35 under the contract. This leaves $44,266.61 remaining yet to be paid. The construction costs totaled only $58,588.41, leaving an initial surplus of borrowed money of $23,411.59 ($82,000.00 minus $58,588.41). Deducting this $23,411.59 from the unpaid $44,266.61 leaves a balance of $20,855.02 remaining to be paid to the district as final reimbursement of the district's outlay. Appellee suggests in argument that a number of expenses were incurred by the district through the years for which it should be reimbursed. To determine which of these expenditures were legitimately chargeable to the city would require a detailed accounting and, forseeably, extensive and prolonged litigation. On trial de novo it is our view that these expenses are a small price to pay for the benefits which have accrued to the district (such as the location of industry), made possible by the creation of the district. Applying the rule that "equity seeks justice rather than technicality, truth evasion, common sense rather than quibbling," the decree is modified and remanded for entry of a decree requiring the city to continue share revenues according to the contract until it has made the district whole by paying the remaining balance of $20,855.02.

DELTIC FARM & TIMBER CO. *v.* MANNING, ADM'X.

5-3446 389 S. W. 2d 435

Opinion delivered April 5, 1965

[Rehearing denied May 17, 1965.]

CRUMPLER & O'CONNOR, WILLIAM J. WYNNE, for appellant.

Bernard Whetstone, for appellee.

FRANK HOLT, Associate Justice. This action resulted from an almost direct head-on collision between two trucks. The appellee brought this action seeking to recover damages resulting from the death of her husband,

Roy Manning, alleging that the collision was caused by the gross and culpable negligence of the appellant, R. C. Brown, Jr., who was an employee of appellant Deltic Farm and Timber Company, Inc. The appellants answered denying any negligence on their part and pleaded Manning's carelessness and negligence in bar of appellee's right to recover. The appellants filed a motion for a summary judgment pursuant to Ark. Stat. Ann. § 29-211 (Repl. 1962). The motion was overruled by the court. Immediately prior to trial appellants renewed their motion for a summary judgment and again it was overruled by the court. The appellee filed no formal answer or counter affidavits to either motion. At the close of appellee's testimony and again at the conclusion of all the testimony appellants filed motions for directed verdicts both of which were overruled by the court. The jury returned a verdict in the amount of $2,500.00 for the benefit of the estate and nothing for the widow and children. From the judgment on this verdict appellants bring this appeal. There is no cross-appeal.

For reversal appellants first contend the court erred in refusing to grant their motion for a summary judgment. Appellants argue that the pleadings, depositions and affidavits reflect that no genuine issue as to any material fact exists and, therefore, as a matter of law the court should have rendered a summary judgment. We think the trial court correctly refused appellants' motion for a summary judgment. It is well settled that *any testimony* submitted with a motion for a summary judgment must be viewed in the light most favorable to the party against whom the motion is made with all doubts and inferences being resolved against the movant. *Russell* v. *City of Rogers,* 236 Ark. 713, 368 S. W. 2d 89. With this in mind we proceed to review the evidence in the light most favorable to appellee.

The deposition of the appellant R. C. Brown, Jr., was one of the depositions submitted by the appellants in support of their motion for a summary judgment. According to appellant Brown's deposition, an employee of appellant Deltic Farm and Timber Company, Inc., he

was driving their truck to work early in the morning when the accident occurred on a clear day upon a straight stretch of a rural gravel road; the road was of average width with enough room for two vehicles to meet and pass each other; appellant Brown met a school bus which was creating a dense cloud of dust; the school bus was of unusual width as compared to a normal vehicle; there were shallow ditches on both sides of the road; appellant Brown, traveling approximately 30 to 35 miles per hour, did not reduce his speed as he approached, passed the school bus and entered the cloud of dust so dense that he could not see more than 10 to 15 feet ahead of him. Before entering the dust he never saw the truck being driven by the deceased who was following the school bus. According to appellant Brown there was no difference in the density of the dust from the point where he first observed the approaching bus until he passed it. He didn't know how much visibility he had into the dust before entering it. According to him, "I wasn't watching the dust. I was watching the bus and the road." The collision occurred almost immediately as he entered the cloud of dust and just as he saw the outline of the deceased's truck in front of him partially blocking his path and before he had time to put his foot on the brake. According to appellant Brown the impact of his truck knocked the deceased's truck backward approximately 6 feet and to Brown's left. Appellant Brown's vehicle followed the backward direction of Manning's vehicle for the 6 feet and to appellant's left.

A motion for a summary judgment is an extreme remedy and the burden of demonstrating the nonexistence of a genuine fact issue is upon the party moving for the summary judgment. *Wirges* v. *Hawkins,* 238 Ark. 100, 378 S. W. 2d 646. Further, where the evidence, although in no material dispute as to actuality, reveals aspects from which inconsistent hypothesis might reasonably be drawn and reasonable men might differ, then a motion for a summary judgment is not proper. *Winter Park Telephone Co.* v. *Southern Bell Telephone & Telegraph Co.,* 181 F. 2d 341 (5th Cir. 1950). We are of the

view that the testimony of appellant Brown as reflected by his deposition is alone sufficient to raise a factual issue about which the minds of reasonable men might differ whether controverted or not. We cannot say that as a matter of law appellants were entitled to a judgment.

Appellants further contend for reversal that the appellee has not met the required burden of proof to establish appellants' negligence and that such negligence was a proximate cause of the alleged injuries and that the injuries were the natural and probable consequence of appellants' negligence and that such should have been foreseen. Appellants also contend that appellee is not entitled to a recovery if the negligence of Manning equaled or exceeded the negligence of appellants, and the court erred in refusing to grant appellants' motions for a directed verdict. Thus, in effect, appellants question the sufficiency of the evidence to sustain the verdict of the jury.

The evidence previously discussed in appellant Brown's deposition in support of appellants' motion for summary judgment was also submitted to the jury. We have already said that his deposition alone created a factual issue and, therefore, the motion for summary judgment is the same as that which underlies a motion for a directed verdict. *Russell* v. *City of Rogers, supra.* In addition the appellee presented other evidence including the bus driver as a witness. He testified that the two vehicles approached each other in the center of the road "where everybody was driving. * * * When I first met it [Deltic truck] it was in the center of the road. He pulled over out of the center and put one wheel in this rut over what I was traveling in and one over here on the shoulder and I pulled over and one wheel on my side and one out in the other direction." According to the bus driver, it created more dust when he pulled out of the ruts onto the soft portion of the road. He couldn't tell that appellant Brown "slowed down a bit".

There was also evidence that Manning made a dying declaration that "A big white thing just came down on

me. I tried to get out of its way, but I couldn't." Further, that he "was driving behind a school bus and the school bus made a quick pull over to the right and it was so much dust that it blinded him and he couldn't see and he said he stopped or almost stopped and said this truck hit him about the time he saw it. * * * he said he tried to get out of the way. He said, 'I didn't have time.'."

We have often held that in determining the sufficiency of the evidence to sustain a verdict, the evidence must be viewed with every reasonable inference deducible therefrom in the light most favorable to the appellee and if there is any substantial evidence we must affirm. *Arkansas Power & Light Co.* v. *Connelly,* 185 Ark. 693, 49 S. W. 2d 387; *Davis* v. *Bullard,* 231 Ark. 898, 333 S. W. 2d 481; *Harkrider* v. *Cox,* 230 Ark. 155, 321 S. W. 2d 226 and [second appeal] 232 Ark. 165, 334 S. W. 2d 875.

Without reviewing further evidence, we are of the view that there is substantial evidence in the case at bar to submit the issues to the jury and to sustain its verdict. The jury might have found that appellant Brown was more negligent than Manning since Brown, with the opportunity to observe the driving conditions he was about to encounter, elected not to check his speed or stop but instead, entered a blinding dust cloud while driving approximately 35 to 40 miles per hour. Also, the jury might have believed from the evidence that Brown, after pulling from the center of the road in order to pass the bus, cut back to the left to avoid the roadside ditch and resume his course in the center of the road resulting in the almost head-on collision. The jury could have believed that Manning was caught unexpectedly in an emergency when the school bus pulled to the right thus placing him in a perilous position as he attempted to stop.

Since appellants do not question the instructions, it appears that all issues were presented to the jury under proper instructions. The finding of the jury was in the form of a general verdict by which the sum of

$2,500.00 was awarded for the benefit of the estate and recovery denied individually to the widow and adult children. It would appear by this modest verdict that the jury considered any comparative negligence of the parties.

Appellants' final contention is that the court erred in permitting over their objection the introduction of a certified copy of letters of administration for the purpose of establishing that the appellee was the duly and legally authorized personal representative of the decedent's estate. Appellants argue that the letters of administration lacked authentication in requisite form. We find no merit in this contention. Appellee alleged in her complaint that she was the duly qualified and acting administratrix of her deceased husband's estate by the appointment of the Fourth District Court of Ouachita Parish, Louisiana. This allegation was not expressly denied. She was permitted to testify without objection that she was the duly appointed administratrix. Therefore, we are of the view that the introduction of the certified copy of the letters of administration instead of authenticated copies was not prejudicial error.

Affirmed.

5-3427 388 S. W. 2d 905

Opinion Delivered April 12, 1965.

[redacted]

Mark E. Woolsey and *Don Langston* for appellant.

Edgar E. Bethell and *William M. Stocks,* for appellee.

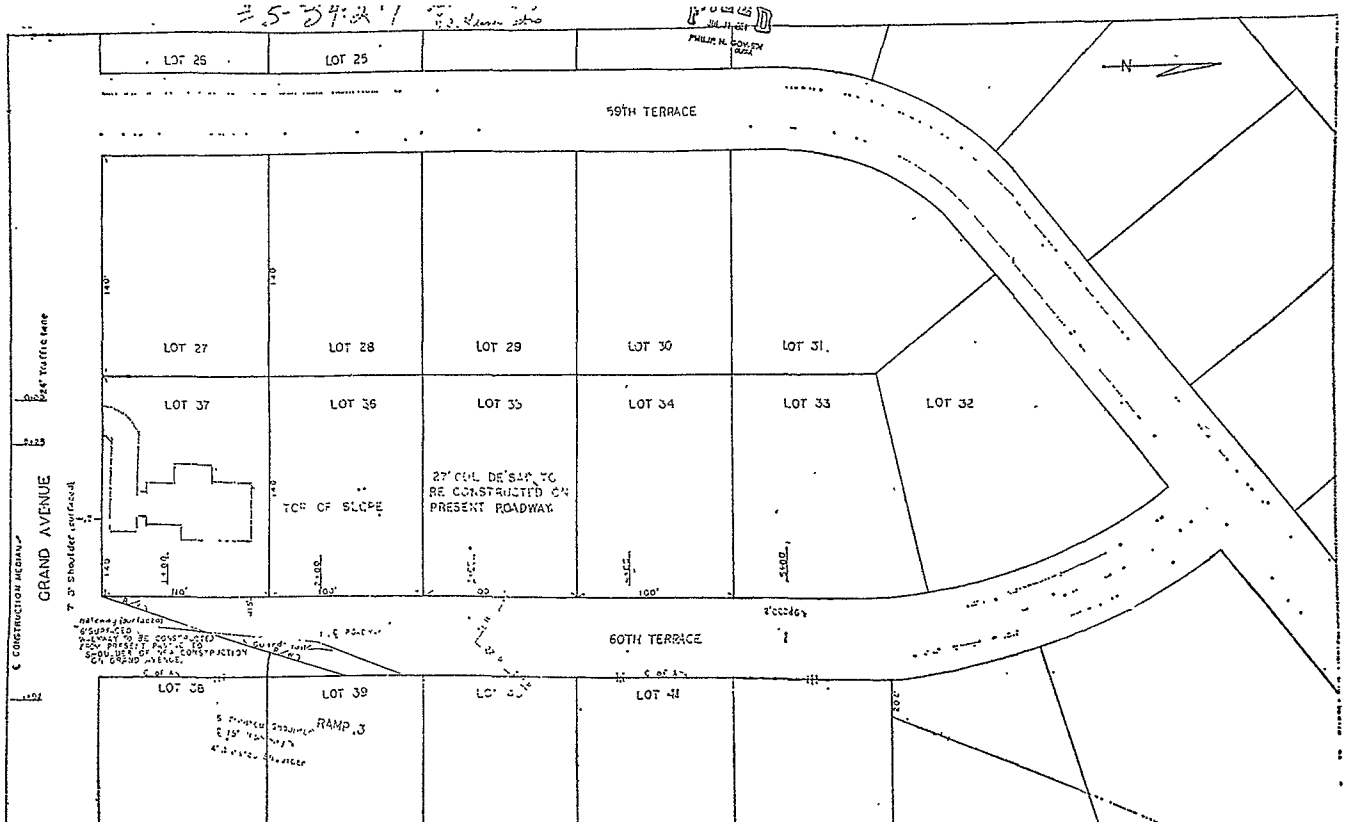
CARLETON HARRIS, Chief Justice. Mr. and Mrs. W. C. Kesner, appellees herein, own Lot 37 in the Eastern Hills Addition to the City of Fort Smith. This lot lies at the northwest corner of the intersection of Grand Avenue and Sixtieth Terrace. Grand Avenue runs east and west, and borders the south side of the lot. Sixtieth Terrace runs north and south, and borders the east side of the lot. The Kesners' house on this corner lot faces east toward

Sixtieth Terrace, connected to that street by a sidewalk. On the south side of the house is located the garage and driveway, which enters upon Grand Avenue.

The Arkansas State Highway Commission, appellant herein, is constructing Interstate Highway No. 540. This highway runs north and south through the Eastern Hills Addition, somewhat parallel with Sixtieth Terrace, and east of it. The Kesner home faces the new highway. In constructing this highway, the commission has not taken any part of the Kesner lot; it has taken by eminent domain the lots across Sixieth Terrace from the Kesner lot, and a part of Sixtieth Terrace, in the shape of a right triangle, has also been taken. The hypotenuse of the triangle is the right of way line; this line starts on the east side of the street, about fifty feet north of the Kesner lot, and runs southwesterly across the street until it reaches the southeast corner of the Kesner lot, this point being the location of the intersection of Grand Avenue and Sixtieth Terrace. Roughly along this right of way line, the commission has constructed a guard rail across Sixtieth Terrace. This rail is a barricade which closes off Sixtieth Terrace from Grand Avenue. On its side of the rail, the Highway Commission has lowered the grade of Sixtieth Terrace, and has constructed an access road from the new highway onto Grand Avenue.

The Kesners instituted suit in the Sebastian Chancery Court, asking that the commission be enjoined from taking or damaging their property without paying for it. The complaint alleges a loss of ingress and egress to and from the property, because of the barricade, and the taking of part of Sixtieth Terrace. It is further asserted that the free course of view, light and air will be impaired, and that the market value of their property will be diminished. The complaint was subsequently amended to allege further damage, because of the violation of certain restrictive covenants.

Appellant answered, denying that the Kesners' property had been taken or damaged, and further asserting that even if damage had occurred, it was non-compensable.


LOT 26
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27' CUL DE SAC TO
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GRAND AVENUE
60TH TERRACE
LOT 38
LOT 39
LOT 41
RAMP 3

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The cause was heard by the court under a stipulation that the only question to be decided was that of liability; the question of amount of damages (if the court found liability) was reserved. After hearing the evidence, the court found that appellees had sustained damage by virtue of the fact that a right of ingress and egress had been lost; that damage had also been sustained by reason of restrictive covenants, and that the Kesners were entitled to just compensation for the diminution in value of their property. An injunction was granted against the commission, but was suspended, because that body had posted a $10,000 bond. From the finding of liability for damage done the Kesner property, appellant brings this appeal.

Appellees asked the court to require a $15,000 cash deposit in lieu of the $10,000 bond, but the court refused this prayer, and appellees have cross-appealed from the provision of the decree suspending the injunction, and the court's refusal to order the $15,000 cash deposit in lieu of the $10,000 bond.

In its opinion, the court mentioned that appellees were not entitled to recover for noise, dust, etc., and we approve and affirm this finding. *Campbell* v. *Ark. State Hwy. Commission,* 183 Ark. 780, 38 S.W. 2d 753.

We first dispose of the court's finding of damage suffered because of restrictive covenants contained in a Bill of Assurance filed in 1955, which provided, *inter alia,* that no lot in Eastern Hills should be used except for residential purposes; that nothing should be done which might become an annoyance or nuisance to the neighborhood, and other restrictions which we do not set out because we find that these are not elements of damage for which appellees can be compensated. This same issue was raised in the case of *Arkansas State Highway Commission* v. *McNeill,* 238 Ark. 244, 381 S.W. 2d 425, and determined adversely to appellee's contention. The litigation presently before us was decided by the Chancellor before our opinion was rendered in *McNeill,* and appellees' brief on this point consists of a plea to reconsider our holding in that case. We decline to do so, feeling that that decision is entirely sound.

It follows that appellees are not entitled to compensation for this alleged damage, and the Chancellor's findings that this is a compensable element of damage is therefore reversed.

One of the main questions is whether the loss of ingress and egress to Sixtieth Terrace constitutes compensable damage. It might be first stated, as a general principle, that, before a landowner can recover for damage to his property where there has been no actual taking, he must suffer direct and substantial damage peculiar to himself, and not suffered by other members of the public, and this is true, even though he may be actually more inconvenienced that the public in general. *Arkansas State Highway Commission* v. *McNeill, supra.* It is not enough that a landowner show that his damage is *different* from that suffered by the general public. He must show that a property right has been invaded, and the fact that the value of his lot has diminished is not, within itself, sufficient to establish special compensatory damages. *Wenderoth* v. *Baker,* 238 Ark. 464, 382 S.W. 2d 578. Certain other conditions may arise, which might appear damaging to a complaining landowner, but which, under the law, are not compensable. We have held that circuity of travel, *i.e.,* being compelled to go a few blocks out of the way is not compensable. *Risser* v. *City of Little Rock,* 225 Ark. 318, 281 S.W. 2d 949. Here, appellees can enter onto Grand Avenue, travel to Fifty-ninth Terrace, turn to the right, and travel back to Sixtieth Terrace, and to their property.

Appellant says that appellees have not lost the right of ingress or egress to and from their property, because of this access to Grand Avenue. In fact, this is the entrance that has consistently been used by the Kesners since building their home. The garage is on the south side of the house, and the driveway enters onto Grand Avenue. There is not, and has never been, a driveway onto Sixtieth Terrace. Accordingly, it is vigorously argued by the Highway Commission that the right of ingress and egress has not been distributed in the slightest. However, we think the commission, in making this argument, overlooks a basic

right of an abutting property owner, for the right of access to a street or highway is one of the incidents of the ownership or occupancy of land abutting thereon. In Volume 25, Am. Jur., Section 154, Page 448, it is said:

"* * * Such right is appurtenant to the land, and exists when the fee title to the way is in the public as well as when it is in private ownership. It is a property right of which the owner cannot be deprived without just compensation. This easement extends to the full width of the street."[1]

The commission is correct in stating that as far as driving onto Grand Avenue from Sixtieth Terrace is concerned, appellees have not suffered any compensable damage by the state's erection of the barricade, because this is a damage common to the traveling public.

But there may be another reason why the loss of access to Sixtieth Terrace will have a particular effect upon appellees. From the time of construction their garage and driveway, appellees have backed out into Grand Avenue, and proceeded in either direction. However, a median has now been placed in the center of Grand Avenue, and, if the Kesners desire to go east on Grand Avenue, it is necessary that the car be backed entirely across the break in the median to the other side of the street. If desiring to travel west, appellees must back their car into the street to the right, or with the back of the vehicle toward the east. It is true that the last mentioned has always been necessary, but appellees contend that the situation has now changed, because of the contemplated flow of traffic, and the erection of the barricade.

The testimony reflects that, prior to the construction by the commission, there was no obstruction to one's vision, and accordingly a person could observe approaching traffic from the east as far as the eye could see; however,

[1]This section further states that this right is subordinate, however, to the public convenience, of which the public authorities having control of the streets are the judges, and is subject to such reasonable use of the street, not inconsistent with its maintenance as a public highway, as may be necessary for the public good and convenience and does not seriously impair it. The public authority may therefore impose reasonable regulations governing the exercise of such right."

with the change of grade, and the lowering of the access road onto Grand Avenue, it appears that, in backing out of their garage, appellees will only be able to observe approaching traffic (off the new highway) from the east for approximately 100 to 150 feet. Such a situation, of course, will be dangerous, and will likely require some sort of change in appellees' method of entering onto Grand Avenue.

Appellees argue that they have been specially damaged, since they can no longer extend their present driveway to Sixtieth Terrace (because of the guard rail and change in grade). It is true that this would have been the logical plan to have followed in order to avoid the traffic on Grand Avenue. Of course, it may be that appellees will be able to build a "turn around," and drive forward onto Grand Avenue. Actually, it appears from plaintiffs' exhibit No. 16 that appellees presently can back immediately to the east, when leaving the garage, and then proceed in a forward direction onto Grand, though this last cannot be definitely ascertained.

Be that as it may, we think the evidence reflects that appellees have suffered direct and substantial damage *peculiar to themselves; i.e.,* not suffered by other members of the public, and, what is of equal significance, not suffered by any other person whose property abuts Sixtieth Terrace. Owners of Lots 32, 33, 34, and 35[2] have full access to Sixtieth Terrace, but more than half of Sixtieth Terrace (now on east side of rail), abutting Lot 37,[3] has been *completely destroyed.*

In *Little Rock* and *Ft. Smith Ry. Co.* v. *Greer,* 77 Ark. 387, 96 S.W. 129, this court, citing an earlier case, said:

"The owner of premises abutting upon a street in a city or town may recover from a railroad company the damages resulting to his premises by the construction of its roadbed or other structures on its right of way along the street in such manner as to obstruct access to the prem-

[2]The cul de sac was not constructed.

[3]The owner of Lot 36 has not complained, though a small part (opposite this lot) of Sixtieth Terrace has been taken.

ises, though he have no interest in the fee of the street, and no part of his premises be taken and the road or other structure be skillfully built."

In *Campbell* v. *Ark. State Highway Comm., supra,* we said:

"The right of eminent domain in the premises is conceded in the Arkansas Highway Commission, but it is insisted that this right is and must, under our Constitution, be subordinate to the right of the property owners to be first compensated for the damages to their property by the construction of the bridge and the approaches thereto. Their claim is based upon the guaranty given by § 22 of the Bill of Rights of our present Constitution, which provides that private property shall not be taken, appropriated, or damaged for public use, without just compensation therefor. It is claimed that under it, whether the property is taken or not, if it has been damaged by reason of the construction or operation of any improvements made for the use of the public, the owner may recover whatever damage the property has actually sustained. Under our decisions, the owner of property abutting upon a street or highway has an easement in such street or highway for the purpose of ingress and egress which attaches to his property and in which he has a right of property as fully as in the lot itself; and any subsequent act by which that easement is substantially impaired for the benefit of the public is a damage to the lot itself within the meaning of the constitutional provision for which the owner is entitled to compensation. The reason is that its easement in the street or highway is incident to the lot itself, and any damage, whether by destrucion or impairment, is a damage to the property owner and independent of any damage sustained by the public generally."

The court, in this case, also stated that special damages can be suffered because of a change in grade.

We have reached the conclusion that the market value of appellees' property has been reduced by the destruction of Sixtieth Terrace, abutting their premises, and they are entitled to compensation therefor.

The order under review, as we have indicated, finds that the appellees are entitled to compensation, but it withholds a determination of the amount thereof until the question of liability has been decided by this court. Neither side has questioned the finality or appealability of this order, for it is evident that they both would like for the principal issue to be determined in advance. In fact, the parties recognize that the court's decree was not a final order, for they stipulated, at the outset of the trial, that, in event the court held for appellees, the order would be considered an appealable order to the Supreme Court. The want of a final order, however, is a matter that we ordinarily raise ourselves.

Under the statute we are limited to reviewing final judgments and decrees. Ark Stat. Ann. § 27-2101 (Repl. 1962).

"A judgment to be final must dismiss the parties from the court, discharge them from the action or conclude their rights to the subject-matter in controversy." *Piercy* v. *Baldwin* 205 Ark. 413, 168 S.W. 2d 1110."

An order, such as the one before us, which establishes the plaintiff's right to recover, but leaves for future determination the exact amount of his recovery, is not final. *Fitzgerald* v. *Phillips,* 41 Ark. 85; *Sennett* v. *Walker,* 92 Ark. 607, 123 S.W. 769; *Miners' Bank of Joplin* v. *Churchill,* 141 Ark. 211, 216 S.W. 695.

This appeal is therefore subject to dismissal. We realize, however, that we may have misled counsel for the Highway Commission by having inadvertently allowed such a piecemeal review in several similar cases (the point not having been raised), such as *Ark. State Highway Commission* v. *McNeill, supra.* Hence, we have considered this appeal upon its merits, but we take this opportunity to state that hereafter we shall revert to the better practice of reviewing only judgments and decrees that are final.

As to the cross-appeal, we find no merit, since we are of the opinion that appellees are adequately protected under the bond filed for any damage for which compensation is due.

In accordance with the views herein expressed, the decree is affirmed in part, and reversed in part, and the cause remanded for further proceedings, not inconsistent with this opinion.

Mr. Justice McFaddin concurs in part and dissents in part.

ED. F. MCFADDIN, Associate Justice (concurring and dissenting). I agree thoroughly with that portion of the Majority Opinion which holds that the entire case should be fully developed on damages before we are asked to review any part of it. When the equity trial court finds that the plaintiff has *not* made a case on liability, then the complaint may be dismissed without offering the evidence as to damages. This is because of our statute on demurrer to the evidence (Ark. Stat. Ann. § 27-1729 [Repl. 1962]). But when, as here, the Trial Court has found that there is liability, the parties have no right to delay completion of the trial in order to get the Supreme Court to pass on that question before completing the evidence in the Trial Court as to damages. Piecemeal trial is to be avoided as much as possible; so I agree with that portion of the Majority Opinion regarding completion of the trial below, since the Highway Department is liable for some damages in this case.

My dissent goes to that part of the Majority Opinion which limits the elements of recoverable damage. My views on this angle of the case are contained in my dissent in *Ark. State Highway Comm.* v. *McNeill,* 238 Ark. 244, and there is no need for me to restate these views in this dissent. I again dissent in order to preserve such views as I stated in the McNeill case.

SEARCY, SHERIFF *v.* COOPER

5-3548 388 S. W. 2d 918

Opinion Delivered April 12, 1965.

[redacted]

Sam Anderson, Wootton, Land & Matthews, for appellant.

Pope, Pratt & Shamburger, By Donald S. Ryan, for appellee.

ED. F. MCFADDIN, Associate Justice. This proceeding is against a sheriff for failure to make timely return of an execution. On May 19, 1964, Rebecca Cooper recovered judgment against Frances Soncini in the Pulaski Circuit Court for $11,000.00; and on May 29, 1964, an execution was issued on the judgment, directed to Duffie Searcy, Sheriff of Garland County. The execution was received by Sheriff Searcy on June 12, 1964, and no return was made thereon within sixty days, as required by law. (Ark. Stat. Ann. § 30-431 [Repl. 1962].) On September 2, 1964, Rebecca Cooper filed in the Pulaski Circuit Court a motion for summary judgment against Sheriff Searcy and the sureties on his official bond, claiming said judgment under the provisions of Ark. Stat. Ann. § 27-207 *et seq.* (Repl. 1962).

The filing of the said motion for judgment brought prompt responses:

(a) On September 14, 1964, Sheriff Searcy filed a pleading objecting to the venue in Pulaski County and claiming he had the right to be sued in Garland County. The Aetna Casualty and Surety Company, as surety on his bond, joined in the motion.

(b) On September 14, 1964, Frances Soncini, the judgment debtor, filed a motion to quash the execution as issued prematurely.

These said matters were heard and, by order dated November 10, 1964, the Pulaski Circuit Court denied both of the motions;[1] and the order concluded with this language:

". . . that Duffie Searcy, Sheriff of Garland County, Arkansas, and The Aetna Casualty and Surety Company be and they are hereby granted leave of the Court to plead further."

On November 17, 1964, there was a notice of appeal by Sheriff Searcy, The Aetna Casualty and Surety Company, and also by Frances Soncini, from the said order of November 10, 1964.

It is instantly apparent that the attempted appeal in this case is from the order entered November 10, 1964, which is not a final and appealable order. *Ark. State Board* v. *Larsen,* 226 Ark. 536, 291 S.W. 2d 269; *Robberson* v. *Steele Canning Co.,* 233 Ark. 988, 349 S.W. 2d 814; and *Coffelt* v. *Gordon,* 238 Ark. 974, 385 S.W. 2d 939. The appeal is dismissed for want of a final order.

[1]As to Sheriff Searcy's plea of venue, the Trial Court relied on *Smith* v. *Drake,* 174 Ark. 715, 297 S.W. 817. See also *Perry County* v. *Gatlin,* 186 Ark. 116, 52 S.W. 2d 626; and *J. B. Pearson Co.* v. *Pittman,* 192 Ark. 1062, 95 S.W. 2d 1143. As to The Aetna Casualty and Surety Company, the Trial Court relied on Ark. Stat. Ann. § 29-207 *et seq.* (Repl. 1962). As to Mrs. Soncini's motion, the Trial Court relied on *Jones* v. *Goodbar,* 60 Ark. 182, 29 S.W. 462.

ARK. STATE HIGHWAY COMM. *v.* WILMANS

5-3483 388 S. W. 2d 916

Opinion Delivered April 12, 1965.

Mark E. Woolsey and *Thomas B. Keys,* for appellant.

Wayne Boyce and *Fred Pickens, Jr.,* for appellee.

George Rose Smith, J. This condemnation proceeding arises from a reconstruction project by which part of U.S. Highway 67 has been widened. The landowner, Charles H. Wilmans, formerly operated a liquor store and beer tavern upon a triangular tract of about seven-tenths of an acre, abutting the highway. The effect of the taking is to narrow the tract to such an extent that the tavern can no longer be maintained and the liquor store has an inadequate parking area for its customers. The jury awarded Wilmans compensation of $20,000.

According to the original plans for the project a concrete curbing or island, ten inches high, was to be built as a traffic control along nearly all of Wilmans' 100 feet of frontage on the highway. If the plans had been followed this curbing would have greatly impaired the facility with which Wilmans' customers could enter and leave his property. In fact, however, the plans were not followed; the curbing was not built. The appellant insists that the trial court erred in excluding proof that the plans had been changed and in permitting the landowner's witnesses to

take the proposed curbing into account in estimating Wilmans' damage.

We think the appellee is right in contending that the Commission's proof fell short of showing such a change in the plans as would bind the Commission in the future. The Commission's complaint asserted in substance that the highway would be rebuilt in accordance with "plans . . . on file at the Arkansas State Highway Department in Little Rock." By stipulation the original plans, showing the curbing, were introduced in evidence.

In its effort to prove a change in the plans the Commission called as a witness its resident engineer on the job, Ralph Wyatt. Objections to most of Wyatt's testimony were sustained. There was no clear-cut offer of what his proof would have been, but apparently he intended to testify that the proposed curbing was abandoned pursuant to an oral agreement that was reached in a discussion he had with the opposing attorneys in the case. He also said that he had prepared a sketch showing the agreed change. This sketch is not in the record, however, nor is it shown to have been of binding force as an official document. The Commission also called Wilmans' attorney as its own witness, but he testified that the sketch did not correctly reflect the agreement and, further, that the highway department had violated its agreement.

It will be remembered that the Commission's complaint affirmatively asserted that the project would follow plans that were a matter of public record in Little Rock. Unquestionably this allegation was meant to fix the rights of both litigants with respect to the property being condemned. The binding effect of a judgment as *res judicata* is ordinarily determined by an examination of the pleadings and the judgment, not the testimony. *Webb* v. *Herpin,* 217 Ark. 826, 233 S.W. 2d 385. Hence if the highway department should decide in the future to put in the curbing the landowner will not be in a position to claim additional compensation for a new interference with his rights of ingress and egress. We think the pleadings and the public records in Little Rock should have been amended to effect a binding change in the plans.

This case has been tried twice. At the first trial Joe Stafford testified without objection as an expert witness for the landowner. Stafford was ill at the time of the second trial, and the court permitted the landowner to introduce his prior testimony. We find no error. The statute authorizes the use of former testimony taken in the same case between the same parties. Ark. Stat. Ann. § 28-713 (Repl. 1962). In the course of his testimony Stafford said that he considered the buildings, the business, and everything in arriving at his estimate of Wilmans' damage. It is argued that his reference to the business was contrary to our ruling on the first appeal that the profits from the business could not be considered. *Ark Highway Comm.* v. *Wilmans,* 236 Ark. 945, 370 S.W. 2d 802. Stafford, however, said nothing about the profits. It was proper for him to consider the business, not only because he thought the tract best suited for use as the site of a liquor store but also because the property had exceptional value in that respect, as it was shown to be the last liquor store site before the highway enters a number of counties where the sale of liquor is prohibited.

It was permissible for the court to give an instruction in the pertinent language of the statute that forbids encroachments upon the public highways. Ark. Stat. Ann. § 76-544 (Repl. 1957). Inasmuch as the taking left Wilmans with a tract so small as to be hardly adequate for the operation of his business, there was no unfairness in cautioning the jury that he could not alleviate that hardship by encroaching upon the public right of way.

The appellant's final contention is that the judgment is excessive. Four qualified witnesses for the appellant gave estimates of Wilmans' damage that ranged from $29,000 to $43,000. Their testimony was competent and constitutes substantial evidence supporting the verdict of $20,000.

Affirmed.

McFaddin, J., not participating.

HOSKINS *v.* COOK

5-3537 388 S. W. 2d 914

Opinion Delivered April 12, 1965.

Fenton Stanley, for appellant.

Bridges, Young, Matthews & Davis, G. W. Lookadoo, for appellee.

GEORGE ROSE SMITH, J. This is primarily a boundary line dispute between the appellee Eunice K. Batchelor and the other appellees and cross-appellants, Albert and Bill Cook. The appellant, D. W. Hoskins, is Mrs. Batchelor's tenant and joined her as a plaintiff in the case. The chancellor upheld Mrs. Batchelor's claim to the strip of land in dispute and fixed Hoskins' crop damage at $50, a sum which he thinks to be inadequate.

We consider first the principal controversy between Mrs. Batchelor and the Cooks. It is conceded that Mrs. Batchelor holds the record title to the strip in dispute, which lies just east of a portion of the western boundary of Section 27. The Cooks' property lies in Section 28,

abutting the disputed strip on the west. They contend that, despite Mrs. Batchelor's record ownership, a boundary by acquiescence has been established by reason of the fact that for many years a fence was maintained along the eastern border of the strip now in question.

Both the location of this fence and its recognition by the parties as a dividing line were questions of fact that were sharply disputed. After studying the testimony we are unable to say that the chancellor's decision is against the weight of the evidence.

Most of the parties' two tracts has been cleared land for many years, but that has not been true of the strip in controversy. A slough, which seems usually to contain at least some water, meanders in a northerly direction in the vicinity of the true line between Sections 27 and 28. The rest of the disputed strip, lying east of this slough, was wooded land until Mrs. Batchelor employed a crew in 1963 to clear the land by using bulldozers. The fence described by the Cooks' witnesses was nailed to trees within this wooded area. The Cooks insist that this fence was maintained for so many years that it became the division line by acquiescence. Mrs. Batchelor, however, offered equally persuasive proof that the fence was actually along the bank of the slough and was not intended to be a division line.

If the fence had divided pasture land or cultivated fields on both sides of it, its maintenance for many years would strongly indicate the existence of a boundary by acquiescence. But when a fence has been nailed to trees in a timbered area, there is much less reason to suppose that the landowners meant to regard it as a division fence. See *Brown Paper Mill Co.* v. *Warnix,* 222 Ark. 417, 259 S.W. 2d 495. With the testimony in irreconcilable conflict we are not convinced that the Cooks proved their contention by a preponderance of the evidence.

Hoskins, the tenant, sought damages upon the theory that the Cooks had obstructed a drain pipe that emptied in or near the slough, with the result that about eight acres of oats were destroyed by standing water. At the princi-

pal hearing in the case Hoskins testified what the market value of the crop would have been if it had matured and had been gathered. That is not the correct measure of damages, for the expense of harvesting and marketing the crop must be deducted. *St. Louis S.W. Ry.* v. *Morris,* 76 Ark. 542, 89 S.W. 846; *Barnes* v. *Young,* 238 Ark. 484, 382 S.W. 2d 580. In the absence of such proof the chancellor's award cannot be said to be inadequate.

There was a supplemental hearing upon the question whether the Cooks had, as directed by the court, removed the obstructions they had put in the pipe draining the Batchelor land. We are unable to say either that the chancellor abused his discretion in refusing to allow the case then to be reopened for additional proof of damages, *Troxler* v. *Spencer,* 223 Ark. 919, 270 S.W. 2d 936, or in finding, upon conflicting proof, that the pipe had been effectively restored to its full usefulness.

Affirmed.

SHORT *v.* STEPHENSON

5-3189 388 S. W. 2d 912

Opinion Delivered April 12, 1965.

[Rehearing denied April 12, 1965.]

Carneal Warfield, for appellant.

W. K. Grubbs and *Ohmer C. Burnside,* for appellee.

PER CURIAM

Subsequent to the opinion rendered by this court in the above styled case, Mrs. Elizabeth Peterson, the present administratirx of the estate of Dr. A. G. Anderson,

filed, on February 24, 1965, a motion to dismiss the appeal, alleging that the original executor of the estate, R. T. Stephenson, had died on June 8, 1963; that the cause of action had abated and there had been no revival as provided by Ark. Stat. Ann. § § 27-1003 — 16, (Repl. 1962).

Dr. Anderson died on the 15th day of June, 1960. R. T. Stephenson was appointed executor of the estate. Mr. Stephenson filed for probate a purported will of Dr. Anderson in which Mr. Stephenson was named the principal beneficiary. Mrs. Helen Short, a niece and only heir at law of Dr. Anderson, filed a pleading in which she contested the validity of the will. Mr. Stephenson, as executor, filed a response denying that the will was invalid. The Probate Court rendered a judgment on March 8, 1963, holding in favor of the validity of the will. On June 8, 1963, Mr. Stephenson, the executor, died. On June 27, 1963, his daughter, Elizabeth Peterson, applied for and was granted letters of administration in the Anderson estate. Mrs. Peterson's application for appointment as administratrix, her bond as such, and her letters of administration were filed in the case at bar.

On October 16, 1963, the record on appeal was lodged in this court. The record is very large. Appellant's brief was not filed until May, 1964; appellee's brief was not filed until October 22, 1964; the reply brief was filed on December 15, 1964, and the case was submitted on January 11, 1965. The decision was handed down on February 8, 1965.

After appellant, Mrs. Helen Short, filed her brief on appeal in this case, the brief in response thereto was filed signed W. K. Grubbs, Sr., attorney for appellee. Mr. Grubbs had represented Mr. Stephenson from the beginning of the case until Mr. Stephenson died. Evidence in the record indicates that Mr. Grubbs represented Mrs. Peterson in getting her appointed administratrix of the Anderson estate; that he also represented her in filing her letters of administration in the case at bar, and represented her when he filed a brief in this court for "appellee".

Appellee's brief on the merits consisted of 465 pages in two volumes. All through the brief language is used showing there was a living appellee, language such as "there are, as in most cases, certain abstracts of evidence made by appellant with which *appellee* does not agree", and "*appellee* feels that there are certain portions of appellant's brief that are inconsistent with the record". (Emphasis ours.) Mr. Stephenson had been dead for about a year and a half when appellee's brief was filed in this court; therefore, of course, the reference to appellee could not have applied to him. Helen Short, the appellant, is the only heir at law of Dr. Anderson, so surely the reference was not to her. The administratrix at the time of the printing and filing of appellee's brief was Mrs. Peterson. In referring to appellee in the brief, the reference must have been to her.

Without deciding whether a motion to revive is necessary in a case of this kind, and without deciding just when the year expired in which a motion to revive could have been filed, it is clear that under no view of the law could the year have extended beyond October 27, 1964. Mrs. Peterson sat quietly by for nearly two months after that time and allowed the case to be submitted to this court for decision, taking her chances on a victory here, and then filed a motion to dismiss only when she lost the decision.

As heretofore pointed out, there is a big record in this case. This court was sharply divided as to how the case should be decided, as shown by the 4 to 3 decision. There was no suggestion of abatement until the last day for the filing of the petition for rehearing in this case. The petition for rehearing and the motion to dismiss were filed on the same day.

There is nothing to indicate that when Mr. Grubbs filed the brief for appellee in this case, and filed the petition for rehearing, he was not representing Mrs. Peterson the same as when he filed the motion to dismiss. Undoubtedly, Mrs. Peterson has been actively participating in this case from the time she was appointed administratix.

In all the circumstances we feel that Mrs. Peterson, personally and as executor of the Anderson estate, waived

the question of abatement by not raising it when the case was first considered by this court. The court said in *Gillis* v. *Jurzyna,* 1 NE 2d 763: "The filing of the brief is held to be equivalent to a joinder in error, and by joinder in error, the right to move to dismiss the writ is waived."

The motion to dismiss is denied.

ARK. STATE HIGHWAY COMM. *v.* STAPLES

5-3528 389 S. W. 2d 432

Opinion Delivered April 12, 1965.

[Rehearing denied May 17, 1965.]

Mark Woolsey and *Don Gillaspie,* for appellant.

Spencer & Spencer, for appellee.

SAM ROBINSON, Associate Justice. The issue here is the correct location of the right-of-way of U.S. Highway 167 at a point where it joins about two acres of land belonging to appellees, D. L. Staples, Jr. and Nettie Lou Staples. The highway runs northeast and southwest at

the place involved, but for convenience, we refer to the side on which appellees' property, involved here, is located as the east side, and the opposite side as the west.

The appellant, Arkansas State Highway Commission, contends that the right-of-way extends 60 feet on each side of the centerline of the paved portion of the highway. Appellees maintain that the right-of-way extends only about 48 feet on the east side thereof where it joins appellees' property. A strip of ground about 12 feet wide is in dispute. Appellees contend that the Highway Commission has no record title to any portion of the right-of-way, but only owns by prescription an easement over that portion of the right-of-way which it has used and maintained, such portion extending about 48 feet from the centerline.

Appellees filed this suit to enjoin the Highway Commission from constructing traffic control islands on the strip in dispute. The appellant made a deposit to indemnify appellees for any damages they might sustain, and proceeded to construct the traffic islands. Upon a trial in the Chancery Court there was a decree for appellees in the sum of $2,500 as damages, and the Highway Commission has appealed.

We have reached the conclusion that the strip in controversy is a part of the highway right-of-way. The land in question is located in Union County. In 1929 the land on which the right-of-way is located belonged to Mrs. Hazel Hartje. That year the County Judge made an order condemning for highway purposes a strip of land 120 feet wide on which to build a completely new highway. The court order is ambiguous; it describes a strip of ground, at least a portion of which is about 450 feet west of the right-of-way on which the road was constructed in 1930. But anyone who had taken the trouble to examine the court order in 1929 or 1930 would have had no difficulty in locating the new right-of-way. The order provides: "Beginning at Survey Station 0/00 located in the S.E. ¼ of N.W. ¼ of Section 16, T. 16 S., R. 14 W., and being Station 539/86.28 on the El Dorado - Calion Road, . . ."

The beginning of the new road was at Station 0/00, located in the center of the existing gravel road known as the Calion - Hampton Road. After entry of the court order, the Highway Department proceeded to build the new road. The new right-of-way was cut through the woods; the timber had to be cut and the stumps grubbed. The contract for the new road called for clearing and grubbing. The contractor's estimate No. 4 showed the clearing and grubbing was 90% complete; estimate No. 8 showed the clearing and grubbing was 100% complete. Of course, anyone could look at the land and see where the right-of-way was located. Mr. C. M. Matthews, who was working for the Highway Department in 1930 when the new road was under construction, testified:

"Q: After the highway was cleared, was it possible to look down and see where the highway was going to be on the ground?

A: Yes.

Q: And that was completed prior to July 30, or July 20, 1930, is that correct?

A: That's correct."

Mrs. Hazel Harje, owner of the land on which the right-of-way was cleared, which is the land now in controversy, filed a claim for $75.00. On August 1, 1930, the claim was allowed; on August 7, 1930, it was paid. Mrs. Hartje accepted it. The doctrine of *res judicata* applies. If property of Mrs. Hartje was taken in clearing the right-of-way that was not included in the order of the taking she should have included a claim for the taking of such property at the time she was paid the $75.00. In *Olmstead* v. *Rosedale Building & Supply, et al,* 229 Ark. 61, 313 SW 2d 235, we quoted from *Robertson* v. *Evans,* 180 Ark. 420, 21 SW 2d 610, as follows: "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."

Appellees are privies with Mrs. Hartje. *Missouri Pacific RR Co., Thompson, Trustee* v. *McGuire,* 205 Ark. 658, 169 SW 2d 872. In the last cited case the court quoted with approval from 30 Am. Jur. 451. The text is as follows: "In general, it may be said that such privity involves a person so identified in interest with another that he represents the same legal right. It has been declared that privity within the meaning of the doctrine of *res judicata* is privity as it exists in relation to the subject matter of the litigation, and that the rule is to be construed strictly to mean parties claiming under the same title. Under this rule, privity denotes mutual or successive relationship to the same right or property, so that a privy is one who, after the commencement of the action, has acquired an interest in the subject matter affected by the judgment through or under one of the parties, as by inheritance, succession, purchase, or assignment."

An electric power company constructed a line of poles on the right-of-way about 12 feet from the east edge thereof. Of course, the poles had to be several feet from the edge of the right-of-way so that the crossarms did not extend over private property. Thereafter, the Highway Department maintained only that part of the right-of-way to about the line of poles.

In 1954, D. L. Staples, Jr. and his wife, Nettie Lou Staples, bought land adjoining the right of way, previously owned by Mrs. Hazel Hartje. The deed described the right-of-way as being the boundary of the property the Staples purchased. The purchasers had a survey made to determine the boundary line of the purchased property. The engineer considered as the boundary line that part of the highway right-of-way which had been maintained. As heretofore pointed out, the part maintained only went to the line of power poles, but the right-of-way actually extended about 12 feet east of the line of poles. Hence, the Staples reached the wrong conclusion as to the proper location of the highway right-of-way, which is described as the west boundary of the Staples' property. It follows from what we have said that the 12 foot strip in question is a part of the highway right-of-way, and the Highway

Department had the right to build thereon the traffic islands.

The highway plans and pictures of the property, at the point involved, are in evidence showing the location of the traffic islands. It does not appear that appellees have suffered any compensable damages by reason of the location of the traffic islands when it is considered that they are located entirely within the highway right-of-way. The property involved here is located at an intersection. A great deal of traffic passes that point each day. Under its police power, the State has the right to channel traffic for the saftey of the public. In *Arkansas State Highway Comm.* v. *Bingham,* 231 Ark. 934, 333 SW 2d 728, this court said: "Private rights relative to highways may be regulated in many ways under the police power, and that without compensation . . . As the problem of regulating motor vehicle traffic on the highways has become more and more complex, new standards of design for highway construction have been adopted by the highway authorities to reduce the hazards of travel and expedite the flow of traffic . . . Such rules and regulations have been recognized by all of the authorities as a valid exercise of the police power."

As heretofore stated, the diagrams of the intersection and the pictures introduced in evidence show that there has not been any excessive impairment of ingress and egress to the Staples' property.

By way of cross-complaint, the Highway Commission alleged that the Staples have encroached on the right-of-way by maintaining thereon a concrete island, gasoline pumps, steel posts, a sign, and certain other service station fixtures; that such encroachment is in violation of Ark. Stats. Ann. § 76-544, and should be removed from the right-of-way. Since it is being held that the 12 foot strip is a part of the highway right-of-way, the Highway Commission is entitled to have the encroachments removed.

Reversed with directions to enter a decree not inconsistent herewith.

GARVAN *v.* KIMSEY

5-3510 389 S. W. 2d 870

Opinion Delivered April 12, 1965.

[As amended on denial of rehearing May 31, 1965.]

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

Glover & Glover, for appellee.

JIM JOHNSON, Associate Justice. The question here involved is the validity of a tax sale of non-producing minerals separate from the land.

The facts are generally not in dispute. Appellee Joe W. Kimsey and twenty-two other property owners in the Magnet Cove area of Hot Spring County entered into one-year lease agreements with W. A. Keith in April, 1954, for exploration, research and mining minerals on about 900 acres of land. After recording of the leases, the Hot Spring County Tax Assessor assessed the mineral interests for the year 1954 separate from the realty, ostensibly undertaking to act under the provisions of Ark. Stat. Ann.

§ 84-203 (Repl. 1960). In August, 1955, Keith executed a release of the lease agreements which was also recorded. In November, 1955, the taxes on the mineral interests assessed in Keith's name were declared delinquent and at public sale [the Sheriff's Certificates of Purchase] were purchased by appellant, Mrs. V. C. Garvan. On January 8, 1958, the County Clerk issued a Clerk's Deed of Tax Sale to appellant. On September 21, 1963, appellees filed their petition in Hot Spring Chancery Court against appellant to quiet title and remove the cloud from the nonproducing minerals.

In its decree of March 3, 1964, the court found that appellant secured by her purchase at tax sale only the title of the lessee Keith, which was for one year unless renewed for one year by payment of $10.00 per acre, which was not paid; further, that since the leases had expired by their own terms, the court felt it unnecessary to make a determination whether the original leases constituted a severance of the mineral interest from the fee; and decreed that the tax deeds were a cloud on appellees' titles and declared them void. From the decree comes this appeal.

For reversal appellant contends that at the tax sale appellant acquired not only the lessees' mineral interests, but also the interest of the lessors, and has thus become the sole owner of all the mineral interests.

The statute on separate tax assessment of mineral rights, § 84-203, reads as follows:

"When the mineral rights (and) or timber rights in any land shall, by conveyance or otherwise, be held by one or more persons, and the fee simple in the land by one or more other persons, it shall be the duty of the assessor when advised of the fact, either by personal notice, or by recording of the deeds in the office of the recorder of the deeds in the office of the recorder of the county, to assess the mineral rights (and) or timber rights in said lands separate from the general property therein. And in such a case a sale of the mineral (and) or timber rights for nonpayment of taxes shall not affect the title to the land itself, nor shall a sale of the land for nonpayment of taxes

affect the title to the mineral rights (and) or timber rights. When any mineral rights (and) or timber rights assessed as above set out, become forfeited on account of nonpayment of taxes, same shall in all things be certified to and redeemed in the same manner as is now provided for the certification and redemption of real estate upon which taxes duly assessed have not been paid."

The telling words in the statute above are: "by conveyance or otherwise." Our cases have consistently held that conveyance by deed constituted an effectual constructive severance of the mineral rights from the fee and thus subjected to assessment and forfeiture under § 84-203. However, this court has also held that an oil and gas lease does not of itself constitute constructive severance of the two estates, but conveys only an interest and easement in the land itself and no title passes until the oil and gas are reduced to possession. (*Pasteur* v. *Niswanger,* 226 Ark. 486, 290 S.W. 2d 852; *Clark* v. *Dennis,* 172 Ark. 1096, 291 S.W. 807; 16 Ark. L. Rev. 301.) In *Quality Coal Company* v. *Guthrie,* 203 Ark. 433, 157 S.W. 2d 756, this court said: "While in Arkansas the two interests [estate in the surface and estate in the oil and minerals] may be severed, we do not understand that the mere fact of leasing the lands for exploration purposes *ipso facto* creates such severance." Nor are we convinced from our search of relevant Arkansas law that a short-term non-producing mineral lease, as is here involved, is such a severance as to fall within the terms of § 84-203, *supra.*

Appellant insists that *State* v. *Arkansas Fuel Oil Company,* 179 Ark. 848, 18 S. W. 2d 906, holds to the contrary. A careful re-examination of that case including the original transcript discloses that the question there presented had to do with producing oil wells. Even though the broad language of the dissenting opinion rendered in that case seems to indicate otherwise, we are unwilling to say here that the court intended to extend the rule announced by the majority to cover short-term non-producing mineral leases.

We therefore conclude that the minerals here involved were never severed (constructively or in any other way) from the land.

Affirmed.

STATE FARM MUTUAL AUTO INS. CO. *v.* BAKER.

5-3541 388 S. W. 2d 920

Opinion Delivered April 12, 1965.

[Rehearing denied May 17, 1965.]

Crouch, Blair & Cypert, for appellant.

John W. Cloer, for appellee.

FRANK HOLT, Associate Justice. Appellant's policyholder, James A. Everett, drove his automobile in such a manner as to strike the ladder upon which Jeff Baker,[1] appellee, was working causing him to fall and be injured. Appellee, an employee of Everett's, was working with two other employees on a house which was under construction by Everett as the general contractor. Appellee filed suit against his employer, Everett, and the trial court, sitting as a jury, awarded appellee judgment in the amount of $9,650.00.

Appellant had issued its automobile insurance policy to Everett and his wife. Appellant had notice of the pen-

[1]The appellee, Jeff Baker, died during the pendency of this appeal. A motion was made and is hereby granted to revive this cause in the name of the administrator of the estate of Jeff Baker. For clarity in this opinion we continue to refer to Jeff Baker as the appellee.

dency of the action by appellee against Everett and declined to defend disclaiming any responsibility to its insured under the terms of its policy. Upon being unable to collect his judgment against Everett, the appellee filed the case at bar against appellant alleging it was obligated by the terms of its policy to pay the judgment rendered against Everett. Appellant denied any obligation under the terms of its policy to defend the action or pay the judgment against Everett.

The appellant filed a motion for summary judgment contending that the pleadings, insurance policy, interrogatories answered by appellant and the deposition of appellee and the deposition and affidavit of his son showed there was no genuine issue as to any material fact and as a matter of law appellant was entitled to a judgment. The trial court denied appellant's motion for summary judgment and, although appellee had not filed a motion for summary judgment, the court rendered judgment in favor of appellee in the amount of $9,800.00 and costs.

For reversal of this judgment appellant's sole point is that the "trial court erred in failing to grant summary judgment for the appellant." Appellant does not assign as error the action of the court in giving summary judgment to the appellee.

It is appellant's contention that there was no liability under the terms of the policy in question because of this exclusionary provision:

"This insurance does not apply under . . . (f) Coverage A, to bodily injury of any employee of the insured arising out of and in the course of the insured's employment,"

It is undisputed that appellee was an employee of appellant's insured at the time of the accident. Consequently the only question before the trial court and before us is whether appellee's injury was one "arising out of and in the course of the *insured's employment.*"

This automobile insurance policy was issued to Everett and his wife. The appellee and other employees

regularly provided for their own transportation to the job site. It appears that Everett, the general contractor, drove his car to and from work and did not use it for business purposes. Further, on occasions he borrowed or used a truck to transport his tools. Everett backed into the ladder as he was leaving the construction site.

The language used in the exclusionary clause applies to an employee's injuries arising out of and in the course of "insured's [Everett's] employment". The ambiguity of this curious language is obvious from the thrust of appellant's argument. It is directed toward the contention that the injury of Baker, the appellee, arose, "out of his employment". To say the least, it is ambiguous.

It is a familiar rule that where terms are ambiguous and fairly susceptible of different meanings, all doubts must be resolved against the insurer and in favor of the insured. *Central Manufacturers Mut. Ins. Co. of Van Wert, Ohio* v. *Friedman,* 213 Ark. 9, 209 S.W. 2d 102; *State Farm Mutual Auto. Ins. Co.* v. *Pennington,* 215 F. Supp. 784 (Ark. 1963); *St. Paul Fire & Marine Ins. Co.* v. *Coleman,* 204 F Supp. 713 and affirmed in 316 F. 2d 77 (Ark. 1963). Any ambiguity in an exclusionary clause likewise must be construed strictly against the insurer and liberally in favor of the insured. *Phoenix Assur. Co.* v. *Loetscher,* 215 Ark. 23, 219 S.W. 2d 629; *American Standard Life Ins. Co.* v. *Meier,* 220 Ark. 109, 246 S.W. 2d 128. Any intent to exclude coverage should be expressed in clear and unambibuous language and the burden is upon the insurance company to present facts that come within the exception. *Milwaukee Ins. Co.* v. *Wade,* 238 Ark. 565, 383 S.W. 2d 105. The rationale for the rule is well expressed in *Travelers' Protective Assn. of America* v. *Stephens,* 185 Ark. 660, 49 S.W. 2d 364. There we said:

"* * * It has been the settled policy of this court since the beginning of its construction of contracts of insurance to hold that the policy should be liberally construed so as not to defeat, without necessity, the claim for indemnity. The reason is that such policies are written on printed forms prepared by experts employed by the insur-

ance companies for that purpose, and the insured has no voice in the matter. Hence, it is fair and reasonable that, where there is ambiguity, or where the policy contains language susceptible of two constructions, that which will sustain the claim and cover the loss should be adopted."

It follows, therefore, that the judgment of the trial court refusing to grant appellant's motion for a summary judgment as a matter of law must be and is affirmed.

HARRIS, C. J., dissents.

CARLETON HARRIS, Chief Justice (dissenting). I feel that the majority are being entirely too technical in affirming this judgment. The pertinent section in the insurance policy is quoted in the court's opinion as follows:

"This insurance does not apply under . . . (f) Coverage A, to bodily injury of any employee of the insured arising out of and in the course of the insured's employment,"

The majority have reached the conclusion that the language is ambiguous in that it is not clear whether the exclusionary clause applies to Baker's employment or Everett's employment. I agree that Sub-section (f) could be written with a greater degree of clarity, but I think it obvious that the meaning actually is, "This insurance does not apply * * * to bodily injury of any employee of the insured arising out of and in the course of *employment by the insured.*" It is my view that in interpreting a contract, we should endeavor to ascertain the intent and purpose of the language, rather than base our findings upon poor sentence structure.

It is noticeable that appellee, in arguing for an affirmance in his brief, never once mentions the point upon which this case is being decided. He simply argues that there is no casual connection between the operation of the automobile and the work he was doing. From his brief:

"The injury did not arise out of the work appellee was hired to do. If appellee had fell from the ladder by

reason of the ladder breaking, or his foot slipping, then it would arise out of his work. The conditions under which he was required to work as a carpenter did not cause the injury."

Likewise, the trial court's decision was based entirely on the finding that Baker's injury did not "arise out of" his employment, and the court devoted quite some time to discussing the legal difference between the term, "out of," and the term, "in the course of." Quoting from the judgment, embracing the findings of the trial court:

"It would appear that in all authorities cited that if there is a casual connection between the employment and the injury of the plaintiff, or the accident results from the risk reasonably incident to the employment, that said injury is excluded under the terms of this policy. Since "out of" and "in the course of" are used conjunctively rather than disjunctively and are not considered by the authorities as being synonymous, the conditions required by each phrase must exist in order to come within the exclusion clause of the policy. Since "in the course of" refers to the time, place and circumstances under which the accident took place, it is obvious in this case that such conditions existed sufficiently in order to bring it under the exclusion terms of the policy, however, as far as the words "out of," whether it is construed as a strict causal connection between the employment and the injury, or whether there is only a reasonable connection between the employment and the injury, the requirements have not been met to bring the facts in this case under the exclusion provision of the policy. In no sense can it be said there is any causal connection or risk reasonably incident to the employment between a man standing on a ladder gabling the end of a house and being knocked therefrom by a moving automobile. Automobiles may be used to haul workmen to and from work or to deliver supplies and materials, but the driving of an automobile into a ladder placed closely against the side of a house in no way can be said to be a risk reasonably incident to the employment of the plaintiff."

Of course, I do not agree with the reasoning of the trial court, for I am of the opinion that the injury arose "out of" the employment,[1] as well as "in the course of" the employment, but I quote the aforementioned findings of the Circuit Court to emphasize that the theory upon which this case is being affirmed is entirely alien to the view taken by appellee and the trial court.

I think I can safely say that if Everett had carried Workmen's Compensation Insurance, this court, including this writer, would very quickly say that this accident arose out of Baker's employment.

However, if we must be technical, I am still of the view that the judgment should be reversed, *i.e.*, if Baker was injured in the course of Everett's employment (which the majority say is the literal meaning of the actual language used), the exclusion clause is still effective. *Baker did suffer bodily injury while an employee of Everett, arising out of and in the course of Everett's employment*, for Everett had been employed by a woman named Virginia Potts to build a dwelling house, and it was while working on construction of the house that Baker was injured. Both Baker and his son testified that Everett actually performed labor himself in constructing the dwelling.

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[1]Actually, Baker was injured by falling from the ladder, which was knocked down by the automobile, rather than being hit directly by the vehicle. To me, standing on a ladder, while working on a house under construction, and particularly where the employer frequently drove in and out, is much more incident to employment than some other cases that have been decided by this court. For instance, in *Parrish Esso Service Center* v. *Adams*, 237 Ark. 560, 374 S.W. 2d 468, a service station attendant, on duty at the station, was lifted into the air by a gust of wind, and carried approximately seventy-five feet before falling. We rejected appellant's contention that the injury did not arise out of, and in the course of, the employment. In *Williams* v. *Gifford-Hill & Co., Inc.*, 227 Ark. 340, 298 S.W. 2d 323, we held that a workman who had gone to retrieve his cap, which he had left in some bushes, and who apparently was seized by illness and fell on the railroad tracks (where he was struck by a train), was injured in the course of his employment, and that the injury arose out of the employment. In that case, the late Justice Minor W. Millwee stated: "Our compensation statute covers every injury to an employee arising out of and in the course of his employment except those injuries caused by his intoxication or by his willful intention to bring about the injury or death of himself or another."

I think the judgment should be reversed under the exclusionary provision of the policy, and I, therefore, respectfully dissent.

WILSON *v.* DAVIS

5-3552 389 S. W. 2d 442

Opinion Delivered April 19, 1965.

[Rehearing denied May 17, 1965.]

Arnold & Hamilton, By: Thomas S. Streetman, for appellant.

George Howard, Jr., for appellee.

CARLETON HARRIS, Chief Justice. This appeal involves an interpretation of certain provisions of the Probate Code. John T. Wilson died on March 5, 1963, leaving surviving him a widow, Odelle M. Wilson, appellant herein, and several brothers and sisters, and also children of deceased brothers and sisters, as collateral heirs, some of whom are appellees herein.[1] The widow petitioned for appointment as administratrix of the estate, and the court

directed that notice of such appointment be given to the collateral heirs; this notice was given to all including appellees. Thereafter, certain claims were presented to the administratrix, approved by her, and filed with the court. None of the appellees filed a request for special notice as provided in Ark. Stat. Ann. § 62-2108 (Supp. 1963).[2] Among the claims allowed was that of the Federal Land Bank Association, such claim being approved in the amount of $2,645.06, and being allowed on June 3, 1963. The court, in approving this claim (along with some others), found that Lucinda Poe, who had made request for special notice, had been notified, and that "no further notice need be given to any other person * * *." The order allowing this claim was not appealed, nor has any motion to vacate the order ever been filed. On that same date, the administratrix, appellant herein, filed her inventory of the estate, listing personal property valued at $4,415.37, and real property valued at $1,495.00. No objections or exceptions were filed to the inventory until after the estate had been closed and distribution made and approved. On October 22, 1963, appellant filed a petition with the court, setting out that the estate did not contain sufficient assets to satisfy the dower and statuory rights of the widow or to pay expenses of administration and claims in full; that she (appellant) would individually pay all claims and expenses of administration in exchange for a distribution to her absolutely of all remaining assets, including the real estate.[3] On October 29, 1963, the court found, "that the claims previously allowed by the court against the estate, the interest of the surviving widow free of claims of creditors, and the expenses of administration are in excess of the assets in hands of the Administratrix;

[1]Appellees are Robert Wilson and Zemri Wilson, brothers of the deceased, Mayme Davis and Effie Smith, sisters of the deceased, Lealle (Luella) Thompson and Eliza Brewer, nieces, and Lawrence Wilson, a nephew.

[2]Lucinda Poe, a sister, was the only heir who asked for special notice, and she was notified of all proceedings. This sister is not a party to the litigation.

[3]The petition recites that the real estate has been appraised at $1,500.00, and that a copy of the appraisal is attached to and made a part of the petition. However, the record does not contain a copy of the appraisal.

that the Administratrix is entitled to and ought to be allowed a fee in the amount of $300.00 for services as Administratrix; that the Administratrix ought to be allowed and ordered to pay a fee in the amount of $350.00 to William S. Arnold for services rendered to the estate; that the widow, Odelle M. Wilson has offered to accept a distribution to her of the assets remaining in the hands of the Administratrix in full satisfaction of the remaining dower and statutory claims of the widow and in addition to indemnify the estate against further liability on account of the approved but unpaid claim of Federal Land Bank of St. Louis in the amount of $2645.06, and the expenses of administration and attorney and administrator's fees; that it would be in the best interests of the decendent's estate and all persons interested therein that such settlement and distribution be made".

Appellant was thereupon authorized to distribute and deliver to herself individually all assets remaining in her hands as administratrix, "including but not limited to the following real and personal property". The order then describes the real estate heretofore referred to, and numerous items of personal property. The court found that such distribution "shall further be deemed settlement in full of all dower and statutory claims of the widow on account of the estate of the decedent as reflected by the inventory previously filed herein".

In November, 1963, the administratrix filed her final accounting. A date for hearing was fixed by the court (January 20, 1964), and notice of such hearing was given to all collateral heirs, including each of the appellees. Notice that the accounting had been filed was duly published. On January 20, no objections having been filed, the court (acting through a special judge) approved the account, including the prior order of distribution heretofore referred to, and discharged the administratrix and her bondsman. On the same day, a petition was filed, seeking authority to sell an interest in some stock, which had belonged to John T. Wilson, and the court authorized that Wilson's interest be sold for $4.45, and directed that this amount should be paid to appellant individually.

On April 22, 1964, appellees filed a petition to set aside the order approving the accounting and distribution, alleging that the distribution of assets to the widow was not in accordance with statutory provisions, and that the administratrix omitted from her settlement certain properties which belonged to the estate, *viz,* "approximately 40 head of cattle, certain United States Savings Bonds and other personal property". It was further alleged that, because of unavoidable casualty, appellees were prevented from appearing and entering their protests. After the filing of two amendments to the petition by appellees, and the filing of a motion to dismiss by appellant, proof was taken from some of the appellees, and the court held that a *prima facie* case had been made to the effect that the deceased was the owner of some 30 head of cattle of the value of approximately $4,000.00 at the time of his death, and the record reflects that these cattle were not scheduled in the inventory or final account. The court set aside its approval of the final accounting, set aside the order authorizing the widow to take all assets in exchange for her assumption of the debts of the estate, specifically disallowed credits which had previously been approved under Schedules "C" and "E", and likewise set aside approval of the claim of the Federal Land Bank. The estate was reopened, and the court directed that appellant, Odelle M. Wilson, continue as personal representative. Petitioners were granted twenty days from the date of the order to file written objections to the final account of the administratrix. From this order, appellant bring this appeal.

At the outset, let it be stated that, if the trial court had found that fraud had been committed by the appellant, the order entered herein by the Probate Court could have been upheld in its entirety (provided that the order was not against the preponderance of the testimony). Ark Stat. Ann. § 62-2912 (Supp. 1963) provides:

"Upon the filing of receipts or other evidence satisfactory to the court that distribution has been made as directed in the order of final distribution the court shall enter an order discharging the personal representative and his surety from further liability or accountability with

respect to the administration. Such order or an order of discharge entered under Section 161 [62-2902] b *shall be final, except, upon a petition being filed within three years of the entry thereof, it may be set aside for fraud in the settlement of the account of the personal representative.*[4]

The court, in its order, made no finding that fraud had been committed, and it would not appear that there was any thought of fraud, since, upon ordering the estate reopened, the court directed that appellant continue to serve as administratrix. We point out that the jurisdictional notices (appointment of personal representatives, and hearing on final accounting) were given appellees, and the court specifically found, in approving various other orders, that notice was not necessary, since no demand for notice had been filed. We agree that the court was within its authority in approving these orders and claims without notice, except in one instance, which will be discussed later.

We think the court erred in disallowing some of the credits under Schedule "C". As pointed out, there was no finding of fraud, and appellees took no appeal, nor filed any timely exceptions to any item allowed.

Ark. Stat. Ann. § 62-2016 (Supp. 1963) deals with appeals from orders of the Probate Court, and it is obvious, from the language of that section, that appellees did not act in a timely manner. For that matter, Schedule "C", in part, claims credit for funds expended for the widow's support ($500.00), and statutory allowance ($1,000.00), and the schedule also reports that she received the household goods. Under Ark. Stat. Ann. § 62-2501 (Supp. 1963), the widow was entitled to these allowances, except that she was only entitled to $500.00 as her statutory allowance against creditors. However, no creditor has complained of the allowance, and appellant was entitled to the $1,000.00 as against appellees. The other credits under Schedule "C" are not proper since they were awarded appellant under the order entered by the court on October 29, 1963, and which order will be subsequently discussed.

[4]Emphasis supplied.

We think it was also error for the court to set aside approval of the claim of the Federal Land Bank. The claim was allowed, and no exceptions were filed to its allowance, nor was any appeal taken. There does not appear to be any dispute that the Land Bank held a proper claim against the estate, and was due to be paid. While not shown by the record, it is entirely possible that this claim has already been paid, in which event the Land Bank probably has already surrendered the note and mortgage upon which the claim was based. Of course, if, after further testimony it should develop that this was a spurious claim, the Probate Court still has the authority to set it aside for fraud.

We affirm the court's action in setting aside the order of October, 1963, in which all property was vested in the administratrix individually upon her agreement to assume and pay all claims and expenses of administration. Appellant contends that her application was not a petition for allotment of dower, but rather was based on Ark. Stat. Ann. § 62-2403 (Supp. 1963), which reads as follows:

"When it appears to be for the best interest of the estate or in the case of an action for wrongful death, for the best interest of the estate or widow and next of kin, the personal representative, upon the authorization of or approval by the court, may effect a compromise settlement of any debt or obligation due or owing to the estate, whether arising in contract or tort, or extend, renew or in any manner modify the terms of any obligation owing to the estate. If the personal representative holds a mortgage, pledge or other lien upon property of another person, he may, in lieu of foreclosure, accept a conveyance or transfer of such encumbered assets from the owner thereof in satisfaction of the indebtedness secured by such lien, if it appears for the best interest of the estate and if the court shall so order."

We do not agree that this section is applicable. Perhaps, technically speaking, the petition filed by the widow (wherein she set out that there was not sufficient money to pay debts of the estate, and offered to assume all debts if she were vested with all property) is not, strictly speak-

ing, a petition for allotment of dower; however, in the petition appellant does, *inter alia,* aver, that, as the surviving widow, she is entitled absolutely to one-half of all real and personal property as her dower interest, and the order, signed by the court, approving the petition, likewise provides that the compromise "shall further be deemed settlement in full of all dower and statutory claims of the widow on account of the estate of the decedent as reflected by the inventory previously filed herein." Ark. Stat. Ann. § 62-704 (1947) provides the manner of petitioning for dower, and requires that "all persons interested in the property shall be summoned to appear and answer the petition * * *." Admittedly, appellees were not summoned, or otherwise notified of the petition. It would hardly be logical to hold that a petition to vest *all* of the estate in appellant required no notice, but that a petition to vest only *half* of the estate in her required the service of a summons. We hold the court's action, in setting aside this order, to be proper.[5]

While we have stated that, with the exception of the order just discussed, the trial court had no authority to set aside the approval of the settlement, including claims allowed and statutory allowances granted, the court does have authority to reopen the administration for the purpose of determining the proper distribution of the personal property alleged to have been omitted from the settlement. This authority is contained in Ark. Stat. Ann. § 62-2913 (Supp. 1963).

Summarizing, the final settlement and distribution had been approved, and collateral heirs had been notified that the final accounting was set for hearing on January

[5]In affirming the court, relative to this order, we likewise affirm as to the court's disallowance of credits claimed under Schedule "E", since Schedule "E" seeks credit for the real estate distributed to appellant as per the court order of October 29, 1963. Actually, the setting aside of this order could work to the benefit of appellant, for, under the present order, she certainly could not take more property than is shown under the inventory filed; on the other hand, if there are other assets of the value of $4,000.00 in the estate, appellant likely will be entitled to some additional amount (since proper claims which she had assumed would be chargeable to the estate). But, if there is no additional amount, the court would likely reinstate the order of October 29, 1963.

20, 1964. Despite this fact, they took no action, either as to an appeal, or by filing exceptions, and it was not until four months later that a petition was filed, seeking to set aside the settlement. Under the Probate Code, their time to follow either course had expired.[6] The order of the court, however, to reopen the case for the purpose of determining disposition of the $4,000.00 not reported is affirmed, and we likewise affirm the court's finding that the order of October 29, 1963, should be set aside for the reason that appellees were not summoned as required by Ark. Stat. Ann. § 62-704 (Supp. 1963), heretofore referred to.

Nothing herein shall be construed as upholding the validity of any order, or the approval of any claim, if it develops during subsequent hearings that the approval of any order or claim was obtained through fraud practiced on the court.

It is so ordered.

[6]The committee (which prepared the Probate Code) commented that the order of final distribution should completely bar all persons who may have a right to object to any of the proceedings as to any matter which might be the basis of their objections. It does not bar third persons who would have no right to intervene in the proceedings or to object to the order.

RANDALL *v.* STATE

5125 389 S. W. 2d 229

Opinion Delivered April 19, 1965.

W. B. Howard and *Jack Segars,* for appellant.

Bruce Bennett, Atty. Gen., *By: John P. Gill,* Asst. Atty. Gen., for appellee.

ED. F. MCFADDIN, Associate Justice. On information duly filed, the appellants, Randall and Carmack, were jointly tried and convicted of the offense of possession of burglary tools (Ark. Stat. Ann. § 41-1006 [Repl. 1964]), and they bring this appeal.[1] The motion for new trial contains nine assignments, but the appellants insist here on only the two points which we now list and discuss.

I.

The appellants state their first point: "The Court erred in admitting in evidence certain tools discovered by the Sheriff, after appellants' arrests, and after the time of the alleged commission of the offense with which they are charged, and at a place far removed from the scene of appellants' arrests, and further erred in admitting testimony relative to such tools."

The appellants were arrested in Paragould on the night of April 18th; and in their car were certain articles, being two "walkie-talkie" radios, gloves, a box of Smith & Wesson cartridges, a hand axe, a ball-peen hammer, a long screwdriver, a small screwdriver, a broad blade cold

[1]Some of our cases involving this statute are: *Satterfield* v. *State,* 174 Ark. 733, 296 S.W. 63; *Jones* v. *State,* 181 Ark. 336, 25 S.W. 2d 752; *Prather* v. *State,* 191 Ark. 903, 88 S.W. 2d 851; and *Cascio* v. *State,* 213 Ark. 418, 210 S.W. 2d 897.

chisel, a short cold chisel, a light broad bladed cold chisel, a punch, two cellophane bound packages of rope, and a loose section of grass rope marked with green stain. The appellants were placed in jail in Paragould; and two days later (April 20th) Sheriff Woodrow Davidson, having received information that the appellants had been heard to talk about a bridge, went about two miles from Paragould and there in high grass near a bridge, the Sheriff found other items, being two crowbars, chisel, flashlight, dynamite caps, and some wire to discharge the dynamite caps, a lock, and also a leather briefcase. Over the objection of appellants these additional items found at the bridge were introduced in evidence by the testimony of Sheriff Davidson. Other witnesses, likewise over appellants' objections, testified that the items found at the bridge were similar in brand, design, dirt thereon, etc., to those first found in the appellants' possession.

The ruling of the Court, in allowing the introduction of the items found at the bridge, is the point that the appellants now argue. But in the motion for new trial there is no assignment relating to the testimony of Sheriff Davidson, who introduced into evidence the tools found at the bridge. To duly preserve a point for presentation to this Court in a felony case, like the one here, there must be: (1) an objection; (2) an exception; and (3) the point must be carried forward in the motion for new trial.[2] *Clardy* v. *State,* 96 Ark. 52, 131 S.W. 46; *Long* v. *State,* 217 Ark. 712, 233 S.W. 2d 237. This third essential is lacking in the case at bar, so we cannot consider the point now argued. *State* v. *Keese,* 223 Ark. 261, 265 S.W. 2d 542.

However, in view of the reversal because of the second point, it is only proper to say that if the case is retried it must be shown by testimony *legally obtained* that it was the statement of the appellants that caused the officer to know where to find the property at the bridge.[3] We also

[2]We have held that Act. No. 555 of 1963 relates only to civil cases and that the motion for new trial is still required in criminal cases. *McConnell* v. *State,* 227 Ark. 988, 302 S.W. 2d 805.

[3]In this connection it is only fair to the present counsel to note that neither of them represented the appellants in the Trial Court or in the preparation of the motion for new trial.

think it proper to mention that while it is not necessary in a prosecution under this statute to show that the accused had the tools with the intent to commit a particular burglary, it is nevertheless proper in all cases to show felonious intent; and any evidence legally obtained bearing on felonious intent is admissible.[4] A person legally engaged in the business of opening safes might have possession of all the tools necessary for burglars, yet such mere possession, *without felonious intent,* would certainly not make a felon of a lawful business man. In *Satterfield* v. *State,* 173 Ark. 733, 296 S.W. 2d 63, the appellants were charged with possession of burglary tools. It was shown that a store had been entered in Spiro, Oklahoma, and part of the property stolen from that store was in the possession of the accused. There is this statement in the Opinion: ". . . nor was the possession of the stolen flour properly admitted over appellant's objection, for the only purpose for which it could have been competent was to show the intent for which these tools were possessed, . . ." We think that sentence and the holding regarding the exclusion of the stolen flour should be modified to the extent herein stated.

II.

The appellants state their second point: "The Court erred in receiving the testimony of witnesses to impeach the appellant Carmack with reference to the whereabouts of appellants Carmack and Randall some 12 days prior to the commission of the offense in question, their whereabouts at such time not having any relevancy to the case at bar and same being an improper attempt to impeach appellant on a collateral matter."

The appellant Randall did not testify, but the appellant Carmack did. On cross examination Carmack was asked if he and the appellant Randall were in Carruthersville, Missouri, and Haiti, Missouri, on April 5th and 6th, and whether one or both of appellants had gone into the office of the Arkansas Missouri Power Company in either or both of these towns during office hours. Carmack stated

[4]In this connection, see annotation in 103 A.L.R. 1313 entitled: "Construction and application of statute relating to burglar tools."

positively and unequivocally that he and Randall had not been in Haiti or Carruthersville, Missouri, on either April 5th or 6th, and that he had never been in the office of the Arkansas Missouri Power Company on either of said days. Then on rebuttal the State called Mrs. Annie Franklin, who was the cashier of the Arkansas Missouri Power Company at Haiti, Missouri, and Mrs. Marjorie Taylor, who was the cashier of the Arkansas Missouri Power Company at Carruthersville, Missouri; and each of these ladies positively stated that both Randall and Carmack had been in the office in which she worked during business hours of April 5th and 6th.

The testimony of each of the witnesses, Mrs. Annie Franklin and Mrs. Marjorie Taylor, was allowed over the objections of the appellants and duly preserved of record; and that ruling is the point on this appeal. The appellants argue that the testimony of the ladies was designed to impeach Carmack on a collateral matter, citing, *inter alia, Spence* v. *State,* 184 Ark. 139, 40 S.W. 986. The rule as to witnesses applies to a defendant: *Shinn* v. *State,* 150 Ark. 215, 234 S.W. 636. The correct rule on this matter was stated in *McAlister* v. *State,* 99 Ark. 604, 139 S.W. 684; "In order to avoid an interminable multiplicity of issues, it is a settled rule of practice that when a witness is cross examined on a matter collateral to the issues he cannot, as to his answer, be subsequently contradicted by the party putting the question. The test of whether a fact inquired of in cross examination is collateral is this: would the cross examining party be entitled to prove it as part of his case, tending to establish his plea?"

So the decisive question is whether the State could have offered the testimony of Mrs. Annie Franklin and Mrs. Marjorie Taylor in its case in chief; that is, could the State have shown that on April 5th and 6th these two men were in Haiti or Carruthersville, Missouri, and at each place visited the office of the Arkansas Missouri Power Company during business hours.[5] We think such

[5]There is no need for us to discuss at length the rule as to the exclusion of other crimes. See *Alford* v. *State,* 223 Ark. 330, 266 S.W. 2d 804; *Moore* v. *State,* 227 Ark. 544, 299 S.W. 2d 838; and *Rhea* v. *State,* 226 Ark. 664, 291 S.W. 2d 521.

evidence is entirely too remote, and if the State had offered it in its case in chief it should have been rejected.

For the error in admitting the testimony of the witnesses, Mrs. Franklin and Mrs. Taylor, the judgment is reversed and the cause remanded.

WIRGES *v.* BREWER

5-3369 389 S. W. 2d 226

Opinion Delivered April 19, 1965.

G. Thomas Eisele, for appellant.

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

GEORGE ROSE SMITH, J. This is an action for libel brought by C. C. Brewer, the county clerk of Conway county, against Gene Wirges, the editor and publisher

of the Morrilton Democrat, a weekly newspaper. Wirges appeals from a verdict and judgment awarding Brewer compensatory damages of $50,000 and punitive damages of $25,000. (Brewer died while the appeal was pending; the cause has been revived in the name of his personal representative.)

Wirges urges a number of points for reversal, but we find it necessary to consider only his contention that he was entitled to a directed verdict on the ground that the two articles complained of were not libelous. We sustain this contention.

Brewer's complaint was based upon the publication of a news article and an editorial in the December 27, 1962, edition of the paper. That part of the news article complained of read as follows:

"2 LAWSUITS ATTACK BALLOTS
IN DEC. 4 SCHOOL ELECTION

"Two separate lawsuits have been filed in Circuit Court challenging the results in two districts of the Conway County School Election (December 4).

"Both suits were filed with Circuit Clerk Millard Richardson on Christmas Eve—the deadline for filing such legal actions.

"The first suit filed was that of Harding A. Byrd, candidate for East Side District No. 5 School Director, who charged that all absentee ballots cast in the district were illegal. Byrd's suit asks that he be certified as the winner of the election.

"Byrd, who faced Sammie Criswell for the School Board post, polled 200 votes to Criswell's 132 in the regular boxes, but lost the election when Criswell received a 143-9 majority of the 152 absentee votes.

"Byrd took his case to the Conway County Election Commission last week, but the commission voted 2-1 to certify Criswell the winner. Republican Chairman Stuart McLeod cast the dissenting vote.

"In his case taken to Circuit Court Wednesday, Byrd charged that all the absentee votes cast are illegal and invalid because they were not handled in the manner required by law.

"Byrd alleged that the absentee ballots were ' . . . . possessed, retained, distributed, received and delivered by persons unauthorized by law.' He also stated in his suit that the ballots were distributed without regard to the statutory procedure and were received without regard to whether the votes were valid.

"The second suit filed was that of Wayne Dunlap of Malletown, who was a candidate for Position No. 2 in Morrilton School District No. 32.

"Dunlap's suit contends that his petition for election was the only legal petition filed since it was the only petition which specified a position as the law provides. Dunlap's suit asks that he be certified as the winner of the election . . . ."

The editorial, which appeared under the caption, "Around the Hub," read as follows:

"Christmas and its traditional spirit notwithstanding, there seemed to be almost no charity in the hearts of folks responsible for handling of certain recent elections and, therefore, lawsuits were filed on Christmas Eve challenging some of the votes and voting procedures.

"Suits were filed in two districts—No. 5 and No. 32—and the reasons vary considerably.

"In District 32, for example, suit was brought against City Attorney Felver Rowell charging that a petition he filed was invalid because it was improperly drawn. If a ruling goes against Rowell, he would be booted off the Morrilton School Board.

"Strangely, the apparent improper filing was pointed out to the County Election Commission BEFORE the election. The State Board of Education said flatly the petitions were invalid.

"BUT the local Election Commission called in the petitioners with such petitions and drew lots for the positions to be sought.

"Asked if it was legal, Chairman Ed Gordon said he 'didn't know.' But the names went on the ballot anyway. Now the suit seeks to correct an unfortunate situation.

"Suit No. 2 charges that many, many illegal absentee votes were cast and asks that they be thrown out as such.

"Suit No. 2's language is mild, indeed. The DEMOCRAT pointed out a couple of weeks ago about the tremendous absentee vote in that district. One precinct had so many they almost doubled the number of 'local' votes.

"As a matter of fact, absentee votes changed the entire election in District 5. One candidate was leading by almost 70 votes on the basis of 'local' votes. Then the big lopsided Absentee Box came in with the other candidate (guess whose support he had?) getting over 90 per cent of the ballots and thereby winning the election.

"Best we could tell, local officials didn't even crack a smile when that tabulation was read, matter-of-fact like.

"Nobody, but nobody, holds elections like they do in Conway County. For the life of me, it doesn't appear to be anything to be proud of.

"AND a Happy New Year to you!

—Gene Wirges"

In *Studdard* v. *Trucks,* 31 Ark. 726, we drew this distinction between words that are actionable in themselves and words that are not: "Where the natural consequence of the words is a damage, as if they import a charge of having been guilty of a crime, or of having a contagious distemper, or if they are prejudicial to a person in office, or to a person of a profession or trade, they are in themselves actionable; in other cases, the party who brings an action for words, must show the damage which was received from them." When the words in question do not on their face appear to be libelous, or when they do not on their face appear to be applicable to the plaintiff, extrin-

sic evidence may be admissible to show that the plaintiff was in fact defamed by the communication. The function of that proof, however, is explanation; it cannot change the meaning of the words. Restatement, Torts, § 563.

It will be observed that neither of the publications complained of even mentioned Brewer or the office of county clerk. At the trial the plaintiff was permitted to introduce a number of other articles that had appeared in the Morrilton Democrat, for the purpose of showing that for some time Wirges had been critical of the Conway county public officers as a group. It is argued that since the county clerk's office is responsible for the distribution, receipt, and preservation of absentee ballots, the effect of the publications in question was to charge Brewer with having participated in an election fraud.

This extrinsic evidence, as we have said, cannot serve to enlarge or change the plain meaning of the language that was used. Nowhere in either the news article or the editorial is there a charge of corruption or wrongdoing on the part of anyone, much less of Brewer in particular. It is conceded that the news article was a fair and accurate summary of the complaints in the two election contests. Those pleadings unquestionably alleged irregularities in the conduct of the election, but to say that they charged dishonesty or fraud is to read a meaning into the words which simply is not there. If a newspaper cannot impartially report a matter of public interest such as these election contests, we hardly see how it can be said that freedom of the press really exists.

In overruling a demurrer to the complaint the trial judge stated that he considered this language in the editorial to be libelous: "Then the big lopsided Absentee Box came in with the other candidate (guess whose support he had?) getting over 90 per cent of the ballots and thereby winning the election." According to the undisputed proof every statement of fact in this sentence was true. The absentee vote was big, it was lopsided, and it did win the election for the successful candidate. Truth, of course, is a complete defense to a charge of defamation such as

this one. *Waters-Pierce Oil Co.* v. *Birdwell,* 107 Ark. 310, 155 S.W. 126.

Counsel for the appellee insist that the parenthetical question—"guess whose support he had?"—was defamatory. In the first place, merely to charge a public officer with having supported some other candidate does not, in itself, involve any assertion of wrongdoing. Secondly, there is no indication in the proof that the parenthetical inquiry was understood by anyone as a reference to Brewer alone. It may have been intended as a reference to the entire group that Wirges considered to have controlling political power in the county, but an individual cannot complain of a statement about an indefinite class, especially when, as here, the statement is not actually libelous. *Comes* v. *Cruce,* 85 Ark. 79, 107 S.W. 185, 14 Ann. Cas. 327.

Reversed and dismissed.

SHERIDAN *v.* STATE

5132 389 S. W. 2d 232

Opinion Delivered April 19, 1965.

J. B. Milham, for appellant.

Bruce Bennett, Atty. Gen., *By: Jack L. Lessenberry,* Asst. Atty. Gen. for appellee.

SAM ROBINSON, Associate Justice. On February 28, 1964, appellant was convicted in the Benton Municipal Court of the charge of driving while intoxicated, in violation of Ark. Stat. Ann. § § 75-1027—29 (Repl. 1957). October 6, 1964, the transcript of the trial held in the Municipal Court was filed in the Saline Circuit Court. On the 18th day of November, 1964, the case came on for trial. After some evidence had been introduced, the prosecuting attorney discovered that the appeal from the Benton Municipal Court had not been lodged in the Circuit Court within 30 days after the date of the judgment in accordance with Ark. Stat. Ann. § 26-1307 (Repl. 1962). The prosecuting attorney, therefore, moved to dismiss the appeal because it had not been filed in the Circuit Court within the time allowed by law. The Circuit Court granted the motion to dismiss; the defendant, Sheridan, has appealed to this court.

Ark. Stat. Ann. § 26-1307 (Repl. 1962) 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."

When a party appeals it is the duty of the clerk of the municipal court to file the transcript in the office of the circuit clerk, but it is the duty of the party appealing to see that the transcript is so filed, and to give the circuit court jurisdiction the transcript must be filed with the circuit clerk within thirty days after the date of the municipal court judgment. *Whiteley* v. *Pickens,* 225 Ark. 845, 286 S.W. 2d 4; *Ex parte Hornsby,* 228 Ark. 975, 311 S.W. 2d 529.

Appellant also contends that he cannot now be compelled to serve the sentence pronounced by the Benton Municipal Court because he was sentenced to serve one

year and a year has expired since the rendition of the judgment. As authority he cites *Canard* v. *State,* 225, Ark. 559, 283 S.W. 2d 685, but the cited case is not in point. There, the defendant had been sentenced to a year and the sentence suspended. After the expiration of the year the court attempted to revoke the suspension. We held that the trial court did not have authority to revoke the suspended sentence after the year had expired. In the case at bar, the defendant was not given a suspended sentence and he does not contend that he has served any part of the sentence pronounced by the Benton Municipal Court. Of course, a defendant who has been sentenced to serve time is not entitled to be credited with the time he is free pending appeal. *Mitchell* v. *Sanford,* 161 F. 2d 374; *Weber* v. *Mosley,* 242 S.W. 2d 273. In the last cited case the court said: "Likewise, where a convicted person takes the necessary steps to appeal, the execution of sentence is suspended and the passage of time is no bar to the later enforcement of the judgment after affirmance of the conviction by the appellate court."

Affirmed.

EX PARTE, COFFELT

5-3449 389 S. W. 2d 234

Opinion Delivered April 19, 1965.

[Rehearing denied June 7, 1965.]

Kenneth Coffelt, for appellant.

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

JIM JOHNSON, Associate Justice. This is an original petition for writ of certiorari in the Supreme Court for review of a contempt of court judgment.

The history of this litigation is briefly as follows: early in 1962 Sam Bell gave the bulk of his property to his favorite niece, Leila Dereuisseaux. Bell died, and after paying funeral and other expenses, Leila in turn gave the rest of the property (real property, a mortgage and cash) to her daughter, Billie Jean. Billie Jean delivered $12,000 in cash to their attorney, Kenneth Coffelt ($2,000 of which was for attorney's fees), and entered into a contract in which they agreed to build and operate a motel. On suit by the administrator of Bell's estate and a creditor, the Faulkner Chancery Court on September 4, 1963, set aside the conveyances from Sam to Leila to Billie Jean as being fraudulent, which was affirmed by this court in *Dereuisseaux* v. *Bell,* 238 Ark. 60, 378 S.W. 2d 208. In the chancery court order Coffelt, a party defendant, was ordered to turn over to the clerk of the court as receiver the money he received from Billie Jean. Coffelt failed to comply. On December 17, 1963, the court issued an execution which was returned unsatisfied by the sheriff. In May, 1964, this court affirmed the chancery court judgment *(Dereuisseaux* v. *Bell, supra),* and on June 2, 1964, the administrator and the then judgment creditor (the creditor having in the interim reduced his claim to a judgment) petitioned the court to require Coffelt to appear and show cause why he should not be cited for contempt of court for failure to comply with the court order. A show cause order was issued June 16, 1964. At the conclusion of the evidence and

argument the cause was taken under consideration. On August 4, 1964, the court entered an order finding Coffelt in contempt of court for willful failure to comply with the September 4, 1963 *(Dereuisseaux* v. *Bell)* order to turn over to the clerk the money he received from Billie Jean. His punishment was fixed at six months in the county jail commencing September 1, 1964, provided, however, if Coffelt delivered $10,000 to the clerk of court the jail sentence would be abated.

There being no appeal from a contempt judgment, Coffelt on August 20, 1964, filed a petition in this court for writ of certiorari, (1) to have the record brought up, (2) for review of the record by this court, and (3) to quash the contempt judgment.

Petitioner contends that (1) there is enough property in the estate to pay the judgment creditor without using the $10,000; (2) that petitioners below (respondents here) are in error in contending that after the judgment is satisfied the remaining assets, if any, would not go back to Leila; and (3) that the real property and mortgage should have been sold and converted into cash before requiring him to deliver the $10,000 into the registry of the court. These contentions of course go to the merits of the Dereuisseaux versus Bell litigation and are not within the purview of the order petitioner seeks to have quashed. [See *Dereuisseaux* v. *Bell, supra,* last paragraph, leaving these matters open. See also Ark. Stat. Ann. § 62-2402 (Supp. 1963)]. Petitioner cannot refuse to obey an order and then question the correctness of the order by certiorari in lieu of appeal. Two contempt cases are in point: (1) *Carnes* v. *Butt,* 215 Ark. 549, 221 S.W. 2d 416, in which was said:

"But during the interim allowed for the benefit of each side, the defendants arbitrarily concluded that the court was wrong in issuing the injunction, hence it could be disobeyed without penalty. The law is otherwise. The proper procedure would have been to obey the order until a higher court passed upon its validity."

and (2) *Stewart* v. *State,* 221 Ark. 496, 254 S.W. 2d 55:

"That the petitioners thought the order too comprehensive is of course immaterial, since it was their duty to obey even an erroneous decree as long as it continued in force. *Carnes* v. *Butt,*" [*supra*].

Petitioner's primary contention is that the contempt judgment was issued in error because petitioner is unable to comply with the order because (1) he is insolvent, (2) the $10,000 never belonged to him, but to his wife, (3) he gave the $10,000 to his wife on August 1, 1963, one month before the decree of September 4, 1963, and (4) to put petitioner in jail would in effect imprison him for a debt.

The facts are undisputed that (1) during trial on July 30 and 31, 1963, petitioner had testified that he had $10,000 (of the $12,000) received from Billie Jean in his lockbox, (2) on August 1, 1963, petitioner gave the $10,000 to his wife (who thereafter gave it to petitioner's brother in Missouri), and (3) that the court order against petitioner was issued September 4, 1963.

Under questioning by the court during the contempt hearing on July 27, 1964, the petitioner, after testifying that his land had been conveyed to his wife but that the deeds had not been recorded, testified as follows (as abstracted by petitioner):

"The Court: What did you do with the $10,000.00 that you stated that you had in the lock box?

Mr. Coffelt: I gave it to my wife, just like I set out in the Response.

The Court: When did you give it to her?

Mr. Coffelt: I gave it to her the day after we finished taking the testimony here in this trial [*Dereuisseaux* v. *Bell*].

The Court: You knew at that time that the ownership of the $10,000.00 was in issue in this proceeding.

Mr. Coffelt: Well, yes, the ownership of the property was involved, but the ownership of all of Sam Bell's property was involved.

The Court: Knowing that to be true, why did you dispose of that property after telling the Court there that you had it in a lock box?

Mr. Coffelt: I did have it.

The Court: And that you were going to keep it there.

Mr. Coffelt: I did have it in the lock box. There's two reasons for it, Judge. I'm going to be absolutely truthful to you about it, there's two reasons. In the first place, the property belonged to my wife. There's no question about that. There's three reasons. The second is that I think she's liable under this contract with Billie Dereuisseaux on the grounds of specific performance. If the Court had — she wasn't made a party to this lawsuit and if — I told her, I said, "I don't know what the Court is going to do, but you're not made a party to this lawsuit. I want you to take the money. It belongs to you anyway and I want you to have it where, if and when there is ever any Order directed against me, I don't want them to be able to enforce it."

And further:

"The Court: What has happened to the money since you turned it over to your wife?

Mr. Coffelt: Judge, she has not got that money and I think possibly that as of this moment, I'd have to find out.

The Court: She still has it?

Mr. Coffelt: I don't think so, as of this moment.

The Court: It's available to her?

Mr. Coffelt: I don't know of this moment.

The Court: Well, of course, you're splitting hairs, aren't you, Mr. Coffelt? You're up here and you're in effect saying that — "Well, something could have happened to the money since I left Little Rock." When you left home you knew where the money was, didn't you?

Mr. Coffelt: No, sir.

The Court: When did you last know where the money was?

Mr. Coffelt: For sure—. I tell you what I think about it. In fact, I think I know. I think that that money is in the possession of my brother in St. Louis as security for a loan."

And further:

"The Court: You owe him some money and you put this money with him as security for that?

Mr. Coffelt: No, I didn't do that.

The Court: Who owes him the money?

Mr. Coffelt: Both of us.

The Court: You and your wife?

Mr. Coffelt: That's right.

The Court: Who made arrangements with him to borrow the money?

Mr. Coffelt: Both of us.

The Court: Who did the negotiating?

Mr. Coffelt: Both of us.

The Court: And when did you borrow the money from him?

Mr. Coffelt: It's been something like three years ago.

The Court: How much did you borrow?

Mr. Coffelt: $15,000.00.

The Court: What other security did you give?

Mr. Coffelt: Didn't give him any. He's got a blanket note.

The Court: Well, has this $10,000.00 been paid to him on it, that note?

Mr. Coffelt: I don't know whether he considers it as being paid to him or not."

Having elicited the above and other testimony, the judge on exchange in his meticulous opinion examined the

proceedings and testimony with great care and reached the conclusion, first, that petitioner is in effective control of the $10,000, even though it is not in his immediate possession, and has the ability to see that the funds are paid to the clerk as originally decreed, if he so desired, and second, that by delivering the money to his wife, petitioner was evading compliance with the forthcoming decree, and that such action "was so contumacious in nature and unbecoming to an attorney and officer of the court that his present plea of inability to comply cannot be accepted as a bona fide defense to the contempt of court charge."

The rule is well settled that:

"[W]here an alleged contemnor . . . . has voluntarily and contumaciously brought on himself disability to obey an order or decree, he cannot avail himself of a plea of inability to obey as a defense to a charge of contempt." 120 A.L.R. 704, 12 Am. Jur. 2d, Contempt, § 51, p. 53.

Petition denied.

ROBINSON, J., not participating.

POTLATCH FORESTS *v.* FUNK.

5-3550 389 S. W. 2d 237

Opinion Delivered April 19, 1965.

Williamson, Williamson & Ball, for appellant.

Wendell O. Epperson, for appellee.

FRANK HOLT, Associate Justice. This is a workmen's compensation case. Appellee's claim for compensation was denied by the referee. Upon review the full commission allowed appellee's claim. The circuit court affirmed the award by the commission.

For reversal the appellant first contends there was insuffient evidence to support the commission's finding that the appellee sustained an accidental injury which arose out of and in the course of his employment. When the sufficiency of the evidence is questioned we review the findings of the commission and if there is any substantial evidence to support the findings it is the duty of the circuit court and this court to affirm. *Rannals* v. *Smokeless Coal Co.,* 229 Ark. 919, 319 S.W. 2d 218.

Appellee testified that as an employee of appellant his duties required heavy lifting; that he first noticed his alleged injury on October 2, 1962; that when it got worse the next day he complained to the floor supervisor and the assistant foreman who advised him it might be due to kidney trouble or a "pulled muscle". He was permitted to leave his job that afternoon and see a local physician who

administered ultra sonic treatment and other medication. Appellee testified he returned to work the next day, although his back was still hurting him, and inquired of his floor supervisor about workmen's compensation. He was again referred to the assistant foreman at which time appellee told him, "I hurt my back while I was working on the tenon machine the other day and I wanted to know about workmen's compensation." The foreman advised appellee that he doubted his claim for workmen's compensation would be successful because appellee failed to report the injury when he had first noticed it two days previous. Appellee continued working until the middle of November when "the pain in my leg existed pretty bad, so that I couldn't hardly stand it." He then consulted Dr. Marsh locally who diagnosed his condition as a ruptured disc and referred him to a Little Rock specialist. Instead appellee, nineteen years of age, preferred to go to his home in Malvern where his father took him to see Dr. Wise. He agreed with the findings of Dr. Marsh and referred appellee to Dr. Christian, an orthopedic specialist in Little Rock. Dr. Christian hospitalized him in traction for about ten days and when appellee did not respond satisfactorily a myelogram confirmed the diagnosis of a ruptured disc. In January 1963 Dr. Christian corrected the ruptured disc by surgery. Appellee was again hospitalized the latter part of March. As of the date of the hearing before the full commission in July 1963 he was still unable to work according to Dr. Wise. Dr. Christian testified that in his opinion claimant's condition resulted from his employment with appellant.

According to appellee he had never suffered any previous discomfort with his back. When appellee started to work for appellant in August 1962 a required physical examination disclosed nothing wrong with appellee. Several of appellee's co-workers testified they had known appellee many years and had never heard him complain about any pain in his back or leg until and following the date of his alleged injury. We think there is ample evidence to sustain the finding of the commission that appellee's injury arose out of and in the course of his employment.

Appellant next contends that there was insufficient evidence to support the commission's finding that the appellant had not been prejudiced by lack of notice of the alleged compensable injury. We do not agree. Ark. Stat. Ann. § 81-1317 (Repl. 1960) provides that written notice of an injury shall be given to the employer within sixty days after the date of the injury. Subsection (c) reads in part:

"Failure to give such notice shall not bar any claim (1) if the employer had knowledge of the injury or death, (2) if the Commission determines that the employer has not been prejudiced by failure to give such notice, * *."

Our law is well settled that our Workmen's Compensation Act is to be liberally construed and any doubt resolved in favor of the claimant. *McGehee Hatchery* v. *Gunter,* 237 Ark. 448, 373 S.W. 2d 401; *Parrish Esso Service Center* v. *Adams,* 237 Ark. 560, 374 S.W. 2d 468. Appellant's floor supervisor and assistant foreman had knowledge of appellee's complaint one day after appellee noticed the discomfort in his back. On that day he was permitted by the assistant foreman to seek medical attention. Further, the matter of group insurance coverage was discussed about one month later with appellant's personnel manager, or well within the prescribed sixty days. Thus, the employer had timely knowledge of claimant's alleged injury within the meaning of the statute since the claimant reported his injury as best he knew it. *Harris Motor Co.* v. *Pitts,* 212 Ark. 145, 205 S.W. 2d 21; *Triebsch* v. *Athletic Mining & Smelting Co.,* 218 Ark. 379, 237 S.W. 2d 26.

The commission found that the lack of formal notice, if any, was not prejudicial to appellant and we think there is substantial evidence to support this finding since the employer had knowledge of the disability. *Gunn Distributing Co.* v. *Talbert,* 230 Ark. 442, 323 S.W. 2d 434. Another answer to appellant's contention relating to lack of notice is that the appellant made no objection at or before the first hearing. Ark. Stat. Ann. § 81-1317.

The appellant next urges for reversal that there was insufficient evidence to support the commission's finding

that appellee was entitled to payment for his reasonable medical and hospital expenses incurred in the past or which may be incurred in the future as a result of the alleged compensable injury and that the commission acted in excess of its powers in making such finding. The main thrust of appellant's argument is that appellee did not secure prior authorization for these medical expenses. Ark. Stat. Ann. § 81-1311 (Repl. 1960) requires that the employer provide promptly for an injured employee's necessary medical services. The appellee received a compensable back injury for which hospital and medical treatment became necessary. The employer had ample opportunity to investigate appellee's complaint and offer the needed medical services. According to the assistant foreman, he did not issue a medical slip, customarily issued to employees, since appellee was unwilling to say absolutely his "back soreness" was the result of his employment. By refusal of this medical slip appellant was in effect failing to provide the medical attention required by our statute. In the case at bar the appellee was justified in seeking on his own initiative medical assistance for which he is entitled to reimbursement. *Caldwell* v. *Vestal,* 237 Ark. 142, 371 S.W. 2d 836. It cannot be said that the commission acted in excess of it power in finding that appellant is required to furnish appellee past and future reasonable medical expenses.

Appellant's final contention is that the commission committed prejudicial error by requesting and admitting into evidence an opinion of Dr. Christian in the form of a letter. We find no merit in this contention. Dr. Christian subsequently appeared as a witness. Appellant availed itself of the opportunity by cross-examination to develop all phases of its theory of the case. Furthermore, the commission has broad discretion with reference to the admission of evidence under our Workmen's Compensation Act. Ark. Stat. Ann. § 81-1327. Dr. Christian's opinion that the nature and type of appellee's injury was causally connected with his work was similar to appellant's own expert witness, Dr. Marsh, who had examined the appellee. Dr. March testified that appellee's alleged injury was com-

patible with the type of work performed by the appellee. The admission of Dr. Christian's opinion as requested by the commission was not prejudicial to appellant.

We are of the view that there is substantial competent evidence to support the findings of the full commission in all particulars.

Affirmed.

HARRIS, C. J., not participating.

5-3575 389 S. W. 2d 428

Opinion Delivered April 26, 1965.

[redacted]

J. B. Milham, for Petitioner.

Kenneth Coffelt and *John L. Hughes* for Respondent.

CARLETON HARRIS, Chief Justice. This is a petition for a writ of prohibition. Celestia S. Palmer, petitioner herein, and Annie S. Sanders are sisters, and are two of the heirs of A. B. Smith, Sr., deceased. Smith, at the time of his death, was the owner of certain land in Saline County. In 1960, Annie S. Sanders instituted suit against petitioner and Huel Hester for $375.00, Mrs. Sanders contending that she was the owner of an undivided one-eighth interest in the land, and asserting that Celestia S. Palmer had sold timber on the land to Hester for $3,000.00, and had not accounted to her (Mrs. Sanders) for her share.

The Circuit Court of Saline County, sitting as a jury, rendered judgment for $375.00 against both petitioner and Hester. Mrs. Palmer appealed to the Supreme Court, but Hester did not. On appeal, this court reversed the Circuit Court, and remanded the cause. See *Palmer* v. *Sanders,* 233 Ark. 1, 342 S. W. 2d 300. The mandate was left in this court, where it still remains, and no further action was ever taken in that case. In October, 1962, Annie S. Sanders, and other heirs of A. B. Smith, instituted a new suit against Celestia S. Palmer and others, in the Chancery Court of Saline County, wherein the heirs seek to partition the lands, and also seek $500.00 damages for the wrongful cutting of timber. Celestia S. Palmer filed a motion to dismiss this complaint, insofar as any rights allegedly held by Annie S. Sanders were concerned, upon the grounds that the Chancery Court did not have jurisdiction of the cause of action. Appellant says, "The question for this court to decide is, can Annie S. Sanders legally file a new suit in the Chancery Court for the same damages she sued for in the Circuit Court?" It is also asserted that the Circuit Court suit is *res judicata* as to the present suit in the Chancery Court. The Chancellor overruled the motion to dismiss as to Annie S. Sanders, and petitioner now here seeks a writ of prohibition to prevent the Chancellor "from proceeding further in said cause, so far as it affects the plaintiff, Annie S. Sanders, and for all other proper relief."

We do not agree that the Chancery Court was without jurisdiction. For one thing, relief was sought in this case that was not sought in the Circuit Court suit, *i.e.,* partition of the lands. It is true that the damages include the same damages that were sought in *Palmer* v. *Sanders, supra,* but there is no jurisdiction in the Circuit Court at the present time. Ark. Stat. Ann. § 27-2144 (Repl. 1962) provides:

"The Supreme Court may reverse, affirm or modify the judgment or order appealed from, in whole or in part and as to any or all parties, and when the judgment or order has been reversed, or affirmed, the Supreme Court may remand or dismiss the cause and enter such judgment

upon the record as it may in its discretion deem just; provided, when a cause is affirmed, or reversed and remanded, the mandate must be taken out and filed in the court from which the appeal was taken by the plaintiff or defendant within one [1] year from the rendition of the judgment, affirming or reversing the cause, and not thereafter; and immediately upon the expiration of the period of one [1] year after the judgment of reversal is entered, when the mandate is not taken out, the clerk of the Supreme Court shall upon application of the party entitled thereto issue an execution for all costs accrued up to the date of reversal in the Supreme Court and in the Court from which said cause has been appealed."

In *Robeson* v. *Kempner,* 189 Ark. 27, 70 S.W. 2d 37, we said, in discussing this statute,

"If the prevailing litigant desires to invoke the aid of the court from which the appeal came to enforce the judgment, he *must file the mandate in the court within twelve months* * * *."[1]

We then went on to discuss the next section,[2] and held that *this* court still had power to enforce its judgment, whether the mandate issued or not, though the decision makes clear that the trial court, after twelve months, could acquire no further jurisdiction in the case. Of course, since we reversed *(Palmer* v. *Sanders),* rather than affirmed, there was nothing for this court to enforce. The result is simply that Mrs. Sanders was therefore free to institute her suit in any court of competent jurisdiction. No one would dispute that the Chancery Court has jurisdiction of the subject matter of the complaint.

Likewise, we do not agree that the first suit, and disposition of same, is *res judicata* as to the issue raised in the Chancery law suit, for it is obvious that *no rights were determined in Palmer* v. *Sanders, supra.* This court reversed the trial court judgment in that case, and remanded the cause, and we have said, on numerous occasions, that, when a judgment is reversed and remanded for new trial,

[1] Emphasis supplied.
[2] Presently Ark. Stat. Ann. § 27-2145 (Repl. 1962).

the case stands as if no action at all had been taken by the trial court. This was first stated as far back as 1874 in the case of *Harrison* v. *Trader and Wife,* 29 Ark. 85. In that case, we quoted language from the case of *Simmons* v. *Price,* 18 Alabama 405, as follows:

"When a judgment is reversed, the rights of the parties are immediately restored to the same condition in which they were before its rendition; and the judgment is said to be mere waste paper."

Since that time, we have had occasion to reiterate this statement many times. See *Hartford Fire Ins. Co.* v. *Enoch,* 79 Ark. 475, 96 S.W. 393; *Holt* v. *Gregory, et al,* 222 Ark. 610, 260 S.W. 2d 459. See also 50 C.J.S. Judgments, Paragraph 625, where it is stated:

"When a judgment has been reversed on appeal, or vacated or set aside by the court which rendered it, it is deprived of its conclusive character, and thereafter it no longer stands as a bar to a further suit on the same cause of action * * *."

There are other reasons why prohibition does not lie, but the aforementioned citations are sufficient to demonstrate that such an order would be inappropriate.

Writ denied.

LAMB, ADM'R *v.* FORD, EX'R.

5-3539 389 S. W. 2d 419

Opinion Delivered April 26, 1965.

Howard Mayes, Robert Branch, for appellant.

Frank Sloan, Kirsch, Cathey & Brown, for appellee.

ED. F. MCFADDIN, Associate Justice. This appeal challenges two rulings of the Probate Court made in the administration of the estate of A. R. Ford, who died testate on February 2, 1963. He was survived by his wife, Viva Lamb Ford, and by four children of a former marriage. We will separately discuss the two questions presented.

I.

Dower. The first question relates to the dower claim. Mr. Ford had executed a will on May 25, 1962, when he was a widower. Viva Lamb Ford was not mentioned in the will. He left his entire estate to his four children. Mr. Ford and Viva Lamb Ford were married on December 22, 1962, but he never changed his will. After Mr. Ford's death (which occurred on February 2, 1963) his children met with their stepmother, Viva Lamb Ford, on one or two occasions in an effort to induce her to take one-fifth of the estate in fee rather than her dower interest in the estate. Mrs. Viva Lamb Ford had the matter under consideration, but had given no definite answer, when she was killed in an automobile collision on February 6, 1963. Jones Lamb (appellant) was appointed administrator of her estate, and as such administrator he sought to claim the dower interest of Viva Lamb Ford in the estate of A. R. Ford, deceased. Appellee J. R. Ford, executor of the estate of A. R. Ford, resisted the claim of dower. Trial in the Probate Court resulted in a judgment against the estate of Viva Lamb Ford and this appeal resulted.

We thus have a factual situation wherein: (a) a man made a will which did not mention the lady that he subse-

quently married; (b) he married; (c) he died; and (d) then she died without having elected to claim her dower. It is conceded that we do not have a case with a factual situation on all fours with the one at bar. Regardless of how our statutory law and case law may have indicated views[1] prior to the adoption of the Probate Code (being Act No. 140 of 1949), we nevertheless reach the conclusion that, under the provisions of the said Probate Code, the judgment of the Probate Court on this dower matter must be affirmed.

When Mr. Ford executed his will on May 25, 1962, he was a widower and Viva Lamb Ford was not mentioned in his will. His subsequent marriage to Viva Lamb Ford did not operate as a revocation of his will because § 23 of Act No. 140 of 1949 (now found in Ark. Stat. Ann. § 60-407 [Supp. 1963] reads:

"Change in circumstances; marriage or divorce. If after making a will the testator is divorced, all provisions in the will in favor of the testator's spouse so divorced are thereby revoked. With this exception, no will or any part thereof shall be revoked by any change in the circumstances, condition or marital status of the testator; subject however, to the provisions of Section 33."

In the above section reference is made to Section 33 of the Act No. 140 of 1949, which may be found in Ark. Stat. Ann. § 60-501 (Supp. 1963); and that section reads:

"When surviving spouse may elect to take against the will. — When a married man dies testate as to any part of his estate, or when a married woman dies leaving as her last will one executed prior to her marriage, the surviving spouse shall have the right to elect to take against the will and to take such part of the property as he or she would have taken had the deceased spouse died intestate."

Furthermore, Section 37 of Act No. 140 of 1949 (as now found in Ark. Stat. Ann. § 60-505 [Supp. 1963]) reads:

[1] Section 235 of Act No. 140 of 1949 (the Probate Code Act) expressly repealed Ark. Stat. Ann. § 61-219 (1947) and also Ark. Stat. Ann. §§ 61-222 to 61-225 (1947), inclusive.

"Right of election personal to surviving spouse. — The right of election of the surviving spouse is personal. It is not transferable and does not survive the surviving spouse. The guardian of the estate of an incompetent surviving spouse may, when authorized by the court having jurisdiction over the estate of the ward, elect to take against the will in the ward's behalf."

Thus, it is clear that the will of A. R. Ford was not revoked by his subsequent marriage and that Viva Lamb Ford had the right to take against that will, if she so elected; but the right was personal to her and did not survive her. The fact that she died before making any election does not give her estate the right to subsequently make an election: the right of election ended when she died. Her stepchildren met with her on one or two occasions after the death of A. R. Ford to see if she would take a child's part of the estate (that is, one-fifth in fee), rather than her dower part. They evidently assumed — as was perfectly natural to do — that she would elect to take against the will, since she received nothing under the will; and the children were, in effect, offering to trade her a one-fifth fee interest for her dower interest when and if she elected to take dower. But all this intended trade was dependent on her election to take against the will; and she died without ever having made any such election.

Even before the Probate Code (Act No. 140 of 1949), this Court held in *Barnes* v. *Cooper,* 204 Ark. 118, 161 S.W. 2d 8, that when the wife outlived her husband only thirty minutes, nevertheless her estate could not claim her statutory allowances because she had failed to claim the same in her lifetime. After the adoption of the Code, we held in *Jeffcoat* v. *Harper,* 224 Ark. 778, 276 S.W. 2d 429, that the right to take against the will was personal. It is argued in the briefs that it was unnecessary for Viva Lamb Ford to make her election because she would take nothing under the will. Even so, she would have been required, under our statutes as previously quoted, to take steps in the Probate Court to claim her dower. She never did this, and the right, being personal as fixed by statute, died with her and her estate cannot claim dower in the estate of A. R. Ford. So

we affirm the decree of the Probate Court which denied Viva Lamb Ford's estate any dower in the estate of A. R. Ford.

II.

Ownership Of The Automobile. Viva Lamb Ford was killed in an automobile collision while in a car she had driven since her marriage. J. R. Ford, executor of the estate of A. R. Ford, took possession of the wrecked car and sold it for $839.00 and held the money as such executor. Jones Lamb, as administrator of the estate of Viva Lamb Ford, filed a claim in the Probate Court against the estate of A. R. Ford for the said $839.00; the Probate Court allowed the claim; and by cross appeal J. R. Ford, as executor, challenges the ruling of the Probate Court. We affirm the said ruling.

There was no necessity for a plenary action by Lamb, administrator, against Ford, executor. Under the peculiar situation here existing the Probate Court could properly determine whether the $839.00 was an asset of the estate of A. R. Ford or whether the proceeds of the wrecked car belonged to the estate of Viva Lamb Ford. *Carlson* v. *Carlson,* 224 Ark. 284, 273 S.W. 2d 542; and *Ellsworth* v. *Cornes,* 214 Ark. 756, 165 S.W. 2d 57. The decisive question is who owned the car; and the preponderance of the evidence established that A. R. Ford gave the car to Viva Lamb Ford as an engagement present and wedding present; and it was her car and she owned it.

The judgments of the Probate Court are affirmed on both direct appeal and cross appeal; and the costs of this appeal are to be paid equally.

PINKERT *v.* CLARK.

5-3566 389 S. W. 2d 427

Opinion Delivered April 26, 1965.

[redacted]

Frank H. Cox, for appellant.

Wayne Foster, for appellee.

ED. F. MCFADDIN, Associate Justice. This is an effort by appellants to have a tax sale declared invalid. Prior to 1948 appellants, Pinkert and Schuman, were the owners of Lot 6, Block 8, Plateau Addition to Little Rock. The 1948 State and County taxes were not paid on the lot; it was certified to the State; the forfeiture, sale and certification were confirmed by a chancery suit under the provisions of Ark. Stat. Ann. § 84-1315 *et seq.* (Repl. 1960); and on January 2, 1952, the State Land Commissioner conveyed the lot to appellee, Willa Mae Clark.

On November 9, 1956 the appellants filed this suit to have the deed of the appellee cancelled and appellants' title restored. They offered to pay the appellee all taxes, penalties, and costs incurred by her. The appellants claim that they had seasonably offered to pay the 1948 taxes and had been informed by the tax collecting authorities that no taxes were due. After hearing the evidence *ore tenus* the Chancery Court denied the prayed relief and this appeal resulted.

We have a number of cases declaring the applicable law. One such case is *Schuman* v. *Person,* 216 Ark. 732, 227 S.W. 2d 160, wherein Mr. Justice Millwee, writing for a unanimous Court, reviewed a number of earlier cases and said:

"Justice Hart, speaking for the court in *Robertson* v. *Johnson,* 124 Ark. 405, 187 S.W. 439, said: 'It is the settled rule in this State that an attempt to pay taxes made in good faith by the landowner or his agent, and frustrated by the mistake, negligence or other fault on the part of the collector, renders the subsequent sale of the land for the non-payment of taxes void. *Hickman* v. *Kempner,* 35 Ark. 505; *Gunn* v. *Thompson,* 70 Ark. 500, 69 S.W. 261; *Scroggin* v. *Ridling,* 92 Ark. 630, 121 S.W. 1053; *Knauff* v. *National Cooperage & Woodenware Co.,* 99 Ark. 137, 137 S.W. 823.' The same principle has been applied in *Kinsworthy* v. *Austin,* 23 Ark. 375; *Fleisher* v. *Wappanocca Outing Club,* 118 Ark. 287, 176 S.W. 312; *Forehand* v. *Higbee,* 133 Ark. 191, 202 S.W. 29; and *Mixon* v. *Bell,* 190 Ark. 903, 82 S.W. 2d 33."

Some of our later cases to the same effect are *Schuman* v. *Lunnie,* 219 Ark. 645, 243 S.W. 2d 937; and *Brown* v. *Bridges,* 227 Ark. 1006, 304 S.W. 2d 939.

There is no uncertainty about the law. In the case at bar the difficulty arises because of the paucity and uncertainty of the testimony offered by the one witness who testified for appellants. He was one of the parties and the testimony of a party is never considered as uncontradicted. *Gingles* v. *Rogers,* 206 Ark. 915, 175 S.W. 2d 192; *Lynch* v. *East Ark. Co.,* 193 Ark. 1004, 104 S.W. 2d 205; *Zorub* v. *Mo. Pac. Co.,* 182 Ark. 232, 31 S.W. 2d 421; and *Ford* v. *Wilson,* 172 Ark. 335, 288 S.W. 712.

The Chancellor saw the witness testify and observed his demeanor, and could thus evaluate whether in 1964 the witness could remember every detail of a transaction in 1949. The Chancellor evidently concluded that the testimony of a party as to events 15 years previous should be supported by more than mere memory. From an examination of the words on the typewritten page we do not feel free to substitute our views for those of the Chancellor.

Affirmed.

HOUSTON *v.* ADAMS

5-3536 389 S. W. 2d 872

Opinion Delivered April 26, 1965.

[As amended on denial of rehearing May 31, 1965.]

Cockrill, Laser, McGehee & Sharp, for appellant.

McMath, Leatherman, Woods & Youngdahl, for appellee.

George Rose Smith, J. This is an action by the appellees, husband and wife, for personal injuries, loss of consortium, and property damage resulting from a traffic collision at a street intersection in North Little Rock. The defendants, the owner and the driver of the truck that struck the Adams car, filed an answer denying negligence on their part and pleading what was in substance a second denial of negligence; that is, that the collision was the result of an unavoidable accident. The jury verdict was for the defendants. On the plaintiffs' motion the trial judge set the verdict aside and ordered a new trial. This appeal is from that order.

Both sides agree that it is the trial judge's duty to set aside a verdict which he considers to be against the preponderance of the evidence, *Stanley* v. *Calico Rock Ice & Elec. Co.,* 212 Ark. 385, 205 S.W. 2d 841, and that we reverse his ruling only if we find an abuse of discretion. *Farmer* v. *Smith,* 227 Ark. 638, 300 S.W. 2d 937. It was formerly necessary for the appellant, in appealing from a motion granting a new trial, to file a stipulation consenting to judgment absolute if the order should be affirmed. Ark. Stat. Ann. § § 27-2101 and -2150 (Repl. 1962). This requirement was taken out of the statute by Act 247 of 1963, which permits the appeal without the stipulation. Ark. Stat. Ann. § 27-2101 (Supp. 1963).

The defendants admit that the cause of the collision was the failure of the truckdriver, Perry Spence, to obey a stop sign at the intersection. They insist, however, that Spence's inability to stop was due to an unexpected and unavoidable failure of his brakes to function. Upon this theory they consider the verdict to have been supported by the weight of the evidence.

Spence testified that his service brake, operated by a pedal, had worked properly a few minutes earlier at a railroad crossing not far from the intersection where his truck

ran into the Adams car. When Spence attempted to stop at the intersection his service brake proved to be completely useless because (as he later learned) a leak had suddenly occurred in the hydraulic system. Spence at once attempted to apply his hand brake, but even at a speed of less than 30 miles an hour he was traveling too fast for this brake to do more than slow the truck down before the collision took place in the intersection. There is no contention that Mrs. Adams, who was driving by herself, was negligent.

The defendants, in disclaiming negligence, contend *(a)* that Spence was not at fault in failing to anticipate an abrupt breakdown in the hydraulic system, and *(b)* that there is no statutory requirement that the hand brake be capable of stopping the vehicle.

Upon the first point there was an issue of fact. The statute requires that all vehicles be equipped with adequate brakes. Ark. Stat. Ann. § 75-724 (Supp. 1963). A violation of this statute is evidence of negligence. Hence we have held that the jury may find negligence on the part of a driver whose brakes suddenly fail. *Pitts* v. *Green,* 238 Ark. 438, 382 S.W. 2d 904.

Point *(b)* is more difficult. Before the passage of Act 307 of 1959 the statute required that the service brake be adequate to stop a vehicle within 25 feet when traveling at 20 miles an hour and that the hand brake be adequate to stop it within 55 feet at that speed. Ark. Stat. Ann. § 75-724 (Repl. 1962). The appellants rely heavily upon the fact that Act 307 of 1959 eliminated the express requirement that the hand brake be adequate to stop the vehicle within any stated distance. § 75-724 (Supp. 1963).

Subsection (A, 1) of § 75-724, as re-enacted by the 1959 act, is pertinent:

"Every motor vehicle . . . . when operated upon a highway shall be equipped with brakes adequate to control the movement of and to stop and hold such vehicle, including two separate means of applying the brakes, each of which means shall be effective to apply the brakes to at

least two wheels. If these two separate means of applying the brakes are connected in any way, they shall be so constructed that failure of any one part of the operating mechanism shall not leave the motor vehicle without brakes on at least two wheels." Subsection (A, 5) requires that the hand brake be capable of holding the vehicle stationary upon a grade. Subsection (B) requires that the service brake be capable of stopping the vehicle within a certain number of seconds at certain speeds.

The appellants insist that the basic requirement in Subsection (A, 1), that the brakes be adequate "to control the movement of and to stop and hold such vehicle," means only that the service brake be capable of stopping the vehicle and that the hand brake be capable of holding it stationary when parked. In harmony with this theory they produced an expert witness who testified that the hand brake on Spence's truck was designed only to hold the vehicle and that it "had no stopping power at all." Spence himself testified that the hand brake merely slowed the truck down just before the collision.

This argument overlooks the blunt requirement in the second sentence of Subsection (A, 1) that the two braking systems be so constructed that a failure of any one part of the operating mechanism shall not leave the vehicle without brakes on at least two wheels. Thus the appellants' insistence that the hand brake need have no stopping power is demonstrably fallacious, for under that theory every failure of the service brake would leave the driver of a moving vehicle with no brakes at all, contrary to the plain intent of the act. Two other courts, in construing statutes in all material respects identical with our 1959 act, have held that the hand brake must have stopping power. *Paulson* v. *B. & L. Motor Freight,* Ohio Mun. Ct., 145 N. E. 2d 364; *Rutz* v. *Anderson,* Wyo., 334 P. 2d 496.

We conclude that the proof, at least with respect to the hand brake, indicates negligence. Since there was no negligence on the part of Mrs. Adams the trial judge did not abuse his discretion in setting aside the verdict for the

defendants. In view of the necessity for a new trial we must consider two additional points urged by the appellees.

First, it is insisted that upon the facts of this case the trial court should not give an instruction submitting the issue of unavoidable accident to the jury. It is pertinent to observe that we have held that a collision is the result of an unavoidable accident if it is not attributable to negligence on the part of either party. *Elmore* v. *Dillard,* 227 Ark. 260, 298 S.W. 2d 338; *Caldwell* v. *McLeod,* 235 Ark. 799, 362 S.W. 2d 436. The defendants argue that since the jury *might* find that they were free from negligence the instruction is proper.

In the past decade several courts have re-examined the suitability of this instruction in negligence cases. In the leading case, *Butigan* v. *Yellow Cab Co.,* 49 Cal. 2d 652, 320 P. 2d 500, 65 A.L.R. 2d 1, the Supreme Court of California overruled an earlier decision and held that the issue of unavoidable accident should not be submitted to the jury in any case (except when a definition of the term may be required by statute). From the opinion: "The so-called defense of inevitable accident is nothing more than a denial by the defendant of negligence, or a contention that his negligence, if any, was not the proximate cause of the injury . . . Since the ordinary instructions on negligence and proximate cause sufficiently show that the plaintiff must sustain his burden of proof on these issues in order to recover, the instruction on unavoidable accident serves no useful purpose.

* * * *

"The instruction is not only unnecessary, but it is also confusing. When the jurors are told that 'in law we recognize what is termed an unavoidable or inevitable accident' they may get the impression that unavoidablity is an issue to be decided and that, if proved, it constitutes a separate ground of nonliability of the defendant. Thus they may be misled as to the proper manner of determining liability, that is, solely on the basis of negligence and proximate causation."

The *Butigan* case was decided in 1958. Its rule has since been adopted in three other states. *Lewis* v. *Buckskin Joe's,* Colo., 396 P. 2d 933; *Vespe* v. *DiMarco,* 43 N. J. 430, 204 A. 2d 874; *Fenton* v. *Aleshire,* Ore., 393 P. 2d 217. On the other hand, five states have refused to follow the Butigan case. *Dietz* v. *Mead,* 2 Storey 481, 160 A. 2d 372; *Lallatin* v. *Terry,* 81 Ida. 238, 340 P. 2d 112; *Rodoni* v. *Hoskin,* 138 Mont. 164, 355 P. 2d 296; *Lucero* v. *Torres,* 67 N. M. 10, 350 P. 2d 1028; *Porter* v. *Price,* 11 Utah 2d 80, 355 P. 2d 66.

We are of the opinion that in a typical negligence case the position taken by the California court is right. In such a case the plea of unavoidable accident is in fact nothing more than an assertion that the defendant was not guilty of actionable negligence. That defense should be submitted to the jury in terms of negligence and proximate causation. For the court to submit also an issue of unavoidable accident is, as the *Butigan* opinion pointed out, to suggest that unavoidability is a separate defense, requiring separate consideration by the jury.

We do not foreclose the possibility that in exceptional situations an unavoidable accident instruction may be permissible. For example, in *Industrial Farm Home Gas Co.* v. *McDonald,* 234 Ark. 744, 355 S.W. 2d 174, both drivers testified in substance that the collision was unavoidable. That is the only case in which we have held that the court's refusal to give an unavoidable accident instruction was reversible error. Again, if a driver with no previous warning of coronary disease should lose control of his car as a result of a sudden heart attack, an ensuing collision might well be described as an unavoidable accident. But when, as here, the question is merely whether one or more of the parties were guilty of negligence we hold that the instruction in question should not be given.

Secondly, the appellees somewhat half-heartedly suggest that we should declare the appellants to be liable as a matter of law and remand the case for trial on the issue of damages only. It is not our province to decide issues of fact in law cases. In *Spink* v. *Mourton,* 235 Ark. 919, 362

S.W. 2d 665, we discussed at some length the reasons underlying the fact that a negligence case almost never presents a situation in which a directed verdict for the plaintiff is proper. That discussion fully answers the appellees' present contention and need not be repeated.

The judgment is affirmed and the cause remanded for a new trial.

POPE *v.* POPE

5-3557 389 S. W. 2d 425

Opinion Delivered April 26, 1965.

Robert N. Hardin, Simon & Simon, Ft. Worth, Texas, for appellant.

Hall, Purcell & Boswell, By: *W. Lee Tucker,* for appellee.

GEORGE ROSE SMITH, J. In 1961 the Saline chancery court entered a decree dissolving the marriage between

the appellant, who was then living in Saline County, Arkansas, and his wife, the appellee, who was then living in Texas. The decree gave the custody of the couple's two older children to their father, but the decree did not mention the couple's one-year-old daughter, who was then living in Texas with her mother. In 1963 the appellant moved to New Mexico with the two older children. Since then neither the parents nor the children have been domiciled in Arkansas.

In June of 1964 the appellant, acting through a lawyer not now in the case, filed a petition in the Saline chancery proceeding, asking that he be awarded custody of the third child. Mrs. Pope filed a response seeking custody of all three children. On August 20, 1964, the chancellor entered an order vesting temporary custody of the three children in their mother. Two days later the appellant moved that the entire proceeding be dismissed for want of jurisdiction, in view of the fact that all concerned were nonresidents. The court refused to dismiss the proceeding. This is an appeal from the order granting temporary custody to the mother and from the order denying the motion to dismiss.

We may review the temporary custody order, for such an order is appealable. *Wood* v. *Wood,* 226 Ark. 52, 287 S.W. 2d 902. We cannot review the court's refusal to dismiss, however, for that is not an appealable order. *Wicker* v. *Wicker,* 223 Ark. 219, 265 S.W. 2d 6.

The temporary custody order was not void for want of jurisdiction. The appellant, having come into court voluntarily and sought affirmative relief, is not in a position to question the court's jurisdiction over his person. *Federal Land Bank of St. Louis* v. *Gladish,* 176 Ark. 267, 2 S.W. 2d 696. As for jurisdiction of the subject matter, the fact that both parents submitted to the court's jurisdiction was a sufficient basis for the temporary order, even though its validity in the states of the children's domicile might be open to question. Leflar, Conflict of Laws, § 180.

The appellant makes the further point that the appellee's proof failed to establish a sufficient change of con-

ditions to justify an award of the two older children to the mother. In this particular case we do not think it was necessary for the appellee to prove a change of conditions. The record indicates that in obtaining a divorce in 1961 the appellant failed to take the necessary steps to see that his nonresident wife was notified of the proceedin, even though he seems to have known her whereabouts in Texas. Thus the order, as a result of the appellant's wrongful conduct, was actually *ex parte*. In the circumstances we are not willing to permit such a defective decree to become binding upon the appellee solely by the feat of lifting itself by its own bootstraps.

Affirmed.

ARK. STATE HIGHWAY COMM. *v.* TRIPLETT

5-3549 389 S. W. 2d 439

Opinion Delivered April 26, 1965.

Mark E. Woolsey, Don Langston, Lindsey J. Fairley, for appellant.

Streett & Punkett, for appellee.

PAUL WARD, Associate Justice. The Arkansas State Highway Commission (hereafter referred to as appellant) brought an action in chancery court against E. E. Triplett and wife d/b/a Dixie Hotel Courts (hereafter referred to as appellees) to require appellees to remove certain signs allegedly located on the right-of-way of U.S. Highway No. 79.

Appellees answered, alleging: (a) they were the owners of the land in dispute, and (b), by way of cross-complaint, that appellant was attempting to take a twenty-foot-wide strip of their land worth $20,000, the prayer being that appellant's complaint be dismissed or that they be paid $20,000.

On May 11, 1964 the trial court, after a full hearing, entered the substance, the findings of facts, and the decree set out below:

"The property in question lies to the south and east of U.S. Highway No. 79; on July 11, 1928 the county court entered an order condemning the 160-foot-wide right-of-way in question (80 feet on each side of a center-line) beginning at a "station number and projecting a line by referring to tangents, bearings, degrees and minutes, as well as to footage". It was conceded the County Court Order was not published and that no notice was given to the affected land owners.

Prior to 1933 there was a fence some 15 to 18 feet west of the tourist cabins which faced away from the Highway.

The court finds that the 80-foot right-of-way line will run through eight of the nine cabins located on defendants' (appellees') property.

Appellees are the owners of the land in controversy which is valued at $4,225, and it will cost appellees approximately $10,234 to rebuild the cabins.

The court then *decreed* that upon payment by appellant to appellees the sum of $14,750, title to the land in controversy would vest in appellant.

There is no controversy over the above findings of facts except as hereafter indicated.

On appeal only two points are urged for a reversal: *One,* the trial court erred in finding appellant did not own the strip of land in controversy; *Two,* In any event the amount of damages is excessive.

One. It is our conclusion that the trial court must be reversed on this point. We do not think the weight of the evidence sustains certain findings of facts as will be pointed out.

Although the trial court's opinion does not specifically say so, its conclusion appears to be founded on the fact that Highway No. 79 (as constructed under the 1928 County Court Order) was not a *new* construction, but that it was a reconstruction of an already existing *old* road. If the construction here did amount to repairing an *old* road, then this case might possibly (depending on other pertinent facts) be controlled by the case of *Ark. State Highway Commission* v. *Dobbs,* 232 Ark. 541, 340 S.W. 2d 283 which might call for an affirmance.

From our understanding of the record, this was a *new* construction.

Mrs. Audrey Stough (former wife of Barney Joyce) testified that she and her former husband were the owners of the land in controversy in 1928 when the said County Court Order was entered; that they were not paid any damages for the land taken by either the county or the state; that the land now owned by appellees was conveyed by her and her husband (Barney) to Ed and Ola Cobb on March 7, 1929; the road which was constructed was the same as now located; and, "*that the stretch of road now involved in this litigation was new and that it replaced a former stretch of the Camden and Eagle Mill road, which also crossed the Joyce property at a point west of the new or present road*". This testimony was affirmed by E. W. Rogers (Engineering Technician for appellant).

"Q. Was this a new stretch, Mr. Rogers, or do the records reflect this?

"A. Yes, the records reflect that this is a new highway, a new location."

The testimony of Mrs. Audrey Stough and others shows that appellant entered on the new location, cleared the right-of-way, set stakes, dug ditches, and placed culverts while the Joyces were living on the land. At any rate it is not disputed that appellant began blacktopping the road in 1931, at which time the property belonged to Ed and Ola Cobb.

It is immaterial, under the above established facts, whether the Joyces had notice of entry while they were owners (and failed to file a claim within one year) or if the Cobbs first received notice of entry in 1931. It follows that if the Cobbs filed a claim (within one year) or if they failed to do so, appellees are barred from filing a claim at this late date. This question was clearly settled in *Ark. State Highway Comm.* v. *Cook,* 233 Ark. 534, 345 S.W. 2d 632.

We see no merit in appellees' contention that our holding in the *Cook* case just mentioned has been changed by Act 185 of 1963. The pertinent part of Section 2 of said Act reads as follows:

"Definition of Entry and Notice: (a) Any construction work performed on a road, street, or highway where the right-of-way thereof condemned by the County Court is on a new location was entry and was notice of the existence of such Condemnation Order, from the date of performance of the work, to the person owning (prior to the Court Order) the property entered upon."

Appellees say the words in parentheses refer only to a person who owned the land *before* entry of the County Court Order but who had disposed of the land at the time the order was made. Such interpretation, we think, is unreasonable and makes the statute meaningless.

Two. In view of the conclusion above reached it is unnecessary to consider the question of damages to ap-

pellees, but we feel the cause should be remanded for the purpose hereafter mentioned.

The trial court found that if appellant did own and claim all its right-of-way, it would be necessary to move or reconstruct eight of appellees' cabins. However, during the trial, it was stipulated between counsel on both sides that appellant had no intention of disturbing any of the cabins even though they (or some of them) were over the right-of-way line. Under our holding in *Arkansas State Highway Commission* v. *McNeil,* 222 Ark. 643, 644, 262 S.W. 2d 129, appellant is bound by the actions of its attorneys. See also *Arkansas State Highway Commission* v. *Partain,* 193 Ark. 803, 103 S.W. 2d 53.

Therefore, upon request by either side, the court should order a new right-of-way line established and made a matter of record for the protection of interested parties in the future.

After carefully reviewing the record, we find no merit in appellees' contention that (a) appellant did not sufficiently comply with Rule 9 of this Court in abstracting the record, and (b) did not lodge its appeal in this Court in due time. As was said in *Allen* v. *Overturf,* 236 Ark. 387, 366 S.W. 2d 189 it is the duty of appellant "to furnish this Court with such an abridgment of the record that will enable us to understand the matters presented". Although the record is not unusually large, the appellant's abstract totals twenty-nine pages, covering the necessary pleadings and the testimony of numerous witnesses. We cannot say Rule 9 was violated. (b) The decree in this case was entered May 11, 1964, notice of appeal was filed June 5, 1964, and on July 28, 1964 the court gave appellant seven months from May 11, 1964 (or until Dec. 11, 1964) to "file the reporter's transcript of the testimony, stenographically reported and designated to be contained in the record on appeal". The transcript was filed in the clerk's office of this Court on Dec. 11, 1964. This, we think, was a sufficient compliance with the statute.

The decree of the trial court is reversed, and the cause is remanded for further proceedings in accordance with this opinion.

ARK. STATE HIGHWAY COMM. *v.* SUDDRETH

5-3535 389 S. W. 2d 423

Opinion Delivered April 26, 1965.

Mark E. Woolsey, Don Langston, Don Gillaspie, for appellant.

Franklin Wilder, Thomas Harper, for appellee.

SAM ROBINSON, Associate Justice. This is an eminent domain proceeding whereby the Arkansas State Highway Commission condemned for highway purposes 38/100 of an acre in Ft. Smith owned by appellees, J. G. Suddreth and his wife, Marceline. The condemned property is a part of a tract upon which appellees' home is located. The Highway Commission contends that appellees were damaged in the sum of $2,200 by reason of the taking. Appellees maintain that they suffered damages to the extent of $14,000. There was a jury verdict for the appellees in the sum of $8,845. The Highway Commission has appealed.

On appeal appellant argues two points. First it is contended that the court commented on the evidence and thereby erred. Second, that the court erred by remarks made in the presence of the jury prejudicial to appellant.

Appellees introduced as an expert witness on value, Mr. Jimmie Taylor, a real estate appraiser. He testified that the difference in value of the Suddreth property be-

fore and after the taking was $9,650. On cross-examination, the attorney for the Highway Commission attempted to show that the witness had taken into consideration certain things which are not regarded by law as recoverable damages. Mr. Taylor's testimony was extremely lengthy for this kind of case. The answers to questions were long and involved. The answer to one question alone takes up seven pages of the record. Several answers he gave required more than a page to transcribe. It is not at all clear that he did not take into consideration claimed damages that are not recoverable at law. Counsel for the Highway Commission moved to strike that portion of his testimony regarding severance damages because in arriving at such damages the witness took into consideration loss of view, loss of privacy, change in neighborhood, and the closing of Duncan Road. The court said: "I understood this gentleman's testimony to be that he did not consider these items, although Mr. Langston (attorney for the Highway Commission) was very diligent in seeking to get him to admit that he had, at least by inference."

It was within the province of the jury to construe the witness' testimony. The court's remark amounted to an expression of the court concerning a construction of the witness' testimony. This was a comment on the evidence, which is prohibited by Article 7, Sec. 23, of the Constitution of Arkansas. When counsel for appellant objected to the comment made by the court, the court inquired of counsel as to what manner the court had commented on the evidence; counsel then offered to approach the bench. No doubt it was the opinion of counsel that the objection in full should not be stated within the hearing of the jury. Finally, after considerable colloquy between the court and counsel for both sides, the court put an end to the objection by stating: "He means—all right, all right, we'll let it go at that."

Article 7, Section 23 of the Constitution provides: "Judges shall not charge juries with regard to matters of fact, but shall declare the law, and in jury trials shall reduce their charge or instructions to writing on the request of either party." Many times this court has held

that this provision of the Constitution prohibits the court from commenting on the evidence. The court said in *Cameron* v. *State,* 214 Ark. 512, 216 S. W. 2d 881: "Under our Constitution (Art. 7, § 23) judges are forbidden to charge juries as to the facts; and we have held that for a trial judge to communicate to the jury in any way his opinion, as to the merits of the contention of either party on a fact question, is error."

In *Harbor* v. *Campbell,* 235 Ark. 492, 360 S. W. 2d 758, the court quoted from *Fuller* v. *State,* 217 Ark. 679, 232 S. W. 2d 988, as follows: "The requirement of Art. 7, § 23, of our constitution, that 'judges shall not charge juries with regard to matters of fact.' applies as well to the credibility of witnesses and the weight to be given their testimony as to the outright truth or falsity of what they say. *St. L.S.W. Ry. Co.* v. *Britton,* 107 Ark. 158, 154 S. W. 215. And it applies not only to what judges tell juries in the course of formal instructions but also to what they say in colloquys with lawyers in the jury's hearing." In *Hinson* v. *State,* 133 Ark. 149, 201 S. W. 811, the court held it was error for the trial judge to give the jury his opinion upon any question of fact, although he admonished the jury to disregard his opinion.

We do not reach the second point, that is, whether other remarks made by the trial court were prejudicial to appellant. In a new trial the remarks complained of are not likely to be repeated.

Reversed and remanded for new trial.

Ed. F. McFaddin, Associate Justice (dissenting). In reversing the judgment in this case the Majority is holding that the Trial Judge commented on the evidence and thereby committed fatal error. There is no need to prolong this dissent by discussing the entire record. I have carefully read the record, and I do not attach such a meaning to the remarks made by the Trial Judge. I am familiar with the Constitutional provision that Judges are not to express opinions to the jury concerning the facts; and I

am sure that the Trial Judge was also familiar with the Constitution. It is one thing to explain a ruling, and quite another thing to comment on the weight of the evidence. I consider the remarks that the Court made as being explanatory and, therefore, I would affirm the judgment.

JOHNSON *v.* SANFORD

5-3531 389 S. W. 2d 421

Opinion Delivered April 26, 1965.

David Solomon, for appellant.

A. M. Coates, for appellee.

JIM JOHNSON, Associate Justice. This suit involves a contested petition for determination of heirship of an intestate's estate.

Appellant Josie Johnson filed a petition for appointment as administratrix of the estate of Will Erwin, deceased, in Phillips Probate Court on April 25, 1963, alleging that she was the daughter and sole heir of the decendent. The petition was granted on April 27, 1963, and appellant thereafter filed an inventory of the estate reflecting total assets of $6,300 in real estate and $370 in personalty. On September 28, 1963, appellee and cross-

appellant Zennie Sanford filed a petition for determination of heirship, alleging that she was decendent's only surviving child and prayed that the court, after hearing, direct the administratrix to distribute the estate to appellee. Hearing on the petition was ordered for November 25, 1963, with publication of notice of the hearing ordered and done. At appellee's behest, the court on February 18, 1964, reopened the cause and permitted the parties to introduce further testimony. In its order of September 4, 1964, the court found that appellee is not a child of or related by blood to the decendent, that appellant, although a child of decendent, is not proved to be born of a lawful marriage, that therefore neither party is entitled to inherit from the decendent, and that additional testimony should be presented to determine the decendent's heirs and next of kin. From this order both parties have appealed.

For reversal appellant contends that the court, having found appellant was decendent's child, erred in not finding appellant to be his lawful child and entitled to inherit from decedent. Appellee, on the other hand, urges that the court erred in finding that appellee was not a child of decedent.

This is not an "either-or" proposition. The parties' claims are not mutually exclusive. If both parties can prove their claims, both can prevail and both will share the estate, or either of them or neither, as the trial court found. Therefore we will consider the claims separately.

I. Claim of appellant Josie Johnson. Appellant and a large number of other witnesses testified that decedent had referred to her as his daughter on various occasions. Appellant testified that she was born in 1903, that her mother was Fannie Williams and her father Will Erwin, the decedent. Appellant also testified that she had never lived with Will or, for that matter, with her mother. She was raised by her aunts because "her mother was never around". Appellant went by the name Erwin until she married but testified that she had no knowledge concerning marriage of her parents. It was undisputed that her mother, Fannie Williams, never went by the name Erwin

and no witness testified that Will Erwin had made any statement that the mother of appellant was his wife or that he had ever cohabited with her as such. There were no marriage or divorce records relative to Fannie Williams introduced.

"It is fundamental that one who claims to be the heir of a decedent must, as a prerequisite to the right to participate in the estate, establish the relationship relied upon. *Holt* v. *Brackville,* 158 Ark. 642, 250 S. W. 33. A presumption of marriage, however, may stem from cohabitation, accompanied by declarations of the parties and behavior consistent with the status alleged. *Martin* v. *Martin,* 212 Ark. 204, 205 S. W. 2d 189." *Lockett* v. *Adams,* 212 Ark. 899, 208 S. W. 2d 428.

In the case at bar there is a complete absence of evidence showing a "cohabitation apparently matrimonial" between Will Erwin and appellant's mother, Fannie Williams. The state of the record being this, the probate court found that appellant is not proved to be born of a lawful marriage between decedent and her mother. We cannot say on trial de novo that such finding is against the weight of the evidence.

II. Claim of appellee Zennie Sanford. Appellee was born in 1894, the daughter of Mattie Mackey. Lucy, her sister, was born a year or two later. Will Erwin married Mattie Mackey in 1905 and Zennie lived with them until she married in 1906. (On her marriage certificate, appellee's maiden name is shown as Zennie Mackey, not Erwin.) After her marriage, appellee and her husband lived close by decedent and her mother, and after her mother's death appellee lived with and kept house for and took care of decedent. It was shown that decedent gave appellee and her daughter some farm land and gave Lucy a house and three acres, retaining forty acres which is the principal asset of his estate. Appellee testified that decedent told her he was her father, however, the testimony of appellee's sister Lucy and two male cousins was that appellee was not Will's daughter and was born before "Will and Mattie got together".

Appellee claims heirship as the daughter of Will Erwin born before his marriage to her mother, legitimated by their marriage under Ark. Stat. Ann. § 61-103 (1947), which provides in part:

"If a man have by a woman a child or children, and afterward shall intermarry with her, and shall recognize such children to be his, they shall be deemed and considered as legitimate."

Zennie was some eleven or twelve years old when her mother married Will Erwin and had a younger sister, Lucy, who was admittedly not the child of Will Erwin. There is an absence of convincing proof that Will ever cohabited with Zennie's mother prior to their marriage and that Will ever recognized Zennie as anything other than a devoted stepdaughter after his marriage to Mattie. It follows therefore that the evidence fell far short of meeting the requirements of Ark. Stat. Ann. § 61-103, *supra.*

Affirmed on appeal and cross-appeal.

ARK. LA. GAS CO. *v.* LAWRENCE

5-3534 389 S. W. 2d 431

Opinion Delivered April 26, 1965.

Cole & Scott, for appellant.

No brief filed for Appellee.

JIM JOHNSON, Associate Justice. This condemnation appeal involves the admissibility of a plat or survey.

Appellant Arkansas Louisiana Gas Company filed its complaint in Hot Spring Circuit Court on June 4, 1963, against appellees Margaret and T. F. Lawrence seeking to acquire a fifty foot easement for a pipeline across appellees' property. Appellant deposited $176 into the registry of the court. The case was tried to a jury on June 29, 1964, and the jury returned a verdict for appellees in the sum of $800.00.

At trial one of the appellees testified that they owned a twenty acre parcel of land (which the gasline easement crosses) and that he contemplated using the property for a housing project. He introduced a plat of the twenty acre tract, made by someone not called as a witness, showing the property laid out in 52 lots. Appellant's objection to the introduction of the plat was overruled by the trial court. On this point appellant has appealed, urging that the court erred in permitting the introduction into evidence of an unauthenticated private plat. Appellee's testimony about value of the individual lots, which was clearly not admissible (*Arkansas State Highway Commission* v. *Watkins,* 229 Ark. 27, 313 S. W. 2d 86), was not objected to.

It is not necessary for us to decide whether appellee could have authenticated a plat without testimony of the maker. Maps or plats of subdivisions have properly been admitted into evidence in condemnation cases (*Arkansas State Highway Commission* v. *O. & B., Inc.,* 227 Ark. 739, 301 S. W. 2d 309; *Arkansas State Highway Commission* v. *Witkowski,* 236 Ark. 66, 364 S. W. 2d 309) for certain purposes, where a subdivision is *in esse* at the time of the taking. In the case at bar, however, appellee admitted on cross-examination that the man who surveyed his property staked each corner of each lot, but the stakes were no longer there, that the plat had never been filed [Ark. Stat. Ann. § 17-1201 *et seq.* (Supp. 1963)], the road shown on the plat had not been dedicated or, apparently, even built, and certainly there was no evidence that any lot had ever

been offered for sale. Thus, no subdivision existed. The plat, showing lots, was not a fair representation of the property at the time of the taking. *Howell* v. *Baskins,* 213 Ark. 665, 212 S. W. 2d 353; *Sanders* v. *Walden,* 214 Ark. 523, 217 S. W. 2d 357. As said in 32 C.J.S., Evidence, § 730, p. 1050:

"Generally, a map . . . must be accurate in order to warrant its admission, that is to say, the paper must correctly represent the situation as it existed at the time under consideration; and a diagram showing a hypothetical condition and not shown to represent any condition actually existing, . . . is not admissible."

For the error in the introduction of the plat, the case is reversed and the cause remanded for a new trial.

BLACK *v.* COCKRILL, JUDGE

5-3525 389 S. W. 2d 881

Opinion Delivered April 26, 1965.

[Rehearing denied May 31, 1965.]

James R. Howard, for Petitioner.

Sam Laser, for Respondent.

FRANK HOLT, Associate Justice. The petitioners filed in this court an original petition for a writ of mandamus seeking to compel respondent, the Judge of the Third Division of the Pulaski Circuit Court, to transfer a pending civil suit from that division to the Second Division of that court. The petitioners are the plaintiffs in the pending case.

When they filed their case it was regularly assigned, pursuant to the local court rules, to the Third Division and by agreement of the parties it was set for jury trial. Before trial, however, the petitioners filed a motion to have the cause transferred to the Second Division invoking Ark. Stat. Ann. § 22-114 (Repl. 1962) which provides:

"Whenever any suit or action shall be brought or pending in any division of any circuit or chancery court of this state, where said court has more than one [1] division, and it shall appear that the presiding judge of the division in which said action is pending is interested in said suit, or has been of counsel, or is related to either of the parties or their attorneys by blood or marriage, within the fourth degree, or shall for any other reason be disqualified to hear said cause, said suit shall be upon motion of any party, transferred to another division of said court." The respondent is the brother of two members of the firm representing the defendant. The Circuit Court

of Pulaski County is divided into three divisions. Ark Stat. Ann. § 22-326.2.

This is a matter of first impression and obviously is a test case in which both parties equally desire a definitive ruling. In resisting petitioners' motion the respondent relies upon two points. The first is that the statute under which petitioners are proceeding is unconstitutional since it attempts to expand upon the constitutionally prescribed causes for disqualification of circuit judges. In support of his argument respondent cites Article 7, § 20 of the Arkansas Constitution which reads:

"Disqualification of Judges—Grounds. No judge or justice shall preside in the trial of any cause in the event of which he may be interested, or where either of the parties shall be connected with him by consanguinity or affinity, within such degree as may be prescribed by law; or in which he may have been of counsel or have presided in any inferior court." Our legislature has prescribed the limitation as being within the fourth degree of consanguinity or affinity. Ark. Stat. Ann. § 22-113.

Respondent argues that since the constitution is silent on any relationship between the presiding judge and counsel the well-known legal principle is applicable that the express mention of one thing implies the denial of another facet of that subject. Although the constitution is silent upon such relationship, the legislature has now spoken on this very subject and, we think, in a valid manner.

Our state constitution is restrictive in nature and leaves to the legislature the absolute power to legislate unless prohibited from so doing by our constitution or unless the authority has been delegated to and exercised by our federal government. It is a well established rule of law that any doubt as to the constitutionality of a legislative act must be resolved in favor of it validity. These principles of law are reflected in such cases as *State* v. *Sloan,* 66 Ark. 575, 53 S.W. 47; *Newton* v. *Edwards,* 203 Ark. 18, 155 S.W. 2d 591; *Hackler* v. *Baker,* 233 Ark. 690, 346 S.W. 2d

677, and *Hooker* v. *Parkin,* 235 Ark. 218, 357 S.W. 2d 534. In the *Newton* case we said:

"The Constitution not being a grant, but a limitation of power, the court should, in all cases, uphold a statute unless there is an express or necessarily implied limitation of the legislative power by the Constitution. It is always presumed that the act is valid, and it will be upheld unless it is clearly prohibited by the Constitution, and where it is doubtful whether an act comes within the inhibition of the Constitution, the doubt must be resolved in favor of the constitutionality of the act."

Certainly it cannot be said that Article 7, § 20 of our state constitution prohibits, expressly or by implication, the enactment by the legislature of the questioned statute. In fact, it tends to carry out the intention of Article 7, § 20 as was expressed in our early cases construing this section. For instance, in *Johnson* v. *State,* 87 Ark. 45, 112 S.W. 143, before the enactment of the questioned statute, it was argued that the constitutional provision had no application to attorneys because they were not "parties" within the meaning of the constitution. However, we held that an attorney handling a cause on a contingent fee basis is a "party" to the litigation. Thus, the presiding judge was said to come within the ambit of this constitutional restriction and, therefore, was disqualified since he and the counsel were related within the prohibited degree. There we said that a technical and strict construction of the word "party" should not be applied. It seems that the legislature in enacting Ark. Stat. Ann. § 22-114 was merely extending the disqualification provisions of Article 7, § 20. The *Johnson* case was cited with approval in the later case of *Ferrell* v. *Keel,* 103 Ark. 96, 146 S. W. 494 and *Copeland* v. *Huff,* 222 Ark. 420, 261 S. W. 2d 2. A liberal scope of the word "parties" has been applied by this court whenever we have had occasion to construe the implications of Article 7, § 20 of our constitution.

In respondent's brief, recognition is given to the validity of Ark. Stat. Ann. § 22-326.6. Such recognition, in effect, strengthens the position of petitioners. This legis-

lative enactment empowers the Judges of the Second and Third Divisions (respondent) of the Pulaski Circuit Court, by joint action or appropriate rules, to assign or transfer all civil cases for trial. Apparently it was pursuant to this statute that the case at bar was regularly assigned. If this statute giving such authority to respondent is valid as asserted, then certainly it must follow that the legislature also has the authority to prescribe other conditions governing the transfer of a civil case from one division to another. This is exactly what the questioned statute provides. Nor can it be said the Act contravenes Article 7, § § 21 and 22 which respectively make provisions for the selection of a special judge and the exchange of circuits. Further, the Act is not at variance with the principle of separation of powers of our government.

Having found Ark. Stat. Ann. § 22-114 to be constitutional, we now direct our attention to respondent's second point which is that this statute is not applicable in the instant case. The main thrust of respondent's argument on this point is that another judge will be presiding on the day of the trial. It is undisputed that the respondent judge in characteristic fairness has voluntarily refused for some twenty years to preside whenever a relative represented a litigant in his court.

We think Ark. Stat. Ann. § 22-114 is applicable to the case at bar. The pertinent part provides:

"Whenever any suit or action shall be * pending * * * and it shall appear that the *presiding judge of the division* in which said action is pending * * is related to either of the parties or their attorneys by blood or marriage within the fourth degree * * * said suit *shall be* upon motion of any party *transferred to another division* of said court." [Emphasis added.] Its language is not restricted to who shall be presiding on the day of the trial. Its terms are mandatory that the cause shall be transferred to another division at any time during the pendency of the action upon the motion of any party. The meaning of a statute must be determined from the natural and obvious import of the language used by the legislature without

resorting to subtle and forced construction for the purpose of limiting or extending the meaning. *Hines* v. *Mills,* 187 Ark. 465, 60 S. W. 2d 181. It is our duty to construe a legislative enactment just as it reads.

Motion for the writ is granted.

CHICAGO, ROCK ISLAND & PACIFIC R. R. CO. *v.* MCCONNELL HEAVY HAULING

5-3555 390 S. W. 2d 111

Opinion Delivered May 3, 1965.

[Rehearing denied June 7, 1965.]

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

Jack Holt, Jr. and *John F. Park,* for appellee.

CARLETON HARRIS, Chief Justice. In July, 1962, three representatives of appellant company, Chicago, Rock Island and Pacific Railway, called upon F. O. McConnell, president of McConnell Heavy Hauling, Inc., appellee herein, for the purpose of arranging for McConnell to unload and haul steel components from the Rock Island railhead to various missile construction sites near Little Rock. Charles J. Novak had been employed by the railroad as a special representative to solicit transportation of materials to the construction sites of missile bases. The Missouri Commerce Commission had granted Rock Island authority to operate a subsidiary motor carrier operation in that state, and this allowed Rock Island to offer to shippers a package proposal whereby construction materials were delivered by rail to the railhead nearest the

sites, and from the railhead to the site by truck. Rock Island did not have the necessary authority to make such a proposal in other states, but Mr. Novak solicited transportation business wherever missiles were being constructed. Rates and billing were not discussed by Novak with McConnell but the railroad agent was given a copy of McConnell's tariff, and Novak stated that he would subsequently send billing instructions to McConnell. Some months later, McConnell was notified of the first shipment of steel, and proceeded to unload it from the railroad cars, and to deliver it to the contractor on the missile sites. The steel was shipped on railroad bills of lading, and Panhandle Steel Products Corporation was named as both shipper and consignee. The bill of lading further stated, "% McConnell Heavy Hauling." Thereafter Novak informed McConnell that the unloading and hauling bills should be sent to Panhandle, and McConnell followed these instructions, but failed to receive payment. Subsequently, a representative of McConnell Company talked to the manager of Panhandle, and learned that Novak had entered into an agreement with Panhandle for that company to pay $4.00 a ton for unloading and hauling from the railhead, with the Rock Island to pay the balance of unloading and hauling costs. It is undisputed that McConnell never agreed to perform the work for $4.00 a ton, but rather has insisted at all times upon receiving its full tariff rates, which were considerably higher.

After getting back the invoices sent to Panhandle, appellee made demand upon the Rock Island for the full amount due, *viz,* $3,097.25 for unloading, and $2,855.00 for hauling. Payment was refused by appellant. Subsequently, McConnell instituted suit for the total amount, and, after the filing of an answer, denying liability, the case was tried by the Pulaski County Circuit Court, sitting as a jury. After hearing testimony, the court entered its judgment in favor of appellee in the amount of $5,952.25, together with interest at the rate of six percent per annum until paid, and from such judgment, appellant brings this appeal. For reversal, appellant relies solely upon the following single point:

"For the Railroad to pay the costs of unloading and hauling in this case would be for it to grant an illegal rebate to the shipper. Therefore, any purported agreement to pay such costs would be illegal and unenforceable."

This litigation is somewhat unusual in that there is no dispute, but that McConnell Company performed services, and there is no disagreement as to the value of the services performed.

Appellant states that McConnell, instead of properly suing Panhandle Corporation, has sought to make the railroad liable on an oral contract, entered into by an agent (Novak), who had no authority to contract. From appellant's brief:

"The Railroad has been embarrassed by the conduct of this agent in this case and in several other similar transactions in other states. However, whether the Railroad is embarrassed or hard-boiled, it is flatly prohibited by statutes of the United States from absorbing the costs of unloading and hauling steel and thereby, in effect, granting a rebate to the shipper in this case."

Appellant then cites a number of cases, which it contends to be controlling in this litigation. However, we do not agree that the cases cited are applicable to the case at bar, for the authority relied upon by appellant involves agreements between carrier and shipper, carrier and consignee, et cetera. Here, we have an agreement *between two carriers*. McConnell testified that no mention was made of Panhandle when Novak made the arrangements for McConnell Company to unload the railway cars and haul the material to the missile sites, and John Hicks, terminal manager for McConnell Company, gave the Rock Island representatives a copy of McConnell's tariffs. From the testimony:

"Q. Mr. McConnell, was there any discussion at this particular time concerning who was employing your company for this job?

A. No, Chicago said they had, I mean the Railroad said they had the steel to haul and wanted it unloaded and

hauled to the site and that we were common carriers within the line and would we haul for them.

Q. They did not identify any third party? In other words, they asked you to haul for them, is that correct?

A. Yes, sir, that's right."

Albert F. Hatcher of Deerfield, Illinois, Assistant Vice-President of traffic for the Rock Island, testified that in February, 1963, he learned that Novak had been making unauthorized representations to contractors and shippers in various places over the nation, mentioning that he had received a telephone call from a company in Spokane, Washington, requesting payment for work that had been done. He also mentioned similar occurrences in Tucson, Arizona, and Wichita, Kansas. Hatcher testified that when he would finally locate Novak, the latter would deny that he had made any such arrangements, but said that he would "straighten it out." Hatcher stated that Novak's services with the Rock Island were eventually terminated.

Under the undisputed testimony, it accordingly appears that Novak, on behalf of the Rock Island, entered into an agreement with McConnell Company for the latter to haul steel from the railhead at Little Rock to the missile sites; that no mention was made of the steel company for which the hauling was to be performed; that no agreement of any nature was made between appellee and Panhandle; that McConnell Company made known to the railway representatives its rates by furnishing them a copy of its tariff schedule.

Appellant's defense is particularly interesting in one respect. It contends that it could not perform such an agreement, because same would be illegal, and therefore unenforceable. Yet, as stated by appellee, in its brief:

"The Appellant is now asking that the Appellee be required to do what it strenuously contends it would be unlawful for Appellant to do. Appellant is asking that Appellee be required to deviate from its own tariff schedule and grant to it, Appellant, an illegal rebate. Appellee is bound by the same laws, and the same regulations of the

Interstate Commerce Commission as is the Appellant. Should Appellee agree to accept payment for its services in any amount less or different than the rates and charges specified in its tariff it would amount to an illegal exaction, which is unlawful, and would subject Appellee to penalties."

We think there was substantial evidence to support a finding that McConnell Company did not occupy the status of a consignee—nor the status of an agent of consignee—nor was it an agent of the appellant railroad. This is simply a case where appellee is endeavoring to recover for an indebtedness due for services performed under a hauling and unloading contract with appellant.

Affirmed.

Mr. Justice Holt not participating.

RIDGEWAY *v.* STATE

5129 389 S. W. 2d 617

Opinion Delivered May 3, 1965.

[Rehearing denied May 24, 1965.]

[redacted]

Ward & Mooney, for Petitioner.

Bruce Bennett, Atty. General, By: *Beryl F. Anthony, Jr.,* Asst. Atty. General, for Respondent.

ED. F. MCFADDIN, Associate Justice. The present case is a sequel to *Ridgeway* v. *Catlett,* 238 Ark. 323, 379 S. W. 2d 277. That case was decided on June 1, 1964; and in it we said that since Ridgeway had been convicted of the crime of embezzling public funds, no executive pardon could restore to him eligibility to hold public office (Art. 5, § 9 of the Arkansas Constitution). As a direct result of that holding, Ridgeway filed, on July 16, 1964, in the Circuit Court of Jackson County, Arkansas, his pleading entitled, "Petition for Writ of Error *Coram Nobis,*" in which he sought to expunge from the records of that Court his conviction for said embezzlement. The conviction was based on a plea of guilty which Ridgeway made in open Court on September 5, 1955.

The regular Judge of the Jackson Circuit Court is Hon. Andrew W. Ponder. He exchanged circuits with Hon. P. S. Cunningham, Chancellor of the 8th Chancery District; and Judge Cunningham presided over the hearing on this motion for writ of *error coram nobis.* Testimony was heard in open Court on August 21, 1964, the witnesses being Mr. Ridgeway, Hon. Judson Hout, an attorney of Newport, and Hon. Andrew Ponder, the Judge who accepted Ridgeway's plea of guilty and sentenced him to the penitentiary in 1955. At the conclusion of the hearing Judge Cunningham denied Ridgeway's petition for writ of *error coram nobis,* and from such judgment Ridgeway prosecutes the present proceeding to this Court, which is really a petition for *certiorari.*[1]

While the motion for writ of *error coram nobis* contained a number of allegations, all were waived by Ridge-

[1] In *Hodges* v. *State,* 111 Ark. 22, 163 S. W. 506, we said: "*Certiorari* must be, and is, the appropriate remedy to review the action of the trial court in refusing the petition for writ of *error coram nobis.* In view of the quoted language, we treat the present case as being before us on *certiorari.*

way's present counsel when, at the opening of the trial on August 21, 1964 (from which trial comes the present appeal) Ridgeway's present counsel made the following statement:

"We are relying on the allegations in paragraph 2 and 6 where we allege that he was unable financially to obtain legal counsel of his own volition; and that he never at any time was afforded an opportunity understandingly and intelligently to waive Court appointed counsel. Legally, that is the whole substance of our lawsuit upon which we will make proof."[2]

On May 21, 1955 an information was filed by the Prosecuting Attorney in the Jackson Circuit Court, charging: that Ridgeway(during the period he was delinquent tax collector, did unlawfully and feloniously use and appropriate funds belonging to the County of Jackson and to the various school districts therein for his own uses and purposes. On the same day of the filing of the information, the Circuit Court on the motion of the Prosecuting Attorney removed Ridgeway from office as said Tax Collector, pursuant to Ark. Stat. Ann. § 41-3920 *et seq.* (1947). Ridgeway was arrested on May 21, 1955, and remained on

[2] Paragraph 2 of Ridgeway's said motion for writ of *error coram nobis* reads:

"This defendant under date of September 5, 1955, was allowed without benefit of legal counsel to enter a plea of guilty to a felonius crime described as embezzlement and misappropriation of public funds in his capacity as a delinquent tax collector for Jackson County, Arkansas, said crime carrying with it a possible sentence of 21 years in the State Penitentiary and forfeiture of the defendant's right to hold public office in Arkansas forever, notwithstanding said defendant, before his plea of guilty, told the Court he had desired counsel but was unable to employ an attorney because he was wholly without money or credit. After this statement by defendant in open court, the Court still did not appoint or offer to appoint a qualified attorney to consult and advise with him concerning his guilt and legal rights before accepting his plea of guilty. The action of this Court in thus accepting a plea of guilty from defendant violated the defendant's rights and violated due process of law as defined by Article 2, Section 10, The Constitution of Arkansas; Amendment No. VI to the Constitution of the United States; and Amendment No. XIV to the Constitution of the United States."

Paragraph 6 of said Motion reads:

"At no time prior to acceptance of his plea of guilty to the crime charged by this Court did the defendant ever have an opportunity understandingly and intelligently to accept or waive legal counsel by appointment of the Court."

bond until September 5, 1955, when he entered his plea of guilty and was sentenced to five years in the penitentiary.

After the plea of guilty and the sentence, Ridgeway's mother went to Judge Andrew Ponder and told him that she would never believe that her son could commit such a crime if he were in his right mind. So, in order to satisfy the mother, Judge Ponder specified in Ridgeway's commitment to the penitentiary that he should be sent via the State Hospital for thirty days examination. Judge Ponder testified in the hearing in August 1964 that he never had any doubt of Ridgeway's sanity and he merely sent him to the hospital for examination and report in order to satisfy Ridgeway's mother, a very fine Christian woman. The hospital report was sent back to Judge Ponder and introduced in evidence in this case, and it showed Ridgeway to be perfectly sane. After thirty days in the State Hospital Ridgeway went on to the penitentiary and served enough of his sentence to be eligible for parole, and was later pardoned, as previously recited.

At the trial before Judge Cunningham in 1964, there was no claim that Ridgeway had ever been insane, so no issue of insanity is in this case. Among the points on which Ridgeway relies there are: (1) that he was not represented by counsel when he entered his plea of guilty in 1955; and (2) that he was not able to employ counsel and did not understand that court appointed counsel would be furnished him free of charge. Of course, these claims of Ridgeway appear to us now as an afterthought. If this Court had held in *Ridgeway* v. *Catlett, supra,* that the pardon which Ridgeway received in fact restored him to eligibility to public office, then we feel confident that no writ of *error coram nobis* would ever have been considered or filed; and this leads us to a consideration of the real purpose and extent of a petition for writ of *error coram nobis.* In *Howard* v. *State,* 58 Ark. 229, 24 S. W. 8, we said of the writ of *error coram nobis:*

"The office of the writ is to correct an error of fact in respect to a matter affecting the validity and regularity of the proceedings in the same court in which the judgment

was rendered and where the record is, when the error assigned is not for any fault of the court; those errors which precede the judgment—as error in the process, or through default of the clerk; where an infant appears by attorney, and not by guardian; where the defendant was insane at the time of the trial, or died before judgment. And this writ has been sustained where the defendant was induced to plead guilty to a charge of felony through fear and by reason of the threats of a mob.

"But it will not lie to contradict or put in issue any fact that has been already adjudicated in the action. An issue of fact wrongly decided is not error, in that technical sense to which the writ refers. If the error lie in the judgment itself, it must be corrected by appeal or writ of error to a superior court."

In *Mitchell* v. *State,* 234 Ark. 762, 354 S. W. 2d 557, we discussed in some length the matter of a writ of *error coram nobis* and cited some of our earlier cases.[3] The writ is to correct mistakes of fact, not mistakes of law. If the Trial Court made any mistake in having Ridgeway sent to the State Hospital enroute to the penitentiary, then certainly that was a mistake of law and not susceptible to being considered on writ of *error coram nobis.* But the sending of Ridgeway to the State Hospital and the examination of Ridgeway by the State Hospital officials and the report to the Circuit Court certainly shows that any possible claim of Ridgeway's insanity was before the Circuit Court and cannot now be considered on petition for writ of *error coram nobis.* See *Mitchell* v. *State, supra.*

Ridgeway's first point is his claim that he was allowed to enter a plea of guilty without having a lawyer represent him; and in making this plea he seeks to bring himself under the holdings of such cases as *Dement* v. *State,* 236 Ark. 851, 37 0S. W. 2d 191; *Carnley* v. *Cochran,* 369 U.S. 506, 8 L.Ed. 2d 70, 82 S. Ct. 884; and *Gideon* v. *Wainwright,*

[3] In addition to the annotations in A.L.R. cited in the Mitchell case, we call attention to the following texts and writings regarding *coram nobis*: 24 C.J.S. p. 661 *et seq.*, "Criminal Law" § 1606 *et seq.*, 49 C.J.S. p. 561 *et seq.*, "Judgments" § 311 *et seq.*,; and Am. Jur. Vol. 30A, p. 687, "Judgments" § 734 *et seq.*

372 U.S. 335, 9 L.Ed. 2d 799, 83 S. Ct. 792, 93 A.L.R. 2d 733. But the evidence in this *coram nobis* hearing clearly and without contradiction shows that Ridgeway stated in open Court that he did not desire an attorney to represent him when he was sentenced in 1955. Ridgeway testified on direct examination in the *coram nobis* hearing:

"Q. Did the Court ask you if you had an attorney?

"A. Yes.

"Q. All right, if you remember, what did you tell him?

"A. I said 'No,' and he said, 'Well, the Court will appoint you an attorney.' And I said I didn't want an attorney, that I would act as my own attorney and throw myself on the mercy of the Court."

Then on cross examination Ridgeway testified:

"Q. So to recap it, if I do it correctly, the Court asked you if you wanted the Court to appoint you an attorney. You said that you didn't want an attorney, you couldn't afford it, anyway you would be your own attorney and throw yourself on the mercy of the court.

"A. I don't think I said I couldn't afford it at that time, I am trying to recall exactly what was said and I am almost; well, I knew what was said that he asked me, the Judge asked me if I wanted an attorney that the Court would appoint me an attorney; I said I did not want an attorney, that I would act as my own attorney and throw myself on the mercy of the court.

"Q. There was no conversation then between you and the Judge with respect to the fact that you couldn't afford an attorney. You merely stated you didn't want an attorney, you would act as your own attorney and throw yourself on the mercy of the court?

"A. I don't remember any conversation, Mr. Harkey.

"Q. Did I state correctly what took place?

"A. Yes.

"Q. Mr. Ridgeway, just a few more questions, First, so the record will be perfectly clear: There was no conversation now on the date of sentence between you and Judge Ponder about you couldn't afford an attorney?

"A. Between Judge Ponder and myself?

"Q. That is right.

"A. No, sir."

Hon. Judson Hout, who represented Ridgeway in other matters, testified that Ridgeway told him in 1955 that he (Ridgeway) had decided he did not want an attorney because he was going to plead guilty and throw himself on the mercy of the Court. Judge Andrew Ponder, who accepted Ridgeway's plea of guilty and gave him the minimum sentence in 1955, testified in this *coram nobis* hearing that before he accepted Ridgeway's plea he told him (Ridgeway) in open Court that the Court would appoint him an attorney who would serve free of charge; and that Ridgeway stated in open Court that he did not want an attorney because he was guilty and wanted to throw himself on the mercy of the Court.

Thus, Ridgeway and the other two witnesses all agree that before Ridgeway entered his plea of guilty in 1955 he was offered counsel and refused the same. Under these facts, Ridgeway does not bring himself under the rule of the cases on which he relies.

Mr. Ridgeway's second point is that he did not understand that he would have a lawyer without cost, even if the Court might appoint one; and so he claims that he did not "intelligently and understandingly" refuse counsel. But the evidence preponderates against him on this point. Judge Ponder testified at length how Ridgeway came to him in chambers desiring to enter his plea, how Judge Ponder required him to appear in open Court, how the Court painstakingly and sympathetically discussed the case with Ridgeway in open Court, and how the services of free counsel were offered to Ridgeway and declined

"Q. And did you explain to him that under our system he could have a court appointed attorney free of charge if he desired?

"A. I certainly did."

There is also presented a point that Hon. Judson Hout should not have been allowed to testify in the *coram nobis* proceedings because he had represented Ridgeway in other matters. There are several answers to this point, but only one need be mentioned. Mr. Ridgeway testified:

"Q. Did Mr. Jud Hout represent you in that matter?

"A. No, sir, he did not.

"Q. In any conversation that you did have with Mr. Jud Hout did he ever suggest that you ought to enter a plea of guilty?

"A. No, sir, he did not."

We conclude that the Trial Court was correct in denying the motion for writ of *error coram nobis*.

DENNIS *v.* DENNIS

5-3569 389 S. W. 2d 631

Opinion Delivered May 3, 1965.

[redacted]

Parker Parker for appellant.

C. R. George for appellee.

George Rose Smith, J. This is a divorce suit brought by the appellee, Betty Dennis, to whom the chancellor awarded a divorce on the ground of personal indignities. An appeal and cross appeal present a number of questions for review.

The appellant's principal contention is that the court should have awarded him a divorce on the ground of adultery. He filed a counterclaim bringing a corespondent into the case and offered much testimony tending to establish an adulterous relationship between Betty Dennis and this man. This testimony is contradicted by at least an equal number of witnesses who took the stand in Betty's behalf. Significantly, one of Betty's most loyal defenders was the wife of her supposed paramour. It would add nothing either to the strength of this opinion or to its usefulness as a precedent for us to detail the conflicting testimony upon this hotly contested issue. The question is essentially one of fact, upon which the conflicting proof is about as nearly evenly balanced as it could be. Unquestionably some of the testimony on one side or the other was deliberately false. In this situation we defer to the chancellor's judgment, for his opportunity to observe the witnesses at firsthand put him in a position that is immeasurably superior to ours. *Murphy* v. *Osborne,* 211 Ark. 319, 200 S. W. 2d 517.

Our decision upon this first point goes far toward answering the appellant's contentions that the court should not have awarded Betty either a divorce or the custody of the couple's three-year-old son. Dennis undoubtedly was extremely jealous of his wife. He not only accused her of infidelity but also made the same charge in conversations with friends. Such unfounded assertions were in themselves indignities justifying a dissolution of the marriage. *Relaford* v. *Relaford,* 235 Ark. 325, 359 S. W. 2d 801. And

if in fact Betty is a woman of fine character, as her proof indicates, the chancellor was right in giving her the care of a child of tender years.

Both litigants are dissatisfied with the chancellor's dceision to permit the appellee to occupy the family home near Danville as long as she remains unremarried. Dennis thinks this property should have been sold and the proceeds divided. There is persuasive proof, however, that Betty used funds from her first husband's estate to contribute at least her full share toward the purchase of the property. In any event we should be reluctant to disturb the chancellor's conclusion to award the possession of the homestead to the wife. *Childers* v. *Childers,* 229 Ark. 11, 313 S. W. 2d 75. Betty complains of the fact that her right to occupy the property will terminate if she remarries, but we certainly cannot say that the appellant is under a duty to contribute toward furnishing a home for the appellee's third husband if she should decide to marry again.

The appellee insists that the chancellor's allowance of $80 a month as alimony and child support is inadequate. We reject this contention. Dennis has an income of only about $5,000 a year, out of which he must pay $50 a month to his first wife. Betty receives Social Security payments for the benefit of her children by her first marriage, of more than $250 a month. She also has some income of her own and will be entitled to occupy the homestead rent-free as long as she remains single. In the circumstances the chancellor's allowance of alimony was as generous as it should be.

We affirm the decree and allow the appellee's counsel an additional fee of $350 for his services in the case.

ROBINSON *v.* J. A. RIGGS TRACTOR CO.

5-3567 389 S. W. 2d 629

Opinion Delivered May 3, 1965.

John B. Hainen, for appellant.

Smith, Sanderson, Stroud & McClerkin, for appellee.

PAUL WARD, Associate Justice. This litigation stems from the sale of a heavy piece of earthmoving equipment, known as a traxcavator. The traxcavator was sold to W. W. Robinson (appellant) on May 9, 1962 by J. A. Riggs Tractor Co. of Little Rock (appellee), on a conditional sales contract, for the price of $23,743.68. There was a trade-in allowance of $665 and the balance payable in monthly installments of $638.68 each.

It was the understanding of both parties that the traxcavator was *new* equipment and *not used* equipment when the sale was consummated. It is admitted by appellee that it gave a warranty on all *new* equipment (including this traxcavator) for six months from the date of sale. Appellee did not give a warranty on any *used* equipment sold by it.

Appellant kept and used the traxcavator from May 9, 1962 until about the first of February, 1964, although he became delinquent in his monthly payments on October 9, 1962, and never thereafter became current.

On February 19, 1964 appellee filed suit in chancery court seeking judgment for the balance due and to impress a lien on the traxcavator to secure payment of any judg-

ment found against appellant. Appellant answered, in effect, that after using the traxcavator for some months he learned that it was not *new* equipment (as represented by appellee) but that it was *used* equipment when sold to him, and also that appellee elected to take the traxcavator in full payment of any balance due on the same.

On the issues above joined a hearing was held which resulted in a decree in favor of appellee. In a written memorandum opinion the trial court said: ". . . the Court has carefully considered all the evidence in this case and finds that the real weight of the testimony preponderates in favor of the plaintiff. . . ." The court entered judgment for the amount due appellee, and held it was secured by a lien on the traxcavator; that if appellant did not pay the judgment by October 23, 1964 the clerk (as commissioner) would sell the traxcavator and apply the proceeds to the judgment. The final result (after the sale and application of the proceeds) was a deficiency judgment against appellant in favor of appellee in the amount of $14,004.43 and costs.

Appellant now prosecutes this appeal urging a reversal on two points. The first point is that the weight of the evidence shows the traxcavator was a "used machine" when it was sold to him. The other point is, in substance, the same as the first one and need not be discussed.

On the vital question of whether the traxcavator was *new* (as claimed by appellee) or was *used* (as claimed by appellant) when sold we agree with the trial court's finding that "the real weight of the testimony preponderates in favor of the plaintiff".

Appellant relies on two separate facts or circumstances to establish that the traxcavator was *used* equipment when he bought it. These will be discussed separately.

(a) After appellant had used the equipment several months he had occasion to remove a track from the traxcavator and found "several rocks" with paint on them. Three such rocks or gravel were introduced in evidence

but are not among the exhibits on file in this Court. These painted rock, in the opinion of appellant and two of his employees, indicated the equipment had been used before it was purchased by appellant. On the other hand there was testimony by people who had worked with this kind of equipment that this could happen to new equipment. Also, the vice-president of appellee (who had been with the company thirty-two years) testified that he saw the gravel or rocks in question; that he had frequently visited the factory which made the traxcavator; that he knew it was usual for new equipment to be placed on a thirty-acre lot of ground covered with gravel very much like the said exhibits; that later it was driven off the lot and painted before being shipped; and, that this fact could account for the gravel in question.

(b) After the traxcavator had been in use by appellant for several months he discovered that the two batteries on the traxcavator were not exactly the same size, that the metal frame which held them had been bent and would not hold two batteries of the larger size. This, to appellant, indicated the equipment had been used when he bought it from appellee. There was testimony by appellee however that the record showed the batteries were installed by appellee while the equipment was in its possession before it was sold.

In addition to the above, the testimony shows that on several occasions when appellant was asked to make up the past due payment, he offered to do so but made no claim the traxcavator had been used when he bought it. Several witnesses, who were longtime employees and who were familiar with the records and inventories kept by appellee, testified positively that this particular traxcavator was new, and had never been used, when it was sold to appellant.

In view of the state of the record wherein only a fact question is involved, we are unable to say the decree of the trial court is not supported by a preponderance of the evidence.

Affirmed.

5-3546 389 S. W. 2d 627

Opinion Delivered May 3, 1965.

[redacted]

Don Langston and *Carl Langston,* for appellant.

Frances D. Holtzendorff and *Chowning, Mitchell, Hamilton* and *Burrow,* for appellee.

SAM ROBINSON, Associate Justice. This is a controversy regarding the sale by the Steele Memorial Baptist Church of the real estate on which the church building is located. The Pastor and Trustees agreed to sell the property to Wilson Realty, Inc. for the consideration of $37,000 and executed a deed to Wilson. The Realty Company gave its check in payment of the purchase price, but learned that the authority of the church officials to sell the property was being questioned, and asked that its check be returned, which was done.

Appellants, Aaron Rowland et al, holding themselves out as members of the church, filed this suit to enjoin the

Trustees of the church, and the Pastor, from going through with the sale and to enjoin Wilson from purchasing the property. Appellants allege that a majority of the members of the church had voted against the sale. The Pastor and Trustees answered denying they were without authority to execute the deed, and Wilson answered also denying that the church officials did not have the authority, and asked for specific performance of the contract. The Chancellor held that a majority of the church members, qualified to vote on the question, had approved the sale and ordered the Pastor and Trustees to convey the property to Wilson in accordance with their agreement. These opposing the sale have appealed.

The issue here is narrow. The sole question is whether 43 persons out of 63 who voted against the sale were eligible to vote on the question of selling the property. If the 43 persons were not eligible to so vote, there was a majority in favor of the sale.

The court's position in taking jurisdiction in an issue of this kind is expressed in *Holiman* v. *Dovers,* 236 Ark. 211, 366 S. W. 2d 197. There we said: "The civil courts are not concerned with mere schisms stemming from disputations over matters of religious doctrine, not only because such questions are essentially ecclesiastical rather than judicial but also because of the separation between the church and the state. And even when property rights are involved the rival factions may be remitted to their remedy within the denomination if its form of government is such as to permit an appeal to higher ecclesiastical authority." Here, property rights are involved and the church form of government does not provide for an appeal to higher ecclesiastical authority.

When the vote was taken on the question of selling the church property, 63 of those present voted against the sale; 43 voted for the sale. Later, the Trustees, or Deacons, held that 44 of those voting against the sale were delinquent in paying their church dues and were, therefore, according to the rules of the church, not qualified to vote on the question of selling the church property. Likewise,

it was held that two of those who voted for the sale were disqualified. Hence, the result was 41 valid votes in favor of the sale and 19 valid votes against it.

There is no question about those being delinquent in paying their dues who were found to be delinquent by the Pastor and Deacons. The question is, did such delinquency, according to the governing rules of the church, disqualify from voting those who were delinquent. There is evidence that a good many years ago the church adopted rules as set out in Hiscox Standard Manual for Baptist Churches, and that Hiscox provides no rule whereby a church member is disqualified from voting on church business because he is delinquent with his dues. But the record also shows that the church had adopted Robert's Rules of Order, and that the "Bible Standard Church Directory" and "Busy Pastor's Guide" were used.

But notwithstanding any rules that may have been adopted prior to that time, the preponderance of the evidence shows that on February 28, 1963, the majority voted to disqualify as voting members of the church those who had nto paid their dues by April 4, 1963, which was before the vote on selling the church property.

Several ministers of the church testified, as experts, that the church has authority to adopt such a rule. Hence, according to the rule prevailing at the time of the vote on selling the property, the 46 members delinquent in their dues were not qualified to vote. A majority of those who were qualified voted in favor of the sale.

The decree is affirmed.

5-3543 389 S. W. 2d 625

Opinion Delivered May 3, 1965.

Carlton Currie, for appellant.

Coleman, Gantt, Ramsay & Cox, for appellee.

JIM JOHNSON, Associate Justice. This is in essence a boundary line dispute. The parties involved are neighbors in Shady Grove Subdivision in Pine Bluff. Appellants J. E. and Joann Moltz own Lot 16 and appellee John B. Dalrymple owns Lot 17. Appellants filed a complaint in Jefferson Chancery Court on July 7, 1964, alleging that appellee built a house within ten feet of their common lot line in violation of the restrictive covenants of the subdivision, thus depreciating the value of appellants' property, and prayed an injunction requiring appellee to move his house so it would not "encroach upon the restricted area in which appellee is prohibited to build." (Appellants do not claim that appellee has encroached upon their lot.)

At trial on August 12, 1964, the chancellor found that appellants "failed to establish by a preponderance of the evidence that there has been a breach of the covenant involved to such an extent that the Court would be justified in granting the relief prayed for." For reversal of the decree, appellants urge that the evidence in the case clearly establishes that an encroachment exists.

The recorded bill of assurance for Shady Grove Subdivision contains certain restrictive covenants including one that states in part: "No building shall be erected

nearer than ten (10) feet to any side lot line.'' Appellants contend that appellee's house is less than ten feet from the side lot line. One of the appellants testified that he tied a string between two iron pins marking the boundary between Lots 16 and 17, measured the distance from the line to the foundation of appellee's house and found that one corner was only eight feet, nine or ten inches from the line and another corner was about nine and one-half feet from the lot line. Photographs were introduced showing appellants' measurements of the distance from appellee's house to the string which allegedly marked the lot line.

Two highly qualified registered professional engineers testified at trial, Walter Combs who had surveyed for appellants, and Leo Tyra for appellee.

Mr. Combs, an engineer since 1907, stated that when he made the survey of appellants' property for their construction loan in 1963, he had to ''hunt all over the neighborhood to find something to work from.'' ''I found one iron [pin] . . . at the southwest corner of Lot 16. That was the only iron I could find.'' He testified that the survey of Lot 16 was as accurate as he could make it, having nothing but one iron to work from. He said on cross-examination that the east corner could easily be ten or twelve inches off, but that the northwest corner was within ''five or six inches of what you call the true corner.'' He said that working under the same set of conditions competent engineers might well differ, and that, under these conditions, ''all you can do is pull from one corner and make them all fit together . . . like a cross-word puzzle . . . and don't get on the other fellow if you can help it.'' When asked if he was willing to state to the court the line which he established as the line of appellants' property is an absolute true and correct line, Mr. Combs repliedly candidly:

''I can't swear to it. It's the best I could get up there with the information I had to work with. Whether it's absolutely accurate or not, I wouldn't swear to it.''

Leo Tyra, an engineer since 1954, surveyed Lot 17 for appellee in the spring of 1964 prior to appellee's con-

struction. He testified that he had examined the original subdivision plat in the recorder's office and found that plat was not tied into a government survey, but apparently was commenced from a center line of a street. Some of his testimony follows:

"We ran into a complication here, because there really is no starting point. We guess at the center line of 28th Street. This plat has numerous curves existing at the time it was laid out. It's a very complicated survey. The starting line or point, I assumed was, from my survey, in the center line of 28th Street, and come up along the railroad right of way to the back of the lots, other lots, in the same subdivision trying to tie in and find the original pins of the original survey, and at an appropriate time you make your cross-over as near as you can to the lot you are starting to survey. You search that lot for pins. You truly hope to have the original pins there . . . We set wooden stakes, set up over these stakes and turn the next necessary angle and make the measurements called for in the original plat, and then really search out for the original pins."

"I have been out there several times . . . I met with [appellant] one afternoon . . . and went through certain measurements where I showed him how we tried to relate this property to the property around it so no one was being encroached on as far as the property was concerned."

"The afternoon I was there . . . I tried to explain to [appellant] then and there that he was putting too much accuracy to the tail end of the survey . . . it would be similar to weighing in tons and all of a sudden . . . begin talking about pounds."

"Now, talking with [appellant] that night I met with him, I tried to explain to him. I went back and told him how you can't use these center lines of these existing streets to survey a lot in a plat bceause houses which have been built prevent you from making the curves that the data calls for in the plat. I explained to him that the inaccuracies in bringing such a survey from 28th Street would not let us draw a string between two pins we had finally set and say those two pins would be accurate between half

a foot and at the time I left him I though he understood that and realized those inaccuracies are inherent to a survey of this type."

The trial court in its opinion discussed the testimony of both engineers and stated: "Even though this is not a boundary line dispute, the true boundary line separating the two lots is material and from the evidence, the Court cannot definitely determine just where the true line is."

A careful study of the testimony of the two engineers reveals that although they employed different methods their testimony was quite consistent. On trial de novo on the record before us, we are also unable to determine just where the true line is. It follows, therefore, that the finding of the chancellor is not against the weight of the evidence.

Affirmed.

BANKS *v.* JONES

5-3551 390 S. W. 2d 108

Opinion Delivered May 3, 1965.

[Rehearing denied June 7, 1965.]

Bernard Whetstone, for appellant.

Shackleford & Shackleford, for appellee.

FRANK HOLT, Associate Justice. This appeal arises from a decree of the chancery court refusing to hold that a corporate entity was a fiction and, therefore, appellee became personally liable for the injuries sustained by appellant.

In August 1960 Jumping Jills, Inc., was duly incorporated pursuant to the statutes of Arkansas. The corporation proceeded to operate a business which offered to the public the use of certain gymnastic equipment commonly referred to as "trampolines". In September 1960 the appellant's sixteen-year-old son sustained an injury while using this equipment. Suit was instituted in April 1961 against the corporation to recover for the injuries based upon alleged negligence in the operation of the equipment. In March 1963 appellant filed an amendment to her complaint making the appellee an additional party individually and as Gerald Jones d/b/a Seven Drive In Theater. By the amendment appellant alleged the appellee had organized the corporation to avoid personal responsibility owed to the public; that the corporation was a fiction; that the corporate entity should be set aside and a judgment entered against the appellee as an individual for the injuries sustained. The personal injury suit was tried to a jury resulting in a judgment in the amount of $1,000.00 for appellant and also $1,000.00 for her minor son. The circuit court reserved from the jury the issue raised by the amendment to the complaint. Judgment was entered against the corporation upon the jury verdict. The trial court then transferred to equity the issues of corporate fiction and resulting individual liability which were raised by the amendment.

On appeal from the adverse ruling rendered by the chancery court appellant first contends for reversal that

the court erred in holding that the "corporate veil should not be pierced and the responsibility placed" upon the appellee. Appellant's main argument under his first contention is that since appellee was the owner of 80% of the stock in Jumping Jills, Inc., the owner of the Seven Drive In Theater, and owner of land upon which both enterprises were located the two enterprises were a composite operation owned by appellee and, therefore, he was individually responsible.

The trampoline enterprise was adjacent to the appellee's theater business on land owned by the appellee individually. Only the appellee and the minor who was injured testified in the case. The minor testified that he observed no public signs indicating that the trampoline business was owned by Jumping Jills, Inc. He bought his tickets at separate entrances when attending the theater and trampoline area and neither ticket admitted him to the other business operation. His testimony tends to confirm the appellee's assertion that the two businesses were operated as separate ventures. Appellee testified that he was the sole owner of the Seven Drive In Theater and the land upon which the theater and trampoline businesses were located. A fence separated the two businesses; separate admission prices were paid. It was a family owned corporation since he owned 80% of the Jumping Jills, Inc., his wife 10%, and his step-son 10%. As president of the corporation he employed the personnel which consisted of two individuals. The corporation paid $200.00 per month to the Drive In Theater business under a lease agreement for the use of the trampoline equipment and the lands. Separate books were kept on the two businesses and advertising was handled separately. The trampoline business existed only for about three months in 1960 since it was unprofitable; federal and state income tax returns were properly filed by the corporation. The corporation purchased and paid $800.00 as an annual premium for liability insurance through an insurance agency. The insurance company, a Canadian organization selected by the agency, later became bankrupt. Appellee had no knowledge of this until after this claim arose. The testimony of

appellee is undisputed and conclusively established that Jumping Jills, Inc., was a properly constituted and existing corporation under the laws of our state at the time of the alleged injuries. Also, that the dissolution of the corporation was regularly and properly accomplished.

It is true that in special circumstances the court will disregard the corporate facade when the form has been illegally abused. *Black and White, Inc.* v. *Love,* 236 Ark. 529, 367 S. W. 2d 427. However, the rule of piercing the fiction of a corporate entity should be applied with great caution. In the case at bar there was no interchange of employees, facilities, funds and management as was present in *Black and White, Inc.* v. *Love, supra,* relied upon by appellant. We agree with the chancellor that the evidence in the instant case does not support a finding that there was an illegal abuse of the corporate form to the injury of the appellant. Further, it is well settled that a corporation and its stockholders are separate and distinct entities even though a stockholder may be the owner of a majority of the stock in a corporation. *Mannon* v. *R. A. Young & Sons Coal Co.,* 207 Ark. 98, 179 S. W. 2d 457; *Atkinson* v. Reid, 185 Ark. 301, 47 S. W. 2d 571; *G. W. Jones Lbr. Co.* v. *Wisarkana Lbr. Co.,* 125 Ark. 65, 187 S. W. 1068.

Appellant's next two points alleged confiscation by appellee of approximately $500.00 of the assets of the dissolved corporation under such circumstances as to hold him personally liable to that extent for the judgment against the corporation. These issues were not before the trial court and cannot properly be raised for the first time on appeal. *Missouri Pacific R. Co.* v. *J. W. Myers Comm. Co.,* 196 Ark. 976, 120 S. W. 2d 693 and *Angelletti* v. *Angelletti,* 209 Ark. 991, 193 S. W. 2d 330. The pleadings, as amended, sought only to pierce the corporate veil and in no way sought to follow the assets of the corporation for the satisfaction of the judgment. The cause was not tried on this issue. The trial court's written opinion recognized only the issue of piercing the corporate veil.

However, if we consider these two points on their merits we must hold there is no evidence that the appellee

confiscated any of the corporate assets with the intent to defraud the appellant.

The decree is affirmed.

LANE *v.* RACHEL.

5-3553 389 S. W. 2d 621

Opinion delivered May 3, 1965.

Shelby R. Blackmon, J. Fred Jones; for appellant.

Hall, Purcell & Boswell, for appellee.

FRANK HOLT, Associate Justice. Appellants brought this action to rescind a sales contract, cancel a deed, a note,

and a mortgage, and for the recovery from appellees of the amount paid on the purchase of a dwelling. The house was sold to appellants by the builder and owner, appellee Marshall Rachel, through his agents, appellees Thomas and Carlisle. In the alternative, appellants sought damages in the amount of $14,000.00. The appellants alleged that appellee Rachel was grossly negligent in the construction of the house and that the appellees made deceitful and fraudulent representations in connection with the sale of the house. The appellees filed an answer asserting only the affirmative defense that the house was built according to F.H.A. specifications. In resolving the issues in favor of the appellees, the chancellor held that the appellants had failed to prove any negligence or fault on the part of appellee-builder and that the damages to the house were beyond his control.

For reversal appellants contend that appellee Rachel, the builder, "was guilty of gross negligence and constructive fraud in the design and especially in the construction of the footing for the foundation of the house;" that the representations of appellees Rachel and Carlisle "as to the adequacy of the foundation and the quality of the house * * * amounted to fraudulent misrepresentations;" and that the decree of the chancellor was against the preponderance of the evidence. Since these contentions are so closely related and intermingled, we discuss them together.

In August 1961 appellants purchased the house in question from appellee Rachel and his wife for $17,500.00. They made a substantial down payment and regular monthly payments until the trial of this cause in September 1964. Appellee Carlisle, as sales agent for the owner and builder, appellee Rachel, sold the house to the appellants. When Carlisle showed them the house, appellant Lane noticed that the house was prefabricated or precut and the walls of the house appeared thinner than usual. Upon inquiry the sales agent represented that the house was constructed so that none of the weight rested on the interior walls of the house. The purchaser, Lane, also noticed there were fewer pillars underneath

the house than he expected to see and the agent, Carlisle, assured him that not as many pillars were needed as usual since all the weight of the house was on the outside walls. Lane testified: "I asked him then if this be the case, is there an adequate foundation to hold all this weight which is on the outside walls and he assured me that it was." Later Lane talked directly to Rachel, the owner and builder, about it. Lane testified: "* * * we again asked Mr. Rachel the same questions and he assured us the same thing. The weight resting on the outside walls required fewer pillars underneath the house to hold the weight of the interior walls, plus the fact that there was an adequate foundation to support all this weight that was on these walls."

The appellants moved into the house the first part of September 1961 and about two months later they noticed the walls were beginning to crack on the west end and the front of the house. The house was built on a slope with the west end on the lower part of the slope. The appellants made an unsuccessful complaint to appellees. The house continued to develop cracks and the following spring appellee Rachel attempted to correct them by putting additional footings under the west end. This did not correct the defects and a few months later appellee Rachel removed the bricks from the west part of the house and replaced them. By this time the sheetrock in the bedrooms on the west end had ripped apart and there were cracked places in the combination kitchen and den extending into the living room. On the north side of the house the bricks had separated at the top and the brick wall had moved one inch from the molding. The floor of the den had dropped from the baseboard three-fourths of an inch and the brick was pulled away from the entrance of the front door for a distance of approximately one inch. There was other damage to the house, including the fact that it had noticeably shifted down-slope. The testimony of appellant Lane as to the representations of appellees that the foundation was adequate to support the house and that the dwelling became uninhabitable was corroborated by his wife. A structural

engineer, Mr. Dickinson, also corroborated them as to the condition of the house.

When the F.H.A. learned of appellants' plight the agency wrote to them: "We suggest that a qualified structural engineer be employed to design a foundation which will be adequate to support the dwelling." It was from Dickinson's inspection that the appellants first knew why the foundation was inadequate. According to him, and it was undisputed, the subsoil was expansive clay and an adequate foundation required a much deeper footing; the concrete footing had not been poured into forms and: "That the footing across the west side had been poured virtually on top of the ground, the original ground, and that the ground on the outside of the footing had been filled so that it was perhaps a foot above the original ground as inside, underneath the house, so that any water underneath the house couldn't get away. It had been ponding underneath there. * * * This footing was poured on top of ground that had roots in it. No attempt was made to dig down far enough to get to completely undisturbed material. * * * The dirt had been scraped out more or less in a half moon shape and the concrete poured in with the top of the concrete flush with the top of the original ground and then the foundation wall came up from that. * * * there is hardly a door in the house that will close. * * * The west end of this house is down perhaps three inches or three and a half inches." He also testified that the appellee, Rachel, in constructing the house had not met the F.H.A. minimum requirements with respect to the depth of the footing and the drainage underneath the house.

Appellee Rachel's main defense is that he relied upon F.H.A. approval. He contended that he was not aware that the subsoil was of the expansive clay type which expanded and contracted according to wet or dry weather and, further, that it was not customary in local building construction to take sampling of the subsoil. Consequently, it is asserted that the assurances appellees gave concerning the foundation were not fraudulently made. Rachel acted as his own architect in preparing

and designing the plans and specifications of the footing and foundation of the house he built and sold to appellants. In the specifications submitted to the F.H.A. by him the soil was described as "sandy clay". He did not test the soil or have it tested and it was after the present controversy arose that he discovered the soil was "expansive clay". He failed to dig a rectangular ditch and construct a form for the foundation footing as he had specified in the design submitted to the F.H.A. Representatives of the F.H.A. admitted they never inspected the footing. The testimony of appellants as to the positive assurances by the appellees regarding the foundation of the house and the negligent construction of the footing is undisputed. In fact, the sales agent, appellee Carlisle, did not testify. We think the evidence is clear and convincing that the appellants should prevail in the case at bar.

It is well settled that when a purchaser is fraudulently induced to purchase property by a vendor's representations, the purchaser has an election of remedies, one of which is to rescind the contract and recover the amount paid by returning or offering to return the property to the seller. *Sullenberger* v. *O'Lee,* 209 Ark. 798, 192 S.W. 2d 543 and *Kotz* v. *Rush,* 218 Ark. 692, 238 S.W. 2d 634.

To rescind a contract based upon fraud, it is not necessary that actual fraud exist. It is well settled that representations are construed to be fraudulent when made by one who either knows the assurances to be false or else not knowing the verity asserts them to be true. *Fausett & Co.* v. *Bullard,* 217 Ark. 176, 229 S.W. 2d 490; *Maurice* v. *Chaffin,* 219 Ark. 273, 241 S.W. 2d 257. In C.J.S., Fraud, § 2, p. 211, constructive fraud is succinctly defined as "a breach of legal or equitable duty which, irrespective of the moral guilt of the fraud feasor, the law declares fraudulent because of its tendency to deceive others * * * *Neither actual dishonesty of purpose nor intent to deceive* is an essential element of constructive fraud." Citing *Stewart* v. *Clark,* 195 Ark.

943, 115 S.W. 2d 887 and *Levinson* v. *Treadway,* 190 Ark. 201, 78 S.W. 2d 59. [Emphasis added]

In the case at bar it is undisputed that the appellants relied, to their detriment, upon the statements and assurances made to them by the appellees and these statements proved to be untrue. Appellees' lack of knowledge of these material representations asserted by them to be true is no defense nor can liability be escaped by their good faith in making the representations.

We are also of the view that the appellee, Rachel, was negligent in the construction of the house with respect to the footing for the foundation. This is true from the undisputed evidence, including the fact that there was insufficient compliance with the minimum F.H.A. requirements as to the footing and drainage.

We have also held that if one of two innocent parties must suffer, the burden must be borne by the one who induced the loss. *Snuffy Smith Motors, Inc.* v. *Universal C.I.T. Credit Corp.,* 236 Ark. 954, 370 S.W. 2d 808. It must be said that the appellees' conduct and assurances induced the loss suffered by the appellants in the case at bar.

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

A AND B *v.* C AND D.

5-3514 390 S. W. 2d 116

Opinion delivered May 10, 1965.

[Rehearing denied June 7, 1965.]

[redacted]

James L. Sloan, Leon Lusk, Houston, Texas, for appellant.

Smith, Williams, Friday & Bowen, By *Robert V. Light,* for appellee.

CARLETON HARRIS, Chief Justice. This appeal questions the validity of an adoption. As a matter of considering the welfare of the child involved, and in keeping with the spirit of the adoption law, the litigants will not be referred to by name, but rather, letters of the alphabet will be used in discussing the facts. B is the natural mother of the child, a female infant, hereinafter called E.

A is the husband of B. C and D are the adoptive parents of E. On January 24, 1961, C and D obtained a temporary order of adoption of E in the Probate Court of Pulaski County on the basis of a petition alleging that E was the illegitimate child of B, having been born on January 18, 1961, at a Little Rock hospital. Filed with the petition was a "Consent of Adoption," executed by B before a Notary Public, and reciting that B had given birth to E; that E was illegitimate, and that B waived all rights to E, and waived service of process and notice of hearing. A final order of adoption was entered on July 25, 1961. On June 26, 1963, B, joined by A, whom she had met, and married in Texas, in June, 1962, filed a petition to vacate the adoption on the basis of fraud and unavoidable casualty, and C and D responded with a general denial, also asserting that the period of limitation (Ark. Stat. Ann. §56-112 [1947]) had expired prior to the commencement of the action. After hearing testimony, the Probate Court of Pulaski County (Second Division) entered its order, dismissing the petition (as amended), and finding, *inter alia,* that B, at the time of executing the consent of adoption was of full legal age, of sound mind, and possessed the capacity to exercise her normal mental faculties. "She was not, at this time, under the influence of any drugs that would affect her ability to understand the nature of her acts." The court further found that no fraud was perpetrated by any person in connection with execution of the consent, "nor was there any overreaching by any person dealing with her in this connection." From the judgment so entered, appellants bring this appeal.

The core, or essence, of this litigation is the contention of appellants that the consent of adoption was signed by B not long after she had given birth to E, and at a time when she was hospitalized, under the influence of drugs, and in a distressed mental and emotional state. It is asserted that she was told by some individual, whom she understood to be a member of the hospital staff, or a physician, that her baby had died, and she would be required to sign some papers in connection with the death; that when signing the consent, she was not aware that she was consenting to the adoption of E, nor aware that she was waiving any

of her rights as the natural mother. According to her testimony, B, in 1960, was employed in the bookkeeping department of a Little Rock concern. She had never been married, but discovered that she was pregnant. By wearing a tight girdle and full skirts, she concealed her condition, and continued with her duties. B received no prenatal care. On January 17, 1961, at about 11:30 PM, she went to St. Vincent's Infirmary, accompanied by four girl friends, who were unaware of the real reason for the trip to the hospital; B told the nurse that she thought she might have appendicitis, and when a doctor came in, the girls were asked to leave. Upon examination, the physician asked if she were pregnant, and she admitted that she was, and was immediately taken to the delivery room. B stated that she received a shot, and remembered nothing else until the next day at noon, when, she stated, a white man was in her room and told her that she had a brother coming to visit her from Forrest City. She definitely placed this time as Wednesday, because she knew that the air-raid siren sounded on Wednesday at noon, and the noise had aroused her. She told the man that she did not have any relatives in Forrest City, and remembered nothing further until late in the afternoon, when Bonita Haston (since married, and now named Griffith), a friend, came to visit. According to B, it was dark in the room by that time, and a man came in and told her that her baby had died. She was unable to describe the man, but remembered that he said there would be some papers for her to sign in order to give the hospital the authority to make an autopsy. She stated that she felt sleepy, as she termed it, "druggy." This occurred on January 18. The witness stated that on the 19th, a nurse came into the room and gave her some pills, and perhaps a shot; that later, around noon, or in the afternoon, a man and woman came into the room with some papers. She testified that she was shown where to sign, and was given a pen to sign with, but that she was not advised as to the nature of the papers. It was her thought that they were the papers which had been referred to the day before. After these persons left, her boss, a Mrs. Taylor, came and visited for twenty or twenty-five minutes, asking if B needed any money, and

advising that she could obtain a loan, if necessary. B testified that she (B) had about $170.00 cash in her purse, and about $175.00 in the bank. On the morning of the 20th, her brother (who lived in North Little Rock) visited her, and she told him that she injured herself when falling while bowling, and this was the reason for her being in the hospital. Later, upon being advised by a nurse that she could go home, she was taken by her brother to North Little Rock. From there she went to her mother's home located in a small town in Arkansas, and stayed until the following Sunday, when she returned to Little Rock, and resumed work.

After marrying, she went to Dr. John Roberts Phillips in Houston for treatment of a cyst, and, during the examination, was asked if she had ever been pregnant. Since her husband was with her, B responded in the negative, but subsequently told Dr. Phillips that she had been pregnant, and had delivered a baby, but that it had died.[1] Upon the advice of the doctor, she revealed these facts to her husband. A insisted that they come to Little Rock to ascertain if the baby actually had died, and they employed an investigator, Reed Thompson. Later, Thompson advised them that the baby was alive, and had been adopted, but would not give any information as to the people who had obtained the adoption. A stated that Thompson suggested that B see a psychiatrist, and Thompson further stated that he had learned that B had given her consent to the adoption, and that he did not care to have anything to do with the case.

Bonita Griffith testified by deposition that on the afternoon of Wednesday, January 18, 1961, she visited B at St. Vincent's, and was in the room, when a white man, in hospital clothing, entered and told B that her baby had died, and that there would be some papers for her to sign. Mrs. Griffith stated that she had learned at B's place of employment that B was in the hospital, and she went to St. Vincent's and made inquiry. She was told that no one by that name was registered, but on confirming from the

[1] Dr. Phillips, by deposition, verified that B had told him that her baby had died.

office, where B was employed, that her friend was indeed in the hospital, Mrs. Griffith stated that she went from room to room until she found B on the third floor.[2]

The Little Rock physician and obstetrician, who delivered the baby, testified that he was on the staff of St. Vincent's Infirmary, and was the physician on call for unassigned patients in obstetrics and gynecology for the month of January, 1961.[3] He stated that on the 18th, he received a call from the emergency room, and found that he had been assigned a patient who was in labor. He ascertained the name and read the information on the emergency records. This patient was B. He testified that the records reflected that she had received thorazine (a tranquilizing drug) at 1:00 AM, and received demerol and scopolamine at 1:45 AM, and at 3:00 AM. He explained that the purpose of demerol is to relieve pain, and the purpose of scopolamine is to dry up secretions, so that the patient will not be likely to vomit. The doctor testified that B told him that she was unmarried, but had been able to conceal her pregnancy from her employer, parents, and friends; that she did not know exactly what she was going to do, but was considering "adopting her baby out." He said that he told her he would attempt to help arrange an adoption if she desired. The baby was delivered at 9:25 AM on the 18th. The witness stated that he saw her again between 4:00 and 5:00 PM when he checked his patients at the hospital, and at that time she told him that she wished to have the baby adopted. The doctor testified that he then contacted a couple who had desired to adopt a baby, but this couple had changed their minds, and no longer desired to adopt a child. He then called an attorney, with whom he was acquainted, to ascertain if the attorney knew of a suitable couple who wished and desired an adoption. Subsequently, C and D called the doctor's office, and made

[2] The witness testified that she looked into the various rooms on the first floor, then the second floor, and repeated the process until she found B on the third floor. On cross-examination, she stated that the rooms on the first floor had patients in them. Subsequently, both local doctors, whose testimony is hereinafter discussed, stated that there are no patients on the first floor at St. Vincent's.

[3] He explained that the physician on call for unassigned patients took care of those people who came to the hospital without a doctor, who did not request a particular doctor, and who needed attention in his specialty.

an appointment to see him. Appellees went to his office, and they discussed the adoption and the usual arrangements, including financial arrangements.[4] The witness stated that he saw B each day until the day of her discharge from the hospital, which was January 21, and that, in his opinion, she was given no drugs that would have affected her at the time of the signing of the consent to adoption. He said that he advised her on Friday that the attorney would be in to see her for the purpose of getting adoption papers signed, and that she was entirely rational and lucid. The doctor testified that on the next morning (Saturday, January 21) he asked her if she had signed the papers for adoption, and she replied that she had.

Dr. Thomas H. Wortham[5] was not acquainted with B personally, and never did see her, but testified that, based upon an examination of B's records, reflecting the medication that she had received, it was his opinion that the medication would affect the reasoning process for about eight hours, and, at the most, twelve hours.

According to the Little Rock attorney, who prepared adoption papers on instructions from C and D, he proceeded on Friday, January 20, to St. Vincent's Infirmary, in the company of Mrs. Helen Ward, a secretary and Notary Public in the Attorney General's office. They entered the room which had been pointed out as the one occupied by B, the lawyer introducing himself and Mrs. Ward, and explaining the purpose of the visit. He testified that B appeared to be expecting him, and indicated that she knew who he was, and the purpose of his visit. The witness stated that he told her he represented the people who wanted to adopt her child, but that his relationship with his clients was confidential, and that if she consented to the adoption he would not be able to disclose the name of the client. He said that he also explained that he did not represent her (B); that the consent was a full

[4] C, the adoptive father, paid the fee of $150.00, and also paid all hospital bills, which the doctor said was customary in this type of adoption case. "It's usually understood, as you well know, the adopting parents usually pay the expenses."

[5] C, at the suggestion of the attending physician, obtained a doctor of his choice to examine the child, before proceeding further with the adoption. He selected Dr. Wortham.

and absolute consent, and that "she could not change her mind." The attorney stated that he handed her the paper, and that she looked at it for a minute or two, then signed, remarking that she thought it was best for the child. He said that B sat up in bed most of the time that he and Mrs. Ward were in the room. The lawyer further testified that Reed Thompson called and informed him that A had married a woman who had given her child for adoption, and asked if he might have the permission of the witness to tell A the name of the attorney (who had handled the adoption), and inquired whether the latter would consent to see A. After receiving permission, A made a visit to the office, and stated that his wife was very upset because she had permitted her child to be adopted; that she was under the care of a psychiatrist, and had been advised to try and get the child back. The lawyer was quite positive that A did not say that B had been informed in the hospital that her baby had died. At the request of A, a letter was directed to his clients, setting out appellants' feelings in the matter, but C and D replied that they did not desire to talk with A, and felt that in remaining unidentified, the best interests of the child would be served.

Mrs. Helen Ward verified all that the attorney had said, stating that he had explained to B the meaning of the consent to adoption, and advising that it would be final. Mrs. Ward quoted B as saying that she had thought about the matter, and realized fully what she was doing; that she could not care for the baby properly, and would rather that it would be reared in a home with two parents, who could look after it, and that she was glad that a nice couple would get the baby.

The record reflects that B, while in Houston, Texas, had consulted Paul V. Ledbetter, Jr., a psychiatric social worker, and two psychiatrists. In answering interrogatories, Ledbetter stated that B did not tell him that her baby had died. He further stated that it was his understanding "that at no time did she believe the child to have died." There was no testimony from the two Houston psychiatrists.

We think the preponderance of the testimony supports the findings of the Probate Judge. In addition to the testimony, which we feel preponderates in favor of appellees, the acts of B clearly indicate that she was aware of the fact that she had consented for the child to be adopted. For instance, while stating that she was told that the baby had died, B made no inquiry about funeral arrangements, nor did she ever inquire as to where the baby was buried. Although aware of the fact that she had incurred financial obligations for medical expenses while in the hospital, and though stating that she had saved some money for this purpose, B left the hospital without consulting, or making arrangements, with any hospital authority for payment of these bills; nor did she ever make any payment. As stated, we think the evidence is convincing that B, not only did not have any fraud practiced upon her, but was also fully cognizant of the nature of the instrument executed, *i.e.,* she was aware that she was irrevocably giving up her rights to E.

It is asserted that the Probate Court erred in receiving testimony that C and D were proper persons to rear the child. Very little evidence was offered on this point, and certainly the testimony was only incidental to the major issue. We agree that, in this particular hearing, the suitability of the adoptive parents was not in question, but we are unable to see that any prejudicial error was committed. In fact, as is known by the attorneys, this court tries Probate and Chancery cases *de novo,* and we think the evidence is ample to sustain the court's judgment, absent the testimony referred to.

Finally, it is urged that the consent to adoption was not properly executed. Appellants point out that the adoption statute requires a written consent, verified by affidavit, and they assert that Mrs. Ward only witnessed and acknowledged B's signature. It is true that the evidence does not reflect that B held up her hand while Mrs. Ward recited a formal oath, but we think there was substantial compliance with the statutory requirement. Mrs. Ward *was present* in the room; Mrs. Ward *did see* B sign the consent; Mrs. Ward *did hear* the explanation given B

by the attorney representing C and D, and it is obvious that this appellant executed the instrument with the full intent to do that which is required by the statute. Ark. Stat. Ann. §28-206 (Repl. 1962) provides:

"Every affidavit shall be subscribed by the affiant, and the certificate of the officer before whom it is made shall be written separately, following the signature of the affiant."

These requirements, of course, were met in the instant case. In *Cox* v. *State,* 164 Ark. 126, 261 S.W. 303, we said:

"So here we think if appellant signed the affidavit for the purpose of swearing to it, knowing that the clerk regarded his act of signing the affidavit as a method of making affirmation, the jury was warranted in finding that appellant was sworn."

We accordingly find no merit in this contention.

As set forth in this opinion, we, like the Probate Judge, find no fraud, or overreaching, and are convinced that the consent was obtained at a time when B was fully cognizant of the significance of her actions. Still, we think it appropriate to make some comment relative to this method of acquiring children for adoption, which has now become an established practice in some areas of the State. Acquiring a child in this manner is, most often, unwise. The natural mother, after some period of time, marries, and sets up her home, and frequently decides that she desires to have her child back. Such a situation may well mean grief, sorrow, and expense for both the mother and the adoptive parents, if the mother is able to learn the whereabouts of the child.[6] When in the hospital, though fully aware that she is giving up her child, her thinking processes may well be clouded by the nature of the predicament in which she finds herself. In addition, the general policy in such cases, which has developed over the years, of the adoptive parents paying all expenses connected with the birth of the child, is somewhat akin to the actual sale

[6] In some instances, prospective adoptive parents have themselves made all arrangements, including financial, with the mother, and, of course, in all such cases, the natural parent is always aware of who has her child.

of babies, which has occurred, though, of course, unlawfully, in some sections of the country. We think constructive legislation could well be enacted in the adoption field by the General Assembly.

Finding no reversible error, the judgment is affirmed.

Justices Johnson and Holt, not participating.

GREGORY *v.* WALKER.

5-3523

Opinion delivered May 10, 1965.

Felver A. Rowell, Jr., for appellant.

Charles H. Eddy, Philip H. Loh, for appellee.

CARLETON HARRIS, Chief Justice. Appellant, Bob Gregory, on June 30, 1962, entered into a parol agreement with appellee, C. E. Chapman, to purchase a certain 130-

acre farm from Chapman. The property was being purchased for the benefit of Gregory's son, David,[1] who desired to commence farming operations, rather than to attend college. Gregory, therefore, was insistent that he must have possession of the lands as of January 1, 1963. Chapman agreed to give possession on that date. At the time, the lands were being rented to Aubrey Walker, also an appellee herein, and Gregory and Chapman agreed that the 1962 rents were to be paid to appellant. Walker did not give up the lands, but continued to hold same for the year 1963, and thereafter, appellant instituted suit against both Chapman and Walker, seeking $6,000.00 damages against Walker for unlawful detention of the premises, and, in the alternative, seeking judgment against Chapman in the sum of $7,500.00 for damage sustained by virtue of breach of contract. The case was transferred from the Circuit Court to the Chancery Court of Conway County, and trial was held in that court. After hearing the evidence, the court found that the Gregorys purchased the land from Chapman on June 30, 1962, for the benefit of their son, and further found that there was an agreement that Gregory was to receive the rents (except grain rents) for the year 1962, and that Chapman would notify Walker to vacate the premises by the end of the year. The court found that Walker's tenancy was a year-to-year holding, entitling him to six months' notice to vacate; further, that Chapman did, on July 1, 1962, give notice to Walker to vacate at the end of the year. However, the Chancellor held that this notice was insufficient to terminate the year-to-year tenancy. The trial court also found that the reasonable rental value of the lands for 1962 and 1963 was the agreed crop rental; further, that Walker had paid the rent in full for 1962, "and has paid or stored the beans constituting the rent for 1963 subject to collection by the plaintiff Gregory." Accordingly, no judgment was rendered against this appellee.

As to Chapman, the court found that he owed Gregory for the reasonable rental value of the premises for the years 1962 and 1963, less amounts paid by Walker. This

[1] The deed was made to David, and the receipt for the down payment was also in his name.

resulted in a judgment against Chapman for $50.00,[2] and also judgment for storage costs on the beans. From the decree entered in accordance with these findings, appellant brings this appeal.

For reversal, appellant relies upon two points, first, that the trial court erred in holding that Aubrey Walker did not receive timely notice to terminate the tenancy, and second, that the court erred in holding that Chapman was only liable for the reasonable rental value of the land, rather than the actual damages sustained by appellant.

We agree with the trial court that the notice to vacate given appellee Walker by appellee Chapman was insufficient to terminate the year to year tenancy. It is pointed out in 32 Am. Jur., Section 997, under Landlord and Tenant, that there is no absolute rule as to computation of time, and the practice varies in the several jurisdictions. The Chancellor, in a written opinion, succinctly gave his reasons for holding the notice insufficient, and since we completely concur, this portion of his opinion is adopted in full as follows:

"The notice to vacate given defendant Walker by defendant Chapman on July 1, 1962, was insufficient to terminate the year to year tenancy. Although it is generally stated that such tenancy requires 6 months' notice, very little authority has been found on the day such notice is to be given. However, it appears that in Arkansas, notices to terminate tenancies must require that the tenant vacate at the end of one of the recurring periods of holding. *Reece* v. *Leslie*, 105 Ark. 127 [150 S. W. 579]; *Stewart* v. *Murrell*, 65 Ark. 471 [47 S.W. 130]. These cases involve month to month tenancies but the principle would appear to be the same, that is that Walker was required to vacate on December 31, 1962. It appears, also, as to month to month tenancies that the notice to vacate must be given prior to the commencement of one of the recurring periods of holding and that a notice given after the period has commenced is insufficient. *Wyatt* v. *Erny*, 193 Ark. 479

[2] Walker had withheld $50.00 from the 1962 bean rent, for work that he had done for Chapman, and the court held that Walker was entitled to the $50.00. This was the reason for the judgment in that amount for Gregory against Chapman.

[101 S. W. 2d 181]; *King* v. *Solmson,* 188 Ark. 237 [65 S.W. 2d 19]. An annotation appearing at 88 ALR 1344 gives cases from other jurisdictions, some of which agree with this holding and some of which would hold the notice in this case to be sufficient. See also 32 Am. Jur. "Landlord and Tenant" Secs. 998-999. This holding, by excluding the day of the notice, appears to be in keeping with Ark. Stats. Sec. 27-127, defining "month" to mean a calendar month and Sec. 27-130 requiring that only one day between two acts may be counted. Thus, since Mr. Walker was entitled to 6 months' notice, terminating his tenancy on December 31, 1962, the notice given on July 1, 1962, would either be less than 6 months' notice since he was to vacate on December 31, 1962, or would have been a notice to vacate on January 1, 1963, after the new term had commenced."

It might be added that this court has, on numerous occasions, held that, in the computation of time, the first day is to be excluded, and the last day, included. See *State ex rel Hebert, Prosecuting Att'y.* v. *Hall, Secretary of State,* 228 Ark. 500, 308 S.W. 2d 828, and cases cited therein.

The trial court found that the measure of damages was the reasonable rental value of the lands for the years 1962 and 1963, and that the agreed crop rental met this test. Appellant asserts that this was error, vigorously contending that if he had been placed in possession of the premises on January 1, 1963, a substantial profit would have been made from farming operations. Gregory stated that he would have made 25 bushels of beans to the acre on 115 acres, and the beans would have sold for $2.68 a bushel. He said that seed would have cost a total of $300.00; that fuel would have cost approximately $400.00, and that $1,000.00 would have been paid to "get it chopped." It is argued that appellant should have been granted judgment in the amount of $7,705.00, less the rent paid by Walker for the year 1963.

We cannot agree with this contention. In *Lamkins* v. *International Harvester Co.,* 207 Ark. 637, 182 S.W. 2d 203, this court said:

"Furthermore, appellant's claim for damages, asserted in his cross-complaint, is based upon allegations that he was prevented from planting and growing a twenty-five-acre crop of soybeans. The measure of damages for preventing planting of a crop is the rental value of the land."

Several cases are then cited in support of the statement. Likewise, in *Dilday* v. *David,* 178 Ark. 898, 12 S.W. 2d 899, we commented:

"The law is settled that, where no crop has been planted, the measure of damages for an actionable wrong so preventing is the rental value of the land."

Further, in *Sumlin* v. *Woodson,* 211 Ark. 214, 199 S.W. 2d 936, this court, after stating that damages cannot be based upon conjecture and speculation, said:

"Such damages 'must be certain both in their nature and in respect to the cause from which they proceed. It is against the policy of the law to allow profits as damages, where such profits are remotely connected with the breach of contract alleged, or where they are speculative, resting only upon conjectural evidence or the individual opinions of the parties or witnesses.' 13 Gyc. 53. *Spencer Medicine Co.* v. *Hall,* 78 Ark. 336, 93 S.W. 985; *Beekman Lbr. Co.* v. *Kittrell,* 80 Ark. 228, 96 S.W. 988, *Hurley* v. *Oliver,* 91 Ark. 433, 121 S.W. 920.' To the same effect, see, also, *St. L.-S. F. Ry. Co.* v. *Spradley,* 199 Ark. 174, 133 S.W. 2d 5; and *S.W. Tel. & Tel. Co.* v. *Memphis Tel. Co.,* 111 Ark. 474, 163 S. W. 1153, and earlier cases there cited. See, also, Vol. 7 West's Arkansas Digest, 'Damages', § 40, 124, 176, listing other cases from this court. See, also, 17 C. J. 758, 788 and 910 for general discussion. (25 C. J. S., Damages, §§ 28, 43, 90.) In 15 Am. Juris. 560, after giving the general statements from leading cases, this rule is deduced:

"It has been said that the most definite rule that can be drawn from the cases would seem to be that if by any chance or under any condition of affairs then existing the profits might not have accrued though the wrongful act had not intervened, there can be no allowance of profits lost as damages; but if, except for the wrongful act, there

must have been profits, notwithstanding any other circumstances existing at the time of the perpetration of the wrong, the question of their speculativeness and contingency is absolutely negatived.''

Crops are, of course, dependent on many factors, *inter alia,* the elements, the type of soil, the time of planting—and the ability of the farmer. Gregory testified that he would have made ''twice as much,'' and then proceeded to give the figures heretofore related. This evidence was no more than guesswork and speculation, and it is also noteworthy that Gregory testified that he had never grown soy beans himself.[3] For that matter, the testimony, as to the crop that he would have made, had possession been turned over to him, is somewhat in conflict with his earlier statement that the land was purchased for the benefit of his son, who would farm it. Be that as it may, the testimony introduced is insufficient to establish damages.

Appellee Chapman urges affirmance of the court decree in the main, but argues that the court erred in directing him to pay $50.00 to Gregory, the storage bill on some of the soy beans, and taxing him with the court costs. We are unable to consider this argument, since appellee took no cross-appeal from the decree of the court.

Affirmed.

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[3] From the record: "Q.—Have you ever raised soy beans? A.—Myself, I haven't, but I've had it done. Q.—You say you've had it done. You mean people have rented your land and raised soy beans on your land? A.—Well I been raising soy beans the last two or three years with other people, partnership and so forth, on some other land."

5-3512 390 S. W. 2d 113

Opinion delivered May 10, 1965.

[Rehearing denied June 7, 1965.]

William J. Smith and *William H. Sutton,* for appellant.

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

Ed. F. McFaddin, Associate Justice. This appeal involves a "switch agreement" between the parties. The appellant, Missouri Pacific Railroad Company (hereinafter called "Carrier"), filed this action against appellee, Southern Cotton Oil Division, Hunt Foods and Industries, Inc. (hereinafter called "Shipper"), basing its cause of action on the said switch agreement.

The shipper has a plant in Newport, Arkansas, and property. The germane provisions of the switch agreement are:

"Sec. 2. Shipper shall maintain vertical clearance of 25 feet from nearer rail, and *horizontal clearance of 8½ feet from center-line, of switch;* (emphasis supplied). . . .
"Sec. 3. Shipper also agrees to indemnify and hold harmless Carrier for loss, damage or injury from any act or omission of Shipper, Shipper's employes or agents, to the person or property of the parties hereto and their employes and to the person or property of any other person or corporation, while on or about Switch; . . .

"Sec. 4. Shipper, at Shipper's cost and responsibility, shall continuously maintain scale, live rails and switches, and appurtenances to each thereof. Shipper agrees to indemnify and hold harmless the Carrier from all liability, damages, expenses, attorney's fees and costs, which Carrier may incur or suffer, caused by the maintenance, existence or use of scale, live rails, switches and appurtenances to each thereof. . . ."

On December 3, 1961 Mr. Davis, a brakeman for the carrier, was having cars placed on the scales of one of the switch tracks for weighing. In signalling the engineer, Mr. Davis moved sideways without noticing a concrete minnow pool on the shipper's property. As a result Mr. Davis fell in the pool and received injuries. He threatened to file action against the carrier under the Federal Employer's Liability Act;[1] and after investigation and negotiation the carrier settled Mr. Davis' claim for $4693.60. This settlement was made in good faith after the shipper had refused to participate in any way. Then the carrier sued the shipper for said amount and also costs of investigation, claiming that under the switch contract the shipper was obligated to indemnify the carrier for all such amounts.

The shipper admitted: (a) the foregoing provisions of the switch agreement; (b) the fact that Mr. Davis was injured; (c) the refusal of the shipper to participate in any settlement made by the carrier with Mr. Davis; and (d) the settlement actually made by the carrier with Mr. Davis. But the shipper, by pleading and evidence, insisted that it was not liable in any way, claiming that Mr. Davis did not receive his injuries while on any space or area covered by the switch contract.

The cause was tried before the Court without a jury and resulted in a judgment for appellee (shipper) and this appeal ensued, in which only one point is urged by appellant (carrier), to-wit: "The court erred, as a matter of law, in refusing to render judgment for the appellant." The parties have cited us to a number of cases involving

[1] The carrier's liability under the Federal Employer's Liability Law was much broader than the shipper's liability under the switch agreement.

switch agreements with provisions similar to those in the case at bar, some of which cases are: *C.R.I. & P. RR.* v. *Dobry Flour Mills,* 211 F. 2d 785; *Colonial Stores* v. *Central of Ga.,* 279 F. 2d 777; *Mann* v. *Pere Marquette* (Mich.), 97 N.W. 721; *Seaboldt* v. *Penna. RR. Co.,* 290 F. 2d 296; *Anthony* v. *La. & Ark.,* 199 F. Supp. 286; *Union Pac.* v. *Bridal Veil Co.,* 219 F. 2d 826; *Booth-Kelly Co.* v. *So. Pac. Co.,* 183 F. 2d 902; and *Ruddy* v. *N.Y. Central,* 224 F. 2d 96.

We come then to the evidence. The shipper had maintained for more than twenty years a concrete "minnow pool" on its premises. From the pictures introduced in evidence the pool appears to be about four feet square with 6-inch concrete walls rising about 18 inches above the ground level. The outside of the concrete wall nearest the switch track is 8 feet, 8¾ inches from the center of the switch track; that is, the center of the switch track is 8 feet, 8¾ inches away from any part of the minnow pool. The switch agreement, as previously quoted, provided a guarantee of clearance of 8 feet, 6 inches, so the outside wall of the minnow pool lacked 2¾ inches of being within the area contracted by the shipper to be free of obstacles. In order to keep grass from growing around the concrete walls of the minnow pool, the shipper had scraped the ground to the extent of about 10 inches from the outside wall of the minnow pool on all four sides. The carrier claimed that this clearing of the grass around the minnow pool had made a depression about two inches deep next to the concrete walls and that it was this depression which invaded the area of guaranteed clearance.

We hold that a question of fact was made in the case at bar as to whether scraping the grass around the sides of the minnow pool constituted a violation of the free clearance which the shipper was required to maintain for the carrier. The switch agreement did not require that the ground be level. The pictures introduced in evidence show many sloping places. We cannot say as a matter of law that scraping the grass from around the concrete wall to a two inch depth was a violation of the contract for clearance. It was a question of fact whether scraping the

grass adjacent to the minnow pool was a violation of the horizontal clearance provision of the switch agreement.

In its judgment the Circuit Court made these findings:

"2. Defendant has not violated any of the provisions of the contract. . . .

"4. The accident did not occur on premises covered by the contract.

"5. No act or omission or conduct of defendant was a proximate cause of the accident. . . .

"7. The minnow pool with a wall around it was open and obvious to all and had been seen by W. H. Davis daily for a long number of years."

From a careful study of the entire record, we cannot say that the Trial Court was in error under the facts shown.

Affirmed.

DeSoto Hotel & Baths *v.* Luth.

5-3556 389 S. W. 2d 897

Opinion delivered May 10, 1965.

Q. Byrum Hurst, for appellant.

Richard W. Hobbs, for appellee.

GEORGE ROSE SMITH, J. This is an action by the appellee for the value of personal property taken from his car while it was in the appellant's custody. Summons was served on the defendant on either March 25 or March 27, 1964. The answer was filed on April 15. On motion to strike the answer the court found that the summons was actually served on March 25, so that the answer was filed on the twenty-first day. This appeal is from an ensuing order striking the answer and awarding the plaintiff a default judgment. The judgment must be reversed, for, in a case decided after the trial in the case at bar, we held that the statute permits the answer to be filed on the twenty-first day. *Widmer* v. *J.I. Case Credit Corp.*, 239 Ark. 12, 386 S.W. 2d 702.

It is true, as the appellee points out, that the appellant's abstract of the record is deficient, but since the appellee's brief supplies the meager facts necessary to an understanding of the case his motion to affirm for noncompliance with Rule 9 must be denied.

Reversed.

BUNTING *v.* SCOTT COUNTY MILLING CO.

5-3576 389 S. W. 2d 896

Opinion delivered May 10, 1965.

Donald Poe, for appellant.

Daily & Woods, for appellee.

GEORGE ROSE SMITH, J. This is a workmen's compensation case in which the claimant, Thomas William Bunting, seeks to recover compensation for permanent partial

disability. The Commission's denial of the claim was affirmed by the circuit court. The only question here is whether the Commission's decision is supported by substantial evidence.

The appellee-employer operates a feed mill. On May 29, 1962, Bunting suffered a severe compensable injury to his back when a stack of heavy feed sacks fell on him. Two vertebrae were fractured, but on July 9 Dr. Jenkins found that Bunting would be able to return to work on July 14, with no permanent injury.

Bunting did return to work and, at his request, was given light duties that involved no heavy lifting. On December 22, however, he tried to lift some sacks of feed and again hurt his back. He was away from his job, either in a hospital or at home, for several weeks. On January 19, 1963, Dr. Kirkpatrick examined Bunting and made a report that concluded with this paragraph: "In my opinion, this man has a healed fracture of the transverse process of the third lumbar vertebra. I see no indication of any further injury or disease state in the low back. I do not think he is disabled." Eight days after this examination Bunting went back to his job and continued to work until April 20 when, according to the employer's testimony, he was discharged for cause. At the first hearing in the case, held on July 9, 1963, the claimant testified that he was disabled and had been unable to do anything more than light part-time work after his second injury on December 22.

It was the unanimous opinion of the Commission that the claimant's proof failed to establish, by a preponderance of the evidence, any permanent partial disability. In reaching this conclusion the Commission pointed out that "none of the doctors who saw claimant for his injuries have stated he has any permanent partial disability attributable to such injuries." This statement is accurate; there is no medical testimony to support the claim. To the contrary, Dr. Kirkpatrick was positive in saying that "I do not think [Bunting] is disabled." The issue is entirely one of fact. With the testimony in conflict we are bound

by the Commission's decision. *Kivett* v. *Redmond Co.*, 234 Ark. 855, 355 S.W. 2d 172 (1962).

Affirmed.

SCAIFE *v.* COLEMAN.

5-3505 389 S. W. 2d 884

Opinion delivered May 10, 1965

W. K. Grubbs, Sr., for appellant.

No brief filed for appellee.

PAUL WARD, Associate Justice. The principal question for decision is whether appellees (Otto Coleman and Ray Eisele) have a right, acquired by prescription, of ingress and egress to and from their property over lands belonging to appellant (Mrs. Jane Scaife). Tom Dixon, a lessee, has no interest in this litigation and we will hereafter refer to Mrs. Scaife as appellant. A summary of the relevant and undisputed facts is set forth below.

Appellant owns (among other lands) the north one-half of the northwest quarter (80 acres) in Section 10 which we will hereafter, for clarity, refer to as tract

"A". She also owns the land (with certain exceptions immaterial here) adjoining on the east and extending approximately three-fourths of a mile to the levee on the west side of the Mississippi River, which land we will, for clarity, refer to as tract "B". Appellees own the land adjoining tract "A" on the north, being in Section 3, and they also own land in the south portion of the northeast quarter of aforesaid Section 10. All the above described property lies in Township 18 south, Range 1 west. The alleged road in dispute runs north and south on or near the line dividing tracts "A" and "B" for a distance of approximately one-fourth of a mile.

Pleadings. (Petition) On May 9, 1963 appellees filed a petition in chancery court against appellant which contained, in essence, the following allegations (after first setting forth the locations and ownerships of the land): The road (as above described) has been openly, continuously and adversely used by petitioners and the public generally under claim of right for more than seven years, and petitioners have "acquired a prescriptive right that is absolute and vested in the petitioners and the public generally". This road is the only accessible way to the property being farmed and used by petitioners, and appellant, on November 15, 1962, obstructed the road and made it impassable to traffic, causing damage to petitioners in the amount of $7000. The prayer was that appellant be required to remove the obstruction, that she be permanently enjoined from interfering with the use of the road by petitioners, and for damages.

(Answer) Appellant denies the existence of any road such as claimed by appellees; denies that appellees or any other person has been adversely using any road across her land; denies that any person has acquired any prescriptive right to any way across her land; denies she has obstructed any road on her land; and, denies appellees have suffered any legally compensable damages. By way of counter-claim, appellant states there is a turnrow across tract "A" which her tenants and appellees have used at times as a road, and that appellees had dug ditches along the turnrow and placed gravel

thereon, causing her damage to the extent of $200. The prayer was that appellees' petition be dismissed and that she be given $200 damages.

Findings. After a rather lengthy hearing, the chancellor found (among other things):

"There was never a fence along the east side of the Scaife place. There was a turnrow, road or passageway . . . either all located on the Scaife place or on the line dividing the two tracts [A and B]. . . . This route was a turnrow for the Scaife place in those years when the rows or cultivation ran in that direction, but it was also, at all times, a way, the only way, a way of necessity, established, accepted and acquiesced by the family, as a means of ingress and egress to the Coleman and Scaife places for the family and their tenants. . . . This route has been used by the several owners of the Coleman place for some 25 years or more. The owners of the Scaife place allowed the way to pass from a family way to one used by strangers without objection and seemingly with approval. During the past quarter of a century, the owners of the Scaife place, despite the several different owners of the Coleman place, have never voiced any objection to the use of the route as a means of ingress and egress. They have by their non action and acquiescence through the years led the several owners of the Coleman place to believe and rely on their right to use said way. . . ."

Based upon the above (and other) findings the trial court decreed appellees had acquired, by prescription, a private easement over the lands of appellant and described the road in detail as set out in the record at page 35. The trial court also gave appellant judgment for $200 against appellees and appellees judgment for $94 against appellant.

On appeal appellant urges four separate points which may be summarized as follows: *One,* There is no evidence to support the findings and decree of the trial court; and *Two,* There is no evidence to support the $94 judgment.

One. We have many times held, under various factual situations, that a right of way across the land of another may be acquired by continual usage for a large number of years. See *Martin* v. *Bond, Trustee,* 215 Ark. 146, 219 S. W. 2d 618; *Fullenwider* v. *Kitchens,* 223 Ark. 442, 266 S. W. 2d 281; *Chicago, R. I. & P. R. R.* v. *State of Arkansas,* 224 Ark. 622, 275 S. W. 2d 646; *Salzer* v. *Balkman, Trustee,* 234 Ark. 209, 351 S. W. 2d 422; and *Duncan* v. *Manes,* 235 Ark. 377, 360 S. W. 2d 128.

There can be no doubt that the findings of the trial court copied above support its conclusion that appellees have acquired the prescriptive right of ingress and egress over the land of appellant. A careful search of the record convinces us that the weight of the evidence supports said findings. Several witnesses testified they had known the road in question for as long as twenty years (and two as long as forty years) and that it had been in constant use by the general public and particularly by tenants who lived on and worked the lands now belonging to appellant and appellees. In addition to the above, the General Highway Map of Chicot County (1958 edition) prepared by the Arkansas Highway Commission shows an unimproved dirt road running south from appellees' land in Section 3, and the same thing is shown by a map of the Mississippi River Commission prepared by the Corps of Engineers, U. S. Army. We see no merit in appellant's contention that the alleged location of the road in question was not proved. As was stated in *Westlake* v. *Duncan, Dieckman, and Duncan Mining Co., Inc.,* 228 Ark. 336, 340, 307 S. W. 2d 220, the weight of the testimony "shows without doubt that there was only one road which all the witnesses were talking about and that is the one involved here". There is, however, some testimony that more than one road (south of the one in dispute) was used from time to time.

Two. We are unable to say the weight of the testimony does not support the trial court's award of $94 to appellees against appellant. There is testimony in the record showing appellant had obstructed the road so that it would have to be repaired before it could be used, and

that it would cost this amount to make the needed repairs. We think the trial court properly held it was the responsibility of appellant to make (or pay for) said repairs. As pointed out above, the trial court also required appellees to pay appellant $200 for damages they did to the road.

Affirmed.

GRIFFIN *v.* STATE.

5123 389 S. W. 2d 900

Opinion delivered May 10, 1965

Murphy & Arnold, Erwin & Bengel, for appellant.

Bruce Bennett, Atty. General, By: *Richard B. Adkisson,* Chief Asst. Atty. General, for appellee.

SAM ROBINSON, Associate Justice. Appellant, Clyde Griffin, was charged by felony information in the Independence Circuit Court with the crime of murder in the first degree. He was convicted of voluntary manslaughter and has appealed to this court.

Appellant owns land adjoining land owned by Kell Wyatt and his wife, Faye Wyatt. There has been considerable controversy and some litigation regarding the correct location of the property line. *Wyatt* v. *Wycough,* 232 Ark. 760, 341 S. W. 2d 18.

On the 4th day of February, 1964, appellant was burning brush on his land when he was approached by Kell and Faye Wyatt, who had walked more than 700 feet over appellant's land to get to the place where appellant was working. Buford Blanton, who was employed by appellant that day, had become ill and was not working at the moment, but was standing near appellant. Mr. and Mrs. Wyatt walked up to Griffin and Blanton. Mrs. Wyatt, who was armed with a club, picked up an axe and threw it behind her. Mr. Wyatt hit at Blanton, but missed him. In dodging, Blanton fell to the ground.

According to testimony in the record, Mrs. Wyatt, without saying a word, hit Griffin across the head with the club, cutting a severe gash; blood ran down into his face and into his eyes. Griffin had an automatic pistol in his pocket; he pulled it and started shooting, killing both Mr. and Mrs. Wyatt. Two separate charges of murder were filed against Griffin. He was tried for killing Mrs. Wyatt.

First appellant argues that the evidence is not sufficient to support a conviction of voluntary manslaughter. The statutory definition of the crime is: Ark. Stat. Ann. § 41-2207 (Repl. 1964), "Manslaughter is the unlawful killing of a human being, without malice express or implied, and without deliberation." Ark. Stat. Ann. § 41-

2208 (Repl. 1964). "Manslaughter must be voluntary, upon a sudden heat of passion, caused by provocation, apparently sufficient to make the passion irresistible."

Without going more into detail regarding evidence of the killing, it is our opinion that it is sufficient to support the verdict.

As justification for the homicide, appellant relied on the theory of self-defense. Of course a plea of self-defense where a man has killed a woman is rather unusual. Counsel for appellant, therefore, considered it absolutely necessary to determine, insofar as possible on voir dire examination of the veniremen, just how they felt about the law of self-defense. Over appellant's objection and exceptions, the court refused to permit counsel for defendant to question the veniremen along that line. In explaining the court's ruling on this point the court said: "This ruling was made after each of the jurors were questioned by the Court as to whether or not they could and would follow the law as given by the Court and an affirmative indication given by each to the Court."

The court should have permitted counsel to question the veniremen as indicated. The mere fact that they stated that they would follow the law as given by the court was not necessarily sufficient to enable counsel to determine whether peremptory challenges should be exercised. There are very few people bold enough to say that they will not follow the law, and yet there are many people who do not believe there is any justification for taking human life, whether it is done in self-defense or in defense of their homes, their family, or their country. In many instances, counsel decides whether to use a peremptory challenge not so much on what a venireman may say, but on how he says it.

In *Lauderdale* v. *State,* 233 Ark. 96, 343 S. W. 2d 422, the court quoted with approval from 31 Am. Jur. 121, as follows: "A wide latitude is allowed counsel in examining jurors on their voir dire. . . . Thus, reasonable latitude should be given parties on the examina-

tion of jurors to gain knowledge of their *mental attitude* toward the issues to be tried." (Our emphasis.) In the case at bar, counsel for defendant thought it necessary to gain knowledge of the veniremen's mental attitude about the theory of self-defense, especially so when the defendant was charged with killing a woman. In many cases this court has given effect to the rule allowing wide latitude in voir dire examination of the veniremen.

Ark. Stat. Ann. § 39-226 provides: "In all cases, both civil and criminal, the court shall examine all prospective jurors under oath upon all matters set forth in the statutes as disqualifications. Further questions may be asked by the court, or by the attorneys in the case, in the discretion of the court." "Discretion of the court", referred to in this section, does not invest the courts with authority to transform discretion into prohibition, nor does it require that in the process of ascertaining the desired facts counsel must utilize the court as a conduit through which communication must be conveyed to the jury. Neither did this statute change the rule giving litigants the right to examine jurors separately in order to determine whether such jurors are subject to challenge for cause, or to elicit information on which to base the right of a peremptory challenge. *Missouri Pac. Trans. Co.* v. *Johnson,* 197 Ark. 1129, 126 S. W. 2d 931.

In the Johnson case the court said: "All trial lawyers, and all students of the science of jurisprudence, know that *general* questions directed to the jury panel, or to individual jurors, by a judge who at the beginning of the trial has no special information regarding the issues, or the relationship of the parties, or the attending circumstances, sometimes fail to elicit answers which may cause even the most conscientious juror to reveal an existing prejudicial status."

In *Sorrentino* v. *State,* 214 Ark. 115, 214 S. W. 2d 517, this court held that a defendant had the right to inquire into the attitude of prospective jurors in regard to the offense involved. The court said in *Clark* v. *State,* 154 Ark. 592, 243 S. W. 868: "It does not follow, however, from the fact that the information to be elicited

might not constitute disqualifying bias that appellant was not entitled to propound the inquiry. On the contrary, we think he was entitled to make the inquiry for the purpose of determining [whether] he should exercise a peremptory challenge allowed by the statute."

This court has held it proper to inquire "whether manufacturer of liquor would prejudice juror against deceased", *Stovall* v. *State,* 233 Ark. 597, 346 S. W. 2d 212; "whether public declarations of a political candidate would influence juror", *Gurley* v. *State,* 164 Ark. 397, 262 S. W. 636; "whether character of prosecuting witness would influence juror", *Turner* v. *State,* 171 Ark. 1118, 287 S. W. 400; "whether juror would convict 'If the state proves that this defendant raped this little girl and gave her gonorrhea or syphilis'", *Fields* v. *State,* 203 Ark. 1046, 159 S. W. 2d 745; "whether the juror had a prejudice against detectives", *Maroney* v. *State,* 177 Ark. 355, 6 S. W. 2d 299; "whether juror is a member of the Ku Klux Klan and prejudiced on that account", *Bethel* v. *State,* 162 Ark. 76, 257 S. W. 740.

In the case at bar, where the defendant was charged with murder in the first degree and sought to justify the killing on the theory of self-defense, his counsel should have been permitted to question the veniremen with reference to their mental attitude regarding the proposition of self-defense.

There is one other thing we might mention. The State's Instruction No. 19, dealing with the law of self-defense, failed to take into consideration the appellant's contention that he was attacked by both Mr. and Mrs. Wyatt, and at the time of the shooting he was protecting himself against both of them. There is evidence in the record tending to support appellant's theory on this point; therefore, in a new trial the instructions should not leave the jury under the impression that only the action of Mrs. Wyatt should be considered in determining whether the defendant was acting in self-defense at the time of the shooting.

Many points are argued on appeal, but we do not find anything prejudicial to defendant, other than the

points heretofore discussed, that would likely occur on a new trial.

Reversed and remanded for new trial.

HARRIS, C. J., dissents.

WARD, J., not participating.

BURTON *v.* BINGHAM.

5-3579 389 S. W. 2d 876

Opinion delivered May 10, 1965

Terral, Rawlings & Matthews, for appellant.

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

JIM JOHNSON, Associate Justice. This is an action for personal injuries to a child pedestrian. On January 2, 1964, eleven-year-old Barbra Withers, attempting to cross Highway 65 at Woodson, was struck and injured by a tractor-trailer rig driven by appellee Earnie Bingham. Suit was filed in Pulaski Circuit Court on March 31, 1964, by appellant Emma Jean Burton, Barbra's mother, against Bingham and his employer. The case was tried to a jury on November 4, 1964, and resulted in verdicts and judgment for appellees.

For reversal appellant contends that the court erred in giving an instruction on unavoidable accident.

In a very recent opinion, *Houston* v. *Adams* (*opinion delivered* April 26, 1965), 239 Ark. 346, 389 S. W. 2d 872, this court scrutinized the giving of instruction on unavoidable accident as follows:

"First, it is insisted that upon the facts of this case the trial court should not give an instruction submitting the issue of unavoidable accident to the jury. It is pertinent to observe that we have held that a collision is the result of an unavoidable accident if it is not attributable to negligence on the part of either party. [Cases cited.] The defendants argue that since the jury *might* find that they were free from negligence the instruction is proper.

"In the past decade several courts have re-examined the suitability of this instruction in negligence cases. In the leading case, *Butigan* v. *Yellow Cab Co.,* 49 Cal. 2d 652, 320 P. 2d 500, 65 A. L. R. 2d 1, the Supreme Court of California overruled an earlier decision and held that the issue of unavoidable accident should not be submitted to the jury in any case (except when a definition of the term may be required by statute). From the opinion: 'The so-called defense of inevitable accident is nothing more than a denial by the defendant of negligence, or a contention that his negligence, if any, was not the proximate cause of the injury. . . . Since the ordinary instructions on negligence and proximate cause sufficiently show that the plaintiff must sustain his burden of proof on these issues in order to recover, the instruction on unavoidable accident serves no useful purpose. . . .

" 'The instruction is not only unnecessary, but it is also confusing. When the jurors are told that "in law we recognize what is termed an unavoidable or inevitable accident" they may get the impression that unavoidability is an issue to be decided and that, if proved, it constitutes a separate ground of nonliability of the defendant. Thus they may be misled as to the proper manner of determining liability, that is, solely on the basis of negligence and proximate causation.' " . . .

"We are of the opinion that in a typical negligence case the position taken by the California court is right. In such a case the plea of unavoidable accident is in fact nothing more than an assertion that the defendant was not guilty of actionable negligence. That defense should be submitted to the jury in terms of negligence and proximate causation. For the court to submit also an issue of unavoidable accident is, as the *Butigan* opinion pointed out, to suggest that unavoidability is a separate defense, requiring separate consideration by the jury.

"We do not foreclose the possibility that in exceptional situations an unavoidable accident instruction may be permissible. . . . But when, as here, the question is merely whether one or more of the parties were guilty of negligence we hold that the instruction in question should not be given."

From what has been said, it follows that in the case at bar the question being simply whether one or more of the parties were guilty of negligence, the trial court erred in giving an instruction on unavoidable accident.

Appellant has urged a number of other points for reversal, including alleged improper questioning by counsel for appellees. While it is obvious some of the questions were improper, appellant's objections were sustained and in the absence of a request by counsel for the court to admonish the jury to disregard the improper questions and appellant's apparent election to thus gamble on the outcome of the trial, we are unwilling here to say that prejudicial error was committed.

For the error in giving an instruction on unavoidable accident, the case is reversed and the cause remanded for new trial.

Justice WARD dissents. It is his view that it was harmless error to give the instruction which in his opinion was more favorable to appellant than to appellee.

LITTLEJOHN *v.* EARLE INDUSTRIES.

5-3563 389 S. W. 2d 898

Opinion delivered May 10, 1965

McMath, Leatherman, Woods & Youngdahl and *John P. Sizemore,* for appellant.

Spears & Sloan, for appellee.

FRANK HOLT, Associate Justice. This is a workmen's compensation case and the sole issue is whether there is any substantial evidence to support the Commission's finding that the claim was controverted to such an extent that the appellees, the employer and insurance carrier, are liable for appellant's attorney's fee. The circuit court reversed the Commission's finding that the claim was controverted and that appellees are liable for an attorney fee. The claimant has appealed.

It is appellant's contention there is substantial evidence to support the Commission's finding that the claim

was controverted and, therefore, the attorney's fee should be paid by the appellees. We agree.

It is well settled that we do not upset the findings of the Commission unless there is no substantial evidence to support them. *Potlatch Forest Inc.* v. *Smith,* 237 Ark. 468, 374 S. W. 2d 166. In *Hughes* v. *Tapley, Admx.,* 206 Ark. 739, 177 S. W. 2d 429, we said: "The rule is also well settled that in testing the sufficiency of the evidence before the Commission, the circuit court, on appeal from the Commission, and this court, on appeal from the circuit court, must weigh the testimony in its strongest light, in favor of the Commission's findings." See, also, *Fagan Electric Co.* v. *Green,* 228 Ark. 477, 308 S. W. 2d 810. With these rules in mind we review some of the evidence pertinent to the appellant's point that the claim was controverted.

The appellant was injured on June 18, 1963. His attorney properly filed his claim with the Commission shortly thereafter. The appellees then requested a thirty-day extension before stating their position on controverting the claim. Over appellant's objection, a ten-day extension was granted. On September 23, 1963 the appellees stated they "neither admitted nor denied that the claimant was entitled to compensation". The appellees later offered to pay compensation to the claimant on the basis of 10% disability conditioned upon an order of final discharge by the Commission since the claim appeared "suspicious". The appellant responded by asserting the evaluation of permanent disability was premature since appellant maintained that he was unable to return to work on October 6, 1963 despite his own medical reports. The claimant steadfastly protested that he had not fully recovered from his back injury and an operation on August 24th to correct this injury.

A hearing was held before the referee in February 1964. The claimant continued to contend that his healing period had not ended. The appellees stated that they were not controverting the appellant's right to compensation or payment of his medical expenses. However, due to the conflicting reports from appellant's various

doctors, the appellees maintained that they were unable to determine exactly what was owed appellant. The appellees stated they were ready to pay any compensation due appellant upon a definitive adjudication. In other words, the appellees said they were ready to make payment when the extent of their liability was determined. The referee found that the claim for compensation had not been controverted and, therefore, appellees were not liable for an attorney fee. He did find, however, that the healing period had ended on December 10, 1963 instead of October 5th and, further, that the appellant's permanent disability amounted to 15% instead of 10%.

The appellant then appealed to the full Commission where additional correspondence and medical reports were considered and made a part of the record. On September 18, 1964 the Commission found, among other things, that the healing period had not ended [appellant had another operation on his back in May 1964]; that the question of permanent disability be held in abeyance; that appellant's claim for compensation beyond December 10, 1963 had been controverted and directed the appellees to pay appellant's attorney the maximum attorney fee based upon compensation due claimant for temporary total disability. The appellees then appealed to the circuit court and it reversed that part of the Commission's finding that the claim for compensation was controverted and the award of an attorney's fee. Appellant has paid all medical expenses.

When we weigh the evidence in the light most favorable to the Commission's findings, we cannot say the evidence was not sufficiently substantial to support the Commission's finding that the claim was controverted.

Despite appellant's own medical reports, he persisted in maintaining that he was physically unable to work because of his injury. Regardless of the conflicting and confusing medical evidence in behalf of appellant, his claim of inability to work was corroborated by the fact it was necessary for him to have an operation on his back in August 1963, May 1964, and November 1964 in order to correct his admitted injury. It must be said

that an adjudication of appellant's contention became necessary before appellees could know the extent of their liability.

Our Workmen's Compensation Commission has authority to assess attorneys' fees whenever the Commission finds the claim has been controverted in whole or in part. Ark. Stat. Ann. §81-1332 (Repl. 1960). Thus, our legislature has entrusted to the Commission the right to determine the necessity of a claimant to secure the services of an attorney in order to preserve his benefits. We have indicated that on appeal this court will not interfere with the Commission's determination on the issue of attorneys' fees unless there is an abuse of discretion. *Lundell* v. *Walker*, 204 Ark. 871, 165 S. W. 2d 600; *Brown* v. *W. H. Patterson Construction Co.*, 235 Ark. 433, 361 S. W. 2d 13 and *Ragon* v. *Great American Indemnity Co.*, 224 Ark. 387, 273 S. W. 2d 524. Generally, the courts do not question the discretionary power of a commission in the matter of an attorney's fee unless the determination is "clearly wrong", 10 Schneider, Workmen's Compensation Text 381 (3rd Ed. 1953), or unless there is a "gross abuse" of discretion, 2 Larson, Workmen's Compensation Laws 349 (1961).

In the case at bar we are of the view that the Commission did not abuse its discretion and, further, there was substantial evidence to sustain the Commission's finding and award of an attorney's fee. The judgment is reversed and the cause remanded for proceedings not inconsistent with this opinion.

5-3649 389 S. W. 2d 887

Opinion delivered May 17, 1965.

Bruce Bennett, Atty. General, By: *Farrell E. Faubus,* Asst. Atty. General, for appellant.

Jim Shaver, N. L. Schoenfeld, Brief Amicus Curiae, for appellee.

CARLETON HARRIS, Chief Justice. This opinion deals with reapportionment of the Arkansas General Assembly.. On January 28, 1965, the United States District Court, Eastern District of Arkansas, Western Division, three judges sitting as the court,[1] held that the existing apportionment of the membership of the House of Representatives and Senate of this state, and the method of apportioning the membership were constitutionally invalid and void, as contrary to the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, and the Arkansas Board of Apportionment was directed to reapportion the General Assembly in a manner which would meet the requirements of the Equal Protection Clause, such reapportionment to be completed not later than June 15, 1965.[2]

In the meantime, on January 6, 1965, Clarke Kinney, appellee herein, had instituted a suit in the Chancery Court of Pulaski County (Second Division), seeking a declaratory judgment as to the validity of Amendment 45 to the Constitution of the State of Arkansas. An answer was filed to this petition by appellants, and on March 17, 1965, the Chancery Court entered its decree, holding that the provisions of Amendment 45, establishing one hundred members for the House of Representatives, and thirty-five members for the Senate, were effective, standing alone, and valid, under the Constitutions of both the State, and the United States. The trial court further held that the provision of the Constitution, creating the Board of Apportionment,[3] was effective, standing

[1] See *Yancey* v. *Faubus,* 238 F. Supp. 290.

[2] The reapportionment was directed under the authority of several cases, decided by the United States Supreme Court, *viz, Baker* v. *Carr,* 369 U. S. 186, decided in 1962, and the following cases, decided in 1964: *Reynolds* v. *Sims,* 377 U. S. 533; *WMCA, Inc.* v. *Lonenzo,* 377 U. S. 633; *Maryland Committee For Fair Representation* v. *Tawes,* 377 U. S. 656; *Davis* v. *Mann,* 377 U. S. 678; *Roman* v. *Sincock,* 377 U. S. 695; *Lucas* v. *Colorado General Assembly,* 377 U. S. 713.

[3] The Board of Apportionment consists of the Governor, the Attorney General, and the Secretary of State.

alone, and that the Board is the proper authority to reapportion the General Assembly. From the decree so entered, appellants bring this appeal.

A resume of the provisions involved is in order. All of the Arkansas Constitutions have provided for periodic reapportionment of the Legislature on the basis of population. Originally the responsibility for reapportionment was placed in the Legislature, but in 1936, the electorate of Arkansas adopted Amendment 23, which created a Board of Apportionment, and placed in such Board the duty of reapportioning both Houses of the General Assembly, following each Federal census,[4] directing, however, that an initial reapportionment be made in 1937. Acting thereunder, the Board made the 1937 reapportionment, and also reapportioned in 1941 and 1951. Amendment 23, *inter alia,* provided (in Section 2) that the House of Representatives should consist of one hundred members, with "each county existing at the time of any apportionment" to have at least one representative, with the remaining members to be equally distributed, as nearly as practicable, among the more populous counties of the state. Section 3 provided that the Senate should consist of thirty-five members, with the Board of Apportionment dividing the state into senatorial districts in such manner that each Senator would represent, as nearly as practicable, an equal number of persons; further, that each district should have at least one Senator. This amendment remained in effect until the general election of November, 1956, when Amendment 45 was adopted by the people. This amendment, which restated the provisions of Amendment 23, in large measure, made only two changes that are here pertinent. Section 3 (referring to the Senate) reiterated the provision that the Senate should consist of thirty-five members, but "froze" the senatorial districts in accordance with the State Supreme Court decision in the case of *Pickens* v. *Board of Apportionment,* 220 Ark. 145, 246 S. W. 2d 556. In other words, Section 3 of this amendment provided that the geographical composition of the districts, and the number of Senators from each district,

[4] The census is taken every ten years.

should not be changed. In conformity with this section, the Board of Apportionment, in Section 4, was only required to apportion the membership of the House of Representatives.

There are only two questions before this court in this litigation. First, does the decision of the Federal District Court, invalidating the apportionment provided in Section 2 of Amendment 45 (referring to the House of Representatives) and invalidating the apportionment in Section 3 (referring to the Senate), also invalidate the provisions of those same sections which provide that the House of Representatives shall consist of one hundred members, and that the Senate shall consist of thirty-five members? The next question is whether the Board of Apportionment is the proper authority to apportion under the Constitution of this State.

As to the first question, the answer is "No." It is the contention of appellants that, since portions of the sections have been invalidated, the entire sections are likewise void and of no effect. We have held contrary to this contention many times. In *Levy* v. *Albright,* 204 Ark. 657, 163 S. W. 2d 529, this court said:

"An act may be unconstitutional in part and yet be valid as to the remainder. Many cases so hold, and the following quotation from Cooley's Constitutional Limitations appearing in the case of *Oliver* v. *Southern Trust Co.,* 138 Ark. 381, 212 S. W. 77, has been many times approved by this court: '". . . Where, therefore, a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in the subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed the Legislature would have passed the one without the other. *The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand, though the last fall.*[5] The point is not whether they are contained

[5] Emphasis supplied.

in the same section, for the distribution into sections is purely artificial, but whether they are essentially and inseparably connected in substance. If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained. . . ."

See also *Emberson* v. *Buffington,* 228 Ark. 120, 306 S. W. 2d 327, and cases cited therein. While these particular cases referred to statutes enacted by the Legislature, the rule is the same in construing Constitutions. The rule is stated in 16 Am. Jur. 2d, *Constitutional Law,* §42 (1964) as follows:

"The question may arise as to the effect of partial invalidity of a constitutional amendment. In accordance with the rules governing the invalidity of portions of a statute, it has been held that where part of an amendment to a state constitution is invalid because it violates the Federal Constitution, if the several parts of the amendment are separable, the valid portions may be saved, unless it is obvious that the intent of the adopters of the amendment was to accept one general scheme in an entirety, in which event, if part of the amendment falls, the whole must fall with it."

Our cases hold likewise. In *Bailey, Lt.-Gov.* v. *Abington,* 201 Ark. 1072, 148 S. W. 2d 176, this court said:

"The rules governing the construction of constitutional amendments are the same as those governing the construction of statutes."

See also *Shepherd* v. *Little Rock,* 183 Ark. 244, 35 S. W. 2d 361.

We think, unquestionably, that the people would have passed the provisions in Amendment 45, fixing the House membership at one hundred members, and the Senate membership at thirty-five, irrespective of whether the other provisions (held invalid by the Federal District Court) had been contained in the sections. This is em-

phasized by the fact that, not once, but twice, the people adopted constitutional amendments, fixing the House and Senate memberships at the above mentioned numbers. Those provisions are certainly not dependent upon the language in the balance of the sections, but are completely independent requirements. We hold that these provisions are valid.

As to the second issue, we likewise agree with the Chancery Court that the Board of Apportionment is the proper authority to carry out the mandate of the Federal District Court. The Federal Court, though directing the Board of Apportionment to effect a valid reapportionment of the Arkansas House and Senate that would meet the requirements of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, made clear that it was not concerned about which body or agency of the state has the power to make the reapportionment.[6]

Here, again, we think it obvious that the creation of the Board of Apportionment is entirely independent of the other provisions of the amendment, and would have been passed by the people, though the invalid provisions had been omitted. As previously pointed out, the Legislature was originally given the task of reapportioning

[6] From the opinion in *Yancey* v. *Faubus*: "The Board of Apportionment is before the Court, and whether rightly or wrongly the Board is taking the position that it has or probably has the power to make a valid reapportionment. Since the Board takes this position, we think that it should be directed, and it will be directed, to come forth with a valid scheme of apportionment not later than June 15 of the current year. If it develops ultimately that the Board has no such power as a matter of State law, the Court can then take such steps as may seem necessary or appropriate in the circumstances, including the addition of other parties defendant if such a course seems necessary or desirable.

"The Court is aware that the Legislature is now in session, and the Court is aware also that the possibility of that body taking some action itself in the field of reapportionment is being discussed rather widely. Our directive to the Board to proceed to make a reapportionment by June 15 is certainly without prejudice to the right of the Legislature to take such action in the field as it may deem to be proper or judicious.

"After all, this Court is not directly concerned at this time with what body brings about a valid reapportionment, nor is it concerned with what particular scheme may be adopted ultimately provided that the chosen scheme meets the constitutional requirement laid down by the Reapportionment Cases."

the General Assembly at proper periods, but the people took away this right in 1936 when Amendment 23 was adopted, placing the authority in the Board of Apportionment. This choice was again reiterated by the passage of Amendment 45. It is true that this last amendment only gives the Board the authority to reapportion the House, but it is obvious that the reason for this distinction (from Amendment 23) is that Section 3 "freezes" the Senate, as heretofore mentioned. In fact, this was the only purpose in passing Amendment 45, as the other provisions of that amendment were substantially the same as the requirements of Amendment 23. This is even shown by the popular name: "To preserve present apportionment of State Senators and Existing Senatorial Districts." Amendment 45 repealed all laws in conflict with its provisions. In *St. Louis, I. M. & So. Ry. Co.* v. *State,* 86 Ark. 343, 111 S. W. 260, this court, through Justice Hart, quoted the general rule on this subject, as follows:

"Where there is, by a general clause, a repeal of all acts and parts of acts inconsistent with the statute, and it is apparent that the repealing statute is to be substituted for the one repealed, the unconstitutional character of the repealing statute will also render void the repealing clause. And on the same principle a prior statute will not be impliedly repealed by inconsistency with a subsequent unconstitutional one."

See also 82 C.J.S. Statutes, §281, and 102 ALR 802. Here, it is apparent that Section 3 of Amendment 45 ("freezing" the senatoral districts) was to take the place of, or be substituted for, Section 3 of Amendment 23, which provided for apportionment of the Senate by the Board. The Federal Court has held Section 3 of Amendment 45 in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, and, under the law quoted, the repealing section was also void.

It is true that certain provisions of Amendment 23 would also be unconstitutional under the decision by the Federal District Court, but, as previously stated, the

number constituting House and Senate membership is not affected, and the creation of the Board of Apportionment is not affected. Under Amendment 23, the Board was given authority to apportion the Senate, as well as the House. In *Davis* v. *Synhorst,* 225 F. Supp. 689 (1964), a reapportionment case, a three-judge court said:

"If an act is repealed by an unconstitutional amendment, the former act remains in force when the unconstitutional amendment is declared void, providing this result gives effect to the Legislature's intention. The matter of legislative intent is controlling."

Likewise, in matters relating to constitutional amendments, the intent of the people is controlling.

Clearly, since 1936, the people have desired that apportionment be accomplished by the Board of Apportionment. It follows that this Board is the proper authority to undertake the reapportionment as ordered.

Affirmed.

WHERRY *v.* WHERRY.

5-3519 389 S. W. 2d 277

Opinion delivered May 17, 1965.

E. V. Trimble, for appellant.

James A. Ross, for appellee.

ED. F. MCFADDIN, Associate Justice. This is an appeal by Mary Wherry from a judgment of the Probate

Court of Drew County, finding and declaring Sarah Wherry—rather than Mary Wherry—to be the lawful surviving widow of William Wherry, who died on June 5, 1961.

The appeal must fail since appellant did not bring to this Court within due time any of the evidence heard by the Trial Court. The following are the factual dates:

(a) The judgment of the Probate Court was filed May 12, 1964.

(b) The notice of appeal was filed June 1, 1964.

(c) The order extending the time for filing the appeal in the Supreme Court "to the full statutory time" was filed July 28, 1964.

(d) The transcript—containing only the pleadings, findings, and judgment of the Probate Court, and the notice of appeal—was filed in this Court on November 12, 1964.

(e) On April 22, 1965, there was tendered to the Clerk of the Supreme Court for filing what purported to be a transcription of the testimony heard by the Probate Court and on which the judgment was based. These pages were certified by the Court Reporter under date of January 21, 1965, but not tendered to the Clerk of the Supreme Court until April 22, 1965.

It is obvious that the filing of the testimony was entirely too late[1] (see Ark. Stat. Ann. §27-2127.1 [Repl. 1962]); and in the absence of the evidence, the appellant has no foundation on which to base an argument that the findings of the Trial Court are contrary to the preponderance of the evidence.

The real question in the Probate Court was which of the parties—*i.e.*, Mary Wherry, the first wife, or Sarah Wherry, the second wife—was the lawful surviving widow of the deceased. The Probate Court had jurisdiction to determine this matter; and heard evidence and rendered an Opinion which we copy in *extenso*:

[1] There was no petition for *certiorari* to complete the transcript filed on November 12, 1964.

"This is a proceeding for the determination of the lawful widow of the decedent.

"Mary Wherry, hereinafter referred to as 'Mary' and Sarah Wherry, hereinafter referred to as 'Sarah,' each contends to be the lawful widow of the decedent.

"Mary was married to the decedent in Drew County, Arkansas, on September 4, 1921. Sarah was married to the decedent in Drew County, Arkansas, on January 23, 1952. There were no children born of either marriage. The decedent died intestate on June 5, 1961, and left surviving no child, children, or their descendants, but certain heirs at law, the names of which are not in issue.

"Mary and the decedent, hereinafter called 'William' separated in Drew County, Arkansas, in 1923, and did not cohabit as man nad wife thereafter, except in the 1940's while Mary was visiting her father in Drew County, they saw each other, and there is an indication that intimacy resulted from these visitations. Mary went to Lincoln County, Arkansas, and there she made an effort to secure a divorce, but she stated the effort was unsuccessful because she lacked the nceessary finances. The proof indicates that during this period the employer of William at the Arkansas A. & M. College was assisting him with some 'divorce papers.' Mary later left Lincoln County and went to Jefferson County, Arkansas. She remained there for a period and then returned to Lincoln County, and from there went to the State of Washington. She remained there for a time and returned to Pulaski County, Arkansas. In the 1940's she spent eleven months in Drew County, Arkansas, visiting her father. Since her separation from William she married a man named Green and still bears his name. She married him on the then assumption that she was divorced from William. She testified that she had never been divorced from William.

"After the separation of Mary and William, he has lived in Drew, Garland, Union, and Ouachita Counties, Arkansas, and was in the Armed Services in World War II.

"Sarah and William lived together as husband and wife from the date of their marriage until his death.

"The Chancery Court records of Drew County, Arkansas, do not show a divorce decree wherein William and Mary were divorced.

"*Applicable Authority*

"Miller v. State, 235 Ark. 880, 362 SW (2) 443.
Miller v. Miller, 237 Ark. 66, 371 SW (2) 511.

"*RESOLVING THE ISSUES*

"The case of *Miller* v. *Miller, supra,* so completely covers the issues in this action that it is adopted as authority and the findings herein made in conformity therewith.

"*CONCLUSION*

"1. The plea of Mary should be denied;

"2. Sarah is the lawful widow of William;

"3. The heirship should be found as shown by the facts;

"4. The response of Sarah should be granted;

"5. The estate should pay all costs of this proceeding;

"6. The attorney for Sarah should prepare precedent in conformity with these findings and submit to the attorney for Mary for approval as to form.

"Dated 2 day of March, 1964.

/s/ James Merritt,
Probate Judge."

On the face of the record the judgment of the Probate Court was correct as to the law; and an examination of the transcription of the evidence (even though filed too late) convinces us that the judgment of the Probate Court was correct as to the facts.

Affirmed, with appellant to pay the costs of the appeal.

HUITT *v.* ERMENTRAUDT.

5-3590 390 S. W. 2d 128

Opinion delivered May 17, 1965.

[Rehearing denied June 7, 1965.]

[redacted]

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

Martin, Dodds & Kidd, for appellee.

ED. F. MCFADDIN, Associate Justice. This case stems from a traffic mishap involving a motorist (appellant)* and a pedestrian (appellee). The pedestrian received a judgment for personal injuries and the motorist brings this appeal, urging only one point, to-wit: "A verdict should have been directed in favor of appellants."*

After a careful study we conclude that a question of fact was made for the jury. Mr. Ermentraudt was walking down the right side of the highway and started across the road at a place not marked for crossing. The appellant, driving a 1955 car, came up behind Mr. Ermentraudt, who either walked into the side of the car or was struck by it. The evidence showed: that the driver of the car usually wore glasses, but was not wearing them at this time; that the speedometer on the car was broken but that the speed was approximately "35 to 40 miles per hour"; that the driver did not see Mr. Ermentraudt until within 50 yards of him; that the driver sounded his horn but never applied his brakes; that the driver swerved his car to the left lane; that Mr. Ermentraudt was struck while in the left lane; that the driver of the car then went off the road on the left side, traveled several hundred yards in the ditch, and finally regained the

* One appellant was owner of the car and the other was the driver. It was admitted that if the driver be liable, the owner is also; so we refer to the driver as "appellant."

highway; and that the driver never stopped his car but went on home.

From all these facts, and others, we conclude that appellant's negligence and Mr. Ermentraudt's contributory negligence were issues for the jury. Such being true, the Trial Court was correct in refusing to give an instructed verdict for the appellants.

Affirmed.

WHEELER *v.* JONES.

5-3593 390 S. W. 2d 129

Opinion delivered May 17, 1965.

[Rehearing denied June 7, 1965.]

G. Thomas Eisele, for appellant.

John B. Driver, N. J. Henley, for appellee.

GEORGE ROSE SMITH, J. This is a proceeding filed by the appellant to contest the general election of last

November with respect to the office of county judge in Searcy County. This appeal is from an order sustaining a demurrer to the complaint, on the ground that it fails to state a cause of action, and dismissing the proceeding.

The complaint alleges that the County Board of Election Commissioners certified that the appellee, the Democratic candidate, had defeated the appellant, the Republican candidate, by a vote of 1,701 to 1,691. As a basis for the contest the complaint asserts that 52 named persons who were not qualified electors voted in the absentee box and that an additional 196 named persons voted in precincts in which they did not reside. There is no allegation either that these challenged votes were cast for the appellee or that the result of the election would be changed if these votes were set aside. All that the complaint really asks is that the questioned ballots be declared void and that the remaining ballots then be counted to see who actually won the election.

We have often held that a complaint such as this one does not state a cause of action. Several of the cases were reviewed in *McClendon* v. *McKeown,* 230 Ark. 521, 323 S. W. 2d 542 (1959). Under these decisions the contestant, to state a cause of action, must show that the outcome of the election would be changed if certain identified illegal votes cast for his opponent were disregarded.

This appellant makes two arguments in his attempt to escape the effect of our prior holdings. First, it is contended that those cases involved the primary election laws and are not controlling in a contest of a general election. It is true that the statute permitting a contest of a primary election, Ark. Stat. Ann. § 3-245 (Repl. 1956), is not worded exactly like the statute that governs the contest of a general election. § 3-1204. There is, however, nothing in the difference in wording to support the appellant's present argument. Neither statute purports to define the allegations that a contestant must make to state a cause of action. The rule followed in our earlier opinions is not of statutory origin. It is merely an example of the basic principle that a complaint, to be

good against demurrer, must state *facts* constituting a cause of action. It is the absence of such facts that makes the present complaint fatally deficient.

Secondly, it is insisted that this plaintiff would be denied due process of law if we should hold his complaint to be subject to demurrer. This argument has no merit. Fundamentally the appellant complains of the fact that some persons voted in precincts where they did not live and that others who were not qualified electors were allowed to vote. There is nothing in the due process clause to require either that a voter cast his ballot only in his home precinct or that he comply with the various Arkansas statutes defining a qualified elector. As far as the constitution is concerned, the legislature is free to dispense with both of these requirements. Thus it is readily apparent that the grievances now asserted by the plaintiff do not involve matters protected by the guaranty of due process of law.

The trial court was right in refusing to allow the plaintiff to amend his complaint after the expiration of the twenty days allowed for the filing of the contest. Ark. Stat. Ann. § 3-1203. As we have seen, this complaint did not state a cause of action. To allow it to be amended in such a way as to state a cause of action would, in effect, permit the plaintiff to assert, for the first time, his cause of action after the expiration of the twenty days. Such an amendment is not permissible. *Cain* v. *McGregor,* 182 Ark. 633, 32 S. W. 2d 319 (1930). We do not think it necessary to discuss other subordinate contentions made by the appellant.

Affirmed.

K. C. So. Ry. Co. *v.* Story.

5-3578 390 S. W. 2d 124

Opinion delivered May 17, 1965.

[Rehearing denied June 7, 1965.]

[redacted]

Hardin, Barton, Hardin & Jesson, for appellant.

Byron Goodson, for appellee.

Paul Ward, Associate Justice. A fire which originated along the right-of-way of the Kansas City Southern Railway Company (appellant herein) damaged real estate belonging to appellees (S. G. Story and Dukes Wilson, d/b/a Story and Wilson) which land lay adjacent to said right-of-way. The stipulated damages amounted to $1980.

Following a trial before the Circuit Judge (sitting as a jury) wherein appellees contended the fire was caused by negligence and carelessness on the part of appellant, a judgment was entered against appellant and in favor of appellees in the amount previously mentioned.

On appeal the only point urged is the lack of substantial evidence to support the judgment.

The material testimony which is not in dispute may be summarized as hereafter set forth. Appellant's freight train, consisting of 122 cars and five diesel locomotive units passed the land belonging to appellees and shortly thereafter a fire was observed on the right-of-way. No one saw the fire when it first started or knows exactly how it started. At the time of the fire the weather was dry and had been for several weeks.

First, it is deemed proper to set forth clearly the applicbale rule of law under which this case is being tried. In the recent case of *Kansas City So. Ry. Co.* v. *Beaty,* 239 Ark. 187, 388 S. W. 2d 79, to which reference is made for more details, it is pointed out that before the passage of Act 141 of 1907, it was necessary for the plaintiff, in a case of this nature, to allege and prove negligence on the part of the railroad company. After the passage of said Act 141 it was not necessary to allege or prove negligence, but it was, of course, necessary to prove (by direct or circumstantial evidence) that the railroad company was responsible for starting the fire. This was the law until the passage of Act 320 of 1955 when once more it was made the duty of the plaintiff to allege and prove negligence. This rule of law applies in this case.

We have concluded that in this case the finding of the trial court (sitting as a jury) is supported by substantial evidence. In the *Beaty* case we quoted with approval from *Missouri Pacific Railroad Company* v. *Johnson,* 198 Ark. 1134, 133 S. W. 2d 33, the following:

"Where fire is discovered shortly after a train has passed, and the proof does not establish some other origin of the fire, the jury is justified in finding that fire originated from sparks from the engine. . . . There is thus made a case of *prima facie* negligence, not rebutted by other evidence to the effect only that the spark arresters were in good condition. . . ."

In addition to the testimony set out above, the record also discloses: one witness said he observed the fire shortly after the train passed; another witness said the train was using its brakes when it went by; and, another witness testified the wheels and brakes on the train were made of cast-iron, which (when the brakes were applied) has a tendency to create sparks; and, appellant has some fiber brake shoes on its newer cars. We conclude, therefore, that the judgment of the trial court is supported by substantial evidence.

Affirmed.

AMERICAN INS. CO. *v.* ROBERTSON.

5-3586 389 S. W. 2d 880

Opinion delivered May 17, 1965.

[redacted]

Griffin Smith, for appellant.

Martin, Dodds & Kidd, for appellee.

SAM ROBINSON, Associate Justice. In May, 1961, appellee, Lillian B. Robertson, and her husband, purchased a house and lot from A. E. Hudspeth and his wife, Velma Hudspeth. Waldrop Realty Company acted as agent for the sellers. On October 22, 1961, appellee's husband died. Harold W. Strangways, who was connected with Waldrop Realty Company as manager, induced Mrs. Robertson to reconvey the property to the Hudspeths, promising that on execution and delivery of the deed he would pay to her the sum of $1,000. On November 28, 1961, Mrs. Robertson executed the deed and delivered it to Strangways. He did not pay her the $1,000 as promised.

Later, in an attempt to collect the $1,000, Mrs. Robertson filed this suit naming as defendants Waldrop Realty Company, Inc., Harold Strangways, and American Insurance Company, the surety on Strangways statutory bond. A jury was waived and the matter was tried before the court. There was a judgment for $1,000 in favor of Mrs. Robertson against all three defendants. Only the American Insurance Company has appealed.

Appellant's sole contention is that its principal, Harold Strangways, was acting only as an agent of Waldrop Realty Company in dealing with Mrs. Robertson, and therefore, there is no personal liability on the part of Strangways and hence, none on the part of the surety.

According to the undisputed evidence, Strangways was a real estate broker. The appellant insurance company made the bond for Stephen L. Waldrop, Jr. and Harold W. Strangways, doing business as Waldrop Realty Company. There is substantial evidence that Strangways was acting in his capacity as a broker when he made the deal with Mrs. Robertson. The surety on his bond became liable thereon when he violated the provisions of Ark. Stat. Ann. § 71-1307 (Repl. 1957) by making a false promise to induce Mrs. Robertson to execute and deliver a deed to the property.

One of the purposes of the statute requiring real estate brokers to make a bond is to protect the public against the very kind of thing that occurred here. If the broker and his surety can avoid liability by hiding behind the skirts of a corporation, the bond would be useless and the statute would have no force and effect whatever.

Mrs. Lucille Hicks testified that she was working for the Waldrop Realty Company at the time of the transaction with Mrs. Robertson, and it was her understanding that Strangways was a partner with Steve Waldrop; that Strangways promised Mrs. Robertson $1,000 upon the execution of the deed, but when Mrs. Robertson signed it he stated he would first have to look it over before paying her the money; that he would pay her as soon as he returned from a home builders convention in Chicago, but he never did return; that Strangways was the broker she worked under. "I worked under Mr. Strangways. As a matter of fact, Mr. Strangways sponsored my license when I passed the State Board examination."

Mrs. Hicks further testified on cross-examination: Q: You knew this deal was a corporation deal? A: I did

not know this deal was a corporation deal. When I was sent out there to Mrs. Robertson's I was sent there by Mr. Harold Strangways and I told her just exactly what he sent me there to tell her.

Mrs. Robertson testified she made the deal with Strangways—no one else.

Affirmed.

ROESLER *v.* DENTON.

5-3562 390 S. W. 2d 98

Opinion delivered May 17, 1965.

[Rehearing denied June 7, 1965.]

H. Clay Robinson and *Hardin, Barton, Hardin & Jesson,* for appellant.

Don Gillaspie and *Mark E. Woolsey,* for appellee.

JIM JOHNSON, Associate Justice. This suit concerns damage to real property.

Appellants Roseler own residential property in Fort Smith, bounded on the north by Park Avenue and on the east by a natural drainage course which ran under Park Avenue through a culvert, and over as well as under Park Avenue during heavy rains. As a part of the local highway program, this section of Park Avenue was included in what is called the Fort Smith Spur. The level of Park Avenue was raised adjacent to appellants' property and after the highway construction was completed, appellants discovered that the new culvert was inadequate to carry off excessive rainfall, resulting in flooding of their land. Appellants filed suit in Sebastian Chancery Court against appellees, members of the State Highway Commission, the Highway Director, the resident highway engineer and the highway contractors, seeking to require rebuilding of this section of the highway so as to restore the natural water courses and surface water drainage to its condition prior to said construction, and then amended their complaint for damages for the permanent injury to their property.

We are well aware that "the right of property is before and higher than any constitutional sanction; and private property shall not be taken, appropriated, or damaged by public use, without just compensation therefor" (Ark. Const. Art. II, § 22) and have in the past wrestled with the particular problem here involved. We are perforce equally cognizant of Article 5, § 20, "The State of Arkansas shall never be made defendant in any of her courts." Were it not for the administrative relief available to claimants such as appellants through the State Claims Commission, Article 5, § 20 might well be considered to be violative of due process. However, the questions here raised have been thoroughly discussed in *Bryant* v. *Ark. State Highway Commission,* 233 Ark. 41, 342 S. W. 2d 415, as follows:

"The chancellor was right in sustaining the demurrer, for the present proceeding falls within the constitutional prohibition of suits against the State. The controlling language of the constitution is mandatory: 'The State of Arkansas shall never be made defendant in any of her courts.' Ark. Const., Art. 5, § 20. Since the decision in *Ark. State Highway Comm.* v. *Nelson Bros.,* 191 Ark. 629, 87 S. W. 2d 394, it has been settled that the Highway Commission cannot be sued, and this immunity cannot be waived even by the legislature.

"The suability of the Highway Commission was considered in a series of decisions closely following the *Nelson Brothers* case. In *Ark. State Highway Comm.* v. *Partain,* 192 Ark. 127, 90 S. W. 2d 968, it was held that where the Commission was threatening to take private property without making any provision for compensation, the landowner was entitled to enjoin the Commission from taking the property until an amount sufficient to cover the damages had first been deposited in court. Such an injunction, restraining the commissioners from acting illegally, was not regarded as a prohibited suit against the State. But where the landowner stood by and permitted the Commission to take, occupy, and damage his lands, he could not maintain an action against the Commission to recover his damages, for such a coercive proceeding would constitute a suit against the State. *Federal Land Bank of St. Louis* v. *Ark. State Highway Comm.,* 194 Ark. 616, 108 S. W. 2d 1077; *Ark. State Highway Comm.* v. *Bush,* 195 Ark. 920, 114 S. W. 2d 1061.

"The case at bar falls within the latter principle, for the asserted injury to the landowners had already occurred when their suit was filed. Nevertheless counsel seek to distinguish the prior cases by arguing that these appellants did not stand by and permit their property to be damaged, since it is contended that the Commission closed the exits so quickly that there was no time for an injunction to be sought. This argument misconceives the basis for the Commission's immunity to suit after the taking or damages has occurred. The landowner's inability to recover damages does not rest upon the doctrine

of laches, in that he has slept upon his rights. Rather, the underlying reason for the court's holding is simply a recognition of the fact that an action to compel the State to redress a past injury would unquestionably constitute a suit against the State. Such a proceeding is plainly forbidden by the constitution.

"It is also insisted that the appellants have a constitutional right to maintain the present suit. Counsel rely upon § 13 of Article 2 of the constitution, which provides that every person is entitled to a certain remedy for injuries to his property, and upon § 22 of Article 2, which declares that the right of property is higher than any constitutional sanction and that private property shall not be taken or damaged for public use without just compensation. It is contended in substance that the State's immunity from suit is in conflict with these constitutional clauses and that the latter can be given effect only by permitting the present proceeding to be maintained.

"This argument must be rejected. The framers of the constitution certainly knew that instances of hardship would result from the prohibition of suits against the State, but they nevertheless elected to write that immunity into the constitution. The language is too plain to be misunderstood, and it is our duty to give effect to it. The appellants' argument, carried to its logical end, would completely destroy the State immunity from suit, for it could be argued in every case that to exempt the State from a coercive proceeding would be to deny the plaintiff a certain remedy for an injury he had supposedly suffered.

. . . "We must conclude that this proceeding falls within the constitutional inhibition against suits against the State. If appellants have a right to compensation—a point upon which we need not express an opinion—they are limited, as we said in the *Partain* case, *supra,* to filing an administrative claim for such relief as the State may see fit to provide."

It follows, therefore, that as to the highway commissioners and employees, the demurrer was properly sus-

tained as a suit against the State, and in the absence of an allegation that the contractors negligently failed to perform in accordance with their contracts with the State Highway Department, the demurrer was properly sustained as to them. See *Southeast Construction Co., Inc.,* v. *Ellis,* 233 Ark. 72, 342 S. W. 2d 485; *Ben M. Hogan Co.* v. *Fletcher,* 236 Ark. 951, 370 S. W. 2d 801.

Affirmed.

ROBINSON, J., not participating.

[redacted]

CHENEY, COMMISSIONER *v.* FREDERICK.

5-3564 390 S. W. 2d 121

Opinion delivered May 17, 1965.

[Rehearing denied September 20, 1965.]

[redacted]

Lyle Williams, for appellant.

Tom Gentry, for appellee.

FRANK HOLT, Associate Justice. This is an appeal by the Commissioner of Revenues of the State of Arkansas from an adverse decree of the Pulaski Chancery Court holding that a house trailer was not subject to the gross receipts tax claimed to be due to the State.

The parties stipulated that appellees purchased a house trailer on July 3, 1958 from a dealer, the Twin City Mobile Homes Company of North Little Rock, Arkansas, and since that date have used it for a home in such a manner as not to require licensing under the laws of the State of Arkansas; that no license has ever been issued; that the appellees did not report the purchase to the Commissioner and no gross receipts tax has ever been paid on the purchase by the appellees. It appears that the appellant had no knowledge of the sale until on or about October 28, 1963 when an auditor of the State Revenue Department made an assessment of the tax due. The appellees were given notice of the assessment of $207.49 and the intention of the Commissioner to file a Certificate of Indebtedness if the appellees did not pay the tax or request a hearing within the time allowed by law. When the appellees did neither, the Certificate of Indebtedness was filed against them on May 13, 1964 in the Circuit Court of Pulaski County.

A few days later, appellees filed in Pulaski Chancery Court their petition requesting a temporary injunction to restrain the appellant from proceeding to collect the tax from them by enforcing the Certificate of Indebtedness. Appellees denied any liability for the tax contending that under the provisions of Ark. Stat. Ann. §84-1903 (Repl. 1960) the Gross Receipts Tax does not apply to a trailer which is not required to be licensed and, further, even if such tax were due and payable at the time of the sale the appellant was barred from collecting the tax by the Statute of Limitations. Ark. Stat. Ann. §84-1910 (a). The Chancery Court upheld the appellees on both of their contentions and from the decree making the injunction permanent this appeal arises.

For reversal appellant relies upon Ark. Stat. Ann. §84-1903 (a) which levies a 3% sales tax upon all sales of "tangible personal property". Appellant ably and strenuously contends that the Act specifically provides that the gross receipts tax applies to the "sale" of a house trailer not requiring a license since it is tangible personal property. Even so, the Act makes the seller

and not the purchaser, the consumer, liable to appellant for the tax. The seller is the tax collector in the sale of tangible personal property. This burden of collecting, reporting and remitting the sales tax was held by us to be reasonable and practical in the case of *Wiseman* v. *Phillips,* 191 Ark. 63, 84 S. W. 2d 91. The rationale behind the legislative requirement that the seller is liable for the collection of the sales tax is well expressed in *Arkansas Power & Light Co.* v. *Roth,* 193 Ark. 1015, 104 S. W. 2d 207: "The enforcement of the law would be impracticable if the Commissioner were required to collect from the consumer, for obvious reasons."

In reviewing this statute we find no provision authorizing the appellant to proceed against the consumer, as in the case at bar, by issuing and enforcing a Certificate of Indebtedness against him for his failure to pay the sales tax. Certainly, it would be impractical and unreasonable to expect the consumer, the buying public, to know when a sales tax is owed and, if so, to whom it should be paid. Under the clear provisions of the statute the onus of collecting the gross receipts sales tax has been placed upon the seller except and only when the article sold is required to be licensed, in which event the consumer is required to pay the tax to the Commissioner before a license can be issued. It is admitted that the trailer in question was not required to be licensed since it was not used upon our highways. Thus, there was no duty upon the appellees, as buyers, to pay the appellant the claimed tax. In connection with the payment of the tax, attention is directed to Act 146 of 1965.

Having determined the appellees are not liable to appellant in the instant case, it becomes unnecessary for us to reach a discussion of the application of the Statute of Limitation.

Affirmed.

WARD, J., dissents.

PAUL WARD, Associate Justice (dissenting). For reasons hereafter set out this case, in my opinion, should be reversed.

The majority, in affirming, appear to rely on two points or conclusions, neither of which, in my opinion, is sound. Both are presently discussed.

(a) The majority state: ". . . the Act [Act 386 of 1941—Ark. Stat. Ann. § 84-1903 (Repl. 1960)] makes the seller and not the purchaser, the consumer, liable to appellant for the tax". I agree that, in the case of merchandise sold in stores (and in other instances) the above statement of the rule is correct, but the majority fail to point out an exception to the above rule. In a sub-paragraph to said § 84-1903 it is plainly stated that in the case of new and used cars the tax "shall be paid to the Commissioner of Revenues". That being true, what about trailers? Is it not logical to suppose that anyone who purchases a trailer would also be required to pay the tax to the commissioner? However, we are not left to supposition. In the same section it says the provisions of the section (about paying to the commissioner) applies to trailers. The majority, I am sure, would readily agree that if the purchaser of a trailer intended to use it on the road he would be required by the section in question to report to the commissioner and pay not only the 3% tax but also pay for a license for the trailer. But, if the purchaser reports to the commissioner and convinces him the trailer would never be used on the road, no license would be payable although the 3% tax would be payable. Any other interpretation of the Act would lead to a ridiculous situation—that is, it would allow the appellees themselves in this case to decide (without reporting to the commissioner or anyone else) whether (a) they owed the 3% tax and (b) whether the trailer would be used on the road or used as a home.

To me it is clear from § 84-1903 that appellees owe the 3% tax even though the trailer was not to be used on the road. The trailer admittedly is personal property and taxable under § 84-1903 (a). If it is not taxable in this case it must be because it is exempted under § 84-1903 (e). However, if there is any doubt about the exemption it must be resolved against appellees. See: *Morley, Commissioner of Revenues* v. *E. E. Barber Con-*

struction Co., 220 Ark. 485, 248 S. W. 2d 689. That opinion, at page 491 of the Arkansas Reports, quoted, with approval, the following: " '. . . We must apply the familiar rules that an exemption from taxation must be strictly construed and to doubt is to deny the exemption' ". In the case of *Scurlock, Commissioner of Revenues* v. *Henderson,* 223 Ark. 727, 268 S. W. 2d 619, this Court had this same question before it and at page 730 of the Arkansas Reports again quoted, with approval, this language:

". . . every reasonable intendment must be made that it was not the design to surrender the power of taxation, or to exempt any property from its due proportion of the burden of taxation".

To ask the following question is, it seems to me, to answer it in the negative: Can it logically and sensibly be said that the legislature (in said Act 386) meant to tax the sale of every conceivable kind of personal property (including the various services enumerated in § 3) but did not intend to tax the sale of a trailer?

We agree with the cases cited by the majority holding the legislature had the right to require the seller (retailer) to collect the sales tax. This, however, in no way means the legislature did not also have the right (as it did regarding sales of automobiles) to require the consumer (or purchaser) to pay the tax to the Commissioner of Revenues. Therefore the cases referred to have no bearing on the issue here involved.

The majority also call attention to Act 146 of 1965, but I fail to see how that Act has any significance in this case. Section 1 provides that persons selling trailers must obtain a permit; § 2 makes the tax apply to used trailers unless the tax has already been paid; § 3 requires the dealer to provide bond; § 4 provides how a dealer may lose his permit; § 5 fixes the effective date of the Act; § 6 repeals all conflicting laws; and, § 7 is the emergency clause.

My purpose in setting out fully the provisions of the 1965 Act was to confirm and emphasize my contentions

in this case. Section 2 of said Act makes it plain that the sales of *used* trailers are subject to the tax. Surely no one would contend that the legislature intended (by Acts 386 of 1941 and 146 of 1965) to place a tax on the sale of *used* trailers and not on *new* trailers. To my mind the legislature (by the passage of the 1965 Act) makes it clear it meant (by Act 386) to levy a tax on the sale of new trailers.

Since it is my opinion that it was the duty of appellees to report their purchase of the trailer to appellant, they cannot now take advantage of their own dereliction to avoid payment of the tax.

POINDEXTER *v.* COLE.

5-3588 389 S. W. 2d 869

Opinion delivered May 17, 1965.

Lester E. Dole, Jr., for appellant.

Gaughan & Laney, for appellee.

FRANK HOLT, Associate Justice. This litigation involves approximately one-eighth of an acre of unimproved rural land. The appellants filed a petition for an affirmative injunction seeking to compel the appellee to remove from this land a fence that he had allegedly erected upon the lands. The appellants also sought recovery for damages caused by appellee's trespass. Appellants claimed ownership by virtue of legal conveyance and adverse possession. The chancellor found "that the plaintiff [appellants] has title to a tract in his possession by reason of adverse possession, but the Court cannot enter a legal description as to the lands involved." The chancellor decreed that appellants had title to the land but did not order removal of the fence nor make an award of damages.

On appeal appellants contend for reversal that the chancellor should have awarded damages and ordered appellee to remove the fence. A careful review of appellants' evidence reflects that no legal description of the disputed property was ever established by a metes and bounds description or by the existence of a recorded plat.

As to the plat relied upon by appellants, the circuit clerk and recorder of Ouachita County testified that she searched the records for a plat called McCluskey Addition to the Town of Ogemaw and found no record of such a plat. Appellants' brief includes a diagram of the property in question, however, the sketch was never introduced into evidence nor made an exhibit to any of the testimony. Therefore, we cannot consider it on appeal. The burden was upon the appellants to demonstrate to us that the trial court was in error. This they have not done. Certainly we cannot say that the chancellor's finding that no legal description was established is against the preponderance of the evidence. As to damages, the appellants' proof is also deficient because it is speculative.

Since we affirm, it becomes unnecessary for us to consider appellee's contention that appellants failed to "seasonably file and docket the appeal". The decree is affirmed without prejudice to the right of appellants in

any further proceedings in this cause to establish by competent proof the boundary lines of the property in dispute by a legal description.

Affirmed and remanded.

GENT *v.* STATE.

5-3529 393 S. W. 2d 219

Opinion delivered May 24, 1965.

[Rehearing denied September 20, 1965.]

Robert C. Downie, Edwin E. Dunaway, Gregory & Claycomb, for appellant.

Bruce Bennett, Attorney General, By: *William L. Patton, Jr.,* Asst. Atty. General, for appellee.

CARLETON HARRIS, Chief Justice. This appeal is from a Decree of the Jefferson Chancery Court, holding that certain magazines were obscene. The court enjoined the appellants from sending, bringing, or causing to be brought, into Jefferson County for sale, exhibit, or gift, any of these magazines, and ordered them destroyed. Jurisdiction was retained to determine whether any future issues are obscene, and appellants were "notified that any future distribution of obscene publications, as set out, and found above, to be obscene, will also be restrained and enjoined and magazines will be removed." Included in the injunction were W. E. Burnham, Jr., county distributor of the magazines, and John Nickell, operator of a newsstand, which sold the magazines. The particular publications held to be obscene were *Swank, Gent, Modern Man, Bachelor, Calvalcade, Gentleman, Ace,* and *Sir.*[1]

The case arose upon complaint of the Prosecuting Attorney that the magazines were obscene, and in violation of Act 261 of the General Assembly of 1961 (Ark. Stat. Ann. § 41-2713-2728 [Repl. 1964]). The Chancellor impaneled, on motion of the state, an advisory jury, which, at the conclusion of an extended trial, unanimously found all magazines listed to be obscene. The court also found the magazines to be obscene, and issued its injunction. From the decree so entered, appellants bring this appeal.

One preliminary matter needs to be disposed of. The court refused to permit *Gent* to file an answer, hold-

[1] Actually, this court would be justified in dismissing the appeals because of non-compliance with Rule 9. We recognize that the contents of the magazines could not be fully abstracted, but we know of no reason why copies of each magazine offered in evidence could not have been furnished for each judge to examine. The inconvenience occasioned by seven different judges examining the one copy of each magazine is obvious. However, because of the importance of, and interest in, the case, we have separately inspected the exhibits in order to reach a determination on the merits of the litigation.

ing that the answer had not been tendered in time, and the judgment, as to this publication, was taken by default. We think the court erred. General counsel for the publication of *Gent,* in New York, wired the court on March 11, 1964, asking for a continuance, for the purpose of obtaining a suitable counsel. The Chancellor replied by letter, acknowledging the telegram, and stating, "The cause was continued yesterday to be heard April 28, at 9:30 A.M." Local counsel was subsequently retained, and tendered a response on April 24. We think the Chancellor's reply, which neither denied the request, nor indicated that the court had no authority to grant same, could well have been taken by New York counsel to mean that *Gent* had until April 28 to file an answer. Accordingly, appellant's request that it be made a party to this appeal, and that its argument on the merits of the appeal be considered by this court, is granted.

For reversal, seven alleged errors are asserted; however, some of these errors relate to the selection of, and instructions given to, the jury. Error is also asserted because of the court's refusal to admit into evidence other magazines and articles, as a matter of comparison, and the refusal to permit counsel to inquire from the state's witnesses whether they considered these other publications obscene. However, during oral argument before this court, counsel for all appellants requested that we make a determination on the merits, *i.e.,* that we decide whether the magazines are obscene, rather than remand the case because of error committed during the trial. We therefore, do not consider the alleged errors heretofore mentioned. Suffice it to say that we agree that procedural error was committed, but in compliance with appellants' request, we disregard legal mistakes committed in selecting and instructing the jury, and proceed to a discussion of the principal issue.[2] In doing so, we enter into a field marked and characterized by uncertainty. In fact, we know of no area of the law in which there is more confusion, and the most

[2] A jury in Chancery Court acts in an advisory capacity only, the court not being bound by jury findings. In this case, both the jury and the Chancellor reached the same conclusion.

recent opinion handed down by the nation's highest court, rather than contributing to clarity, has actually compounded the confusion.

In 1957, the United States Supreme Court decided the case of *Roth* v. *United States,* 354 U. S. 476. After holding that obscenity is not within the area of constitutionally protected speech or press, the court stated:

"The early leading standard of obscenity allowed material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons. *Regina* v. *Hicklin* [1868] LR 3 QB 360. Some American courts adopted this standard but later decisions have rejected it and substituted this test: *whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.*[3] The Hicklin test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press. On the other hand, the substituted standard provides safeguards adequate to withstand the charge of constitutional infirmity."

Following this decision, a number of states, through their legislatures, adopted the italicized standard. In 1961, the Arkansas General Assembly passed Act 261, which defines the word, "obscene," in the exact language set forth in the *Roth* case.

Appellants, for reversal, rely upon the more recent case of *Jacobellis* v. *Ohio,* 378 U. S. 184, and assert that this case makes clear that the "contemporary community standards," mentioned in *Roth,* actually refers to a "national" community, rather than a "local" community. Appellants vigorously argue that *Jacobellis* determined conclusively that the "national community standard" must be applied. We cannot accept this contention, since it does not appear that five judges, constituting a major-

[3] Emphasis supplied.

ity of the court, agreed upon the "national community" standard. The case was decided by a six to three vote, in which the lower court was reversed. There was no court opinion. Mr. Justice Brennan announced the decision, and wrote an opinion. Mr. Justice Goldberg concurred in Mr. Justice Brennan's opinion, but also filed a separate opinion of his own. Justices Douglas, Black, and Stewart concurred in the judgment of reversal, the first two on the basis that the Constitution does not permit censorship at all, and Mr. Justice Stewart, in a separate opinion, stating that the constitution only permits censorship of "hard core pornography;" further, "I shall not today attempt further to define the kinds of material I understand to be embraced within that short-hand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." Mr. Justice White concurred in the judgment for reversal, without expressing a reason. The Chief Justice, joined by Justice Clark, in a dissenting opinion, rejected the national standard, which Justices Brennan and Goldberg stated the court must apply. Mr. Justice Harlan likewise dissented, saying:

"* * * The more I see of these obsenity cases the more convinced I become that in permitting the States wide, but not federally unrestricted, scope in this field, while holding the Federal Government with a tight rein, lies the best promise for achieving a sensible accommodation between the public interest sought to be served by obscenity laws and protection of genuine rights of free expression. * * *"

Thus, it appears that only two justices of the prevailing six adopted the national community standard. It is therefore evident that a majority of the court, whatever may be the thinking, have not flatly said that the national standard must be applied. Much has been written about the *Jacobellis* case, and we think one of the

most comprehensive articles (or notes) appears in 40 Notre Dame Law., P. 1 (Dec. 1964)[4] The article states:

"According to the opinion of Mr. Justice Brennan in *Jacobellis* v. *Ohio,* the Supreme Court itself must weigh and decide the issues in obscenity cases; it must decide whether the disputed material is obscene; and it must decide this according to the standards of the community, that is, the whole country—all 50 States. In other words, the Court must apply a national standard. This note is addressed primarily to that opinion."

After pointing out that, though critical, the writers intend nothing derogatory toward the court or its individual members, it is further stated:

"Indeed, it is precisely because of our respect that we venture to suggest what seems to promise a way out of the *total confusion* which envelopes the problem of obscenity as a result of the opinions in some recent Supreme Court cases and the entire absence of opinion in others."

The article then notes that Justice Brennan sets out in his opinion that the Supreme Court must ultimately decide when a particular work is obscene, and the article poses the question of the logic of the court itself deciding obscenity cases when it does not decide for itself matters of equal or greater importance; for instance, whether a convicted murderer, when firing a fatal shot, was capable of distinguishing right from wrong, or was under a compulsion so strong that he was without power to resist it. These matters, of course, are determined by a jury. It is the opinion of the writers of the article that the Supreme Court, in deciding that it is the duty of the court to make its own independent decision of the issues in obscenity cases, has committed itself to an impossible task.

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[4] The note was prepared by Joseph O'Meara, Dean of the Notre Dame Law School,and Thomas L. Shaffer, Assistant Professor of Law of the Notre Dame Law School.

"Not only has the Court assumed an impossible task, that is, to make its own independent decision of the issues in obscenity cases, but, in so doing, if the opinion of Mr. Justice Brennan is followed, it must apply an absolutely impossible test, that is, the standard in such matters of the Nation as a whole.

"As a matter of *fact* there is no national community standard. Large cities are much more permissive, by and large, than smaller towns and farming areas, and standards vary not only according to the size of the community but according to geographical location as well. * * *

"* * * And to go back to population, the standard varies from one large city to another. Thus, it appears that practices are permitted in the Nation's capital which are not tolerated in New York or Chicago.

"Further examples of the *fact* that standards vary from one community to another come readily to mind. Consider, for instance, the State of Nevada where gambling is legalized; where prostitution flourishes openly; and where divorce is easier to obtain than almost any other place in the present-day world. Are the morals and mores of that State no different from the morals and mores of, say, New England? * * *

"Confronted, as it is, by conflicting standards, lax in one community, strict in another, what is the Court to do? If it succeeded in imposing the standard of, say Washington, D. C., or of Reno, on the rest of the Country, it would be imposing a standard which is repugnant to perhaps a majority of the people of the Nation, particularly in the smaller towns and rural areas. And, of course, the reverse would be equally true.

"Even as regards the big cities, there is no 'community standard.' There are many and conflicting standards; and our legal institutions provide judges no

mechanism for ascertaining what they are, sorting them out and selecting one as controlling. The inevitable effect of this is that each member of the Court will apply his own standard. But that is historically the role and function of the jury. The jury is the mechanism provided by the common law for determination of questions involving the presence or absence of due care, reasonableness, prudence, decency and other concepts reflecting the common sense and/or conscience of a community. And the jury can do it better than the members of our highest tribunal. But, of course, the jury could not and would not reflect a *national* standard, because such a standard is a fiction pure and simple.''[5]

Summarizing the views expressed in the several *Jacobellis* opinions, it is obvious that the court, in the final analysis, determines obscenity cases *de novo,* but the standard applied is not so readily apparent.

The stories and pictures in the eight magazines in question, in the main, deal with the theme of sex. The pictures generally portray side or back views of young females, totally unclad, or front views of the girls, unclad from the waist up. A large number of the stories, or articles, deal with adultery or fornication, the number varying in the several magazines.[6] In fact, all can be classified under the general term, ''girlie'' magazines. A few examples of the type of stories, or articles, found will illustrate the general theme. For instance, the following is an excerpt from a story in *Ace,* entitled, ''On the Level:''

''The window was open.

''I tugged at the shade and it snapped up with a swish, and there I was gazing at the two most perfect

[5] 13 Kan. L. Rev., P. 117, (1964) also contains an interesting article entitled "Obscenity: The Search for a Standard."

[6] No effort is made in appellants' briefs to point out differences in the articles, or pictures, from the different magazines, i.e., one magazine might possibly contain obscene material, but another particular magazine does not. It is simply the contention of appellants that none of the magazines can be classified as obscene, under the law as declared by the United States Supreme Court; a separate argument is presented by *Gent,* which is represented by different attorneys.

breasts in creation. Full they were, and round and firm, and by any criterion, utterly fantastic. She was powdering them with a fluffy pink puff, and as the shade flew up she paused in mid-puff. * * *

"She was lovely, but there was something wrong in the way she looked, in the lilt of her head, in the raven shimmer of her lustrous black hair, in the feline greeness of her eyes. And then I knew what it was—she was on her feet.

"Just as Goya's nudes would look ludricous standing up, and Botticelli's undraped beauties would look foolish except lying down, so this chick was made for the horizontal; and while she was great standing upright, I knew that on her back she'd be sensational. * * *

"We reacted to one another as if we were oppositely magnetized. My mouth was on her lips—moist, full, red lips. I've a thing for lower lips. The chick can be a dog, as long as the lower lip is a full, soft one.

"She intertwined herself about me, nudely white from cascading raven hair to scarlet toenails, and the sensation was not of this world. I could feel the sleek perfection of her body through my clothes, her ruby-tipped breasts pushing against me impatiently. I felt her soft arms around me, under my arm-pits, as she hooked her exquisitely manicured hands at my shoulders, thrusting her dancer's belly toward me.

"And I suddenly realized that we were standing by the open window. Not only could we be seen in sharp relief against the white apartment walls by everyone in neighboring apartments, but my colleague, a fellow student, might come looking for me any moment. I pried loose, and the chick let go with low moans that set my hair climbing. I'd been right. She was the type that digs. What might have been foolish prematurity had turned out to be telling perception. She was a chick who thought 'horizontally.' * * *

"* * * What it was with her, I couldn't quite pin down, but she never made love in the dark, and always

with the blinds up—and once while there was a girl friend in the living-room. It got to be a bit embarrassing. But she was a cool sketch, and she knew how to use that horizontal body of hers—*so well.* I didn't really give a damn."

In *Bachelor,* a particularly obnoxious (to us) article appears, entitled "Those Free-Loving Coeds — Why Every Man Should Go To College." The opening paragraphs of this article (giving some idea of the nature of the remainder of the story) are as follows:

"If you're a young man with plenty of initiative, zip and get-up-and-go, the place to be right now is in college. Just think of all the advantages. I don't mean the ordinary ones of being exposed to the great minds of science and the arts, learning from brilliant instructors and preparing yourself for a career. The advantages I'm talking about are even more important and have to do with meeting the most willing group of coeds ever to invade the campus scene.

"The fact is, today's crop of college girls are not only loving more—but they are more lovable, too. And it all goes to give Joe College fonder memories of his Alma Mater to take with him when he graduates.

"Only recently, for example, an anonymous senior from a large coed university in the middle-West was asked by an interviewer why his school had so few panty-raids in comparison with some of the all-male Eastern schools.

"The senior grinned. "Why *should* we have panty raids here?' he asked. 'They are all right for guys who can't get enough of the real thing. The girls in this school, though, keep us perfectly happy and content.' "

Again, in *Ace,* the story, "39 Inches of Femme Fatale," commmences as follows:

" 'You are a bitch!' Louise said.

" 'Yes, aren't I?' Carla Sanders laughed indulgently. 'And right here is 39 uptilted inches of bitchiness that

I intend to make pay off.' Insultingly she cupped her hands under her breasts."

From *Cavalcade,* "The Wrong Chimney:"

" 'Shh,' she murmured.

"She lifted his hand to cup her full breast, and turned a bit, her eyes closed, lifting her face to kiss him on the mouth, her rich lips parted. His hand felt her warm softness and moved of itself, amorously, his other hand automatically reached behind her, caressing, his mouth felt her warm lips and the tip of a tongue going into his, darting, exploring.

"She drew her face back a little, breathing fast, her eyes still closed. He looked at the lovely features he'd dreamed of so often looking just this way, with the same eager, surrendering expression, and reached for her again.

" 'You were late,' she said softly. 'I was afraid . . . Don . . .'

"She stopped talking as her mouth again met his. Then it penetrated . . . Don, she'd said. He started to draw back but he couldn't, he wanted her too much. He raised his hand a little to the back of her proud lovely neck and kept her mouth pressed to him. Then he thought . . . polite . . . proper . . . courteous . . . an officer and a gentleman, and pulled his seeking lips from her eager mouth.

" 'Hurry,' she said, her eyes still closed. 'We only have a few minutes.' "

We recognize that articles, or stories (and pictures) dealing with sex are not necessarily obscene. The material only becomes obscene when it deals with sex in a manner appealing to prurient interest. Of course, there are frequently pictures or drawings in health and art magazines, which might be said to deal with sex, but such magazines would not be considered obscene, because their *dominant theme* relates to health or art. In Lock-

hart and McClure, "Censorship of Obscenity," 45 Minn. L. Rev. 5, page 91, we find:

"In applying the requirement that material must be judged as a whole and by its dominant theme, courts have often spoken of the relevance of the objectionable parts to the dominant theme. If the objectionable parts are relevant to the dominant theme, courts ordinarily have found the material not obscene. But if the parts are irrelevant to the theme and independently obscene themselves, courts have usually found the material obscene . . ."[7]

There are articles, or stories, in these eight magazines, which would not be considered obscene, but, in viewing the total contents of each of these publications, we think it can well be said that their dominant theme appeals only to the coarse and base in man's nature, and any literary merit is entirely coincidental. It is evident that the portrayal of sex in these magazines appeals to the prurient interest.

Perhaps we lack sophistication, but, to us, articles, which, for example, indicate that our colleges are simply play-grounds for the indulgence of sexual pleasures, are completely obscene, and totally without any redeeming feature. Of course, we are not cognizant of the standards of Washington, New York, Chicago, or San Francisco,[8]

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[7] It is mentioned also that some pornographers "may seek to disguise the pornographic nature of the dominent theme of the materials they assemble, by the inclusion of some material that is clearly legitimate."

[8] The press carried an account, datelined San Francisco, May 9 of this year, as follows: "Bosoms were bared again Saturday as bawdy North Beach celebrated the acquittal of its topless dancers and fashion models.

"Two separate juries brought in the innocent verdicts Friday, vindicating nightclub owners and their busty showgirls of police charges of lewd conduct."

It is interesting to note that the trial judge, in directing the jury to return a verdict of not guilty, stated: "No police officer can substitute his personal feelings of what is right or wrong.

"The test is not what a couple of people feel. The test is what the people of San Francisco feel."

This occurrence points up the difference in the standards over the nation, for women appearing in this state in similar "attire" (or lack of it) would be in violation of the criminal statutes.

nor is there any way for us to know the "standard" of the nation at large, but we think the evidence clearly established that the contents of the magazines in question are not compatible with the contemporary community standards in Pine Bluff, Arkansas.[9]

We know not what the United States Supreme Court may hold as to these magazines, or the validity of Act 261. Let it here be said that, if a firm and clear guideline had been established, we would certainly follow it, for we recognize that the rulings of the United States Supreme Court are controlling, and, in conformity to the legal process, must be adhered to. But, as previously pointed out, we find no definite determination by a court majority that a "national standard" shall apply.

Appellants contend that the injunction granted by the Chancellor is clearly illegal in that it bans future issues of the magazines. The Attorney General concedes that the dissemination of future issues of a publication may not be enjoined simply because its past issues have been found to be offensive. But we, like the Attorney General, do not find that the injunction operates to that extent. The decree clearly provides that the particular issues of the pertinent magazines (introduced into evidence) shall not be sold, but it does not enjoin future issues. The court simply finds that future distribution or sale of future issues of the magazines will be enjoined upon a showing that such magazines are obscene. This means, of course, that a hearing (or trial) would be held before any order was rendered. Actually, the trial court would have the authority, upon proper complaint being made, to hold such a hearing, irrespective of whether reference was made to future issues in the present decree.

We do not agree with appellants that Act 261, as here applied, violates the First and Fourteenth Amendments to the Constitution of the United States, as abridg-

[9] The State's witnesses were Reverend J. W. Watson, Pastor of Lakeside Methodist Church in Pine Bluff, Carl Welch, a business leader of the city, B. E. Whitmore, County School Superintendent of Schools, Reverend Pirtle, Pastor of Second Baptist Church of Pine Bluff, Arthur C. Hendrix, Assistant Probation Officer of Jefferson County, and Norman Young, Chief of Police of the City of Pine Bluff.

ing freedom of speech and press, nor that it deprives appellants of their property without due process of law.

The decree is modified to the extent that appellant *Gent* is made a party to this appeal, and, with such modification, said decree is affirmed.

Justices Johnson concurs. Justices George Rose Smith and Robinson dissent.

SAM ROBINSON, Associate Justice (dissenting). Not only is it the duty of the United States Supreme Court to uphold the Constitution, but it is the duty of this court, and every court in the land, to support and defend the Constitution. Of course, any document as important as the Constitution has to be construed. It would be utterly impossible to write a Constitution for a great nation that would need no construction by courts of competent jurisdiction, and no one now questions the jurisdiction of the U. S. Supreme Court to construe the Constitution.

The First Amendment, as construed by the U. S. Supreme Court, among other things, protects the freedom of speech and freedom the press. The Supreme Court has construed this Amendment many times but the majority of our court, in the case at bar, has cited only two cases on that point; neither of the cited cases sustain the majority opinion, and no other authority is cited sustaining the majority view. One of the cases cited by the majority is *Roth* v. *U. S.,* 354 U. S. 476. The facts in the Roth case are not shown, therefore it is not known whether it is analogous with the case at bar.

The other case is *Jacobellis* v. *Ohio,* 378 U. S. 184. There, Jacobellis was convicted in the Ohio courts on two counts of possessing and exhibiting an alleged obscene film in violation of Ohio Statutes. The picture was a French film called "Les Amants" ("The Lovers"). The conviction was reversed by the U. S. Supreme Court. Here, the majority makes no attempt to point out any distinction between the Jacobellis case and the case at

bar. Otherwise, the majority has not shown how it can be said that the material in the case at bar is obscene and therefore not protected by the First Amendment, notwithstanding what the U. S. Supreme Court has said in the Jacobellis case.

In view of the fact that undoubtedly this case will go to the U. S. Supreme Court for a final decision, I see no point in elaborating on the construction placed on the First Amendment by the majority of our court, which is contrary to the construction of the Amendment by the U. S. Supreme Court in many cases, including *Times Film Corp.* v. *City of Chicago, et al.,* 355 U. S. 35; *One, Inc.* v. *Olesen, Postmaster of Los Angeles,* 355 U. S. 371; *Sunshine Book Co.* v. *Summerfield, Postmaster General,* 355 U. S. 372; *Kingsley International Pictures Corp.* v. *Regents of the University of the State of New York,* 360 U. S. 684; *Manual Enterprises, Inc.* v. *Day, Postmaster General,* 370 U. S. 478.

All of the foregoing cases are directly in point with the case at bar. There was a conviction in each case of violating some statute prohibiting dissemination of obscene material. In each case the alleged obscenity involved was lewd, lascivious, and perhaps shocking. In each case the conviction was reversed by the Supreme Court of the United States.

The majority has made no attempt whatever to distinguish the alleged obscene material in the case at bar from the material that was in issue in the foregoing cases. There is no effort to show that the material involved here is any more obscene than the material that the Supreme Court has held to be protected by the First Amendment.

In my opinion the decision in this case will be reversed by the U. S. Supreme Court. I, therefore, respectfully dissent.

I am authorized to say that Mr. Justice George Rose Smith joins in this dissent.

5-3544 390 S. W. 2d 100

Opinion delivered May 24, 1965.

McMillan, McMillan & Turner, for appellant.

McMath, Leatherman, Woods & Youngdahl and *John P. Sizemore,* for appellee.

CARLETON HARRIS, Chief Justice. This is a Workmen's Compensation case. Cecil Cash was an employee of Reynolds Metals Company, having been employed as an automobile mechanic for a number of years at the Jones Mill Plant near Malvern. According to the evidence, he attended church with his family on February 3, 1963, and, after lunch, complained of pains in his chest and arm, which continued until late afternoon. However, the pain subsided, and no medical aid was sought. Cash returned to his job on Monday morning, and worked through Wednesday noon. A short time after eating lunch, and while servicing a truck, he became ill, complaining of pains in the left arm and chest. He was taken to Hot Spring County Memorial Hospital, and, after the making of an electrocardiogram, his ailment was diagnosed as a coronary occlusion, and Cash was ordered to remain inactive. About fifteen or sixteen hours after admission, around 7:00 A.M. on Thursday, Cash suddenly died. Cause of death was determined as acute coronary occlusion due to atherosclerosis. Lucille Cash, widow, sought benefits for herself and an eleven-year-old son, contending that her husband had suffered a

compensable injury. The claim was controverted by appellants, and a hearing was held before a commission referee. This referee held that the claim was compensable, and on appeal, the full commission sustained the award. Thereafter, the Circuit Court affirmed the commission's finding. From the judgment so entered, appellants bring this appeal.

Reduced to the concise contention, appellants' argument is that the atherosclerotic condition, suffered by Cecil Cash, was entirely responsible for the acute coronary occlusion. It is asserted that this condition resulted from a gradual body process, occurring over a long period of time, and the work being performed by Cash on Wednesday, had absolutely nothing to do with the attack that occurred at that time. Mrs. Cash testified that her husband complained on Sunday, after eating, of pain in his arm and side; however, it subsided, and he went to work on Monday, apparently entirely normal. The fatal attack then occurred on Wednesday. It is not known whether Cash suffered a heart attack on Sunday, since he was not attended by a physician. The medical evidence reflected that this occurrence could have been the beginning of a heart attack, but, on the other hand, pains sometimes represent a digestive disturbance of some type. The family physician, Dr. W. F. Barrier, testified that Cash had frequently had attacks of acute pain in the stomach and abdomen for the last several years before his death, and, at times, had to be relieved by morphine. However, under our view, the question of whether Cash actually suffered a heart attack on Sunday is immaterial to the issue, for we have held that where there is substantial evidence that one's work aggravated an already existing condition, and hastened the injury of death, the claim is compensable, as arising in the course of, and out of, the employment. In the case of *Reynolds Metals Company* v. *Robbins,* 231 Ark. 158, 328 S. W. 2d 489, the workman, Robbins, suffered a heart attack, which admittedly had commenced before he had actually performed any labor. We said:

"The question therefore before this Court, is whether there was substantial evidence to show that Robbins' condition was aggravated by the work performed, as heretofore set out; or stated differently, whether his death occurred sooner than would have otherwise occurred if the work had not been performed."

That too, is the question here. Dr. Philip Cullen stated:

"In my opinion the work Mr. Cash was doing at the time of onset of his acute symptoms contributed to the severity of his disease and lessened his chances for survival."

Dr. Barrier also testified positively that the work Cash was performing "hurried" or aggravated the condition. Medical evidence was offered by appellants to the effect that the work being performed by Cash had nothing to do with the attack, but we are only concerned with whether there was substantial evidence to support the finding of the commission. Had the commission accepted the version of appellants' expert witnesses, we would likely also hold that a decision for the companies was supported by substantial evidence.

Appellants assert that, with the ailment suffered by Cash, activity of any kind would have contributed to the attack, *i.e.,* he just happened to be engaged in his work, instead of participating in some other activity that would likewise demand effort. Of course, we do not know whether the attack would have occurred if Cash had been fishing, or driving, or playing golf—nor is this knowledge held by anyone else. We do, however, know that he was working on his job, and that the physicians, heretofore mentioned, stated that the work aggravated his condition, and hastened his death. Of course, if Cash suffered a heart attack on the preceding Sunday, and a doctor on that date had found that to be true, Cash would have undoubtedly been ordered to bed, and directed to refrain from activity of any nature—but no physician was called, and no one really knows whether he actually

suffered an attack at that time. People frequently have chest pains which are not related to heart disease, and we consider it an accepted fact that unless pains are quite severe, the average person does not immediately call a physician. The record reflects that Mr. Cash had had intense pain, at times, for ten years, which probably (according to the family doctor) was caused by an improper functioning of the liver and gall bladder. At any rate, we do not think Cash can be blamed for not consulting a physician on Sunday. The record in this case does not clearly reveal just when the attack started —but it did start—either before or during work—such work[1] (according to medical evidence), hastening his demise.

Affirmed.

[1] Although not controlling, there is evidence that the job performed by Cash was rather strenuous, requiring a constant uplifting of the arms, and there is evidence that, after his death, two men were given the job of performing his normal duties.

ALLIED TELEPHONE CO. *v.* ARK. PUBLIC SERVICE COMM.

5-3540 393 S. W. 2d 206

Opinion delivered May 24, 1965.

[Rehearing denied September 20, 1965.]

H. Clay Robinson and *R. H. Thornton, Jr.*, for appellant.

Harry E. McDermott, Jr., Donald K. King, Bill R. Holland, Hershel H. Friday, F. Mark Garlinghouse, St. Louis, Mo., for appellee.

ED. F. MCFADDIN, Associate Justice. The important question in this case is whether the appellant should be allowed to use a machine called "Telfast" for completing long distance calls to points in Arkansas served by Southwestern Bell Telephone Company. A minor question relates to an injunction.

The appellant, Allied Telephone Company (hereinafter called "Allied"), is an Arkansas corporation owning and operating telephone exchanges in the cities of Sheridan and Fordyce, as well as in several other cities in Arkansas. Southwestern Bell Telephone Company (hereinafter called "Southwestern") is a corporation (being a subsidiary or affiliate of American Telephone and Telegraph Company) operating telephone exchanges and long distance lines in Arkansas and several other states. The Bell system of American Telephone and Telegraph Company (of which Southwestern is a part) is nationwide, whereas Allied is one of several so-called independent companies operating in Arkansas.

In order that the subscribers of the independent telephone companies may complete long distance calls to points on the Southwestern system throughout Arkansas,[1] and in order that Southwestern subscribers in

[1] We are stating the case as an intrastate case so that the Arkansas Public Service Commission's order cannot be considered as infringing on the powers of the Federal Communications Commission (see Title 47 U.S.C.A.); but, of course, some of the calls from Allied subscribers would be to points outside Arkansas. In the brief for Southwestern it is stated that there are now more than 80 million telephones in the

other Arkansas cities may complete long distance calls to subscribers served by independent companies, there exists a so-called standard "Traffic Agreement" between Southwestern and the various independent companies specifying how long distance calls will be handled over the long distance lines of Southwestern throughout the State. Thus long distance calls are available from any point in the State to any telephone exchange having such Traffic Agreement with Southwestern. The present Traffic Agreement between Allied and Southwestern was signed on July 21, 1961, and was for one year and then automatically renewable until notice of termination should be given by either party. Two of the provisions in the Traffic Agreement are:

"V. TOLL OPERATING. The toll operating (ticking and timing) required hereunder shall be performed as may be agreed upon from time to time between the parties.

"VI. METHODS AND PRACTICES. With respect to all matters covered by this Agreement, each company will adopt and comply with standard Bell System operating methods and practices and will observe the rules and regulations of the lawfully established tariffs. Each company will, upon request, furnish to the other such information relating to the interchanged business covered herein as may reasonably be required."

There are at least three methods now in use for making and completing long distance calls:

(1) Call the operator[2] at a local exchange and place the long distance call to the place, number, and/or person desired; and the operator handles interchange and communications, and the person placing the call has only to wait until his desired number or person is reached. This is called the "Operator Method."

United States, and that there are 55 different telephone companies in Arkansas, and 2,800 different telephone companies in the entire United States.

[2] Back at the turn of the century the operator was called "Central."

(2) Use the method of "Distance Direct Dialing," whereby the person making a station to station call dials an area code, exchange number, and the number of the telephone at the destination desired. This is called the "DDD Method."

(3) Use the method known as "Person to Person Called Special" whereby the person making the long distance call may dial direct to the desired city but have an operator come on the line to control completion of the call and the billing of the charges either to the person called or to a credit card or to a third party number. This method is called "PPCS."

The foregoing three methods are now in operation in various exchanges; but the problem involved in this litigation arises because of a fourth method which Mr. Hugh R. Wilbourn, President of Allied, has invented and desires to use at the Allied telephone exchange in Sheridan, Arkansas. This fourth method for handling of long distance calls is called "Telephone Fully Automatic Switching and Ticketing," and is herein referred to as "Telfast." Below we copy the description of "Telfast" as contained in Allied's brief in this Court:

"Tape recording equipment is added to the existing automatic ticketing machines of a PPCS system. Station to station prepaid calls work like DDD and PPCS. The difference comes in sending other types of toll calls. To operate the equipment, the subscriber dials three digits: the first activates the machine, the second indicates the type of call that he wishes to make, and the third designates which station on a party line is making the call. Then the subscriber dials the area code (if the call is to another state), followed by seven digits of the desired number. Both the calling and called number are recorded in a computer, and the call is stored in the machine. At this point, the subscriber is connected with the tape recorder and a periodic beep tone commences. The tape recording tells the caller what type of call he has dialed and gives him instructions (e.g. for a credit card call, the recording might state, 'when you hear the bell, give

your credit card number'). After a certain period of time, up to twenty (20) seconds, the machine rings the called number. When a party answers at the called number, the subscriber, in a person to person call, asks for the desired person, or in a collect call, asks if the party will accept the charges. During this period the tape recorder is running to make sure that the correct party has reached the phone or that the charges will be accepted. When the desired party is reached, or charges are accepted, the calling party dials the digit 2 which disconnects the tape recorder (including the beep tone), and the call is timed and ticketed automatically. If, for any reason, a subscriber does not wish to use the Telfast equipment, e.g. if he wants time and charges, he may dial the digit '0', get the operator, and proceed to complete his call with operator assistance."

There is no Telfast machine now in use in any telephone exchange in the United States. Mr. Wilbourn's invention of Telfast has been patented during the course of this litigation and the Kellogg Division of the International Telephone Telegraph Company is ready to manufacture and install a Telfast machine in Allied's exchange in Sheridan, Arkansas.

With the above background matters, we come to the present litigation. On June 14, 1963, Southwestern filed before the Arkansas Public Service Commission[3] a complaint against Allied regarding Telfast. The complaint alleged the traffic agreement between Allied and Southwestern; that Southwestern had been notified of Allied's intention to install a Telfast machine in the Sheridan exchange; "that the use of such equipment would create numerous problems and have much a detrimental effect on long distance telephone service that Southwestern could not agree to Allied's proposal." The complaint also alleged:

"The use of the aforesaid ticketing equipment in the making of long distance calls will conflict with Bell

[3] For the applicable statutes in relation to the powers and duties of the Arkansas Public Service Commission, see Ark. Stat. Ann. § 73-201 *et seq.* (Repl. 1957), particularly § 73-218.

System standard practices and, therefore, violate the parties' Traffic Agreement. It will also cause damage, expense and financial loss to Southwestern, will adversely affect the quality of toll service furnished jointly by Allied and Southwestern, will lead to toll service abuses and will result in dissatisfaction, confusion and complaints on the part of Southwestern's customers and other telephone users in the State of Arkansas. The use of such equipment would unreasonably impair the ability of Southwestern and Allied to furnish reasonably safe, adequate and sufficient service to the telephone users in Arkansas and would be contrary to the public interest."

The complaint detailed a number of results—all claimed to be detrimental to the long distance service—that it was claimed would flow from the use of Telfast by Allied in its Sheridan exchange; and the prayer of the complaint was that the Commission order Allied to refrain from the installation or use of Telfast. Allied resisted Southwestern's complaint, insisting that Allied had a managerial right to use the new and improved Telfast in its exchange; prayed that Southwestern's complaint be dismissed, and said:

"Allied is desirous of making available to its subscribers of all classes the best possible service which becomes available through technological advances in the science of telephony. Allied admits that one feature of the system being installed in Sheridan is technologically new, and like all new equipment can only be tested out in practice, as have been all of the technological advancements made in telephony; . . ."

Also Allied said:

"Allied proposes that a hearing on the merits of this controversy be delayed for six (6) months, during which time the Sheridan System can be given a trial run. During this period of time all dialings invoking the unique features of the system will be monitored by a human operator in Fordyce so that no possible fault in the system will result in harm to the subscribers or

to Southwestern. Allied considers that the facts which will become available through actual experience are necessary for a proper determination of all issues of customer service, and that actual experience in the operation will resolve all controversy with Southwestern with regard thereto."

Southwestern resisted the six months abeyance plea of Allied; the Arkansas Telephone Association and the City of Sheridan intervened on behalf of Allied; and the Commission proceeded to a full hearing on all issues. Various witnesses testified and a record of more than 700 pages is before us. On December 12, 1963, the Commission entered its order refusing to hold the case in abeyance for six months, ordering Allied to refrain from installing the Telfast machine in its Sheridan exchange for use in any calls over Southwestern's long distance lines, but permitting Allied to use the Telfast machine on its own lines.[4]

There was a Majority Opinion delivered by two of the Commissioners and a Dissenting Opinion by one Commissioner; and the Opinions demonstrate the care with which the Commission considered this cause. From the order of the Commission adverse to it, Allied proceeded in due channels through the Circuit Court, and the cause is now here before us and Allied has made three points, to-wit:

"I. The Commission exceeded its authority in prohibiting installation of adequate service equipment because of 'degradation.'

"II. The Commission exceeded its authority in prohibiting installation of Telfast because of an alleged breach of contract.

"III. The order is erroneous because it is arbitrary and capricious."

We will use our own topic headings in disposing of the issues.

[4] The order also contained provisions for an injunction against Allied for rerouting long distance calls; and that will be discussed in Topic III of this Opinion.

I. *Use Of Telfast On Long Distance Calls Over The Southwestern Lines.*

The Commission found:

"The Allied proposal would degrade the quality of long distance service, would breach the contract between Bell and Allied; and would, therefore, be adverse to the public interest."

Based on the above finding the Commission ordered:

"That Allied be, and it is hereby, ordered to cease and desist from installing the proposed system at Sheridan for the purpose of connecting it to Bell's facilities."

It is well to state again the extent of our review in a case like this one. In *Barnes* v. *Ark. Public Service Comm.,* 235 Ark. 683, 362 S. W. 2d 1, Mr. Justice Bohlinger quoted from an earlier case:

" 'It is well settled by our decisions that the Commission is clothed with broad legislative and administrative powers and that a review of its findings and order by either the circuit court or this court, on appeal, is considerably limited in its extent. Ark. Stats., Sec. 73-233 (d) provides that such review shall not be extended further than to determine whether the Commission has regularly pursued its authority, including a determination of whether the order under review violated any right of the complainant under the U. S. or State Constitutions. However this does not mean that the courts cannot inquire beyond mere formality when other provisions of the statute are considered along with Sec. 73-233, *supra.* In this connection we have repeatedly held that if the Commission's order is supported by substantial evidence, free from fraud, and not arbitrary, it is the duty of courts to permit it to stand, even though the courts might disagree with the wisdom of the order. *Department of Public Utilities* v. *Ark.-La. Gas Co.,* 200 Ark. 983, 142 S. W. 2d 213; *City of Fort Smith* v. *Southwestern Bell Telephone Co.,* 220 Ark. 70, 247 S. W. 2d 474; *Arkansas Power & Light Co.* v. *Arkansas Public Service Commission,* 226 Ark. 225, 289 S. W. 2d 668.' "

Witnesses for Southwestern testified that the use of Telfast by Allied at its Sheridan exchange would violate the provisions in the Traffic Agreement, as heretofore copied; would reduce revenue to Southwestern because of the holding of circuits in attempting to complete calls; and would degrade the quality of long distance service in the confusion and slowing of service. This latter was explained by these features:

(a) The person placing the call would be required to dial an increased number of digits;

(b) the presence of the "beep tone" would be an innovation;

(c) the person placing the call would directly inquire if the person called would accept the collect call, and this might be in language much longer than the regular operator would use; and

(d) then a new digit would be dialed or the line would be automatically disconnected after an interval.[5]

A reference back to the description of the Telfast Method clearly shows that the foregoing factors are present. Also it was shown that the telephone industry has spent large amounts of money and considerable time to educate the telephone using public as to Distance Direct Dialing; that PPCS has not yet gone into full service; and that larger amounts of money and much more time would be required before the telephone using public could efficiently use the Telfast system, which is as great a departure from the DDD as that method was from the Operator Method. Even the PPCS is not yet in general use, and Telfast contains additional factors not found

[5] Allied has abstracted the testimony of the witness Edward Kice, Jr. as to the loss of circuit time through use of Telfast: "In an average Arkansas town the relationship of uncharged time to total circuit time is 2.49 minutes to 5.92 minutes. In evaluating the Sheridan system, we knew a newly trained operator is 40% less effective than an experienced operator, and assumed the Sheridan customer would equal a newly trained operator. Since 55% of Sheridan calls would require that the customer perform some operating functions, the penalty will be 55% × 40% or about 20% inefficiency. I will make no adjustment for the 45% of calls which did require an operator, but will become completely automatic. This 20% applied to the ratio of 2.49 to 5.92 equals 7% of the circuit time."

in PPCS. Furthermore, witnesses testified that the use of Telfast by Allied in its Sheridan exchange would necessitate the expenditure by Southwestern of several thousand dollars in its Little Rock exchange. There were other matters in evidence, but we have detailed enough to show that the Commission's findings meet the tests set by our cases.

Allied says that the finding that Telfast would "degrade" long distance service is not the correct test. The applicable statute (Ark. Stat. Ann. § 73-218 [Repl. 1957]) gives the Public Service Commission the power to "Detemine the reasonable, safe, adequate, sufficient service to be observed, furnished, enforced, or employed by any public utility, and to fix the same by its order, rule, or regulation." The record before us shows that the present long distance service, without Telfast, complies with the requirements of the quoted statute. When the Commission found that the use of Telfast to complete long distance calls over Southwestern's lines would "degrade" the service, such was tantamount to a finding that the use of Telfast for such long distance calls would result in service that would be less than "reasonable, safe, adequate, sufficient," because the word "degrade" means (according to Webster) "to lower from a superior to an inferior level," or "to lower or impair in respect to some physical property," or "to damage."

We conclude that the order of the Public Service Commission—that Allied cease and desist from installing Telfast System for the purpose of connecting with Southwestern's long distance lines—is sustained by the Commission's findings, which are likewise sustained by the evidence, and should be affirmed.

II. *Refusal To Allow The Six Months Trial Period Sought By Allied.* Allied moved that the Commission temporarily postpone any hearing and decision and allow Allied a period of six months to install the Telfast machine in the Sheridan exchange for use on all long distance calls over Southwestern lines. Allied claimed that the Commission would be able to determine from

actual experience the effect of Telfast, and offered to indemnify Southwestern for any loss or expense caused by such six months trial period if the Commission, on final hearing, found against Telfast.

The Commission postponed decision on this six months test period request until the final hearing in this cause, and then disallowed such trial period on Southwestern's long distance calls. The order of the Commission on this point is:

"That the motion of Allied to hold these proceedings in abeyance until the completion of a trial of the equipment and procedure, during a controlled test period, be, and it is hereby, overruled."

Allied insists that the Commission allowed Allied to use the Telfast machine on long distance calls on its own lines, thereby—as Allied claims—finding that Telfast was not "degrading" Allied's efficiency. Why then —insists Allied—should Telfast not be tried on Southwestern's system? The answer seems clear to us: one of the point made by Southwestern against the immediate use of Telfast on Southwestern's long distance lines was the amount of money and time that would be required to educate the telephone using public as to the new procedure required for Telfast. If Allied wants to undertake this educational effort among its own subscribers in its limited territory, it is free to do so; but the Commission found that it was not feasible to have this done all over the State at this time. The City of Sheridan intervened to support Allied, so evidently the City of Sheridan feels that the educational program on Telfast will not be too difficult for calls in that area; but just as "one swallow does not make the spring," so one Telfast machine in Arkansas does not require Southwestern to undertake a six months educational campaign for long distance telephone calls originating in Sheridan.

Progress is sometimes made by small independents, rather than by large corporations, and we sincerely hope that Telfast will prove to be a great forward advance in long distance telephone service. The mere fact that

Telfast is something new that Southwestern had not installed and the like of which the Bell Laboratories have never been able to perfect, is no justification for the objection of Southwestern to the use of Telfast by Allied on its own lines; but the amount of educational campaign and advertising that Southwestern and other companies would have to conduct over their entire systems in Arkansas to explain the use of Telfast is a good reason for the action of the Commission in denying Allied's request for a six months trial period. The order refusing the use of Telfast on Southwestern long distance calls is not *res judicata.* After Allied has used Telfast for a time for long distance calls on its own lines, and thereby demonstrated the efficiency of Telfast, Allied may see fit to ask the Commission for a new hearing as regards Telfast on Southwestern lines long distance calls. In such event, the entire issue will be tried anew without any plea of *res judicata* being available to Southwestern.

III. *The Injunction To Prevent Allied From Rerouting Long Distance Calls.* This issue is largely unrelated to the Telfast issue, but is in the same case. The Traffic Agreement signed by Allied and Southwestern on July 21, 1961, and previously discussed, provided that Allied's Sheridan exchange would be interconnected with the Southwestern facilities at Sheridan and served by Southwestern's Pine Bluff, Arkansas Toll Center. The complaint filed by Southwestern in this case alleged the foregoing Traffic Agreement and alleged that Allied was proposing to reroute all outgoing Sheridan long distance calls through Allied's Fordyce, Arkansas Toll Center, and proposed to use Southwestern's Sheridan-Pine Bluff facilities for incoming traffic only. Southwestern prayed that Allied be enjoined from such rerouting of its outgoing long distance calls, and claimed that such rerouting would be a violation of the Traffic Agreement between Southwestern and Allied. The Commission made this order:

"That Allied be, and it is hereby, ordered to cease and desist from rerouting Sheridan Long Distance traffic through Fordyce, and it is further ordered to main-

tain the present routing of such traffic during the existence of the present traffic agreement between Allied and Bell."

While this is a minor issue in the case, we nevertheless conclude that the Commission acted beyond its jurisdiction in enjoining Alled from the breach of a contract on the broad terms as contained in the aforesaid copied order. Of course, if there had been a finding that such rerouting of calls would result in inadequate service to the telephone using public, then the Commission would have had jurisdiction, since, under Ark. Stat. Ann. § 73-218 (Repl. 1957), its duty is to see that service is adequate, etc. But there was no finding in this case that the mere rerouting of Sheridan long distance calls through Fordyce would result in any inadequate service; and the Commission is not the proper forum to enjoin a mere breach of contract.

In *Asso. Mechanical Contractors* v. *Ark. La. Gas Co.*, 225 Ark. 424, 283 S. W. 2d 123, there was a proceeding brought before the Arkansas Public Service Commission by the Associated Mechanical Contractors, seeking to enjoin and restrain Arkansas Louisiana Gas Company from selling and installing air-conditioning equipment in competition wth the Associated Mechanical Contractors. The Commission found that it had no jurisdiction in such a case, and we upheld the holding of the Commission to that effect. The cited case is ruling here. The mere fact that Allied may be about to breach its contract with Southwestern does not give the Commission jurisdiction to issue an injunction in the absence of any factual finding (and there is none to that effect in this record) that such breach of the contract would impair the service to the public. Southwestern must seek its remedy in the proper judicial tribunal regarding breach of the contract, rather than before an administrative agency. So we reverse that part of the Commission's order which enjoined Allied from rerouting Sheridan long distance traffic through Fordyce. To that extent only the order of the Commission was in error.

In all other respects the order of the Commission is affirmed.

Robinson & Holt, J. J., not participating.

Special Associate Justice Albert Graves votes for this opinion.

George Rose Smith, Johnson, J. J. and Special Associate Justice Robert Compton, dissent.

ROBERT C. COMPTON, Special Associate Justice, (dissenting).

I am unable to agree with the majority opinion and therefore respectfully dissent.

This appeal questions the jurisdiction and right of the Arkansas Public Service Commission to grant the relief sought by Appellee Southwestern Bell Telephone Company prohibiting Appellant Allied Telephone Company from connecting to Bell's facilities automatic long distance equipment conceived by Allied and called "Telfast."

A unique problem and likely a case of first impression is before us because a public utility regulatory body, upon complaint by one telephone company, has restricted another telephone company as to its proposed use of equipment chosen by management. Certainly the effects of such action by such a regulatory body, if lawful, will be far reaching.

Allied is an Arkansas corporation owning and operating telephone exchanges in towns and cities within the State, including Sheridan and Fordyce. Bell is a wholly owned subsidiary of American Telephone & Telegraph Company, which owns the lines carrying most of the long distance calls in the United States. Allied's exchanges are interconnected with Bell's lines.

Bell and Allied operate under contract, cancelable by either party on sixty-days' notice, the most recent being dated March 25, 1963. This contract sets forth the agreement between the two companies regarding Allied's

connections with Bell's lines, establishes points of connection, operating methods and procedures for the settlement of revenues derived from long distance calls.

In recent years Bell has developed and put into wide use "Direct Distance Dialing" (DDD) by which the customer dials a distant number without the assistance of an operator, the calling and the called number and the time length of the call being recorded in a computer. Another recent automation of long distance calls is referred to as "PPCS" meaning "person-to-person collect and special." With this equipment, a customer, in addition to directly dialing a distant number, may, in part, by dialing appropriate digits to activate the machine, call person-to-person, collect, etc., but such call is completed with some assistance from an operator.

In March, 1961, Allied, over the objections of Bell, installed such a PPCS system at its toll center in Fordyce. This was the first installation of this type of equipment in the United States. Allied then programmed the installation of another PPCS system in Sheridan and on January 26, 1962, the Arkansas Public Service Commission granted Allied a Certificate of Convenience and Necessity for the Sheridan PPCS system.

Subsequently, H. R. Wilburn, Jr., President and General Manager of Allied, himself conceived an improvement on the PPCS machine whereby a customer, if desiring to do so, could dial person-to-person, etc., entirely automatically and without any assistance from an operator. Allied presented its plans for such automatic machinery to the Kellogg Division of International Telephone and Telegraph Company and that company agreed to build the machine for Allied, the device being called "Telfast".

In May, 1962, Mr. Wilburn met with Bell personnel to explain the system to them. After a series of meetings, engineering studies and exchange of letters, Bell, by letter dated April 23, 1963, advised Allied that it would not agree to the connection with its lines of the Telfast system at Sheridan. Allied then informed Bell that it

would install Telfast at Sheridan and instead of routing its long distance traffic through Bell's lines to Pine Bluff, as provided by the contract, it would route Sheridan long distance traffic over its own lines to Fordyce, where Allied's first PPCS system had been installed in 1961.

On June 14, 1963, Bell filed an action before the Arkansas Public Service Commission praying that Allied be ordered to cease and desist from installing the Telfast system at Sheridan because (1) by installing the equipment Allied was breaching its contract with Bell, and (2) the installation of the equipment would be detrimental to the nationwide telephone system. Allied filed an answer and motion denying the Commission's jurisdiction to grant the relief sought and moved that any action be held in abeyance for six months so that the Telfast system could be subjected to monitored testing by the Public Service Commission.

Bell objected to Allied's motion to hold in abeyance. The City of Sheridan, Arkansas, intervened in behalf of allowing Allied to install Telfast for service to Sheridan citizens. The Arkansas Telephone Association intervened and asserted that any telephone company should have the right to test new facilities.

The Commission refused to hold Bell's complaint in abeyance and the matter proceeded to hearing. On December 12, 1963, by a two-to-one decision, the Commission entered its findings, conclusions and order. The findings of the Commission were based upon the assumption that the proposed Allied equipment will work properly from a mechanical standpoint. The Commission nevertheless concluded that it had jurisdiction over the parties and the subject matter and that "the Allied proposal would *degrade* the quality of long distance service, would breach the contract between Bell and Allied; and would, therefore, be adverse to the public interest." The Commission then ordered Allied to cease and desist from installing the proposed system at Sheridan for the purposes of connecting it to Bell's facilities and to cease

and desist from re-routing Sheridan long distance traffic through Fordyce and to maintain the present routing pursuant to the agreement between Allied and Bell.

Following the filing of a vigorous and well-written dissent, the Commission entered a clarifying order stating that the order only prohibits Allied from connecting Telfast to Bell's facilities and specifically stated that such order does not interfere with Allied's right to test equipment on its own system.

Allied appealed to the Pulaski Circuit Court, which affirmed the Commission's order. Allied now appeals to this Court and for reversal of the Commission's order asserts:

(1) "The Commission exceeded its authority in prohibiting installation of automatic service equipment because of 'degradation' ";

(2) "The Commission exceeded its authority in prohibiting installation of Telfast because of an alleged breach of contract;"

(3) "The order is erroneous because it is arbitrary and capricious."

Bell and the Public Service Commission have filled Appellees' Briefs in support of the Commission's actions. As expressed in oral argument Bell takes the position that this is an attempt by a flea on the end of the tail of a dog to wag the dog, inasmuch as Allied's proposal would degrade the existing telephone system by destroying uniformity.

For the purposes of this opinion these points will be discussed under the headings of Authority and Arbitrariness.

AUTHORITY

Although one of the two conclusions, reached by the Commission, is that the installation of Telfast "would breach the contract between Bell and Allied", there is no mention of the contract in the eleven findings of the Commission.

However, the facts concerning this contract are not in controversy. It was entered into by the parties on March 25, 1962, approximately nine months after Allied had written Bell confirming an earlier conference at which the installation of Telfast was discussed, and shortly after a meeting discussing the installation in greater detail. *Thus at the time this contract was made Bell had full knowledge of Allied's intention to install Telfast at Sheridan yet there are no provisions in that contract prohibiting such equipment.*

Thus it is clear that any anticipatory breach of the contract could not be due to the proposed use of Telfast but due to Allied's plans to route its Sheridan long distance traffic to Fordyce rather than Pine Bluff, but this proposed change in routing was only made when Bell refused to permit the connection at Sheridan.

In any event, the question of who breached the contract and the consequenses thereof is a question for a Court of Law and certainly not a determination that can properly be made by this state regulatory body.

The governmental powers of this state are divided among the legislative, executive and judicial, no one of which may exercise any powers belonging to one of the others. *Constitution of 1874, Article 4.* The judicial power of the state is vested in certain specified courts and this list does not include the public service commission. *Ibid,* Article 7, Section 1.

The Commission is an administrative agency and has no powers not specifically granted by the Legislature for the purpose of regulating public utilities. It is not a court and cannot exercise judicial powers. *City of Ft. Smith* v. *Department of Public Utiliites,* 195 Ark. 513, 113 S. W. 2d 100.

This is not to say that the Commission could not have authority over any controversy which also involved a breach of contract. An act by a public utility in breach of a contract with another utility could also be in violation of the utility's duty to the public within the statutory authority of the Commission. However, in such event,

the authority of the Commission would exist because the act would violate the statutory regulation governing the activity of the utility, not because of the breech of the contract.

That part of the Commission's order based upon its conclusion of "breach of contract" could well fail because there are no findings of fact to support that conclusion, but must fail because the Commission has no authority to decide such matter.

Having eliminated the Commission's authority to prohibit Allied's installation of Telfast because of any supposed breach of contract, did the Commission have authority to prohibit the installation because of "degradation"? If so, one utility has successfully used the police power of the state to prohibit the use of particular machinery by another utility.

Since Bell's complaint was based only upon breach of contract and the alleged detrimental effect on the nationwide telephone system, that part of the Commission's order concluding that the Allied proposal would "degrade the quality of long distance service" grants Bell's prayers on a ground not urged by Bell.

The reason for this is obvious. The Arkansas Public Service Commission has no jurisdiction over the nationwide telephone system, so the Commission could not base its order on the nationwide effect of Telfast. This is a field pre-empted by Congress and in that arena the states have no power to regulate. 47 USCA 151, *Oklahoma-Arkansas Telephone Company* v. *Southwestern Bell Telephone Company,* 45 F. 2d 995 (C.C.A., Ark. 1930), *Independent Theatre Owners* v. *Arkansas Public Service Commission,* 235 Ark. 668, 361 S. W. 2d 642.

The Commission does have authority to regulate public utilities within the state and under this authority to require utilities to furnish adequate facilities. In any utility there are different grades of service, e.g., the private telephone lines and the multiple party telephone lines. If the grade of service becomes so low that the service becomes inadequate, Commissions have authority

to require that adequate service be provided the public by the utility.

Here the Commission's order was not based on a conclusion that the installation of Telfast would result in inadequate service to the people of Arkansas, but rather that it would "degrade the quality of long distance service." Yet, by its clarifying order, the Commission specifically stated that its order does not interfere with Allied's right to test this equipment within its own system.

In its tenth finding the Commission stated that it proceeded on the assumption that the equipment will work properly from a mechanical standpoint. In its clarifying order it expressly permitted Allied to test the equipment within its own system, yet it enjoined Allied from connecting Telfast to Bell's facilities. As shown, the Commission had no authority for this action on the ground of breach of contract. Likewise, the Commission's action is not authorized on the ground of degradation of quality.

When the Commission found that Telfast will work properly from a mechanical standpoint and then permitted Allied to test Telfast within its own system and actual effect was a determination of adequacy and the Commission exceeded its authority in prohibiting the connection of Telfast to Bell's lines.

To hold otherwise would result in the Commission's allowing Allied to furnish inadequate service to the public within Allied's system. The Commission is charged with the regulation of public utilities for the benefit of the consuming public. It cannot, with or without complaint, knowingly permit a utility to furnish inadequate service to any segment of the people of this state.

It cannot correctly be said that a finding that the use of Telfast would degrade service is tantamount to a finding of unreasonable, unsafe, inadequate or insufficient service. If the Commission actually found that the use of Telfast would result in inadequate service to the public it could have and would have so stated. This Court cannot re-phrase the findings of the Commission in order to sustain the Commission's unauthorized acts.

The Commission simply does not have authority to prohibit the use of particular equipment on the basis of degradation. Otherwise, the Commission could direct the type of vehicles, poles, lines, insulators, telephone instruments and personnel based solely upon its own conception of grades of quality.

Authority to regulate does not include authority to manage. If utility equipment functions mechanically and provides adequate and reasonable service to the public, a state regulatory body has no authority to overrule management's decision to put that equipment into use.

In *Banton* v. *Belt Line Ry. Corp.*, 268 U.S. 413, 45 S. Ct. 534, 537, 69 L. Ed. 1020, it is said:

"Broad as its power to regulate, the state does not enjoy the freedom of an owner. Appellees property is held in private ownership; and, subject to reasonable regulation in the public interest, the management and right to control the business policy of the company belong to its owners. * * *"

Certainly, there can be no question of the right of a utility to adopt new methods of furnishing service if those methods are reasonable. The Commission has no authority to substitute its judgment for the judgment of management when the choice is between two systems which provide reasonable and adequate service. *State of Missouri* v. *Public Service Commission of Missouri,* 262 U.S. 276, 43 S. Ct. 544, 67 L. Ed. 981, 31 ALR 807.

ARBITRARINESS

It is not often that an appellate court will construe the actions of the fact-finding administrative tribunal to be unreasonable, an abuse of authority or arbitrary and capricious. 2d Am. Jur. 2d. Administrative Law, Section 651. This Court has often stated that its judgment will not be substituted for that of the Commission and that an order of the Commission will not be disturbed if supported by substantial evidence. *City of Ft. Smith* v.

Southwestern Bell Telephone Co., 220 Ark. 70, 247 S. W. 2d 474.

But this does not mean that this Court should summarily affirm a Commission's act, even when based upon substantial evidence, if that act exceeds the Commission's authority and is arbitrary and unreasonable.

The entire evidence relating to the effect of Telfast is speculation. The cost to Allied, Bell and the public; the nature and extent of confusion and customer education, and the overall effect of change in uniformity are all actually unknown. This is true because nobody really knows and cannot know until the device is adequately tested.

All Allied asks is an opportunity to submit the device to an adequate test. It has already invested a substantial sum in the development and manufacture of Telfast; its management is convinced that it will be of benefit to the public and Allied is willing to indemnify Bell against any loss by reason of the connection of Telfast to Bell's lines. Of course, a test confined to Allied's own small territory would in reality be no test at all.

The principle that new ideas deserve to be tested by customer acceptance or rejection is basic to the concept of a free enterprise society. The Arkansas law clearly reflects this principle in that the Commission is directed (Ark. Stats. 73-201, 218) to prescribe reasonable regulations for the examination and testing of the plant and equipment or apparatus employed by any public utility in performing any service to its customers.

In its finding no. 7, the Commission states that "the feature of Allied's proposal that is objected to as being contrary to the public interest is the elimination of operator control over those types of long distance calls in which, under the 'PPCS' system, the operator performs an essential function." However, the record shows that if a customer so desires he may merely dial the digit "O" and place his call in the present manner. Also, Allied offers to have an operator on duty to furnish aid, if needed, in the public's use of telfast.

The Commission also states that uniformity is a desirable quality in the nation's toll network, however, uniformity was not met by the Commission permitting Bell's installation of "DDD" equipment and its prior approval of the Allied "PPCS" system at Fordyce.

The Commission prohibited Allied from connecting Telfast to Bell's toll lines, yet permitted Allied to install Telfast within its own system which would, of course, result in non-uniformity. Each innovation in the telephone communications industry has resulted in non-uniformity until the proven contribution of that innovation and subsequent industry-wide adaption has resulted in the uniformity of its use.

Truly, necessity is the mother of invention and the building of a better mouse trap will carve a path to the door of the builder. The record in this case reveals that all parties recognize a need for fully automatic long distance equipment and, according to Bell's own witness, a need that Bell has been studying and working toward for some years.

Allied has now developed and had manufactured a machine designed to fill that need. It asks that the device be tested for six months, that such test be monitored by the Commission and Bell and offers to hold Bell harmless for any loss it may sustain. The Commission has denied Allied permission to connect Telfast to Bell's lines for such a test. That action effectively prevents Allied from adequately testing the device because such test confined to its own small system would be inconsequential.

A determination of the adequacy of Telfast as a fully automatic long distance device cannot be made unless and until it is put into use as a part of the telephone system. Allied has developed the device and its management has directed its installation at Sheridan. The City of Sheridan asks that Allied be permitted to install Telfast at Sheridan. The Arkansas Telephone Association asserts the right of telephone companies to test new facilities. Only Bell objects to the installation and connection with its lines. Under these facts and circumstances the action

of the Commission not only exceeded its authority but is also arbitrary and unreasonable.

This cause should be reversed and remanded to the Pulaski Circuit Court, to be remanded to Arkansas Public Service Commission with directions to permit Allied to install Telfast at Sheridan and connect it with Bell's lines for a six-months' test to be monitored by the Commission and Bell, Allied first to indemnify Bell against loss by reason of the connection of Telfast to Bell's lines.

Smith and Johnson, J. J., join in this dissent.

WILSON *v.* COSTON

5-3565 390 S. W. 2d 445

Opinion delivered May 24, 1965.

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

Wootton, Land & Matthews, McMillan, McMillan & Turner, for appellee.

ED. F. *McFADDIN,* Associate Justice. This case stems from a traffic mishap in the City of Hot Springs. Appellant Wilson was driving his car south on Central Avenue; appellee Coston was driving east on Oakwood Avenue into Central Avenue; and the collision occurred in

the intersection. Both parties were seriously and painfully hurt. Mr. Wilson filed action and Mr. Coston filed answer and cross complaint. Trial to a jury resulted in a verdict and judgment for Mr. Coston and Mr. Wilson brings this appeal, urging for reversal five main points and a number of minor points. We find it unnecessary to discuss all of the points, since we conclude that the judgment must be reversed.

I. *Giving Of Defendant's Instruction No. 33.* It was claimed by defendant Coston that plaintiff Wilson was driving while intoxicated. The traffic mishap occurred at about 10:30 A.M.; Mr. Wilson was taken to a hospital in an ambulance; and two hours later (12:30 P.M.) there was a test made of Mr. Wilson's blood for the presence of alcohol. At the trial it was shown that *at the time of the test* the alcohol in Mr. Wilson's blood was 0.10 per cent. The doctor who made the test was allowed, *without objection,* to give it as his opinion that at 10:30 A.M. (the time of the traffic mishap) the alcohol content of Mr. Wilson's blood would have been as much as 0.15 per cent. Over strenuous and well worded objections of Mr. Wilson's attorneys, the Court gave the Defendant's Instruction No. 33, which reads:

"You are instructed that under the laws of the State of Arkansas if a person is charged with driving a vehicle while under the influence of intoxicating liquor, the amount of alcohol in the person's blood, at the time alleged as shown by chemical analysis of the person's blood, urine, breath, or other bodily substance, shall give rise to the following presumptions: 1. If there was at that time 0.05 per cent or less by weight of alcohol in the person's blood, urine, breath, or other bodily substance, it shall be presumed that the person was not under the influence of intoxicating liquor. 2. If there was at that time in excess of 0.05 per cent but less than 0.15 per cent by weight of alcohol in the person's blood, urine, breath, or other bodily substance, such fact shall not give rise to any presumption that the person was or was not under the influence of intoxicating liquor, but such fact may be considered with other competent evidence in determining whether the person was under the influence of intoxicat-

ing liquor. 3. If there was at that time 0.15 per cent or more by weight of alcohol in the person's blood, urine, breath, or other bodily substance, it shall be presumed that the person was under the influence of intoxicating liquor."

The foregoing instruction was framed from Ark. Stat. Ann. § 75-1031.1 (Repl. 1957) which applies to admission of blood tests in cases wherein a defendant is charged with the offense of driving while intoxicated. The original Legislative Enactment was Act No. 346 of 1957, which was captioned: "An Act relating to the admission of evidence derived from chemical analysis in cases where persons are charged with driving a motor vehicle while under the influence of intoxicating liquor." The 1957 statute was amended by Act No. 215 of 1961, and the caption of that Act reads: "An Act to amend Section 1 of Act 346 of 1957, being § 75-1031.1 of the Arkansas Stats. relating to the admisison of evidence derived from chemical analysis in cases where persons are charged with driving a motor vehicle while under the influence of intoxicating liquor." It is true that proof of the violation of a criminal statute is evidence going to show negligence (*Rogers* v. *Woods,* 184 Ark. 393, 42 S. W. 2d 390; and *Hammond* v. *Hamby,* 191 Ark. 980, 87 S. W. 2d 1000); but this statute (§ 75-1031.1) is not a criminal statute, as such. Rather, it is a statute relating to *admission of evidence* in cases of criminal prosecution. It was error to apply this statute to a civil proceeding such as in the case at bar.

The Supreme Court of Arizona had this same question before it in *Mattingly* v. *Eisenberg* (1955), 79 Ariz. 135, 285 P. 2d 174. After quoting the Arizona statute similar to ours, the Court said:

"It will be further observed that these presumptions according to the language of the statute, apply only in criminal prosecutions for driving or being in physical control of any vehicle while under the influence of intoxicating liquor. (The use of the word 'vehicle' of course includes automobiles.) We therefore conclude that the above section of the statute is intended to create a rule

of evidence in the prosecution of persons charged with driving an automobile while under the influence of intoxicating liquor. We therefore hold that it constituted reversible error for the trial court to extend the application of the statute to an action for damages for personal injuries. *McDonald* v. *Hamilton B. Wills & Co.,* 240 N.Y. 144, 147 N.E. 616, 43 A.L.R. 956. See also 43 A.L.R. 956 with annotations. Inasmuch as the statute has no application to civil cases or to any offense other than that defined in the act itself the instruction which in effect states that the presence of certain percentages of alcohol (by weight) in the blood of defendant created a presumption of intoxication was, we believe, a comment upon the evidence as much so as if the particular statute had never been enacted."

Because of the error of the Court in giving Defendant's Instruction No. 33, the judgment is reversed and the cause remanded.

II. *Other Matters.* Because of the likelihood of a new trial we think it well to mention a few of the other matters:

(a) There was no error in the ruling of the Court in refusing to strike the cross complaint of defendant Coston. See *Huffman* v. *City of Hot Springs,* 237 Ark. 756, 375 S. W. 2d 795.

(b) In several of the instructions there is a detailing of certain acts and the instructions say of these acts: "This would be negligence." We mention particularly Defendant's Instruction No. 21 and Defendant's Instruction No. 34. It is sometimes proper to say that certain acts "would be negligence" (see our Opinion in *Wright* v. *Covey,,* 233 Ark. 798, 349 S. W. 2d 344); but in most of the instructions in this case the better language would be that these acts "would be evidence of negligence."

(c) Defendant's Instruction No. 36 pertained to heart injuries alleged to have been sustained by Mr. Coston. This instruction appears to have several defects.

(d) Other matters argued are not likely to occur on retrial; so we do not discuss them.

Reversed and remanded.

GRACE *v.* MT. HOLLY LUMBER CO.

5-3570 390 S. W. 2d 105

Opinion delivered May 24, 1965.

McMath, Leatherman, Woods & Youngdahl and *John P. Sizemore,* for appellant.

Mahony & Yocum, for appellee.

ED. F. MCFADDIN, Associate Justice. This is a workmen's compensation case. Marvin Grace died on March 18, 1963, as a result of serious injuries received in a traffic mishap on December 27, 1962. A claim was filed for temporary total disability from the date of his injury until his death; and another claim filed by his widow and minor child (the present appellants) for death benefits. The claims were against the alleged employer, Mt. Holly Lumber Company, and its insurance carrier (appellees here). The two claims were consolidated for hearing before the Commission and were resisted[1] on the ground that the injuries and consequent death of Marvin Grace did not arise out of and in the course of his employment.

The case was heard by the Referee, who disallowed the claims; and the Full Commission likewise disallowed the claims, on the basis that the injuries and death did not arise out of and in the course of employment. The Circuit Court affirmed the Commission; and the case is here on appeal.[2]

[1] The claims were also resisted on another alleged ground: that Marvin Grace was an independent contractor. We forego any discussion of the independent contractor matter because the Commission rested its order, adverse to the claimants, solely on the ground that the injuries and death did not arise out of and in the course of the employment.

[2] Appellants state their point in this language:

"Marvin Grace suffered a fatal accident which arose out of and in the course of his employment and the Commission's decision other-

Marvin Grace lived near Mt. Holly in Union County. In October 1961 he commenced to work for the Mt. Holly Lumber Company, being engaged in the work of "log banking." The contract between Mr. Grace and Mt. Holly was entirely oral. The manager of Mt. Holly would go with Mr. Grace to a tract of timber and offer Mr. Grace the opportunity to "bank" the cut logs along the roadside at a designated point. Mt. Holly paid a total of $14.00 per thousand feet for having the trees cut into logs and the logs "banked." Five Dollars of the Fourteen Dollars was paid to the cutter; and Nine Dollars of the Fourteen Dollars was paid to the "log banker." If Mr. Grace accepted the offered work, then he would undertake the job of "banking" the logs, which consisted in dragging the logs with tractors from the place, where the tree had been cut, to the designated point on the roadside. To accomplish this "log banking" Mr. Grace used his own two tractors and employed his own helper.

Mt. Holly was careful to see that there was full compliance with the Wage and Hour Law of the United States. So Mt. Holly paid Mr. Grace's helper $1.25 per hour for each hour that the helper worked, and likewise paid Mr. Grace $1.25 per hour for each hour that he worked. Each week Mr. Grace would deliver the time to the manager of Mt. Holly and from the "time checks" of Mr. Grace and his helper there were deductions made for Social Security and withholding tax. After issuing the

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wise is not supported by substantial evidence.

"(A) When he was killed Marvin Grace was on a trip he made for the mutual benefit of the Mt. Holly Lumber Company inasmuch as it was for the purpose of obtaining parts to repair the tractors and/or for the purpose of trading the tractors to be used exclusively in his work for Mt. Holly Lumber Company.

"(B) An accident that occurs while an employee is in the process of securing workable equipment 'arises out of and in the course of his employment.'

"(C) The fact that Marvin Grace had not been assigned a new tract of timber to 'bank' does not defeat his status as an employee and is no basis for concluding his death did not 'arise out of and in the course of his employment.'

"(D) The Workmen's Compensation Act should be liberally construed and all doubts should be resolved for the claimant.

"(E) This Court has consistently held that when a Commission denial of benefits is not supported by substantial evidence it will be reversed."

"time checks," if any amount remained from the $9.00 per thousand for "log banking" this balance was paid to Mr. Grace in a separate check each week; and from this "balance check" there were deductions for workmen's compensation premiums on Mr. Grace and his helper, as well as other deductions authorized by Mr. Grace. One of these deductions consisted in the time payments due by Mr. Grace on his tractors. He had at one time purchased some tractors from a third party, but later had purchased two tractors from Mt. Holly and had authorized Mt. Holly to withhold $1.50 per thousand from each "balance check" to apply on the purchase price of the tractors. Keeping the tractors in good working condition was at the expense and responsibility of Mr. Grace.

On December 26, 1962 Mr. Grace had completed all work on the assigned tract of timber, and no new tract of timber had been agreed upon for Mr. Grace to "log bank." Mr. Grace had experienced some difficulty with the tractors as regards cranking; and on December 27, 1962 he asked his neighbor, Harold King, to drive with him in Mr. Grace's automobile to Magnolia, where Mr. Grace would see about trading the tractors for others. The two men went to Magnolia but Mr. Grace made no trade there; and so the two drove on to Haynesville, Louisiana, where Mr. Grace talked to a tractor dealer in that city. Finally it was thought best for Mr. Grace to put one tractor in good condition by taking the good parts from the other and then consider trading the discarded tractor. No trade was made. Mr. Grace and his friend, Mr. King, started the return trip from Haynesville to Mt. Holly, and the traffic mishap occurred which resulted in Mr. Grace's injuries and subsequent death.

On the foregoing facts, and others in evidence, the Referee first, and the Full Commission secondly, held that Mr. Grace's injuries did not arise "out of and in the course of his employment" as those words are used in our Workmen's Compensation Act (Ark. Stat. Ann. §81-1302(d) [Repl. 1960]. We cannot say that the Com-

mission's findings are erroneous.[3] Mr. Grace's work had

[3] The Full Commission found:

"1. That on December 27, 1962, Marvin Grace sustained an accidental injury when he was involved in an automobile accident while driving his personally owned automobile after leaving Haynesville, Louisiana, en route back to his home near Sparkman, Arkansas.

"2. That the purpose of Marvin Grace's trip to Haynesville, Louisiana, was to attempt to trade his tractors.

"3. That on December 26, 1962, Marvin Grace completed the work he was doing for respondent employer, Mount Holly Lumber Company, and just when he would have resumed wok on another tract of timber was not known, and Marvin Grace had not made any agreement to work after December 26, 1962.

"4. That on December 27, 1962, the relationship of employer and employee did not exist between Mount Holly Lumber Company and Marvin Grace nor was there any other relationship such as an independent contractor relationship." On these findings the Commission concluded:

"We are of the opinion that the preponderance of the evidence clearly establishes that the purpose of Grace's trip to Haynesville, Louisiana, on December 27, 1962, was to see about trading his tractors and said trip was not for the purpose of purchasing parts for said tractors. While on such trip Grace was involved in an automobile accident while riding in his personally owned automobile after leaving Haynesville, Louisiana. We are, therefore, of the opinion that Grace's accidental injury did not arise out of *and* during the course of any employment he may have previously had with Mount Holly Lumber Company.

"Section 2 (d) of the Act (Section 81-1302 (d) Ark. Stats.) provides: '"Injury" means only accidental injury arising out of and in the course of employment, including occupational diseases as set out in Section 14 and occupational infections arising out of and in the course of employment.'

"This Commission, as well as the Arkansas Supreme Court, have held on numerous occasions that to be compensable, the injury must not only arise out of, but must also occur during the course of the employment. Both elements must be present. The terms 'out of' and 'in the course of' are used conjunctively. 'Out of' denotes the origin or cause of the accident. 'In the course of' identifies the time, place, and circumstances. In our opinion, Grace's accidental injury neither arose out of nor during the course of any employment he may have had with the respondent employer.

"The uncontradicted evidence in this case establishes that a separate agreement was made between the respondent employer and Marvin Grace on each separate tract of timber; that if Grace did not choose to work a particular tract, he had a right to decline; that the work on the last tract of timber Grace worked by agreement was completed by him on December 26, 1962. No additional agreement as to another tract of timber had been agreed upon between Grace and the respondent employer. In fact, there is no evidence that another tract had even been discussed by the parties. We believe a reasonable inference to be drawn from the testimony is that when another tract of timber was ready to be harvested at some uncertain and unknown date in the future, Grace would have been given the opportunity to accept or decline skidding and banking the logs on that tract. We, therefore, are of the Opinion that on December 27, 1962, Grace was not acting in the scope of any relationship he may have had with the respondent em-

been completed on the agreed tract of timber on December 26th and there had been no new tract agreed upon between the parties. While he was thus "between jobs" he decided to see about having some kind of work done on his tractors. He was not sent to Magnolia or to Haynesville. He went in response to his own desires. He was not paid so much per hour for the day that he made the trip: he was only paid so much per hour while he was at work in "log banking" the timber. It is true that he left his tractors in the woods on December 26th; but all the evidence shows that this was not to do any further work in the woods but merely because any tract later agreed upon might be close to where the tractors were.

There was testimony to support the Commission's findings of fact, and the conclusions of the Commission are supported by the findings of fact. The appellants cite us to many cases from this and other courts. Some of the cases from our Court are: *Fine Nest Trailer Colony* v. *Reep,* 235 Ark. 411, 360 S. W. 2d 189; *United Steel Workers* v. *Walden,* 228 Ark. 1024, 311 S. W. 2d 787; and *Frank Lyon Co.* v. *Oates,* 225 Ark. 682, 284 S. W. 2d 637. In all of these cases there existed the relationship of employer and employee at the time of the injury received by the workman. But in the case at bar there was evidence that the relationship had ceased to exist when one tract of timber had been completed and no new tract of timber had been agreed upon to re-establish the relationship.

The appellants cite a variety of cases from other jurisdictions; but we have repeatedly held that the injury must arise "out of and in the course of the employment"; and we conclude that the Commission committed no error in its conclusions since there was no employment after December 26th, and the injury occurred on December 27th when Mr. Grace was on a mission of his won.

Affirmed.

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ployer so as to make Mount Holly Lumber Company liable for the unfortunate accident that befell him on that date. Claimants' claims are therefore denied and dismissed."

MEYER *v.* CONFAB CORPORATION.

5-3614 393 S. W. 2d 253

Opinion Delivered May 24, 1965.

[Rehearing denied September 20, 1965.]

[redacted]

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

John T. Haskins and *Neill Bohlinger,* for appellee.

GEORGE ROSE SMITH, J. In December, of 1962 the appellant, Robert M. Meyer, and one of the two appellees, Joseph A. Pascale, executed a written contract by which they became business associates. Pursuant to the contract Meyer invested $38,000 in common stock and debentures issued by the other appellee, Confab Corporation, which was one of several allied companies controlled by Pascale. As of April 1, 1964, the business relationship between Meyer and Pascale came to an end. Under the contract it became the duty of Pascale and Confab to repurchase Meyer's stocks and debentures. The only disputed issue now in the case is the date as of which this repurchase must be made. The chancellor held that Pascale and Confab are not required to repurchase the securities until December 31, 1965. Meyer insists that under the contract the obligation to repurchase arose not later than sixty days after the parties' business association ended.

With one exception—the question of who was at fault in bringing about the dissolution of the parties' association—the facts are not in dispute.

When the parties first negotiated their contract in December, 1962, Pascale controlled three corporations that were to engage in the production of Fourdrinier cloth and wire, which are used in the manufacture of paper from wood pulp. Meyer wanted to engage in that business. The contract recited that Pascale would use his influence in the other two corporations (referred to as National and Lauren) to obtain for Meyer a three-year contract of employment at a salary of $10,000 a year. Meyer, as we have said, was required to invest $38,000 in Confab Corporation. His contract with Pascale contained this pivotal language:

"In the event that the employment of Meyer with National and Lauren is terminated for any reason, Meyer will sell and Pascale and Confab, jointly and/or severally, will agree to purchase the shares of no-par common stock and the debentures which Meyer may own in Confab at such time for a cash consideration equal to the par value of the debentures and a consideration for the stock equal to its adjusted book value . . .

"The said consideration as determined shall be paid as follows:—one-third of the total amount within sixty days after determination and the balance over a period of two years thereafter in equal monthly payments with the right to prepay in whole or in part at any time before maturity."

In January, 1963, National and Lauren executed an agreement with Meyer by which he was employed for the years 1963, 1964, and 1965 at an annual salary of $10,000. Meyer became the manager of both companies and worked in that capacity until the latter part of March, 1964. He then quit his job, tendered his resignation as an officer and director in the two companies, and requested that Pascale and Confab repurchase his common stock and debentures.

On April 7, 1964 National and Lauren brought suit against Meyer for breach of contract, their complaint asking that the matter of the repurchase of the securities be held in suspense until the case was decided. A few days later Meyer sued Pascale and Confab for specific

performance of the repurchase agreement. The two cases were consolidated for trial. At the beginning of the trial National and Lauren took a nonsuit in their case. The other suit was tried on its merits. The chancellor found that it would be "manifestly unfair" to permit Meyer to quit his employment and still require Pascale and Confab to repurchase the securities promptly. Upon that reasoning the chancellor held that the repurchase need not be made until December 31, 1965—the expiration date of Meyer's contract of employment.

In this court the appellees insist that Meyer alone was at fault in leaving his employers, that he does not come into equity with clean hands, and that he is precluded from recovery under the rule that one who is himself in default in the performance of his contract cannot compel performance by the other party. *Boswell* v. *Gillett,* 226 Ark. 935, 295 S. W. 2d 758 (1956); *Haney* v. *Caldwell,* 43 Ark. 184 (1884).

We are unable to agree with the appellees' basic premise, that Meyer alone was at fault. Meyer gave several reasons for his decision to quit, including the fact that he was excluded from participating in matters of policy, the fact that the companies did not produce Fourdrinier cloth and wire as had been planned, and the fact that misrepresentations had been made to a bank that lent money to the companies.

Pascale was the principal witness for the appellees. In a discovery deposition taken before the trial he stated positively that during the fifteen months of Meyer's employment his services were not satisfactory. "We got nothing out of him. We got no sales from him." Pascale went on to say that he had told Meyer "a number of times" that his services were not satisfactory. It is quite apparent that this disparagement of Meyer's work tended to support National and Lauren's suit for breach of contract. That suit, however, was dismissed on the day of trial.

At the trial Pascale's testimony was materially at variance with his discovery deposition. He testified not only that Meyer's services had been satisfactory but also

that he, Pascale, had been "anxious" to keep Meyer on the job. He professed to be perfectly willing for Meyer to resume his duties under the contract of employment. It will be seen, of course, that this testimony tended to establish the appellees' defense to Meyer's suit for specific performance.

Reviewing the evidence *de novo,* we are not impressed by Pascale's testimony. What he said at the trial is so seriously in conflict with his pretrial deposition that one version or the other must be untrue. It is our best judgment that Meyer's decision to give up his employment was acceptable to all concerned, so that it is fair to say that his contract of employment was abrogated by common consent. Hence neither side is in a position to complain of a breach of contract on the part of the other. The agreement between Pascale and Meyer provided, as we have seen, that Pascale and Confab were obligated to repurchase Meyer's stock and debentures in the event that his employment should be terminated "for any reason." In the circumstances we are of the opinion that Meyer is entitled to insist that the securities be repurchased in accordance with the contract; that is, that one third of the purchase money be paid as of June 1, 1964, and the rest in equal monthly installments as of the next two years thereafter.

Reversed and remanded for the entry of a decree consistent with this opinion.

Ward, J. dissents.

5-3581 390 S. W. 2d 103

Opinion Delivered May 24, 1965.

[redacted]

Harold L. Hall, for appellant.

Reed Williamson, By: *Lesly W. Mattingly,* for appellee.

PAUL WARD, Associate Justice. On September 19, 1964, the parents of six minor children herein involved met their death under tragic circumstances. The children (all girls except one) ranged in age from thirteen months to thirteen years.

On September 29, 1964 John R. Beck (a resident of Little Rock and an uncle of the children) filed a petition in Probate Court which named as the nearest of kin the following:

Mrs. L. H. Betts, Maternal Grandmother, Norwich, England

Mrs. Lee Beck, Paternal Grandmother, Booneville, Arkansas

John R. Beck, Uncle, Little Rock, Arkansas

William J. Beck, Uncle, Benton, Arkansas

Rex Beck, Uncle, Stinnett, Texas

Ray Beck, Uncle, Bossier City, Louisiana

Geneva Parsons, Aunt, Lakewood, California

Bessie Nelson, Aunt, Red Bluff, California.

The prayer was the Rex Beck be appointed guardian of the person and estate of each of said minors with authority to remove them to his home in Stinnett, Texas, "so that he can keep them in his home and thereby properly care for and educate them. . . ."

To the above petition a response was filed by Mr. and Mrs. L. H. Betts (maternal grandparents of the minors) and Rev. B. Franklin Bates (formerly appointed temporary guardian of the minors) in which it was alleged: The minors desire to live with their maternal grandparents in Norwich, England who are willing and able to provide them with a suitable home and to properly educate and care for them; it is desired to have Rev. B. Franklin Bates appointed permanent guardian so that he may return the children to Norwich, England and place them under the care of their grandparents. The prayer was that the petition filed by Rex Beck be denied; and, that Rev. B. Franklin Bates be appointed permanent guardian of the children with power to take them to their grandparents in Norwich, England.

After hearing the testimony of several witnesses the trial court (on October 9, 1964) found and ordered: It will be for the best interest of the children to appoint Rev. B. Franklin Bates of Jacksonville as permanent guardian of their persons and estates; it would be for the best interest of the children to allow them to be removed to Norwich, England and placed in the care of their maternal grandparents; and, the guardian is directed to make a full account of his actions.

The decisive question involved is whether the trial court erred in directing and empowering Rev. Bates (as guardian) to take the children to England and deliver them to their maternal grandparents. For several reasons we think the court acted properly. In the first place, appellant having withdrawn his petition to have Rex Beck appointed guardian, we find nothing in the record to indicate that anyone else (including relatives) is ready, able and willing to take and look after the children. On the other hand, it is undisputed that the maternal grandparents want the children and are able to provide them with a good home. If appellant or any other relatives had a better plan—or any plan—for taking care of the children, they failed to reveal it to the trial court. In support of the trial court's decision, we also point out certain facts and circumstances revealed by the record. (a) The children (or some of them) had formerly lived with their grandparents in Norwich, England. Two of them had gone to school while living there — one for four years and the other for two or three years. (b) The children will not be *sent* to England but will be taken there by Rev. Bates who will have an opportunity to observe the home and surroundings in which the children would live, and who testified he would see that all legal arrangements would be made for the protection of them and their property. (c) The grandparents state they are ready, able and willing to take the children and look after their best interests, and the record reveals they have kept in constant (almost weekly) touch with the children during recent years, and they have frequently sent them presents.

As to the jurisdiction and power of the trial court to commit the children to the care and custody of their grandparents in England, we refer to the statement in Annot., 15 A.L.R. 2d 444 (1951) which reads:

"Upon showing of circumstances which would better promote the welfare and interests of the child, the courts have not hesitated to award the custody of a child to a nonresident, or to permit a resident custodian to remove the child to another jurisdiction . . . ."

The rule or principle above set out is held to apply where the child is removed to another country. See *Wilson* v. *Mitchell,* 48 Colo. 454, 111 P. 21, 30 L.R.A. N.S. 507, the cases cited therein, and also 12 R.C.L. 1174, Guardian and Ward, Foreign Guardians § 65.

There was no error in allowing the introduction of a doctor's certificate which established the death of the parents of the children. It was necessary to establish the reason for the guardianship proceedings, and no one questioned the death of the parents.

Certain letters were offered in evidence by appellees but, upon objection by appellant, the letters were not admitted. It is contended, however, by appellant that the trial court read the letters, and that this constituted reversible error. Conceding for the purpose of this opinion, the court should not have read these said letters, yet, we think no possible prejudice has been shown. When the objection was made the trial court stated: "I did not read them. I glanced at portions of them."

It follows therefore that the order of the trial court must be affirmed.

Affirmed.

DEAM *v.* DEAM

5-3599 390 S. W. 2d 97

Opinion delivered May 24, 1965.

Reimberger, Eilbott, Smith & Staten, for appellant.

Edward M. Owens, for appellee.

SAM ROBINSON, Associate Justice. Appellee, Delores Deam, filed suit against appellant, Leslie Deam, asking that she be granted a divorce, the custody of the parties two minor children, alimony for herself, support for the children, and possession of the homestead. The trial court denied the petition for a divorce, but ordered that appellee have custody of the two children, possession and occupancy of the home, and that appellant pay to her $200 per month as support. Later, appellee petitioned the court for authority to lease the homestead for one year for the consideration of $125 per month. The petition was granted, and Leslie Deam has appealed from that order.

The only issue is whether the Chancellor erred in authorizing appellee to lease the home place for the one year period. Appellant does not contend that the court erred in ordering that appellee have the right of possession and occupancy of the property, but does maintain that the Chancellor erred in authorizing her to lease the property.

It was shown that the appellee would have great difficulty in maintaining the property and supporting herself and the two children on $200 per month; that she could lease the property for $125 per month and move into the City of Pine Bluff (the homestead is located in the country), where she could get a job and earn enough to help with the support of herself and the children. The court ordered the monthly rent money to be divided $100 to appellee and $25 to appellant.

We have held that the trial court may grant the wife possession of the homestead although no divorce is awarded. *Cassell* v. *Cassell,* 211 Ark. 489, 200 S. W. 2d 965. To the same effect is *Goodin* v. *Goodin,* 232 Ark. 853, 340 S. W. 2d 580, where it is pointed out that the order

giving the wife possession of the home would not amount to a permanent disposition of the property rights. Likewise, in the case at bar the arrangement is not permanent. The lease is only for one year. Here, for all practical purposes, the appellee will have possession of the property, but instead of occupying it she will live on other property more economical and convenient, and will use the rent money from the homestead to pay the rent on the property she will occupy. In the circumstances, the court did not exceed its jurisdiction or discretion.

Appellee was allowed an attorney's fee in the Chancery Court and has asked for additional fee on appeal. Due to the present circumstances of the parties, we are allowing an additional fee of only $100.

Affirmed.

MOORE *v.* MOORE

5-3542 393 S. W. 2d 381

Opinion delivered May 24, 1965.

[Rehearing denied September 27, 1965.]

Wayne Foster, for appellant.

No brief filed for appellee.

SAM ROBINSON, Associate Justice. This is an appeal from a decree granting appellee a divorce, and a finding by the court that she is the owner of a one-half interest in certain real property and also owner of a one-half interest in some personal property consisting of household goods, etc.

Appellee first filed suit against appellant asking for a divorce in 1959. On appeal to this court a decree in favor of appellee was reversed because, in the opinion of this court, the record showed both parties to be at fault. The doctrine of recrimination applied. *Moore* v. *Moore,* 230 Ark. 213, 322 S. W. 2d 77. The case was decided March 9, 1959.

Later, on November 29, 1962, appellee filed the present action alleging three years separation as grounds for divorce. On appeal appellant does not question that part of the decree granting appellee a divorce, but does contend that the Chancellor was in error in finding that appellee owned a one-half interest in the real and personal property involved. The real property in issue is Lot 16, and the North 11 feet of Lot 15, Block 4, Davis Addition to Argenta (now North Little Rock). The preponderance of the evidence shows that the property was acquired by the joint efforts of both parties; that originally the property was conveyed to appellant, Hugh Moore, that later he conveyed the property to his wife, the appellee herein, using her maiden name, Minnie Hart, as grantee; that a purported deed dated August 27, 1956 from Minnie Hart to Hugh Moore was not signed by the appellee; that the deed is a forgery.

Since it is decided that the deed from Minnie Hart to Hugh Moore is a forgery, the title to the foregoing real property is still in appellee under her maiden name, Minnie Hart; however, she makes no contention that appellant does not own one-half interest in the property.

The preponderance of the evidence also shows that the parties each own one-half interest in the personal property.

The decree is affirmed.

WEATHERS *v.* CITY OF SPRINGDALE

5-3561 390 S. W. 2d 125

Opinion delivered May 24, 1965.

Rex W. Perkins, Dickson, Putnam, Millwee & Davis, for appellant.

Crouch, Blair and *Cypert,* for appellee.

JIM JOHNSON, Associate Justice. This is an appeal from a summary judgment. Appellants Sam Weathers and Margaret Weathers are the owners of a dairy farm in Benton County. On December 30, 1963, appellants filed suit against appellee City of Springdale alleging a taking of and/or damages to their land occasioned by the city's continued conduct of dumping raw sewage into a mountain stream which traverses the land of appellants; that this activity of the city has so polluted the stream (Spring Creek) as to render the land useless and amounts

to a taking by the city of appellants' land. The prayer is for damages as just compensation for such taking.

The city filed an answer and *inter alia* pleaded res judicata. In support of this plea appellee attached exhibits showing that in 1961 appellants and a number of other landowners in Benton County filed an action in the Washington Chancery Court seeking an injunction against the City of Springdale to prevent the same conduct which is alleged in the present complaint to amount to a taking of appelents' land. The Washington Chancery Court on November 29, 1961, by consent of the parties to that action, entered a decree enjoining such conduct in the future. It was further shown that on April 6, 1962, the same landowners petitioned for and obtained an order of citation against the city to show cause why the city should not be adjudged in contempt for failure to comply with the decree. On April 11, 1962, the city responed to the citation. No further action has been taken in Washington Chancery proceedings.

In the present action, before a trial on the merits the city filed a motion for summary judgment contending that prior chancery proceedings established a defense of res judicata to the present action as a matter of law. The trial court granted summary judgment and dismissed appellants' complaint; this appeal followed.

For reversal appellants contend that the Washington Chancery Court was without jurisdiction and thus the Washington Chancery decree could not have been res judicata to the action in the Benton Circuit Court.

We take judicial notice that the City of Springdale is located within Washington County. The consent decree acknowledges that the city was dumping raw sewage into Spring Creek to the detriment of the parties to that law suit, including appellants. Certainly the Chancery Court of Washington County had jurisdiction to command the City of Springdale to refrain from that particular act. We hold that the Washington Chancery decree is valid to that extent. Ark. Stat. Ann. §§ 32-101, 32-102 (Repl. 1962).

Having so found we reach the real question in issue, *i.e.,* did the Washington Chancery Court have jurisdiction over Benton County lands so as to award damages for the taking thereof?

Appellants in the Washington Chancery action asked no damages for the taking of their land, and it would have been a vain prayer. Damages for the taking of land is a local action. Ark. Stat. Ann. § 35-101 (Repl. 1962) provides that the owner of property taken for public use "shall have the right to bring an action . . . in the circuit court of the county in which said property is situated." And Ark. Stat. Ann. § 27-601 (Repl. 1962) requires that an action for an injury to real property must be brought in the county in which the land is situated. *Missouri Pacific R. Co.* v. *Henry,* 188 Ark. 530, 66 S. W. 2d 636. The Washington Chancery Court never obtained jurisdiction of the subject matter. This is true even though the parties to the equity action consented to the jurisdiction and entry of that decree. Jurisdiction of the subject matter cannot be conferred by consent. *Pruitt* v. *Sebastian County Coal & Mining Co.,* 215 Ark. 673, 222 S. W. 2d 50. It follows, therefore, that the Washington Chancery Court could not have awarded damages in the previous action because of lack of jurisdiction. It is well settled that where jurisdiction is lacking, a decree to that extent is void and therefore not res judicata to a subsequent action in a court of competent jurisdiction. *Hendricks* v. *Henson,* 192 Ark. 544, 92 S. W. 2d 867; *Kyle* v. *Pate,* 222 Ark. 4, 257, S. W. 2d 34. See generally *Dobbs* v. *Gillett,* 119 Ark. 398, 177 S. W. 1141; and *Hall* v. *Bush,* 128 Ark. 437, 194 S. W. 1031.

In the alternative, appellee urges that even if the present action were properly brought in Benton Circuit Court, appellants are barred by the statute of limitations.

The summary judgment made no finding as to statute of limitations but is based entirely (as both parties concede) on the question of res judicata. The question of statutes of limitation, which limitation may be applicable, if any, (see 152 A.L.R. 343), is a question of fact. The office of summary judgment is invocable "where there

is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Ark. Stat. Ann. § 29-211 (Repl. 1962). A fact question existing in the case at bar, summary judgment will not lie. The case is therefore reversed and remanded for further proceedings not inconsistent with this opinion.

ARK. STATE HIGHWAY COMM. *v.* LASLEY.

5-3545 390 S. W. 2d 443

Opinion delivered May 24, 1965.

Mark E. Woolsey and *Don Gillaspie,* for appellant.

Howell, Price & Worsham, for appellee.

FRANK HOLT, Associate Justice. This is a condemnation proceeding by appellant to acquire land for highway purposes. The appellee sought just compensation for his leasehold interest in the land. In addition he sought to recover for the damages to his crops and the loss of cattle caused by the negligent acts of appellant's agents and employees. From the judgment on the verdict favorable to the appellee, the appellant brings this appeal. For reversal appellant relies upon two points. One of appellant's contentions is that the court erred in permitting a suit against the appellant, an agency of the state, in violation of Article 5, §20 of the Constitution of the State of Arkansas. Appellant asserts that the appellee's damages which resulted from loss of his cattle and their trampling and eating his crops are tort claims.

Appellant's agents and employees went upon appellee's property for acquisition purposes. They permitted appellee's cattle to escape resulting in the loss of fourteen head of the agreed value of $1,050.00. The damages to the crops outside the strip of right-of-way, caused by the escaped cattle, was agreed to be $3,125.30. Appellee filed his claim with the State Claims Commission for the recovery of these and other damages. The appellant filed a motion to dismiss appellee's claim on the basis that there was a suit pending in the Pulaski Circuit Court "filed for the purpose of paying all damages to which * * * [appellee is] entitled, as well as for acquisition of land title"; that appellee "has a good legal remedy open to him in the Circuit Court, which he cannot ignore and must exercise"; that an award by the State Claims Commission would result in a cost to the State which would not be shared by the Federal Government; and that "claimant is not placed in the position of suing the State of Arkansas".

Pursuant to appellant's motion to dismiss, the Claims Commission entered an order placing appellee's questioned claims upon the inactive docket stating that in its opinion "the claimant has a remedy at law" for the damages appellee suffered to his crops and his loss

of cattle. Thereupon appellee filed his answer in the pending suit in circuit court. Appellant then filed a motion to require appellee to make his answer more definite and certain, to which appellee properly responded. A joint stipulation, prepared by the appellant, setting forth the proceedings before the Claims Commission and the extent of some of the damages suffered by appellee, was admitted into evidence without objection. Appellant made no motion for a directed verdict nor made any objection to the pleadings, the testimony, or the jurisdiction of the court.

In a long line of cases we have recognized that: "The State of Arkansas shall never be made a defendant in any of her courts." Article 5, §20, Arkansas Constitution. We are of the view that the loss of the cattle and resulting damages to the crops after their escape are tort claims and, therefore, are not permissible in a suit against the state. *St. Francis Drainage Dist.* v. *Austin,* 227 Ark. 167, 296 S. W. 2d 668 and *Wenderoth* v. *Baker,* 238 Ark. 464, 382 S. W. 2d 578. In *Ark. State Highway Comm.* v. *McNeil,* 222 Ark. 643, 262 S. W. 2d 129, we recognized the well settled principles that there is no authority in the law to waive the state's immunity to a suit; that the state is not bound by the unauthorized acts of its agents and, further, the state is not estopped by an erroneous construction of the law by its representatives.

As was said in *St. Francis Drainage Dist.* v. *Austin,* supra:

"There are many laymen, lawyers and judges who believe that, in all fairness, the State, its political subdivisions and quasi public corporations such as improvement districts created by the State, should be liable for torts committed. But the law, holding otherwise, has been firmly established for many years."

The State Claims Commission was created to represent the state's conscience in such matters. The fact that the loss of the cattle and the resulting damages to appellee's crops outside the acquired right-of-way strip are tort claims does not now prejudice the right of appellee

to again present his apparently just claims to the Claims Commission. Appellant urges that damages to other items belonging to appellee sound in tort. However, we refuse to interfere further since we are of the view that there was sufficient evidence the damages were necessary and incidental to the taking of the leasehold interest.

Appellant next contends for reversal that certain instructions given by the court were inherently erroneous as being confusing and conflicting. No specific objection was made to any instruction given by the court and, further, appellant offered no instruction. We find no merit in this contention, especially in view of the remittitur we now order.

If the sum of $4,175.30 [$1,050.00, the agreed value of appellee's cattle and $3,125.30, the agreed damages to appellee's crops outside the right-of-way strip] is entered as a remittitur to the judgment of $20,160.00 within seventeen (17) calendar days then the judgment will be affirmed. If no remittitur is so entered, then the judgment will be reversed and the cause remanded for a new trial.

McFaddin, J., concurs.

C.J.C. Corporation *v.* Cheney, Commissioner.

5-3577 390 S. W. 2d 437

Opinion delivered May 24, 1965.

Smith, Williams, Friday & Bowen and *Jerry T. Light,* for appellant.

Lyle Williams and *Tom Tanner,* for appellee.

FRANK HOLT, Associate Justice. The appellant, a foreign corporation, supplied concrete and aggregate to a contractor in the construction of a Titan II missile base in Arkansas. The appellant purchased fourteen cement mixer trucks and four batching plants outside Arkansas. The machinery was subsequently brought into the state and used by appellant in the performance of its local contract. The appellee assessed a compensating [use] tax against the appellant in the amount of $9,529.98 based upon the use of this equipment in Arkansas.

This tax was paid under protest by the appellant and suit was brought to secure a refund contending that the equipment was exempt under Ark. Stat. Ann. §84-3106 (d) (Repl. 1960). It was stipulated that the appellant's business in Arkansas consisted of processing and supplying the cement and aggregate, pursuant to a contract between appellant and the prime contractor, for the construction of the federal project. It was further agreed by the parties that in the cement business, the various basic materials used to make concrete are initially measured, commingled and mixed in the batching plant which contains mechanical measuring and mixing equipment. The measured and mixed product of the batching plant is then transferred in a dry condition to a mixer truck. There water is added and the mixing drum on the truck revolves en route to the job site. The adding of water

and the mixing by the revolving drum causes a chemical reaction which completes the processing of the concrete product so that it is prepared for ultimate use.

On appeal from an adverse decision the appellant urges for reversal that the court erred in holding that the appellant's manufacturing and processing equipment was not exempt from the compensating [use] tax under Ark. Stat. Ann. §84-3106 (d) (Repl. 1960). The pertinent part of this statute reads as follows:

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

* * *

(d) Tangible personal property used by manufacturers or processors or distributors, including ginners of cotton and including the artificial drying of rice, for further processing, compounding or manufacturing;".

The main tenor of appellant's argument is that the exemption was denied by the appellee because of appellant's status as a non-resident contractor making sales to a single purchaser instead of the general public. Appellant contends that the exemption section clearly contains no such limitation. We think, however, the issue to be decided is aptly stated by the appellee when he says that "appellant's brief refers to appellant as a 'manufacturer or processor' as though this had been decided, when this is in fact the sole point of contention."

When determining whether a particular operation constitutes "manufacturing or processing" we follow the rule of common usage or the popular meaning of the words. *Morley* v. *E. E. Barber Const. Co.*, 220 Ark. 485, 248 S. W. 2d 689. In that case a road contractor claimed that the exemption applied to steel, sand and gravel purchased outside the state because they were processed and used in the construction of roads. Therefore, it was urged that the contractor was a manufacturer or a processor within the meaning of the statute. In holding that the construction of a highway is not manufacturing and,

therefore, the materials processed and used in construction are not exempt, we said:

"* * * We think that this is a strained construction and that it is not supported by the intent of the legislature or the ordinary use of language. The intent of the legislature was that the Use Tax Act, Act 487, would complement or supplement the Gross Receipts Tax Act and [since it taxes personal property bought in other states] that it would protect home merchants and businesses from out of state competition. If appellee's interpretation is accepted the Use Tax Act would not only not complement the Gross Receipts Tax Act but would to a large degree emasculate it. Such an interpretation would be a strong inducement for contractors engaged in building roads [and it would have to include houses and every similar construction] in Arkansas to buy all material from suppliers in other states, thus avoiding the tax imposed by both Acts."

Surely it must be said that the machines processing or mixing certain of these concrete ingredients are not exempt within the meaning of the statute if, as we have held, these ingredients, when processed, commingled, mixed and used in construction, are not exempt.

Furthermore, in *Scurlock* v. *Henderson,* 223 Ark. 727, 268 S. W. 2d 619, we held that cotton ginning machinery was not within the exemption provisions since it was not being used for "manufacturing or processing". There we said:

"Strictly speaking, any change or alteration in a commodity is a process; but 'processing' as utilized in the exemption Act must have been selected as a word having some direct bearing upon manufacturing."

Later the legislature expressly exempted the ginning machinery.

There is a presumption favoring the taxing power of the state and the claimant has the burden to establish clearly any right to an exemption. *Wiseman* v. *Madison Cadillac Co.,* 191 Ark. 1021, 88 S. W. 2d 1007. There can be no implied exemption and an exemption provision

must be strictly construed. To doubt is to deny the exemption. *Scurlock* v. *Henderson, supra; Wiseman, Comm. of Revenues,* v. *Town of Omaha,* 192 Ark. 718, 94 S. W. 2d 116; *Bangs* v. *McCarroll,* 202 Ark. 103, 149 S. W. 2d 53.

The rationale behind these cases is that taxation is the rule and exemption from taxation is the exception. The presumption is against any surrender of the taxing power in favor of any particular class. In order for this presumption to be refuted, there must be a clear indication of the legislative intent to provide for the exemption. The exemption, if allowed in the case at bar, would discriminate against any home merchants since the use tax complements or supplements the sales tax. The record does not disclose exactly when the equipment was first brought into the state for use. However, it was purchased and brought into Arkansas sometime during 1961. In this connection, attention is directed to Ark. Stat. Ann. §84-3106 (D) (Supp. 1963) [Act 140 of 1961].

Suffice it to say we do not think there is a clear intention of the legislature to exempt the machinery in the case at bar.

Affirmed.

JOHNSON *v.* NORSWORTHY.

5-3558 390 S. W. 2d 439

Opinion delivered May 24, 1965.

Arnold & Hamilton, for appellant.

W. P. Switzer, for appellee.

GENE WORSHAM, Special Associate Justice. The appellees were the proponents in the Ashley County Court of a petition seeking the establishment of a sanitary sewer improvement district in a 2,514.02 acre area adjacent to the City of Crossett, a city of the first class. After proper hearing, the Ashley County Court reached the conclusion that the petitions were legally sufficient and entered an order creating the improvement district. From this order the opponents timely appealed to the Ashley Circuit Court. The findings of the County Court were modified in certain respects not germane to the issues herein, but affirmed as to the establishment of the district. From this order comes this appeal.

The principal issue is whether or not the proponents' petitions were legally sufficient in containing signatures of a majority in area of real property owners within the proposed improvement district. The opponents to the formation of the improvement district assert various irregularities in the computation of the acreage represented by the signatures borne on the petitions.

There seems to be no dispute that the proposed district contains 2,514.02 acres. The circuit court found that the petitions bore valid signatures of landowners who owned an aggregate of 1,259.20 acres within the district, thereby giving the proponents and appellees a majority of 2.27 acres.

The most serious question raised concerns certain corporate lands which were included in the ranks of the proponents for the formation of the district. It is conceded that the corporate names appeared nowhere on the petition.

It appears that Etheridge & Sawyer, Inc., an Arkansas corporation, holds legal title to a 37-acre subdivision within the proposed district. At the hearing below it was established that H. A. Etheridge is the president of Etheridge & Sawyer, Inc., and that his wife, Etta Mae Etheridge, is the secretary. Mr. and Mrs. Etheridge both signed their individual signatures to the proponents' petition. Mr. Etheridge testified that he and Mrs. Etheridge had authority to act solely in the affairs of the corporation and to bind the corporation. That he signed the sewer district petition for the purpose of including the acreage owned by Etheridge & Sawyer, Inc. The lower court found that Mr. and Mrs. Etheridge signed the petition to bind the corporation and it was the intention of the corporation to be bound by their action.

A similar irregularity was raised by the inclusion of a .50-acre tract owned by Crossett Zero Butane Gas Company which also is a corporation, of which John Scott is the vice-president. Mr. Scott's individual name appeared on the petition and he testified that he signed the petition as an official of the corporation for the purpose of binding the corporation, and that he had approval of the board of directors to sign the petition. The name of Crossett Zero Butane Gas Company did not appear on the petition. The court also included lands owned by the gas company among those favoring establishment of the district.

The statute under which this petition was filed (Ark. Stat. 20-701) provides:

"Upon the petition of a majority in value and of area of the owners of real property in any territory adjacent to a city of the first class * * * it shall be the duty of the county court to lay off into an improvement district the territory described in the petition * * *."

Ark. Stat. 20-702 provides:

"* * * On the day named in the notice it shall be the duty of the county court to meet and to hear said petition and to ascertain whether those signing the same constitute a majority in value and of area and if the county court determines that a majority in value and of area have petitioned for the improvement it shall enter its judgment laying off the district as defined in the petition and appointing the commissioners named in the petition * * *. If it finds that a majority in value and of area has not signed said petition, it shall enter its order denying the same."

The principal question here is whether or not signatures on the petition constituted a majority "in area" of the owners of real property within the proposed district. If the petitions contained a majority in area of the owners, it was the clear statutory duty of the court to enter its order laying off the district. On the other hand, if the petitions were deficient in containing a majority, it was the lower court's duty to deny the petition. We have previously held that this statutory proviso is jurisdictional. *Colquitt* v. *Stevens,* 111 Ark. 314, 163 S. W. 1411.

In this case the corporate names of Crossett Zero Gas Company and Etheridge & Sawyer, Inc. did not appear on the petition. Appellees urge that the petition should be corrected to conform to the intention and purpose of the property owners; more specifically, that the petition should be corrected to reflect that the corporate officers were acting in behalf of their respective corporations, and not in their individual capacities. Numerous cases are cited by appellee touching on the authority of corporate officers to corporate officers to bind their principal. This is not a question, however, of whether or not the officers had or lacked authority to so bind their corporations, but whether in fact they did act in a manner so as to exercise or effectuate such authority.

Appellees, among other cases, rely upon *Lewis* v. *Forrest City Special Improvement District,* 246 S. W. 867, 156 Ark. 356. In that case, however, the corporate names were duly signed to the petition and the issue was

whether or not the persons affixing the corporate names to the petition had legal authority to do so. The effect of this court's ruling in that decision was that the signing of the corporate name to the petition was within the scope of the general authority which the directors, by continued consent, permitted the persons who signed the petition in its behalf, to exercise. It was there stated:

"There was no formal meeting of the board of directors for the purpose of authorizing Nimocks to sign the petition, nor was there any such formal meeting held until during the progress of the trial in the chancery court. During a suspension of the trial this corporation, as well as all the others whose signatures appeared on the petition held directors' meetings, and formal resolutions were passed ratifying the action of the respective officers who had signed their names. Counsel for appellee insist that that was a timely ratification in each instance, but this court reaches the conclusion that it was too late to validate the signatures by ratification after the enactment of the ordinance, for the reason that there must be a majority in value of the property represented by authorized signatures before the council can pass the ordinance."

The omission of the corporate owners' names from the petition is not cured by a subsequent ratification, nor can a deficient petition be corrected by a substitution or exchange of invalid signatures for valid ones, in order that the required majority be obtained.

In the case of *Colquitt* v. *Stevens,* 111 Ark. 314, 163 S. W. 1141, where legal title to property was held solely in the wife's name and the husband signed the petition in his individual name, the question was raised as to whether the wife's lands could be included. We there held:

"It is said of each of these persons, who are not the owners of any property, but whose wives are, that their signatures should be included because the petition was signed with the knowledge and consent of the wives of the respective petitioners, and that, if in any case this

consent had not been obtained in advance, the subscriber's act was subsequently ratified * * * It is urged that ratification cures the lack of authority, and that where the proof shows subsequent ratification it is immaterial in whose name the petition was signed, and that it is likewise immaterial that there was no authority for the signature in the first instance.
* * *

"Here the owners of the property could not ratify the signing of their names, because their names were not signed, and there could be no ratification of a thing which had never been done. * * * It is not therefore sufficient that an owner favor the improvement, and that he did not object that some name other than his own was signed to the petition, with the intention of binding him. The statute requires, and its provisions are mandatory, that the name of the owner must be signed to these petitions, although, if the owner does not sign his own name in his own hand, he may authorize another to do so for him, or may ratify the act of another who has signed it."

Inasmuch as we are of the opinion that to include these corporate lands in the acreage represented on the petition was error, we do not deem it necessary to a determination of this cause to discuss the other alleged errors raised by appellants.

After deducting the 37 acres owned by Etheridge & Sawyer, Inc., and the .50 acre owned by Crossett Zero Butane Gas Company from the 1,259.20 acres found by the lower court to be represented on the petition, there is a remainder of only 1,221.70 acres represented by valid signatures on the petitions, which is 35.32 acres less than a majority.

The judgment therefore is reversed and this cause remanded to the Circuit Court with direction to dismiss the petition as being deficient in containing signatures of a majority in area of the landowners within the proposed district.

JOHNSON, J., disqualified.

5-3480 393 S. W. 2d 256

Opinion Delivered May 31, 1965.

[Rehearing denied September 20, 1965.]

Jack Machen and *McKay, Anderson & Crumpler,* for appellant.

Keith, Clegg & Eckert, for appellee.

CARLETON HARRIS, Chief Justice. This is a will contest. Frank Garrett, a lifelong bachelor and resident of Columbia County, executed his will on January 21, 1950, leaving his entire estate to his brother, A. C. Garrett. Frank died on February 27, 1962, at the age of 83 years, and in due time, appellee A. C. Garrett petitioned the Columbia Probate Court for admission of the will to probate. Thereafter, appellants filed their contest. Lillie Garrett

Viston and Otis Harwell, appellants herein, are respectively the sister and nephew of the testator. Following a lengthy trial, the court dismissed the contest and admitted the will to probate, and from such order comes this appeal.

For reversal, it is contended that Frank Garrett lacked testamentary capacity, and that, in executing the will, he was acting under undue influence.[1] These contentions are so interwoven that they can hardly be discussed separately.

A factual background is in order. Frank, A. C. (Asa) and Lillie were the three surviving children of Levi Garrett,[2] who died testate in 1946, leaving his estate to Frank and Asa. Lillie and Harwell contested that will, alleging that Levi was mentally incompetent to make a will, and that undue influence had been exercised upon him by Frank and Asa. That contest was unsuccessful. Levi had been a successful farmer, but during the 1930's, oil was discovered on his property, and on other property owned by Asa. Frank's estate consists of real property, bank accounts, and oil income, obtained from property which he inherited from his father.

The record in this case is voluminous, containing the testimony of sixty-three witnesses and eleven depositions. Included is the testimony of schoolmates, neighbors, business acquaintances, oil company employees, who worked on the Garrett wells, and various citizens of Magnolia. The Chancellor, at the conclusion of the evidence, rendered a comprehensive opinion, discussing the testimony of a large number of the witnesses, and this opinion will be subsequently referred to.

Winston O. Wilson, Executive Vice-President of the First National Bank of Magnolia, was one of the witnesses to the execution of the will. He testified that he saw Frank Garrett sign the instrument, and stated that Garrett said that he also wanted two others present, W. R. Gantt, Jr., and W. C. Blewster, to witness the will.

[1] Originally, the complaint also alleged that the signature of Frank Garrett was a forgery, and this issue was included in the trial below, but the allegation has been abandoned on appeal.

[2] Harwell is the son of a deceased daughter, Alice.

Wilson testified that Gantt also signed as a witness.[3] The will had been prepared by a Magnolia attorney in the bank building. Appellants attempt to establish that A. C. Garrett brought Frank into town for the purpose of making the will. This, in itself, of course, proves nothing, and for that matter, frequently happens, and, in some instances, beneficiaries actually take the testator to the lawyer's office without ever being accused of exercising undue influence. One argument advanced by appellants is under the sub-heading, "Asa wanted Frank to execute a will to him." The proof was not very extensive on this point, but at any rate, it certainly did not establish undue influence. In *Langford* v. *Gates*, 238 Ark. 167, this court, quoting from 94 C.J.S., Section 226, Page 1075, stated:

"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."

Another sub-head asserts that "Frank was under the control of Asa," and this will be hereafter discussed.

There is no direct evidence that Frank Garrett was acting under duress at the time of the execution of the will. As long ago as 1887, in *McCulloch* v. *Campbell*, 49 Ark. 367, 5 S. W. 590, this court said:

"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 disposi-

[3] Gantt died before the will was offered for probate. Gantt's signature was established by the testimony of Wilson, T. A. Monroe, a vice-president of the bank, Mrs. John Dexter, former wife of Gantt, and W. C. Blewster, President of the First National Bank of Magnolia.

tion of his property. And the influence must be specially directed toward the object of procuring a will in favor of particular parties. 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."

See also *Rosenbaum* v. *Cahn,* 234 Ark. 290, 351 S. W. 2d 857, and *Langford* v. *Gates, supra.*

Appellants' strongest arguments are based on their allegations and evidence offered to the effect that Frank Garrett was mentally deficient to the extent that he did not possess testamentary capacity. Appellants strongly argue this contention, and evidence was offered to the effect that Frank had been considered dull, even in school days, probably not finishing the first or second reader; that he was rather quiet and timid, and rarely joined with the other children in the games that would be played. Testimony was introduced by appellants to the effect that Frank would not clean up, but constantly wore the same dirty clothes, "smelled bad," liked to take a bath in the creek, spent very little for groceries, stating that a $20.00 bill "had to do him a long, long time," was not interested in modern conveniences, and appeared to think more of his crops than his oil wells. Others testified that Frank would say that he had no money, and as authority for this statement would quote his brother, Asa, as saying, "The government got all their money," and indicate otherwise that his opinions were formed by what Asa had to say. Oil field workers, who would see Frank off and on over several years, emphasized that he was uncommunicative, and had little to say, except to comment about crops or the weather. There was testimony that Frank would eat cheese and crackers for lunch, and a neighbor testified that one day he saw Frank hide some peanuts behind a fence "because he didn't want Asa to know about the peanuts, he would take them away from him." Evidence was offered that Frank lived in filth, rarely shaved, and had frequently stated that he would rather have a water well than an oil well. Frank was

apparently more interested in agriculture than in oil, and this seemed strange to some of the witnesses.

The Chancellor commented on some of the testimony as follows:

"* * * One witness, Lee Roy Hollier, who now lives at Norphlet, Arkansas, where he has lived since the latter part of 1951, testified that he formerly lived in Columbia County where he was an oil gauger; that he first met A. C. Garrett in 1939; he met Frank Garrett shortly after he met A. C. Garrett; that every time he saw Frank, with one exception, he was dirty; he never had any business transactions with him, that all of his dealings were with A. C. Garrett; that Frank seemed to be more interested in growing peas and farming than in oil wells; he saw Frank cutting trees; he never heard Frank talk about current events and in his opinion he did not believe Frank even knew, during the years 1942 and 1943 and 1944, that we were involved in World War Two and in his opinion he did not possess the mental capacity of a child of more than nine or ten years of age. He further testified that he never saw Frank Garrett reading; also, on cross examination, he said he never read anything himself in front of Frank Garrett. Later the same day the Respondents[4] called another oil field worker as a witness, Mr. Hartley, who testified that during the War Frank Garrett came by where he was working and during the conversation asked him if he had heard any war news. Another of Respondents' witnesses, C. B. Simmons, an oil field worker, testified that Frank discussed with him food rationing during the war. In the light of this evidence from Respondents' own witnesses, the Court is of the opinion that Mr. Hollier's statement as to Frank Garrett's capacity or incapacity is not of much value.

"The Court certainly is not impugning the motive or credibility of people who testified for the Respondents, regarding the mental capacity of Frank Garrett, but at the same time the Court cannot overlook the fact that most of their opinions are based upon a few casual and

[4] Here, appellants.

brief conversations without any business dealings or transactions with Frank Garrett. One witness offered by Respondents who testified that in his opinion Frank Garrett was not capable of doing business was Mr. N. W. White but according to his testimony, he tried to sell Frank Garrett a car on one occasion while he was in the automobile business and also testified that he tried to buy royalty from him and further stated that if Frank had agreed to buy a car, he would have sold it to him and that if he had a title opinion from an attorney, he would have bought royalty from him. This Court has known Mr. White for a long number of years and knows him to be a very high type man and, being committed to the belief that Mr. White would not take advantage of an incompetent person, I do not see how he could have concluded that Frank Garrett was not capable of transacting business when Mr. White testified that he undertook to do business with him. * * *

" * * * Another witness offered by Respondents for the purpose of showing mental incapacity, a Mr. Beard, testified that in a conversation with Frank Garrett concerning damage which salt water was doing to his timber, Frank Garrett told him the number of board feet in trees which had been damaged by salt water. Harry Baker, another of Respondents' witnesses, who is 67 years of age, testified he was born within three quarters of a mile of the Garrett place and lived there until 1918; that he has known the Garretts since he was six years old; that his family and the Garrett family visited with each other; that he ginned cotton at the Garrett's Gin; that even though Frank Garrett was some fifteen years older than Mr. Baker, he testified they hunted together; that Frank was a good hunter; he knew the woods and he knew the Garrett land, knew when he was on their land or not on their land while in the woods hunting and that in his opinion Frank was not competent to execute a Will or transact business. After considering testimony of this type, the Court cannot help but feel that when Respondents own witnesses testified Frank Garrett knew his land, knew that Salt Water was damaging his timber and knew how to even estimate the number of

board feet in the damaged trees, certainly this is not descriptive of one who is mentally incompetent. * * *

"Wilbur and Minnie Ford, his wife, were offered as witnesses for the Respondents to show the incompetency of Frank Garrett. Mr. Ford is a former oil field worker who moved from Columbia County in 1941 and did not return until 1956 when he and his wife, while in Columbia County and driving in the vicinity of near the Garrett place, came upon Mr. Frank on the side of the road. Both Mr. and Mrs. Ford testified that Frank Garrett, without any forewarning or any prompting, recognized Mr. Ford and called him by name although he had not seen either of them for approximately fifteen years. * * *

"Numerous witnesses also testified for the Proponent to rebut the testimony offered by the Respondents and likewise many of their witnesses were neighbors and people who were closely associated with Frank Garrett, who had worked with him and who had actually transacted business with him. Ned Baker, age eighty, was a school mate and lifelong acquaintance of Frank Garrett. He testified that he went to school with Frank and to Church singings and did the same sort of work that Frank Garrett did and actually worked with him and had numerous conversations with him and he also testified that Frank Garrett got along in school as well as the average; that he was a good farmer and would exchange ideas with him about how to do farm work * * *

" * * * Roy Couch, seventy years of age, testified he had known Frank Garrett most all of his life, * * * that Frank could estimate the depth of an oil well by the number of drilling pipe that was stocked in the derrick. Mr. V. S. Parham, a witness for the Proponent and a resident of Magnolia, testified he has known the Garretts since about 1921 or 1922 and has been engaged in the oil business since 1935; prior to that time he was in the feed and grocery business and that he has sold groceries to Frank Garrett; that Frank always knew what he wanted, made his purchases and resisted any attempt to be sold items which he did not want. This witness further testified that in November, 1937, he purchased from

Levi Garrett, Frank Garrett and A. C. Garrett a mineral interest in lands owned by them; that during the course of this transaction, on several occasions, he talked with Frank Garrett alone about the proposed purchase, talked with Frank also in the presence of Levi and A. C. Garrett; that originally offered but finally agreed upon a price which was the highest price paid for royalty in that area; * * *

"Corbin Yelvington, formerly an employee of the Land Department of Lion Oil Company, testified he had known Frank Garrett most all of his life; that in 1928 he bought timber from Levi Garrett, the trees he bought were marked and Frank Garrett alone accompanied this witness and showed him the trees to be cut; * * *"

The above constitutes only excerpts from a lengthy opinion, but it is apparent that the testimony was much in conflict; it is also evident that some of appellant's own witnesses contradicted themselves at times.

It is, of course, pertinent to mention the degree of mental capacity required in executing a will. Let it first be stated that one does not have to be a genius, a college graduate, a high school graduate, or even have attended grade school, to make a will. While a male minor, generally speaking, is unable to enter into binding contracts (he must first attain the age of 21 years), the law does not require that one be an adult before being capable of executing a will. This may be done when a minor reaches the age of 18.

In Volume 1, Page on Wills, Section 12.20, we find two cases cited on this question as follows:

"The making of a will does not require so high a degree of mental capacity as does the making of deeds or contracts. Making a will is not a matching of wits. It is giving, not bargaining. *Huffnagle* v. *Pauley* (Mo.) 219 S. W. 373.

"Where the Court gave a correct statement of what testamentary capacity was, in law, it was held not to be error to add that it required less mental powers to make a will than it did to make a contract. *Gable* v. *Rouch,* 50 S. C. 95, 27 S. E. 555."

Again, in Section 12.37 of the same volume, we find a discussion of "eccentricity," as follows:

"To distinguish eccentricity from insanity is easy in theory and difficult in practice. Eccentricity is deviation from the methods of conduct and behavior usual to the great mass of mankind similarly situated. Every person has slight peculiarities of his own, which may never cause any suspicion of his testamentary capacity. It is only when they become pronounced by contrast with those about him that they become known as eccentricities, and are invoked to discredit his testamentary capacity. Eccentricity has no effect on testamentary capacity; and the wills of persons who are highly eccentric, and in some cases eccentric to the verge of insanity, have been upheld. This is especially true where eccentricity is due, not to any form of mental derangement, but to vanity, selfishness and the like. A testator may avoid the society of others and yet be sane enough to make a will.

"The fact that the testator was filthy, forgetful and eccentric, or that he was miserly and filthy, or that he was blasphemous, filthy, believed in witchcraft, and had dogs eat at the same table with him or that he was filthy, frequently refused to eat, and would lie in bed with his clothes on for two weeks at a time, or that he would leave his home only at night, and would count or recount his money, or that he was high tempered and violent, or was irritable and profane, or that testator thought that others were plotting against him and was afraid to go out in the dark, or that he was inattentive when spoken to and mumbled when trying to talk, does not establish lack of capacity."

It is true that Frank Garrett may not have always acted in a manner consistent with what the average person considers "normal," but the acts mentioned by appellants, we think, at most, only establish that Garrett was "peculiar," and it might be added that, frequently, wealthy persons act as though extremely poor, and there are, of course, numerous instances where eccentric persons have lived in abject poverty, though thousands of dollars would be found on the premises. Our own court,

in the case of *St. Joseph's Convent* v. *Garner,* 66 Ark. 623, 53 S. W. 298, said:

"Over the objections of the plaintiff, Jacob Hufsteder, J. A. Luttrell and D. W. Reynolds, who did not attest the will, were allowed to testify as to the mental capacity of Ellen McKenzie. Hufsteder testified that her mind was weak and that he did not think that she understood what a contract is. Luttrell did not think that she was very bright, or that she was capable of making wills or contracts, and testified that her teacher said that she could not learn anything; and Reynolds said she did not have a bright intellect like other children.

"The effort to impeach the testamentary capacity of Ellen McKenzie was indeed feeble. * * * The substance of it was, she was 'weak-minded,' 'not bright,' not as intelligent as other girls. * * * The fact that her mind was weak, not 'bright,' or that she was not as intelligent as the average girl, does not show that she did not have sufficient testamentary capacity to execute the will in question."

Let us look at some of the other circumstances adduced by the evidence as a matter of determining if Frank Garrett possessed testamentary capacity. The record reflects that some seventy legal documents, about half of which had been recorded, were introduced into evidence, all of these documents admittedly being signed by Frank Garrett. These instruments consist of bills of sale, deeds, releases, Division Order contracts with oil companies, Income Tax returns, checks (including checks in payment of Federal and State Income Tax), and numerous other instruments, all signed over a period of years. During this time, *not once* has anyone questioned Frank Garrett's competency to execute these instruments until the present litigation. *Not one single medical witness* testified that Frank Garrett was incompetent. To the contrary, the only medical witness who appeared, Dr. Joe Rushton, a respected physician of Magnolia, stated that, in his opinion, based on several conversations with Frank, the testator was competent, and it is interesting to note that the will in question was executed only twelve days

after Dr. Rushton's last conversation with Frank Garrett.

Of course, there was a close connection between the testator and the beneficiary, and it may well be that Frank, in some business matters, depended quite a bit upon the judgment of his brother, Asa. But this fact does not establish mental incompetency—or undue influence. In *Dunklin* v. *Black,* 224 Ark. 528, 275 S. W. 2d 447, we said:

"* * * It definitely appears that Hattie Boone was also the dominating personality—in business affairs; that her decisions were generally the ones accepted in matters relating to business."

After stating that this is not unusual, the court went on to say that likely

"In every family, one person's business judgment is looked upon by members of the family as being more reliable, either because of business ability, or because of business experience, and that particular one's opinion is generally given more weight in matters that arise for a decision."

This is certainly not a case where an unnatural will was made. Under all the facts, it is clearly established that Frank felt closer to his brother, Asa, than to anyone else. He had been constantly associated with his brother during his entire adult life. Actually, human nature being what it is, a stronger case for incompetency might well be made if Frank *had* named appellants (his sister and nephew) beneficiaries in the will. Lillie Garrett Vinton, the sister, had resided in St. Louis, Missouri, for the past forty years, and there is no evidence that, *during all of this time, she either visited or communicated with Frank Garrett.* Otis Harwell, the nephew, had lived in Texas for the past forty-years, and did not remember *ever having talked to Frank Garrett.* Though he had visited in this state six or seven times, and had seen other relatives, apparently no effort was made to visit with Uncle Frank. These facts are sufficient, within themselves, to suggest why neither appellant was made a

beneficiary, but there is even a more cogent reason why Frank might well have ignored these relatives. When Levi Garrett, father of Asa, Frank, Lillie, and Harwell's mother, died, he devised and bequeathed substantially all of his property to the two boys, Asa and Frank, leaving appellant Lillie Vinton and appellant Otis Harwell $1.00 each. These same two appellants (in the present case) contested the will of Levi Garrett, alleging in their complaint that for a long time Levi Garrett "had been under the undue influence of said Asa C. Garrett and Frank Garrett and each of them, and said Levi Garrett by reason of said undue influence did not make said instrument of his own free will in the disposition of his property, but made it, controlled by and under the influence of said Asa C. Garrett and Frank Garrett and each of them; the deceased resided with his son, Frank Garrett, and said son and Asa Garrett, another son of the deceased, looked after and had the personal care and attention of their father for a long time prior to and up to the time of his death. * * * said sons had influenced and dominated their father as aforesaid in the execution of said instrument purporting to be his last will and testament. During the last illness of the deceased he was grossly neglected by his said sons in that they did not provide him with the necessary nourishing foods to sustain his life, or with medicines, nursing care or the adequate service of a physician as was plainly indicated by his age, feebleness and illness, and absolutely necessary for the preservation of his life, but on the contrary permitted and caused him to die for the want of such attention, and which under the facts and circumstances amounted to criminal neglect."

Frank and Asa Garrett prevailed in this lawsuit, but harmonious family relationships are not preserved through litigation. Certainly, Frank Garrett would have been a most unusual person, if he had devised or bequeathed any property to appellants, who not only had accused him of exercising undue influence upon his father, but had further alleged that he and his brother had so neglected Levi Garrett that they were guilty of "criminal neglect," and had caused the father "to die for the want of such attention."

The inconsistency of appellants' allegations is quite noticeable. In contesting Levi Garrett's will, they asserted that Frank Garrett exercised undue influence over, and dominated, his father; yet, in the present complaint, they assert that Frank did not even have testamentary capacity. To say the least, it is out of the ordinary for a man characterized more or less as a simpleton (in the present litigation) to dominate a normal individual (as alleged in the first litigation).

There is certainly nothing unusual or abnormal about the will. This is not a case where a total stranger—or an acquaintance of a short period—inherits the property. This is not a case where those who have been close to the testator, and who might have reasonably expected to be included in a will, are left with nothing. To the contrary, the man with whom Frank Garrett had been most closely associated throughout his life—his brother, to whom, according to all witnesses, he was quite devoted—was named the beneficiary.

We are unable to say that the Chancellor's findings were against the preponderance of the testimony.

Affirmed.

Robinson, Johnson and Holt, J. J., dissent.

JIM JOHNSON, Associate Justice, (dissenting). I do not agree with the majority view. The following having been prepared for the majority was after prolonged discussion rejected and now appear as my dissent.

This is a will contest. The testator, Frank Garrett, executed a will on January 21, 1950, leaving his entire estate to his brother, A. C. Garrett. The contestants (appellants) are a sister, Lillie Garrett Vinton, and a nephew (son of a deceased sister), Otis Harwell, decedent's remaining heirs at law. Decedent died on February 27, 1962, and on March 29, 1962, appellee A. C. Garrett petitioned the Columbia Probate Court for admission of the will to probate. Thereafter appellants filed their contest. [Ark. Stat. Ann. § 62-2113 (Sup.

1963)] After a lengthy trial the court dismissed the contest and admitted the will to probate. From this order appellants have prosecuted this appeal.

Appellants contend that the testator lacked testamentary capacity in that he was not capable of knowing the nature and extent of his property.

This court has defined testamentary capacity as follows:

"We have often defined mental capacity such as must be possessed by a testator in order for him to make a valid will. The rule has been generally expressed that sound mind and disposing memory, constituting testamentary capacity, is (a) the *ability* on the part of the testator to retain in memory without prompting the extent and condition of property to be disposed of; (b) to comprehend to whom he is giving it; and (c) to realize the deserts and relations to him of those whom he excludes from his will. *Taylor* v. *McClintock,* 87 Ark. 243, 112 S. W. 405; [and other cases cited]." *Shippen* v. *Shippen,* 213 Ark. 517, 211 S. W. 2d 433 [emphasis ours].

We are here dealing with the first part of this three-fold test.

Frank, Asa (A. C.) and Lillie were the three surviving children of Levi Garrett, who died in 1946 leaving a will devising his estate to A. C. and Frank. These appellants contested that will, unsuccessfully, alleging undue influence. After extensive litigation that contest was settled by payment of $4,000 to appellants when it was conceded that an apparently valid 1931 will made generally the same provisions as the later contested will. Lillie has lived in St. Louis for some forty years and Otis in Texas, with little contact with Levi, Frank or A. C.

Levi was a successful farmer and a shrewd businessman, as is his younger son Asa. Asa bought farm land from his father and others as a young man and through hard work prospered. Sometime in the 1930's oil was discovered on Levi and Asa's property, the well known

Magnolia oil field. Frank's vast estate includes real property, enormous bank accounts and substantial oil income from property obtained and inherited from his father.

The briefs contain the abstract of testimony of sixty-three witnesses and eleven depositions; the record is voluminous. Testimony of neighbors, school mates, oil company employees who worked on the Garrett wells and townspeople is included.

The most favorable testimony in support of Frank's testamentary capacity (other than A. C.'s) was that of A. C.'s doctor, a general practitioner and a well respected man. He had occasion to see Frank five times, which was at A. C.'s home in 1949 when the doctor made professional calls on A. C.'s wife while she was dying of chronic nephritis, resultant pelagra and suffering from a psychosis common to Bright's disease. The doctor apparently visited or chatted with Frank during four of these visits, and testified that as a result of these chats he considered Frank capable of understanding the nature and extent of his property. He also testified that his talks with Frank were about crops, cotton ginning the way it used to be done, the saw mill, all of which "reminded me [the doctor] of old times. The old timer talked like my dad used to, about your having to get up when you were a kid early in the morning and go outside in the field and run the cows out." Frank was never a patient of the doctor's and apparently the only contact the witness had with Frank was the casual conversations which occurred during the doctor's treatment of Frank's sister-in-law who at the time was at the point of death.

The bulk of the testimony in the record related to Frank's later years, hardly surprising considering that he died in 1962 at eighty-three. However, there was testimony of at least five witnesses who had gone to school with Frank at the ungraded Mount Nebo school. All of these witnesses were a few years younger than Frank, but the gist of the testimony is that when he did go to school, he was quiet, didn't join the other children in games or talking, when he tried to read the teacher had

to supply many or most of the words, that he probably didn't finish the first or second reader, that the other children made fun of him and considered him dull or stupid.

After growing up, Asa, six years Frank's junior, bought land and farmed successfully, married and raised a family; Frank continued to live with his parents and did so until their deaths. His father went into partnership with Asa in a cotton gin and Frank worked there as a helper, as well as at the Garrett saw mill. There is testimony that as a young man, Frank was quiet, and that when he ventured to say something in a conversation, his father would say with a smile, "Frank, I don't know whether you know or not," which would end his attempt. Years later when Frank was talking to a live stock man about pigs, A. C. told the man, "Don't pay any attention to him, he is always talking about damned old pigs and he hasn't got any use for them."

Most of the testimony dealt with the period following discovery of oil on the Garrett property in the 1930's. A number of the men who worked in the oil field testified. The trial court referred to them as "transients". While it is true they were subject to transfer by the oil companies, we note that these workers saw and knew Frank over a period of, at a minimum, several years, and some for twenty or thirty years. These men saw Frank almost daily since this field occupied in part the Levi Garrett farm. Frank is pictured as being as uncommunicative and inattentive as a child. Frank spent much of his time walking in the woods. When he came to the field, the men would speak to him and he would have little to say except to comment on the weather or his crop of peas. In response to their remarks relative to his wealth, he would say, "No, he didn't have anything because the government took everything for taxes, bud (Asa) said so," or "No, he didn't have any money because the wells were turning to salt water, Bud said so," or (according to one witness), "No, he didn't have any money because it took everything to settle with Sister, Bud said so." Frank's attention span was so short he would then wander off back into the woods like a child. One man who

lived next door to Frank for four years testified that Frank would bring him a quarter and ask him to buy "beefsteak, cheese and crackers" for Frank's dinner. (Frank was then about sixty.) The man would buy all he could for the quarter and take it to Frank. This occurred a number of times, as was also testified to by the man's wife. There was quite a bit of testimony that Frank desperately wanted a water well and a "Sunday car." The "quarter" neighbor and his wife testified that some thirteen years after they moved from Columbia County they returned for a visit and happened to see Frank. Frank recognized his former close neighbor of many years and called him by name. When the man asked Frank what he was doing at that particular place (on the side of a new highway), Frank told him, "He come over there . . . every Thursday, and the man on the highway promised him a new automobile and he never had brought it, and he went over there every Thursday to see if he brought his new automobile."

Another neighbor testifed about giving Frank a ride to town one day. He also picked him up on the way back and when the neighbor stopped to do a little business, Frank went to someone who was selling apples. Frank was told that the apples were five cents each or three for a dime. Frank gave him ten cents and took two apples, one for himself and one for the neighbor. When the neighbor kidded Frank about shortchanging himself, he called the neighbor a liar. Another neighbor testified that one day he gave Frank a ride and when he got near Frank's home, Frank got out and hid peanuts under some leaves behind a fence, "because he didn't want Asa to know about the peanuts, he would take them away from him." Another man testified that one day in the woods he saw Frank hide something in a tree, and after Frank was out of sight, investigated and found peanuts in the crotch of the tree.

Almost all of the witnesses commented on Frank's filth and aroma, especially after Levi's death in 1946. (Levi had had a woman who cooked and washed for them.) Frank apparently never changed clothes, never washed them, and wore them until they wore out. One

witness testified that Frank's brother had said that Frank smelled so bad he and his son couldn't eat when Frank was in the house; and another time, that they tried to get Frank to put on clean clothes, but had been unable to make him do so. Most of the witnesses agreed that Frank was odorous within conversation distance.

Several of the oil field witnesses testified that Frank told them he looked forward to warm weather so he could wash in the creek. A number of them testified that he said a number of times he would rather have a water well than the oil wells so he could water his garden and grow water "millions" (melons), which he loved.

He lived in penury, extreme poverty. Filth was his constant companion. The simplest conveniences were denied him — running water, electricity, even gas, although he lived adjacent to an oil field. When he gave the neighbor the quarter to buy groceries, he would say that he didn't need much. Another testified that Asa complained that he couldn't get Frank to eat enough, that Frank wanted to save the food. A grocer testified that when Frank came in for his loaves of bread (apparently Frank's primary food), cheese and peppermint sticks, if Frank had a bill (usually a $5, once a $20), Frank would say that had to do him a long time. When he gave her (the grocer) the $20 bill, Frank said Asa said the government got all their money so this twenty had to do him a long, long time. A passerby called a doctor to see Frank in 1956 after Frank was found collapsed by the roadside. This doctor testified in part as follows:

"I found him to have bronchial pneumonia. Someone else was there at the time, but I do not remember who they were. I know Mr. A. C. Garrett, either he or some of his sons were there. I don't remember. Frank had a rattle in his chest and he was spitting up blood and I advised that he be sent to the City Hospital at once. I gave him a shot of penicillin and he said he didn't like the hospital and didn't want to go because it cost too much. Frank said that. The blankets on the bed were very filthy. There was bread in the window with syrup on it and the house was very untidy and unclean. Frank

hadn't shaved and hadn't had a hair cut in a long time and he had the appearance of not being clean."

Yet there is in evidence Frank's 1956 federal income tax return showing a taxable income for that year (after deductions) of $41,144.24.

Frank's brother in a so-called exploratory deposition testified that Frank was quite capable of carrying on his own business, and did so regularly. However, examination of employees of various banks that housed Frank's and Asa's joint accounts revealed that few of them had ever seen Frank in a bank although Asa was a familiar sight, making deposits to the various accounts. It is established that Asa would deposit Frank's oil income checks and hold out a little cash for Frank. Courthouse employees testified that they never saw Frank and that Asa took care of all assessment and other tax matters. An accountant testified that he had prepared Frank's income tax returns for the year 1951 on, but he had never seen Frank and had been hired and paid by Asa. A respected attorney testified that he had handled litigation for many years for the Garretts but he had never seen Frank in his office until shortly after settlement of Levi's estate. Frank came in with Asa, and Asa told the attorney Frank wanted a will. When the attorney asked Frank who he wanted to will his property to, Frank said, "I want to leave it to me." The attorney explained that he (Frank) couldn't receive his own property after his own death. The attorney testified that:

"I then asked him again, what do you want to do with your property. I don't remember the exact words of any of the rest of the conversation, but I do remember that he said he wanted to leave something to (and he gave a feminine name). I don't recall what the name was. He said I want to leave something to this girl and I want to leave something to brother A. C. Mr. A. C. Garrett, who was seated by my desk, then got up and said, I am sorry but we have to go. I don't remember the exact words, but I do know he said, we will have to go and we will come back later. They got up and walked out and to my knowledge, neither of them ever came back into our law firm again, prior to the death of Mr. Frank."

Some months later Frank executed a will at the local bank which the bank president had had a local attorney draw at the bank's expense. This attorney had not seen Frank, but simply drew the will on directions related to him by the bank president (who had done business with Asa for years and who had on deposit — at no interest — much of the money involved in this litigation). After the will was executed, it was immediately placed in Asa's lockbox in the same bank.

There are a number of instruments—deeds, releases, agreements, etc.—of record to which Frank was a party. One notary public testified that she had seen Frank sign a particular instrument some years earlier, and then on recall testified that after reflection she remembered that Asa had carried the instrument out of her presence to get Frank's signature on it. There seems to be no dispute that Frank could write, or at least sign his name, but other than the will, only one or two witnesses testified that they had actually seen him sign his name, and that only because they had notarized his signature.

Asa was present during the entire trial and heard all of the myriad testimony showing the obvious lack of testamentary capacity of his brother, and chose not to take the stand to deny or refute the testimony of any of the witnesses or to subject himself to cross-examination. We have only his "exploratory" deposition which in part describes events immediately prior to Frank's death:

"He never grunted in his life. He wasn't sick at all before he died. He was up over there the day before he died. Ray [Asa's son] went over there and lit the heater and the stove in there and got his breakfast on and he was in the kitchen there and he tended to it and finished it up and ate whatever he got ready. The next morning they found him dead. He wasn't sick. Ray went over there and found him. Ray told me about it, he came back over there and told me. He lived over there by us where we could kinder look after him."

Appellants properly offered the testimony of the undertaker as follows:

"It was stated that [he] would testify that he was called to get Mr. Frank Garrett's body after his death, that he found him in the little house across the road from A. C. Garrett, that it was a real cold day when he went out there and rigor mortis had completely set in; that the skin on Frank Garrett's leg had rotted off to the bone, that three of his toes had no skin on them, and his instep bone was without skin on the top of it; that he had been excreting in his clothes for some days; that he had three pair of clothes on that were so filthy that he could not unbutton them and take them off, and they were so stiff with the filth that he had to cut them off with a knife; that it took three knives to cut them all off; that it was the only body that was so stinking that they couldn't take care of it in the undertaking parlor and had to carry it out to the garage; that the body was so deteriorated that they were unable to obtain any circulation to embalm it and therefore, requested permission to seal the casket and such permission was granted by Mr. A. C. Garrett's family. He will testify that the body was filthy and when he attempted to wash the body, when he touched the skin it would fall off and they were unable to clean it up. He will also testify that during his entire years in the undertaking business, which is more than fifteen years, he had never seen a body in such terrible condition even though he had handled some bodies found three days after death, where maggots had set in, and once where a body had been submerged for a couple of days in water."

On the whole case it is inescapable that Asa had allowed his mentally weak brother very small amounts to live upon, advising him that his sister had taken it, that the government was getting it, or that the wells were going to salt water, resulting in Frank's firm fixation that they were practically at starvation's door. All in all, this case presents in essence a portrait of a person of limited capabilities, looked after by his family, assigned simple jobs at the gin, the saw mill or on the farm which he was capable of doing and did do; a person of very limited intellectual scope who was completely unable to translate oil wells into a water well. That is to say Frank did not, and I think could not, visualize the oil

wells (that he apparently so disliked for ruining the farm) as an income-producing means of obtaining the two things that were his heart's desire, a water well and a car.

The question here is *not* whether Frank Garrett would have willed his property as is provided in the instrument here involved, but rather whether he was competent to make a will. On trial de novo on the record before us, it is my view that the testator not only did not know the extent of his property but that he was incapable of so knowing, which is one of the essentials of testamentary capacity. For the lack of testamentary capacity, the decree of the court admitting the purported will to probate should be reversed.

For the reasons stated, I respectfully dissent. I am authorized to say that Justices Robinson and Holt join me in this dissent.

OLIVER *v.* JONES

5-3606 393 S. W. 2d 248

Opinion Delivered May 31, 1965.

[Rehearing denied September 20, 1965.]

H. Paul Jackson, for appellant.

Lewis E. Epley, Jr., for appellee.

ED. F. MCFADDIN, Associate Justice. This lawsuit stems from a traffic mishap caused by cattle being on the public highway. Appellee Jones was driving his car on State Highway No. 23 in Carroll County and suddenly came upon some cattle on the highway. Jones' car struck or was struck, by a yearling, and the collision resulted in the death of the yearling and damage to the car. Jones filed action against appellant Oliver, as the owner of the yearling, seeking to recover the damages to the car. Oliver denied ownership of the yearling and all liability for damages. Trial to a jury resulted in a verdict and judgment in favor of Jones for $450.00 and on this appeal Oliver urges the two points which we now discuss.

I. *The Insurance Matter.* When plaintiff Jones was testifying, the following occurred:

"Q. Did you talk to Lynn Oliver about this after the accident?

"A. A few days after.

"O. What did he tell you?

"A. Well, he said that he went out and counted his cattle and he had none missing and I asked him if he had insurance on the cattle and he said he did, but he didn't tell me who had it insured.

"MR. JACKSON: I am going to object to any statements about insurance.

"THE COURT: I will sustain objection about insurance. The jury will disregard it.

"MR. JACKSON: I am going to move the Court at this time for a mistrial because of the fact of the mention of liability insurance or the suspicion of any liability insurance and I ask the Court to declare a mistrial.

"THE COURT: Gentlemen of the Jury, I will sustain the objection in regard to it. I will ask you to disregard it. I will ask you further if there is any question about completely disregarding the question of insurance? It's immaterial whether there is, or there isn't and it has no bearing whatsoever in this case. Since I have with-

drawn it from your consideration, I will ask you individually if you can accept the ruling of the Court, or would you have a reservation in your mind that would influence your verdict in the case? Mr. Newman, can you completely disregard the statement here and the answer given and follow the instruction of the Court?

"MR. NEWMAN: (A Juror) Yes, sir."

The Court then interrogated each juror individually and received a reply that each could and would disregard all reference to insurance.

The appellant insists that the "court erred in failing to declare a mistrial when John T. Jones, appellee, while testifying, said that the defendant-appellant had disclosed to him that he had liability insurance." As we see the record, there was no mention of the word "liability." So far as the record here shows it merely meant that Mr. Oliver had insurance on the life of his cattle. But, regardless of that distinction, we hold that the prompt action of the Trial Court eliminated any prejudice that might have occurred because of the mention of the word "insurance." *Malco* v. *McLain,* 196 Ark. 188, 177 S. W. 2d 455; *Beatty* v. *Pilcher,* 218 Ark. 152, 235 S. W. 2d 40; and *Ragon* v. *Day,* 228 Ark. 215, 306 S. W. 2d 687. We find no merit in appellant's claim.

II. *Defendant's Motion For Instructed Verdict.* At the close of the entire case[1] defendant Oliver moved that a verdict be directed in his favor; and the ruling of the Court in denying the motion for an instructed verdict is the point[2] now urged. This point has given us considerable concern. Section 1 of Initiated Act No. 1 of 1950 (as

[1] A motion for directed verdict was made at the close of the plaintiff's case and denied by the Court. The defendant then introduced evidence, and such waived the motion made at the close of plaintiff's case. *Grooms* v. *Neff Harness Co.,* 79 Ark. 401, 96 S. W. 135; *Ft. Smith Cotton Oil Co.* v. *Swift,* 197 Ark. 594, 124 S. W. 2d 1; and *Granite Mountain* v. *Schwarz,* 236 Ark. 46, 364 S. W. 2d 306. At the close of entire case appellant again moved for directed verdict, and that brings the ruling before us.

[2] Appellant's point reads: "Court erred in overruling appellant's motion for directed verdict at close of plaintiff's case and at close of all testimony and jury's verdict was against weight of testimony and contrary to law all because there was no evidence that the cow that was struck was appellant's and that if it was that he knowingly allowed it to run at large or negligently allowed it to escape from its enclosure."

found on page 1013 of the printed Acts of 1951) reads: "After the passage of this Act it shall be unlawful for owners of cattle, horses, mules, hogs, sheep, or goats to allow them to run at large along or on any public highway in the State of Arkansas."[3] The plaintiff's theory was that the defendant had allowed his stock to run at large on the highway and that such violation of the statute was evidence of negligence. To make a jury question of defendant's liability in this case the burden was on the plaintiff to offer substantial evidence (a) that the yearling was the property of Oliver; and (b) that Oliver was guilty of negligence in allowing his yearling to be on the highway. *Briscoe* v. *Alfrey,* 61 Ark. 196, 32 S. W. 505, L.R.A. 607; *Fraser* v. *Hawkins,* 137 Ark. 214, 208 S. W. 296; *Fields* v. *Viraldo,* 141 Ark. 32, 216 S. W. 8; *Pool* v. *Clark,* 207 Ark. 635, 182 S. W. 2d 217; and *Favre* v. *Medlock,* 212 Ark. 911, 208 S. W. 2d 439. See also the Opinion by Judge Lemley in *Poole* v. *Gillison,* 15 Fed. Rules Dec. 194.

As to the ownership of the yearling the evidence showed: (a) that some of the cattle on the highway belonged to defendant Oliver; (b) that after the mishap some neighbors drove all the cattle (except the dead yearling) to a nearby enclosure; (c) that next morning one of Oliver's cows went back to the scene of the mishap (which testimony was designed to show that the cow was looking for her yearling); (d) that Oliver did not mark or brand his cattle and that the dead yearling had no mark or brand; and (e) that shortly after the mishap Oliver inquired concerning the amount of the damages to Jones' car and remarked at the time, "It looks like I am stuck with the bill." Oliver and his witnesses denied that the yearling belonged to Oliver; but we hold that all of the five items of evidence above listed when added together were sufficient to take the case to a jury on the ownership of the yearling by Oliver.

As to Oliver's negligence in allowing the yearling to be on the highway, we find abundant testimony to take the case to the jury. Sheriff Dwan Treat testified that

[3] Act No. 30 of 1901 and Act No. 174 of 1905 relate to livestock in Carroll County, but neither Act is applicable to the facts in this case.

there had been a continuous complaint of cattle running at large on Highway No. 23 at the point where these cattle were. One witness testified that he had seen Oliver's cattle on the highway; and another witness testified that the cattle had been on the highway, at or near this place, for about five hours before the mishap.

Without further detailing the evidence, we conclude that a case was made for the jury; thus, appellant was not entitled to a directed verdict.

Affirmed.

JACKSON *v.* SOUTHLAND LIFE INS. CO.

5-3607 393 S. W. 2d 233

Opinion Delivered May 31, 1965.

[Rehearing denied September 20, 1965.]

E. L. Holloway, for appellant.

Gus R. Camp, for appellee.

ED. F. MCFADDIN, Associate Justice. This is an action brought by appellants, Mr. and Mrs. Jackson, against appellee, Southland Life Insurance Company, seeking to collect double indemnity benefits under an insurance policy on the life of their son, Gerald E. Jackson.

The policy was originally issued by Reserve Loan Life Insurance Company of Texas but was reinsured and assumed by Southland Life Insurance Company. The policy insured the life of Gerald E. Jackson for $1000.00 and also for an additional $1000.00 if death should occur through accident, etc. Gerald E. Jackson was drowned on March 12, 1964. The appellee paid the beneficiaries $1000.00 on account of the death of the insured, but denied liability for the additional $1000.00 claimed by them under the said accidental death provision. The appellants filed this action for the double indemnity of $1000.00. The answer specifically pleaded the language of the policy (hereinafter quoted) as a defense. Trial to the Court without a jury resulted in a finding and judgment for the insurance company and this appeal resulted, in which appellants list three points, being:

"1. That the court erred in finding 'that the deceased was seized with an epileptic attack and as a result of such seizure fell into the ditch and drowned, the court concludes that the death was not the result of an accident within the meaning of the policy, and that the same was excluded under the provision of Clause 5.'

"2. That the court erred in entering a judgment for the defendant.

"3. That the court erred in not entering a judgment against the defendant for the amount of one thousand dollars, with interest at 6% from date of death of decedent on March 12, 1964, together with a penalty of 12% and a reasonable attorneys fee."

We will consolidate the three points in this Opinion. The insurance policy here involved stated that the insurance company would pay the beneficiaries the double indemnity upon "due proof of the death of the insured, as the result, directly and independently of all other causes, of bodily injuries sustained through external violent and accidental means . . . . provided . . . . (5) that death shall not have been the result of self destruction, whether sane or insane, or caused or contributed to, directly or indirectly, wholly or partially by disease, or

by bodily or mental infirmity; . . . ." The Company specifically pleaded the quoted language as a defense.

The facts involving the death of the insured were stipulated as follows:

"2. That on March 12, 1964, the insured Gerald E. Jackson, son of the plaintiffs, was working on a ditch near his home near Corning, Arkansas, that the said Gerald E. Jackson had been having for several years frequent epileptic seizures; and that it is agreed by and between counsel for the respective parties to this action that from the evidence found at the scene of the death of the deceased that the said Gerald E. Jackson suffered from and was seized with an epileptic attack while the said Gerald E. Jackson was near the edge of the ditch and as a result of such seizure fell into the ditch which was filled with water about four feet deep and drowned; and that the death did occur from drowning.

"3. That there is no evidence which would indicate that the deceased was morbid or that he had any intention of taking his own life."

We thus have a case in which the insured suffered an epileptic seizure by reason of which he fell in the water and was drowned. The question presented is whether for such death his beneficiaries are entitled to the double indemnity, since the insurance company pleaded the exclusionary language that the death was "caused or contributed to, directly or indirectly, wholly or partially by disease, or by bodily or mental infirmity." When the plaintiffs established that the insured met his death by drowning then the burden shifted to the insurance company to establish that the death by drowning was caused proximately by "disease or by bodily or mental infirmity."

We have many cases of this Court involving double indemnity policies or accident policies with language similar to that contained in the policy before us. These cases begin with *Fidelity & Cas. Co.* v. *Meyer,* 106 Ark. 91, 152 S. W. 995, and continue in an unbroken line to *Life & Cas. Co.* v. *Jones,* 230 Ark. 979, 328 S. W. 2d 118.

We have repeatedly held that it was a question of fact for the jury as to whether the physical infirmity was the proximate cause of the accident. In *Travelers Ins. Co.* v. *Johnston,* 204 Ark. 307, 162 S. W. 2d 480, the insured was suffering from Paget's disease,[1] and as he attempted to alight from a taxicab he fell and fractured his hip. He sued on an accident policy which provided that the policy did not cover an accident "caused directly or indirectly, wholly or partly, by bodily or mental infirmity . . . . or by any other kind of disease." The insurance company claimed that the injury sustained by the insured was caused by the Paget's disease. We said the following instructions were as favorable to the insurance company "as it had the right to ask":

"4. If you find from the evidence in this case that the plaintiff's physical condition at the time he was riding in the taxicab contributed or concurred either directly or indirectly, wholly or in part, to his fall, then in such event the plaintiff is not entitled to recover and you must find for the defendant. In other words, if the fall sustained by the plaintiff was not the direct and proximate cause of the injury, but that the same resulted in whole or in part from his physical infirmities, to-wit, Paget's disease, then you are instructed that the plaintiff would not be entitled to recover.

"A. Proximate cause as is used in these instructions means the immediate, efficient cause without which the result could not and would not have happened."

While *Travelers Ins. Co.* v. *Johnston*[2] involved Pagent's disease, the law is the same in cases wherein the insured was, as here, suffering from epilepsy.[3] Our

[1] It is stated in the Opinion that the doctors define Paget's disease as "a chronic degenerative condition of the bones, in which there is an overgrowth of part of the bones and degenerative changes in other parts of the bones, the exact cause of which is not known."

[2] In *Travelers Ins. Co.* v. *Johnston* we reviewed our earlier cases in detail; and that case has been cited and approved in our subsequent cases: *Metropolitan Co.* v. *Fairchild,* 215 Ark. 416, 220 S. W. 2d 803; *Duke* v. *Life & Cas. Co.,* 218 Ark. 522, 254 S. W. 2d 311; *Fidelity Reserve Co.* v. *English,* 226 Ark. 210, 288 S. W. 2d 951; and *Life & Cas. Co.* v. *Jones,* 230 Ark. 979, 328 S. W. 2d 118.

[3] In Malloy's Medical Dictionary for Lawyers epilepsy is defined as follows: "[Gr. *epilepsia,* a seizure, stoppage — Aristotle; the falling sickness, epilepsy — Hippocrates]. A chronic disease, known for ages

search reveals the following epilepsy cases: *Wadsworth* v. *Canadian Ry. Co.,* 49 Canada S. Ct. 115, Ann. Cas. 1914C, p. 306; *Hughes* v. *Standard L. Ins. Co.* (U.S.D.C. La.), 139 F. Supp. 490, also 140 F Supp. 577, Affirmed 240 F. 2d 859, *Standard L. I. Co.* v. *Foster* (Miss.), 49 S. 2d 391; *Metropolitan L. I. Co.* v. *Jenkins* (Fla.), 12 S. 2d 374; *Griffin* v. *Prudential Ins. Co.* (Utah), 133 P. 2d 333, 144 A.L.R. 1402; *New England Ins. Co.* v. *Fleming* (Calif.), 102 F. 2d 143; *Puszkrewicz* v. *Prudential Ins. Co.* (Pa.), 55 A. 2d 431; *Bennett* v. *Metropolitan L. I. Co.* (Wash.), 212 P. 2d 790. There is a splendid anotation in 84 A.L.R. 2d entitled, "Pre-existing physical condition as affecting liability under accident policy or accident feature of life policy." In Am. Jur. 29A, on pages 351 and 353, the general rules are stated in this clear language:

"The general rule is that the mere fact that the insured is afflicted with some disease or infirmity at the time of an injury will not preclude recovery upon an accident insurance policy if an accident is the direct or proximate cause of death or disability, even though the policy excepts death or injury caused by disease or infirmity . . .

"On the other hand, if the insured is afflicted with a disease or infirmity at the time an alleged accident occurs, which disease or infirmity proximately causes or substantially contributes to the death or injury resulting, such death or injury is not within the coverage of a policy which insures against death or bodily injury by accident or accidental means, independently of all other causes, or which excepts death or bodily injury produced by disease or infirmity."

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as the sacred disease and the falling sickness. It is characterized by fits or attacks accompanied by loss of consciousness, and violent convulsive motions or jerking of the muscles. In some cases attacks may not occur more than once a year; others tell about only two or three attacks in a lifetime. In other cases, however, the patient may have many attacks that follow one another until death occurs from exhaustion. Fits or paroxysms vary in length from five to twenty minutes." In Funk & Wagnall's New Standard Dictionary of the English language epilepsy is defined as " . . . a chronic nervous disease characterized in its more violent forms (grand mal) by paroxysms recurrent at uncertain intervals, attended by loss of consciousness and sensation, facial distortion, foaming at the mouth, convulsions of the limbs, and difficult stertorous breathing and also followed by sleepiness . . . "

It is a question of fact for the jury as to whether the pre-existing disease was the proximate cause of the resulting accident. In the case at bar the question was submitted to the Trial Court sitting as a jury, and the Trial Court found that the pre-existing disease was the proximate cause of the drowning of the insured. Such finding of the Trial Court is supported by the stipulated facts, which, as heretofore copied, stated that "Gerald E. Jackson suffered from and was seized with an epileptic attack while . . . . near the edge of the ditch . . . .and was drowned." Therefore, the Trial Court, sitting as a jury, had ample evidence to sustain the finding against the plaintiffs.

Affirmed.

SURRIDGE *v.* STATE

5130 393 S. W. 2d 246

Opinion Delivered May 31, 1965.

[Rehearing denied September 20, 1965.]

John F. Gibson, for appellant.

Bruce Bennett, Attorney General, By: *Clyde Calliotte,* Asst. Atty. General, for appellee.

GEORGE ROSE SMITH, J. James Surridge appeals from a verdict and judgment finding him guilty of murder in the first degree and sentencing him to life imprisonment.

The decedent, Norman Dollar, owned a small motel which he occupied as his residence. On the morning of July 9, 1964, Dollar did not leave his room at his usual time. By early afternoon his employees became concerned about him and reported the matter to the McGehee chief of police. Officers broke into Dollar's room and found his dead body lying upon a bed. He had been shot in the back of the head with a shotgun. The coroner estimated that the crime had been committed in the early morning hours.

In attempting to establish Surridge's guilt the State offered proof that Surridge had been negotiating with Dollar for the purchase of the motel and had spent the night of July 7 there. It was shown that on the evening of July 8 Surridge borrowed a shotgun for the asserted purpose of killing a deer, although the deer-hunting season was not open. The man who lent Surridge the gun testified that after the murder was discovered Surridge said to him, "I know they are going to question me . . . don't say nothing about that gun." Surridge's fingerprints were proved to have been upon an empty beer bottle that was on a table in Dollar's room when his body was discovered. Surridge refrained from testifying, as of course he was privileged to do.

Much of the appellant's brief is devoted to the contention that the State's proof was not sufficient to present a *prima facie* case for submission to the jury. We are of the opinion that the testimony is sufficient to support the verdict. We need not, however, discuss this point in detail, for the insufficiency of the evidence was not carried forward as an assignment in the motion for a new trial and is therefore not available to the appellant

as a ground for reversal. *Decker* v. *State,* 234 Ark. 518, 353 S. W. 2d 168 (1962); *Crouch* v. *Gilbert,* 210 Ark. 885, 198 S. W. 2d 72 (1946). The appellant is not entitled to rely upon the statutory rule that an objection alone is sufficient in a capital case, for although charged with a capital offense, he was sentenced to life imprisonment only. *Hicks* v. *State,* 225 Ark. 916, 287 S. W. 2d 12 (1956).

The defense offered two witnesses whose testimony tended to establish an alibi, by indicating that the accused was not at Dollar's motel on the night of his death. Counsel now complain of an instruction by which the court told the jury that they should scrutinize the testimony of the (alibi) witnesses to see if they might or might not be mistaken about dates and times, and, further, that it was proper for the jury to consider the lapse of time since the occurrence happened and whether witnesses were or were not likely after such a lapse of time to be accurate about the precise time or hour they saw the accused. In *Ware* v. *State,* 59 Ark. 379, 27 S. W. 485 (1894), an instruction in all material respects indentical to the one now complained of was approved, in the face of the same objections now being made. Later cases have approved and followed the *Ware* decision. Thus the present argument is without merit.

Counsel properly preserved an objection to a statement by the witness Gershner, a police officer, that there were at police headquarters specimens of Surridge's fingerprints in addition to those submitted for comparison in this particular case. We discern no prejudicial error, not only because the witness's statement was invited by a question put by defense counsel but also because the court promptly admonished the jury not to consider the statement for any purpose. If the witness's remark was in fact prejudicial we think it was plainly of the type susceptible of being effectively cured by the court's admonition.

There is no reversible error in the record.

Affirmed.

5-3626 390 S. W. 2d 628

Opinion Delivered May 31, 1965.

[redacted]

Warren & Bullion, for appellant.

Harper, Harper, Young & Durden, for appellee.

GEORGE ROSE SMITH, J. Gibson Products Company of Fort Smith, a corporation, applied to the Arkansas State Board of Pharmacy for a permit to operate a pharmacy in the city of Fort Smith. Under the Board's Regulation 33 the application was made in the name of the appellee Lee R. Whitmer, a registered pharmacist whom Gibson intended to put in charge of its pharmacy if the permit should be granted. The Board denied the application, find-

ing that earlier in the month Whitmer had been suspended for 90 days by the Oklahoma Board of Pharmacy and was therefore not qualified "at this time" to be a supervising pharmacist in Arkansas.

Gibson and Whitmer appealed to the circuit court, which set aside the Board's order and directed that the permit be issued to Gibson. Under the statute the circuit court tries the case *de novo* on the record made before the Board. Ark. Stat. Ann. § 72-1029 (Repl. 1957). In similar situations, where the circuit court hears a matter under the procedure ordinarily followed in chancery, we too review the case *de novo* as in appeals from courts of equity. *City of Little Rock* v. *Newcomb,* 219 Ark. 74, 239 S. W. 2d 750 (1951); *Alston* v. *State,* 216 Ark. 604, 226 S. W. 2d 988 (1950).

There is no real dispute about the facts. Whitmer was originally licensed as a pharmacist in Arkansas, in 1950. Some years later he practiced pharmacy for a short time in Oklahoma before returning to Arkansas in 1964. Both before the Oklahoma Board and in the present Arkansas proceeding Whitmer candidly admitted that he had violated a federal law in Oklahoma by refilling two prescriptions that should not have been refilled without a physician's authorization. For this violation of law the Oklahoma Board suspended Whitmer's license for 90 days and placed him on probation for an additional 90 days. The Arkansas Board did not attempt either to suspend or to revoke Whitmer's Arkansas license; it merely rejected the Gibson-Whitmer application on the ground that as a result of the Oklahoma disciplinary action Whitmer was not qualified to act as a supervising pharmacist in Arkansas "at this time." (It should be noted that the Oklahoma suspension and probationary period have long since expired.)

We are of the opinion that the Board, in utilizing its own Regulation 33 in the way that it did, exceeded its statutory authority. The statute contemplates that a person or corporation such as the Gibson company, which is not itself a registered pharmacist, may nevertheless operate a pharmacy upon obtaining a permit from the

Board. It is required that the applicant be found by the Board to be qualified to conduct such a pharmacy and that the pharmacy will be under the direct supervision of a registered pharmacist. Ark. Stat. Ann. § § 72-1017.1 and 72-1018.

There is no contention that Gibson is not qualified to operate a pharmacy or that Whitmer is not a registered pharmacist in Arkansas. Thus if Gibson itself had applied for a permit for its proposed operation, as the statute contemplates, the Board would have had no basis under the statute for denying the application. In fact, a denial of the application would have been an arbitrary and capricious act, unsupported by the evidence.

By regulation 33 the Board required the application to be made in Whitmer's name. It then rejected the application upon the nebulous ground that he is not qualified "at this time" to supervise a pharmacy. Thus the Board in practical effect suspended Whitmer's license without bringing charges against him and without affording him the notice and opportunity to be heard that the statute requires. Ark. Stat. Ann. § 72-1028. Moreover, the suspension is fatally indefinite, for no one can say what is meant by the finding that Whitmer is not qualified "at this time." We are firmly convinced that the Board cannot in this fashion deprive a registered pharmacist of his livelihood without bringing any charges against him and without the basic requirements of notice and hearing that are essential to fair play.

On March 29 of this year, before the case was ready for submission, we granted the Board's motion for a stay of the circuit court's order until the matter could be decided here on its merits. Now that the merits have been considered there is no further need for the stay order. To the contrary, we direct that an immediate mandate be issued, to prevent Whitmer's wrongful suspension from being continued during the court's summer recess. This action is of course without prejudice to the Board's right to file a petition for rehearing. See *Tassin* v. *Reynolds,* 222 Ark. 363, 260 S. W. 2d 462 (1953).

Affirmed.

SPEIGHTS *v.* ARK. SAVINGS & LOAN ASSOCIATION

5-3568 393 S. W. 2d 228

Opinion Delivered May 31, 1965.

[Rehearing denied September 20, 1965.]

Hall, Purcell & Boswell, for appellant.

Spitzberg, Bonner, Mitchell & Hays, Bereford L. Church, Jr., and *James R. Howard,* for appellee.

PAUL WARD, Associate Justice. On May 13, 1963 James L. Speights and wife (appellants herein) entered into a written contract with Bill Boland, d/b/a Benton Home Clinic, for the construction of an addition to appellants' place of business in Benton (described as the south eighty feet of Lot 1, Block 3, Hillcrest Addition). The agreed contract price was $7,500. This amount was borrowed from Arkansas Savings and Loan Association (hereafter called Arkansas) on a note signed by appellants and secured by a first mortgage on the property mentioned above.

After Boland had spent most of the $7,500 but had completed only about one-third of the contract he abandoned the job and left the state.

On August 9, 1963 appellants filed a suit against Arkansas in circuit court (later trasnferred to chancery court) alleging, in essence: Shortly after Bond started on the contract they informed Arkansas that his work was unsatisfactory and that no inspection (required by the construction contract) had been made; Later they learned that most of the $7,500 had been disbursed by Arkansas although the job was only about one-third complete — all contrary to the terms of the construction contract and contrary to instructions given Arkansas. Almost immediately thereafter they began to receive notices that several suppliers and laborers were filing liens on the property; The disbursement of the loan proceeds by Arkansas was contrary to "the agreement of the parties", resulting in said liens being filed; And, the said mortgage and liens should be satisfied by Arkansas, and removed by the court as clouds on their title. The prayer was in accord with the above allegations.

In response to a motion by Arkansas to make the complaint more definite and certain, appellants amended their complaint to allgee, in substance: They had an agreement with Arkansas' agent (Art Gregory) that an escrow account would be set up with Beach Abstract Company to insure that all bills for material and labor would be paid before Boland was paid anything; Certain laborers and materialmen are claiming liens against the property; and, the theory on which they seek to recover is based on the construction contract of which Arkansas had a copy, on Arkansas' promise to disburse the money, and on Arkansas' negligence in failing to see that all bills for materials and labor were paid before making any payments to Boland.

To the above complaint and amended complaint Arkansas filed a general denial, and specifically denied the existence of any "agreement" which it breached negligently or otherwise. It was further stated that any loss which appellants suffered was occasioned by appellants' own negligence. The prayer was for judgment on the note, a first lien on the said property, and other proper relief.

After a lengthy hearing the Chancellor found all issues in favor of Arkansas, including the right of Arkansas to have the land sold and apply the proceeds on its judgment if the same was not paid in sixty days.

On appeal appellants seek a reversal, relying on four separate points which we have paraphrased and consolidated and will discuss under two subdivisions.

One. The court erred in finding in favor of Arkansas. Before discussing this point further it will be clarifying to set out below a few relevant and undisputed facts.

Appellants entered into a written contract with Bill Boland wherein Boland agreed (for $7500) to construct a certain building; The contract set out in detail the character and structure of the building; It provided payments to be made to Boland "⅓ 1st Inspection, ⅓ 2nd Inspection, ⅓ on final Inspection." To provide the $7,500 appellants signed a note and mortgage to Arkansas. Appellants signed the instrument (set out below) which was prepared and presented to them by Arkansas:

"We, the undersigned (whether one or more), having applied for a Real Estate loan, hereby authorize and request Arkansas Savings & Loan Association, upon it having completed processing of said loan, to disburse the proceeds thereof to Beach Abstract & Guaranty Company, of Little Rock, Arkansas to close the said loan *as our agents and make final disbursement of the said loan proceeds in accordance with the terms as agreed upon by us this date.*" (Emphasis added.)

It is also undisputed that Arkansas paid to Beach Abstract and Guaranty Company (hereafter referred to as Beach) the sum of $5000, that Beach paid out (to Boland and to claimants for labor and materials) practically all of the above amount, that the building is only one-third complete, and that claims for labor and materials in excess of $1500 are still unpaid. It is likewise undisputed, since Boland has absconded and is not a party to this litigation, that either appellants or Arkansas will suffer a financial loss.

It is our conclusion that any loss resulting from this unfortunate venture must fall on Arkansas and not on appellants. We agree with the trial court's finding that Boland was not an agent of Arkansas, but it clearly appears (as was conceded by appellee on oral argument) that Art Gregory was the agent of Arkansas. It is apparent from the record that Gregory practically took charge of the distribution of the money as well as the building operation. Admittedly he made seven trips from Little Rock to Benton in connection with this matter. On three separate occasions he called on Mr. Speights at his barber shop in Benton, made inspections of the work, and on one occasion took a picture of certain portions of the construction. Gregory evidently knew all about the construction contract and its several provisions. In his disposition Mr. Speights testified "I told Gregory not to pay Boland until he seen that all bills was paid and satisfied." This is not denied, and it is not denied that Boland was paid (with Gregory's knowledge) $800 on May 30 (the day work began), $448.19 on June 7, and $1179.73 on June 20. Kenneth Jones (who worked for Beach and disbursed the money in this case) testified that Arkansas determined how much and when money was turned over to him; that Arkansas turned over to him the note, mortgage, and disbursement authorization (in blank) to fill out, and Arkansas instructed him about disbursing the money. Jones also testified:

"Q. Then the only instructions you ever did get was from Arkansas Savings and Loan Association?

"A. That is right.

"Q. Did you disburse it in the manner that they told you to?

"A. Yes sir, I believe we did.

"Q. Do you have any doubt about it?

"A. No. sir."

From the above it is our inescapable conclusion that Arkansas directly, and especially through its agent Gregory, controlled the distribution of the money borrowed by

appellants (which money they never handled or even saw), and that in doing so it did not use reasonable diligence or care to protect the interest of appellants.

Two. We find the trial court erred in holding the Peoples' Lumber and Supply Company was entitled to a lien on appellants' land. The record discloses that the company made an effort to perfect its lien, but it used a description that did not properly describe the land belonging to appellants. Ark. Stat. Ann. § 51-613 (Supp. 1963) provides that the account filed with the circuit clerk shall contain ". . . a correct description of the property to be charged with said lien . . . ."

The trial court found liens had been established by Vandergrift, Drennan, and Buck Plumbing and Electrical Contractor (referred to here as Buck), and we think properly so found. The first two mentioned had claims for labor performed, and appellants' main objection appears to be that their work was sub-standard and that some portions of the construction were not according to specifications. These men were working under the direction of Boland (employed by appellants) or someone else approved by him. Presumably their work was approved by someone with power and authority to do so, otherwise, they should have been discharged. Having thus been induced to give of their time and efforts, it would be unjust, in the absence of a statute to the contrary, for a court of conscience to deprive them of remuneration. Likewise, we think the trial court correctly allowed the lien in favor of Buck. It was alleged by Arkansas (and not denied) that he had perfected his lien on August 15, 1963 (within the time allowed by statute, § 51-613 previously mentioned). This being true the trial court had no power (if it had tried to do so) to invalidate the lien already established. Buck identified a copy of his lien and testified that the amount of his claim was $518.37. The record contains a verified statement of Buck's account conforming to Mr. Buck's testimony. Even though Buck did not file any pleading in the case, we think it was effectively made a party to the suit, and that the trial court properly considered and approved its lien and

claim. If it had been necessary, the trial court had the right to amend the pleadings to conform to the proof.

We call attention to the fact that (according to the record) the sum of $801.68 was paid by Beach to satisfy a lien on appellants' land. This amount (with interest) is of course due from appellants to Arkansas.

The decree of the trial court is affirmed in those respects above indicated, but is reversed in all other respects. Accordingly, the cause is remanded to the trial court for further action consistent with this opinion.

THE HOUSING AUTHORITY OF THE CITY OF NORTH LITTLE ROCK, ARK. *v.* AMSLER, JUDGE

5-3511 393 S. W. 2d 268

Opinion Delivered May 31, 1965.

[Rehearing denied September 20, 1965.]

Byron Bogard and *U. A. Gentry,* for petitioner.

No brief filed for Respondent.

PAUL WARD, Associate Justice. Petitioner, the Housing Authority of the City of North Little Rock, in an eminent domain proceeding, instituted its complaint in the Pulaski County Circuit Court for the purpose of acquiring title to a certain parcel of land, such land belonging to the Arkansas Transportation Company, Inc., a domestic corporation. It was alleged in complaint that the land was *necessary* (Emphasis added.) for public use in the Authority's undertaking of constructing low-cost housing, and the complaint set out that the appraised value of said land was $13,500.00. Arkansas Transportation Company did not question the right of the Housing Authority to proceed, but asserted that the land was worth $95,000.00. On trial, the jury returned a verdict of $45,000.00. Thereafter, but before the entry of judgment, the Board of Commissioners of the Housing Authority determined to *exclude* (Emphasis added.) the property from the housing project, rather than purchase same at the value fixed by the jury, and accordingly filed a motion to dismiss the complaint as to that particular parcel of land. Arkansas Transportation then filed a motion, praying that the court require the petitioner (Housing Authority) to reimburse it in the amount of $14,000.00 for expenses incurred in defense of the action. The court dismissed the complaint (as to lands owned by Arkansas Transportation) in accordance with the motion filed by petitioner, but, with reference to the motion by Arkansas Transportation Company, set a date for a hearing to determine the expenses, if any, to which the company was entitled.

Petitioner, in this action, seeks a Writ of Prohibition to restrain the trial court from conducting the aforementioned hearing, contending that the court has no jurisdiction to award the landowner expenses incurred in the defense of the eminent domain proceeding, and further, that, even though the expenses of Arkansas Transportation were recoverable, such recovery would have to be sought in an independent suit.

In support of the petition two principal arguments are made: (a) The matter of eminent domain is exclusively statutory, and (b), the circuit court (in the absence of

a statute) has no authority to assess against petitioner expenses incurred by the property owner.

(a) In petitioner's brief it is stated:

"The proceeding for the condemnation of lands is not a common-law action, but is exclusively statutory. In the case of *Mountain Park Terminal Railway Co.* v. *Field,* 76 Ark. 239, 88 S. W. 897, the Court said:

'The proceeding under our statute is a special one, directed solely to the object of determining the compensation to be paid the owner of property proposed to be taken'. Citing Bentonville Railroad v. Stroud, 45 Ark. 280."

Petitioner failed, however, to point out that the cases cited in support of this point deal with a special statute relating to railroads — being § § 6545 and 6546 of Kirby's Digest [Ark. Stat. Ann. § § 73-305 and 73-306 (Repl. 1957)]. To show conclusively that the matter of eminent domain was cognizable at common law we need only to refer to Nichols on Eminent Domain (1964 Ed.) § 1.12 where it is pointed out that the power to take private property for public use has always been exercised since the days of the Romans. Also, § 1-14[2] of the same authority, in speaking of eminent domain, states, "It does not require recognition by constitutional provision, but exists in absolute and unlimited form". To sustain the above the author cites cases from 35 states including the case of *Young* v. *City of Gurdon,* 169 Ark. 399, 275 S. W. 890, and *Smith* v. *Arkansas Irrigation Co.,* 200 Ark. 1022, 142 S. W. 2d 509.

(b) We find no merit in petitioner's contention that the trial court is powerless (in the absence of a statute) to require it to reimburse the landowner for expenses incurred in the condemnation suit under the facts in this case. To sustain its contention under this point petitioner quotes extensively from, and relies almost entirely upon, a former decision of this Court in the case of *Selle* v. *City of Fayetteville,* 207 Ark. 966, 184 S. W. 2d 58. We have carefully studied that decision and are not convinced it supports petitioner's contention. In the first place, the

reasoning and the conclusions reached appear to us to be contradictory. On the one hand, the case seems to hold the trial court had no authority to assess against the condemner expenses incurred by the landowner because there was no statute authorizing it ot do so. On the other hand, the opinion seems to hold that if the landowner could prove bad faith on the part of the condemner then the trial court could assess said expenses against condemner — overlooking the very obvious fact that there was no statutory authority for such action. We are unable to understand why a statute would not be as necessary in one instance as in the other.

There are also practical and equitable reasons why, in a case like the one here under consideration, the circuit court has and should have the right to require the condemner to reimburse the property owner. To hold otherwise would, in effect, be in violation of Article 2, § 22 of the Arkansas Constitution which says ". . . . private property shall not be taken . . . for public use without just compensation therefor". It is certainly reasonable to assume that a property owner would be under great pressure to sell his property to the Housing Authority for less money if he knows that otherwise he may have to spend hundreds or thousands of dollars and get absolutely nothing in return. When the Housing Authority (which is supported by taxes) forces a property owner into a state court (which is also supported by taxes) to ask a jury to fix the price it must pay the owner and then chooses to renege merely because the jury verdict is not to its liking, then, we submit, the trial court must have the inherent right to require the Housing Authority to reimburse the owner (for all legitimate and reasonable expenses), otherwise the court is powerless to protect its own processes, the property owners, and the constitution.

There is, in addition to what we already said, another reason why the writ should not be granted in this case. The *Selle* case (upon which petitioner relies so heavily) holds that the property owner can recover said expenses if he can show the condemner acted in bad faith in refusing to accept the jury verdict. The pleadings in

this case show petitioner did not act in good faith. The complaint in the condemnation suit filed by the Housing Authority, and sworn to, states that the property involved is being taken in the public interest and is *necessary* for the public use. (Emphasis added.) Then, without any reason or explanation the Housing Authority merely stated in its motion that it had ". . . determined not to purchase said property at the value affixed by the jury . . . ." In the *Selle* case, heretofore mentioned, there appears this language:

"Bad faith on the part of the city is alleged, and, if true, constituted a cause of action, which would have entitled the land owners to recover a reasonable attorney's fee and any damages that may have resulted from placing a cloud upon the title during the period of the existence of the option to purchase the land."

We are cognizant of the annotation in 92 A.L.R. 2d 355, 366, under the title, "Liability for counsel fees, expenses, and disbursements", in condemnation cases. The essence of this annotation appears to be that in the absence of statute such fees and expenses cannot be recovered by the landowner, but a careful reading of the annotation and the cases cited in support, indicates very clearly it does not rule out recovery of expenses if the condemner does not act in good faith. Some of these cases are noted below. In *State ex rel. Morrison* v. *Helm,* 86 Ariz. 275, 345 P. 2d 202, 206, we find this statement: "This rule [refusing to allow expenses], however, is subject to the qualification that the condemning party shall have acted in good faith both in instituting and in abandoning the proceedings. . . ." In the case of *Hamer* v. *State Highway Com.* (1957, Mo.) 304 S. W. 2d 869, the Supreme Court of Missouri, in considering the same question with which we are concerned here, disallowed the landowner to recover expenses, stating: "But it is held, *in the absence of bad faith or unreasonable delay* . . . ." the landowner is not entitled to recover his expenses. (Emphasis added.) Mentioned also is the *Selle* case. In the same volume of A.L.R. at page 363, § 4, under the sub-head "Effect of condemner's bad faith or unreasonable delay", there appers this statement:

"The rule denying the condemnee's recovery of damages upon the abandonment of eminent domain proceedings, in the absence of statute, is subject to the qualification that the condemner must have acted in good faith . . . ."

Many cases, including the *Selle* case, are cited in support of the quoted rule.

Accordingly the writ is denied and, at the next hearing, the trial court can determine the question of good faith or the lack thereof and also the amount of damages, if any, suffered by the condemnee.

Writ denied.

Robinson, J., concurs; Harris, C. J., and McFaddin, J., dissent.

ED. F. MCFADDIN, Associate Justice, (dissenting). My personal feelings are on the side of the landowner in this case, and in most other eminent domain cases. A citizen buys property with his own money, pays taxes, and improves his property under the belief that his home is his castle. Then one fair day some public agency—be it the Highway Commission, the Housing Authority, or what not—decides to take the citizen's property because the Legislature has granted such public agency the power of eminent domain!

And what happens? The citizens is hailed into court; the public agency, with the power of eminent domain, makes the citizen either accept the small amount determined *ex parte* by the public agency to be the value, or else the citizen, at his own expense, must employ an attorney and fight the public agency to get what the citizen feels he is entitled to receive. Finally, the citizen gets a jury verdict in his favor for the value of the property taken by the public agency; but the citizen does not recover from the public agency the amount the citizen has paid for attorney's fees; so the citizen is never made whole!

Under the Workmen's Compensation Law the claimant gets his attorney's fee (Ark. Stat. Ann. § 81-1332 [Repl. 1960]). Under the Insurance Law the policy holder in some cases recovers his attorney's fee (Ark. Stat. Ann. § 66-514 and § 66-524 [Repl. 1957]). But the citizen landowner never gets his attorney's fee from the public agency that takes his property. Why? Simply because the Legislature has never seen fit to enact legislation which gives the citizen landowner his attorney's fee in condemnation matters; and the matter of awarding attorney's fee and costs is in the discretion of the Legislature. I think attorney's fees should be allowed in all eminent domain cases; but my personal feelings do not make the law. I am sworn to enforce the acts of the Legislative Department and to be guided by our former cases. So in the case at bar I lay aside my personal feelings and proceed to view the case as a judge; and, as such, I must dissent from the Majority holding.

There is no sound distinction between this case and our holding in *Selle* v. *City of Fayetteville,* 207 Ark. 966, 184 S. W. 2d 58. We there recognized that if the condemnor had not taken possession of the property before the jury's verdict, then the condemnor, if dissatisfied with the verdict, could dismiss the case. That identical situation exists in the case at bar. We certainly should not overrule the Selle case because the great weight of authority throughout the nation is in accord with our holding in *Selle* v. *Fayetteville, supra.* In Nichols on Eminent Domain, Third Edition, Volume 6, § 26.42, cases from a score of jurisdictions are cited to sustain this textual statement:

"In the states in which condemnation is effected by judicial proceedings it is almost universally held that the mere fact that compensation has been assessed does not prevent a discontinuance of the proceedings. In fact, one of the strongest arguments in favor of this method of exercising the power of eminent domain is the public policy requires the cost of a public improvement to be ascertained before it can be finally determined that it is advisable to undertake the work, and that this cannot be done until the compensation for the land taken has been

finally assessed by the jury or other tribunal required by the constitution o rstatutes. The award in such states is merely an offer which the public agency contemplating the work may accept or decline as it sees fit."

In 92 A.L.R. 2d 355 there is an annotation entitled "Liability, upon abandonment of eminent domain proceedings, for loss or expenses incurred by property owner, or for interest on award or judgment." In discussing the liability of the condemnor for attorney's fees, the text on page 366 reads:

"In the absence of a statute expressly imposing liability, it has usually been held that a condemnee is not entitled to a recovery for his attorney fees, expenses, or disbursements in connection with eminent domain proceedings by the federal government or a state government, or by an agency of either, upon the abandonment of the proceedings by the condemnor."

Page after page of cases are cited and discussed to sustain the above quoted statement. There can be no doubt that the law is, or has been until the present Majority holding, that in the absence of a statute so declaring, the landowner cannot recover attorney fees if the condemnor dismisses the condemnation proceeding. In *Romer* v. *Leyner,* 224 Ark. 884, 277 S. W. 2d 66, this Court reaffirmed its statements from earlier cases as follows: "Attorney's fees are not ordinarily held to be an element of damages which may be recovered for breaches of contract. Attorney's fees cannot be allowed as costs in suits except as provided by statute, the same being regarded as a provision for a penalty and not to be enforced in the state courts."

As regards the recovery of expert witness fees, we have specifically held that there cannot be a recovery in the absence of statute. *Ark. Game & Fish Comm.* v. *Kizer* 222 Ark. 673, 262 S. W. 2d 265, 39 A.L.R. 2d 1372; *Ark. State Highway Comm.* v. *Union Planters Bank,* 231 Ark. 907, 232 Ark. 200, 333 S. W. 2d 904, 334 S. W. 2d 879.

To overcome all these cases and reach the result that it desires, the Majority now, in effect, overrules *Selle* v

Fayetteville, supra, and also says in effect that when the condemnor dismisses its case then the Court will consider whether the condemnor was in bad faith in ever commencing the case. Such a holding is contrary to all the cases that I have found; and the Majority Opinion cites no case to support it. To say the least, the Majority holding in this case is certainly legislative enactment by judicial decision. I submit that it would be far better for this Court to follow the law than to start enacting statutes to reach a desired result.

So because, as I see it, the law is clearly against the Majority holding, I must dissent in this case.

ROBINSON *v.* KEATON

5-3601 393 S. W. 2d 231

Opinion Delivered May 31, 1965.

[Rehearing denied September 20, 1965.]

John W. Moncrief, George E. Pike, Milton G. Robinson, Wm. C. Gibson, for appellant.

Fulk, Wood, Lovett, Parham & Mayes, for appellee.

SAM ROBINSON, Associate Justice. Appellant, Milton G. Robinson, an attorney, represented appellee, Earl Keaton, in a claim before the Workmen's Compensation Commission. The Commission allowed the claim in the sum of $2,363.50. In addition, there was an attorney's fee allowed in the amount of $536.25. In the beginning, appellant and appellee had agreed to pool the total amount allowed by the Commission and to divide it equally. This was done, and appellant, therefore, received a fee in the sum of $1,449.25 for representing appellee in his claim before the Commission.

Later, Keaton took up with the Commission the question of whether he had been charged an excessive fee. The Commission was of the opinion that there could be no valid contract for an attorney's fee that was not approved by the Commission; that Ark. Stat. Ann. § 81-1332 (Repl. 1960) is controlling as to the amount of attorney's fee allowable in Workmen's Compensation cases; that the Commission had allowed the maximum fee permitted by statute—$536.25, and since the attorney had collected as a fee $1,449.25, he should refund $913.00 to the claimant. The Commission entered an order to that effect, and further ordered that if the attorney failed to make the refund within thirty days the matter should be certified to the Circuit Court for contempt of court proceedings as provided in Ark. Stat. Ann. § 81-1331 (Repl. 1960).

The attorney, Mr. Robinson, appealed to the Circuit Court. There, after fully considering the entire matter, the court entered judgment for Keaton in the sum of $913.00.

First appellant contends that the Workmen's Compensation Commission did not have jurisdiction to determine whether the contract between the parties that appellant should have as his fee fifty per cent of all sums recovered, is valid, and that, therefore, the Circuit Court in this proceeding did not have jurisdiction.

There is no genuine issue of a material fact. The issue is the applicability of the statute regulating attorney's fees in a case of this kind. In the interest of justice, the proceeding may be treated as one for a declaratory

judgment. *Johnson* v. *Ford,* 233 Ark. 504, 345 S. W. 2d 604; *Culp* v. *Scurlock,* 225 Ark. 749, 284 S. W. 2d 851. There is only an issue of law. Is Ark. Stat. Ann. § 81-1332 controlling as to fees that an attorney may charge for representing a claimant in a workmen's compensation case? If the statute is controlling, appellant charged an illegal fee and appellee is entitled to judgment for the excessive charge, which, in this case, amounts to $913.00.

Ark. Stat. Ann. § 81-1332 (Repl. 1960) provides: "Fees for legal service rendered in respect of a claim shall not be valid unless approved by the Commission, and such fees shall not exceed thirty per centum (30%) on the first one thousand dollars ($1,000.00) of compensation, or part thereof, twenty per centum (20%) on all sums in excess of one thousand dollars ($1,000.00), but less than two thousand dollars ($2,000.00) of compensation, and ten per centum (10%) on all sums of two thousand dollars ($2,000.00) or more of compensation. . . ."

Our view is that the statute regulating the amount of attorney's fee that may be charged in a case of this kind is so clear that it admits of no doubt. First, the fee charged must be approved by the Commission, and then the Commission is limited as to the amount that may be allowed. In the case at bar, the Commission did not approve the fee charged, and it was in excess of the amount allowed by statute. The great weight of authority is in accord with the view we have expressed. *Sarja* v. *Pittsburg Steel Ore Co.,* 191 NW 742; *Terrell* v. *Wardlaw,* 59 NE 2d 59; *May* v. *Charles Hoertz & Son, et al,* 170 NW 305; *McCamey* v. *Payer,* 22 NE 2d 127; *Whittaker's Case,* 66 NE 2d 785; *Silva's Case,* 25 NE 2d 708. See also 159 A.L.R. 926.

Ark. Stat. Ann. § 81-1331 authorizes contempt proceedings by the Commission in some instances, but here the facts are not such that the statute may be invoked.

The judgment for $913.00, as superseded, is affirmed.

5-3538 393 S. W. 2d 273

Opinion Delivered May 31, 1965.

[Rehearing denied September 20, 1965.]

McMath, Leatherman, Woods & Youngdahl, for appellant.

Luke Arnett and *Arthur G. Frankel, Jr.,* for appellee.

JIM JOHNSON, Associate Justice. This is an unemployment compensation case.

The appellants are employees of the International Shoe Company. In the summer of 1963, the shoe company ceased operation of their factories for a two week plantwide vacation shutdown. Appellants had not worked for the company long enough to be entitled to a vacation. During this two week period, appellants performed no

work and received no vacation pay or other remuneration from their employer. Appellants initiated or continued claims for benefits under the Arkansas Employment Security Act. From the record it appears that appellants met every qualification of the law required for entitlement of benefits. Ark. Stat. Ann. § § 81-1103 and 81-1105 (Supp. 1963). There was no indication that these appellants voluntarily and without good cause left their work so as to be disqualified under the provisions of the Act. Ark. Stat. Ann. § 81-1106 (Supp. 1963). Upon hearing, benefits were denied by the Employment Security Division, Appeal Tribunal, Board of Review and the Circuit Court. From such denial comes this appeal.

For reversal appellants contend that they are entitled to benefits based upon the established law and urge a reconsideration of the pirnciples enunciated in a prior decision.

The sole basis given for the denial of these claims was the case of *Thornbrough* v. *Schlenker,* 228 Ark. 1012, 311 S. W. 2d 753 (1958). In that case this court after reviewing cases from other jurisdictions and the annotation in 30 A.L.R. 2d 366, said:

"It is impossible to reconcile all of the various cases. A *reasonable distinction* between the two lines of decisions *might be:* if, by the contract between the Union (the agent of the workers) and the management of the plant, *there was reserved by the management of the plant the right to fix, at its own option, a plant wide vacation period,* then the employees had agreed to such vacation and been '*voluntarily* unemployed'; and, therefore, not entitled to employment benefits. But if the contract *had no provision whereby the management reserved the right to fix, at its own option, a plant wide vacation shutdown,* then the employees had not agreed to such vacation period and were '*involuntarily* unemployed' during such shutdown period; and, being *involuntarily* unemployed, they were entitled to unemployment compensation."

[Emphasis ours.]

This opinon concludes with the following language:

"We hold that under the contract between the Union and the Shoe Company, here involved, these twenty-four appellees are entitled to unemployment compensation benefits for the week ending July 10, 1954. This is true because there was *no provision in the contract whereby the Shoe Company had the right to close down its entire plant for a vacation period at any time it elected* and thereby force the appellees to take vacations at such time, even though some of them had not worked long enough to be entitled to vacations, and others had taken their vacations with consent of the management."

[Emphasis ours.]

The same annotation relied upon by this court for the "distinction" found to exist in the *Schlenker* case, *supra,* had this to say:

"On this question the courts have been divided some by a process of *legalistic hairsplitting* concluding that such workers are voluntarily unemployed and therefore not eligible for unemployment compensation, and *others taking the more realistic view* that such employees are out of work through no fault of their own and therefore are entitled to benefits."

[Emphasis ours.]

Appellants concede the historic fact that under our free enterprise system the right to close a manufacturing plant is a basic prerogative of management. *N. L. R. B.* v. *New Madrid Mfg. Co.,* 215 F. 2d 908 (8th Cir.).

A leading authority on labor relations, Elkouri, How Arbitration Works (Rev. Ed. 1960), has this to say on pages 338-339: "One of the prerogatives of management [is] to schedule vacations at such time as best meets the needs of the business."

With these fundamental prerogatives of management thus established, it is our view that a contractual expression of those rights as is implicit in the dictum of the *Schlenker* opinion is manifestly superfluous. To give weight as a basis for a "distinction" to a contract clause which purports to grant to management that which

management already possesses is to create an artificial criterion.

From the record in the case at bar it becomes obvious that if appellants and others similarly situated are to confidently meet the test implicit in *Schlenker* they must insist upon a labor contract which denies the employer the right to close. Such a contract of course would be against public policy and contrary to the economic system of this country.

On the whole case appellees urge, and *Schlenker* seems to hold, that entitlement to compensation during vacation shutdowns should be governed exclusively by the particular wording of the employment contract. This is in direct contravention to § 81-1118 of the Employment Security Act: "Any agreement by an individual to waive, release, or commute his rights to benefits or any other rights under this Act shall be void." See *Sallee Bros.* v. *Thompson,* 208 Ark. 727, 187 S. W. 2d 956. Upon reconsideration of *Schlenker* we find the opinion and its resultant ramifications to be untenable.

The first paragraph of the Arkansas Employment Security Act is, in part, as follows:

"§ 81-1101. As a guide to the interpretation and application of this act, the public policy of this State is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this State. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the Legislature to prevent its spread and to lighten the burden which may fall with crushing force upon the unemployed worker and his family."

This law is remedial in nature and must be liberally construed in order to accomplish its beneficent purposes. *Prince Poultry Co.* v. *Stevens,* 235 Ark. 1034. 363 S. W. 2d 929; *Holland* v. *Malvern Sand & Gravel Co.,* 237 Ark. 635, 374 S. W. 2d 822.

"It seems to us that a worker who is ready, willing and able to work but is left without work and pay because

his employer's plant has temporarily shut down comes fairly within the broad coverage of the Unemployment Compensation Law. The shutdown may be for a relatively short period or it may be for a relatively long period. In either event the worker does not receive his weekly pay check upon which he and his family are generally dependent for their food and shelter. In good times as well as bad there are unemployed persons who seek work and finally obtain it at plants which they understand may temporarily shut down thereafter. These persons are truly without employment during the payless shutdowns, even though they will resume when the plants reopen." *Teichler* v. *Curtiss-Wright Corp.,* 133 A. 2d 320 (N.J., 1957).

The Employment Security Division has long been recognized as a primary supplier of temporary labor. Contemplation of permanent employment is not and has never been a prerequisite for qualification for entitlement for benefits, or for job placement, under the Arkansas Employment Security Act. "Playing with phrases like 'vacation without pay' or 'leave of absence' stems from want of better terms to avoid the words 'laid off.' This is to say, the act should be liberally construed so as to insure a subsistence bridge for those who have been separated from employment under conditions whereby they are ready, willing and able to work, but cannot conscientiously secure it during the period of separation." *Dahman* v. *Commercial Shearing Co.,* 170 N. E. 2d 302 (Ohio, 1960).

Strict constructions which result in defeat of the intended purposes of the Act will not be sanctioned by this court. Accordingly, this case is reversed and the cause remanded for further proceedings consistent with this opinion.

McFaddin, Ward and Robinson, JJ., dissent.

ED. F. MCFADDIN, Associate Justice, (dissenting).

Although there are numerous reasons for this dissent, I will urge only two points: (1) the present holding creates judicial uncertainty; and (2) the present holding is wrong.

I.

Judicial Uncertainty. This case is an attack on the Opinion of this Court in *Thornbrough* v. *Schlenker,* 228 Ark. 1012, 311 S. W. 2d 753. That Opinion was delivered on April 7, 1958 by a unanimous Court; and now, after seven years, the present Majority is saying: ".. . we find the Opinion and its resultant ramifications to be untenable." Bear in mind that in 1958 this Court announced, in a unanimous Opinion, a yardstick whereby all concerned — the Commissioner of Labor, the labor unions, the employers, and the employees — would know how to proceed. We said:

"It is impossible to reconcile all of the various cases, A reasonable distinction between the two lines of decisions might be this: if, by the contract between the Union (the agent of the workers) and the management of the plant, there was reserved by the management of the plant the right to fix, at its own option, a plant wide vacation period, then the employees had agreed to such vacation and had been '*voluntarily* unemployed'; and, therefore, not entitled to employment benefits. But if the contract had no provision whereby the management reserved the right to fix, at its own option, a plant wide vacation shutdown, then the employees had not agreed to such vacation period and were '*involuntarily* unemployed' during such shutdown period; and being *involuntarily* unemployed, they were entitled to unemployment compensation."

The test of voluntary unemployment as opposed to involuntary unemployment during the period of a plant vacation was simply and succinctly stated. If what we said in *Thornbrough* v. *Schlenker* was in error, the Ar-

kansas Legislature could have changed it by legislative enactment. Since 1958 there have been four regular sessions of the Arkansas Legislature — 1959, 1961, 1963, and 1965 — and there has been no legislative enactment to overcome the Opinion. If there was to be a change, it should have been by legislative enactment rather than by judicial decision, because a legislative enactment is prospective, whereas a judicial decision is retroactive. In *Carter Oil Co.* v. *Weil,* 209 Ark. 653, 192 S. W. 2d 215, this distinction was stated.

If the Majority of the Court desires to re-examine the correctness of our language in *Thornbrough* v. *Schlenker,* the Court could now issue a caveat that in all transactions arising after this date we will be free to re-examine the correctness of our language in *Thornbrough* v. *Schlenker.* This caveat method has been used in several cases since the usury cases[1] and has been a notice to the public. It is fair. But the present holding, in changing the rule announced in *Thornbrough* v. *Schlenker,* is retroactive and creates uncertainty as to the stability of judicial holdings. If the Arkansas Supreme Court is to change its holdings whenever the same question is again presented, our holdings will have become as uncertain as those of some other courts which have a tendency to re-examine every question whenever there is a change of personnel on the court. The Bench and Bar, and the public generally, have contracted in reliance on the holding in *Thornbrough* v. *Schlenker.* How will anyone know that the rule will not be changed again when the question is next presented to this Court? The present holding creates judicial uncertainty.

II.

The Present Holding Is Wrong. The basic question is: "When is a worker involuntarily unemployed?" It is only when he is involuntarily unemployed that he can qualify for unemployment compensation benefits. Involuntary unemployment means unemployment without his

[1] See *Hare* v. *Gen. Contr. Corp.,* 220 Ark. 601, 249 S. W. 2d 973; *Crisco* v. *Murdock,* 222 Ark. 127, 258 S. W. 2d 551; and see also *Clubb* v. *State,* 230 Ark. 688, 326 S. W. 2d 816.

own volition. When he works under a contract that provides that the plant may be shut down for a two weeks vacation — whether with or without pay — he cannot be heard to say that during that two weeks period he was *involuntarily unemployed,* since he had agreed to such vacation period.

Under the National Labor Relations Act, when a union becomes the bargaining agent for the employees at a plant it is the bargaining agent for *all employees,* not just those who belong to the union. In *Thornbrough* v. *Schlenker* there was no provision in the contract for a plant wide vacation period; but in the contract here involved there is a definite provision for a plant wide vacation[2] period. The contract is dated November 27, 1962 (several years after the Schlenker Opinion) and is a document of some thirty typewritten pages. Section 13 of the contract concerns the matter of vacation,[2] and provides:

"The COMPANY will close the plant the calendar week which includes the first Monday in June and during the following calendar week for the purpose of providing vacations to those employees who are entitled to vacation benefits except that in cases where process requirements make this impracticable (such as a tannery) the closing will start on the first working day of the week which includes the first Monday in June and will progress thereafter through the plant as rapidly as the process permits and work will resume two weeks after the last day worked before vacation started . . . "Upon request of either the employees or the COMPANY not later than April 15th the matter of changing the plant closing for the purpose of granting vacations will be discussed. If the parties are unable to agree as to any proposed changes, the plan as written herein shall remain unchanged."

Thus we have a contract which provides exactly when the plant should be shut down for summer vacation. How

[2] The contract stated that if any person had worked for as long as one year he would get one week vacation with pay; if he had worked not less than five years he would get two weeks vacation with pay; and if he had worked longer he would get three weeks vacation with pay.

can anyone say that he was "involuntarily unemployed" during such vacation period when he was working under a contract that specified the dates for the summer vacation? These men were certainly "voluntarily unemployed" during the annual vacation period covered by this contract; and no amount of judicial legerdemain can change that fact. The contract here involved was negotiated in 1962. If the union had wanted to provide that any man who did not get vacation pay would be considered involuntarily unemployed the contract had only to so state in one sentence; and yet there is no such provision in the contract here involved.

Since our decision in *Thornbrough* v. *Schlenker* the question here presented has been before the Supreme Court of Mississippi in the case of *Mississippi State Employment Sec. Com'n.* v. *Jackson* (decided January 11, 1960), 116 So. 2d 830. The language of the Supreme Court of Mississippi is so clear that I quote it and adopt it as my own:

"The question for our decision involves the right to unemployment compensation for a period when the plant was shut down for vacations in accordance with the union contract.

"In order to be entitled to unemployment compensation benefits under the statutes, an employee must be involuntarily unemployed and must be available for work, and it follows that if the employees are voluntarily unemployed and were not available for work within the meaning of the statute, the Commission was justified in denying unemployment benefits.

"The courts of Mississippi have not passed on this question. The case of Moen v. Director of Division of Unemployment Security, 324 Mass. 246, 85 N. E. 2d 779, 8 A.L.R. 2d 429, is directly in point. In that case the union contract was silent as to the status of those employees not entitled to vacation with pay while the plant was shut down for vacations of those employees entitled to paid vacations, and the union contract permitted the company to designate any period of temporary shutdown as the vacation period. The Court held that those em-

ployees who were not entitled to vacation with pay were on vacation without pay. The basis of the decision denying benefits to those employees who were not entitled to vacations with pay was that such employees were voluntarily unemployed. Other similar holdings are Mattey v. Unemployment Compensation Board of Review, 164 Pa. Super. 36, 63 A. 2d 429; In re Buffelen Lumber & Mfg. Co., 32 Wash. 2d 205, 201 P. 2d 194; Jackson v. Minneapolis-Honeywell Regulator Co., 324 Minn. 52, 47 N. W. 2d 449; In re Claims of Rakowski, 276 App. Div. 625, 97 N.Y.S. 2d 309; Naylor v. Shuron Optical Company, 281 App. Div. 721, 117 N.Y.S. 2d 775; In re Graziadei's Claim, 286 App. Div. 911, 142 N.Y.S. 2d 380; General Electric Co. v. Unemployment Compensation Board of Review, 177 Pa. Super. 49, 110 A. 2d 258; Philco Corporation v. Unemployment Compensation Board of Review, 175 Pa. Super. 402, 105 A. 2d 176; Glover v. Simmons Co., 17 N.J. 313, 111 A. 2d 404."

When one considers that the Mississippi case, and all the other cases which the Mississippi opinion cites have the same rule that was announced by us in *Thornbrough* v. *Schlenker,* it is hard to see how the Majority of the Arkansas Court can now say that such rule is "untenable."

The Majority Opinion quotes from Ark. Stat. Ann. § 81-1118 (Repl. 1960): "Any agreement by an individual to waive, release, or commute his rights to benefits or other rights under this Act shall be void." This quotation leaves the impression that by the employment contract in this case the workers are waiving or releasing their rights to draw unemployment compensation. I think such conclusion misses the entire point. Certainly a worker cannot "waive" the benefits of the Unemployment Compensation Act, but when he becomes *employed* he is not *unemployed;* and when a worker is *employed* he is not entitled to the benefits of the Unemployment Compensation Act. These appellants in this case are *employed* under a contract which gives them paid holiday as therein specified and which provides that when the plant is shut down they are *voluntarily unemployed.* While they are under such contract they are certainly not "*involun-*

tarily unemployed.'' That is the test for their right to receive unemployment benefits.

For the reasons herein stated, I dissent.

PAUL WARD, Associate Justice, (dissenting). My purpose in dissenting is to attempt to bring some sort of order out of obvious confusion and to formulate a simple, workable rule to apply when the issue here involved arises. I fully realize this attempt may be fruitless.

I am not in complete agreement with the majority opinion or with the *Schlenker* case. The majority opinion in effect holds that an employee cannot, under any kind of contract or arrangement, agree to take a vacation without pay (and be unable to draw E. S. D. benefits) for a short period of time even though (under the contract) it would be to his financial advantage to do so. Such a conclusion, in my opinion, is illogical, unsound, unreasonable, and inequitable. I do not agree entirely with the *Schlenker* case, because, in my opinion, it does not sufficiently protect the employee from being the victim of an inequitable contract. I readily agree that it would be a violation of Ark. Stat. Ann. § 81-1118 (a) (Supp. 1963) to allow an employee to agree (for example) to a four month vacation without pay, and then for this Court to hold he could not draw E. S. D. benefits.

The rule, in a case of this nature, which embodies my views and which easily could be applied to any factual situation, is this: Let the Employment Security Division (through its administrative agencies) decide (subject to approval by the courts) whether the employee (in any labor-management contract) has bartered away any of his unemployment benefit rights. If it be determined that he has done so, then he is involuntarily unemployed — otherwise, he is voluntarily unemployed.

5-3585 390 S. W. 2d 630

Opinion Delivered May 31, 1965.

[redacted]

Harold L. Hall, for appellant.

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

JIM JOHNSON, Associate Justice. This is an interpleader action to determine the proper party to receive proceeds of certain life insuranc policies.

Appellant Nina Harris (Brewer) and Jerry Brewer, deceased, were divorced on March 4, 1963, after some twelve years of marriage. (Appellant was later restored to the use of her maiden name, Harris.) Approved and incorporated into the final decree was a property settlement agreement executed on January 10, 1963, purporting to be a complete settlement of all their property rights. The detailed agreement at length set off various parcels of real property, personalty and money to each of the parties, and contained a provision in which appellant (concurrently with decedent's quitclaim to appellant

of certain valuable stock) "transferred and released any and all interest in" decedent's Life & Casualty Insurance Company and Southern Equitable Insurance Company life insurance policies, and went on to state after this unconditional transfer that decedent would have the right to designate beneficiaries and exclude her if he so desired.

Jerry Brewer died on September 7, 1963. His brother, appellee Claude Brewer, was appointed administrator of his estate in Arkansas Probate Court. The two life insurance policies were among decedent's papers. The named beneficiary, "Nina Mae Brewer—Wife" was unchanged.

On June 24, 1964, Southern Equitable Life Insurance Company filed a complaint in interpleader in Arkansas Chancery Court against appellant and appellee. The complaint alleged that at Brewer's death there was in force a life insurance policy for $10,000, that both parties defendant claimed the proceeds, and it therefore interpleaded the proceeds to be held by the clerk of court until the court should determine which of the parties was entitled thereto. On August 7, 1964, Life & Casualty Insurance Company of Tennessee filed a similar suit interpleading $2,020.30. By stipulation these cases were consolidated for trial.

In the decree of November 27, 1964, the chancellor ordered payment of the proceeds to appellee administrator, and relieved the insurance companies of any further liability. The insurance companies no longer being parties, this appeal is between the adverse claimants.

For reversal appellant contends the trial court erred in awarding the proceeds of the policies to decedent's estate instead of to the named beneficiary, appellant.

We are confronted with two theories: (1) decedent didn't change the beneficiary because he wanted appellant to be the beneficiary, and (2) conversely, that he didn't change the named beneficiary because he assumed the property settlement agreement had already effectively done so.

We are cited cases from other jurisdictions in support of either of the theories, there being none directly on all fours in Arkansas. However, a similar case directly in point in principle is *Roman* v. *Smith,* 228 Ark. 833, 314 S. W. 2d 225, in which the property settlement provided that the wife should receive $40,000 cash and savings bonds worth $1,800. The agreement was fully performed except $1,780 in cash was paid to the wife in lieu of delivering the $1,800 in bonds. After the divorce the husband died without cashing the bonds (which on their face were payable on death to the ex-wife). This court held that the ex-wife:

"received all that she was to get under the property settlement agreement which was at least approved in part by the Chancery Court, and now she seeks to get a part of that property which was set aside to the appellants' decedent solely because he neglected to cash the bonds or have them reissued in his name alone during his lifetime pursuant to the Treasury Regulations. Such a construction of the Treasury Regulations is not supported by the authorities, and certainly is contrary to the principles of equity and fair dealing."

Under the law and practice in this State, property settlement agreements, especially after approval by a chancery court, are considered binding — and final — contracts between the parties. Settlements and compromises have historically been looked upon with favor by the courts. The parties having met and agreed upon a settlement, all prior claims were merged in the settlement. *Burke* v. *Downing,* 198 Ark. 405, 129 S. W. 2d 946. The agreement in the case at bar states in the preamble and again at the close that the agreement was intended to be and did constitute "a full and complete settlement of all property rights." The decedent was not represented by counsel in the divorce proceedings and the appellant's then counsel was under no legal or ethical duty to advise decedent about advisibility of changing the named beneficiary on the policies. Concededly, the contract was prepared by appellant's divorce attorney and appellant is therefore bound by the rule that a contract is to be strictly construed against the party preparing it.

Further, it is well settled in this jurisdiction that insurance beneficiaries may be changed by will, based upon the theory that the will is a later expression by the insured than the designation of the beneficiary made at the time the policy was issued. *Pedron* v. *Olds,* 193 Ark. 1026, 105 S. W. 2d 70; *Eichelkamp* v. *Carl,* 193 Ark. 1155, 104 S. W. 2d 814; *Clements* v. *Neblett,* 237 Ark. 340, 372 S. W. 2d 816. Here the property settlement agreement was executed long after the designation of the beneficiary in these policies.

Applying the law to the facts in this case, it is clear that appellant is foreclosed to claim any interest or proceeds from the policies she specifically transferred and released to decedent.

Affirmed.

McFaddin, J., concurs; Smith, Ward and Robinson, JJ., dissent.

Ed. F. McFaddin, Associate Justice, (concurring). I dissented in the case of *Roman* v. *Smith,* 228 Ark. 833, 314 S. W. 2d 225; but under the Majority holding in *Roman* v. *Smith,* and under the unanimous holding in *Mabbitt* v. *Wilkerson,* 220 Ark. 270, 247 S. W. 2d 201, the decree of the Chancery Court in the case now before us must be affirmed; and I so vote.

However, I have concluded that we should now give notice to the Bench and Bar that we will re-examine our former cases when a case like this one is next presented to us. For myself, I hereby give such notice. I think the weight of authority, and certainly the better reasoned cases, are contrary to our holding in *Mabbitt* v. *Wilkerson supra,* and *Roman* v. *Smith, supra.* Some of the cases which I consider as stating the better rule are these: *Prudential Ins. Co.* v. *Broadhurst* (Calif.), 321 P. 2d 75; *Shaw* v. *Board* (Calif.), 241 P. 2d 635; *Pendleton* v. *Great Southern* (Okla.), 273 P. 1007; *John Hancock Co.* v. *Soluri* (U.S.D.C. N.Y.), 134 F. Supp. 86; *Parrish* v. *Kaska,* 204 F. 2d 451; and *Kurgan* v. *Prudential* (Ill.), 91 N. E. 2d 620.

The fact that the insured, having the right to change the beneficiary, did not elect to do so, or to take any steps in that regard, leads me to believe that the insured decided to allow the beneficiary of the policy to remain exactly as written. The purpose of this concurrence is to give notice that I intended to re-examine the question anew should it ever again arise while I am a member of the Court.

George Rose Smith, J., (dissenting). The property settlement agreement contained this paragraph: "[Nina Brewer] herewith concurrently agrees to and does hereby transfer and release to [Jerry Brewer] any and all interest she now has in any and all life insurance policies on the life of [Jerry Brewer] in the Life and Casualty Company and the Southern Equitable Insurance Company, including a certain endowment policy [Jerry Brewer] has in one of said companies; and agrees that [Jerry Brewer] shall have the sole right to designate beneficiaries of said policies, and exclude [Nina Brewer] as a beneficiary if he so desires." If Jerry Brewer had died before the lapse of a reasonable time in which he might have effected a change of the beneficiary, or if there were extrinsic circumstances, such as a remarriage on his part, to assist us in discovering his true intent, then I should agree with the majority opinion.

These situations, however, are not before us. When Jerry Brewer read and signed the property settlement agreement it was brought directly to his attention that he had the power to exclude Nina as a beneficiary "if he so desire[d]." Yet in the nine months that elapsed between the execution of the agreement and Jerry's death he took no steps to change the beneficiary of the policies. He did not contest Nina's suit for a divorce. He did not remarry. He left no children. In the circumstances it is not unreasonable to believe that he wanted Nina to receive the proceeds of the policies. What the majority are doing is *guessing* that Jerry really meant to change the beneficiary but did not get around to doing it. Instead of making a guess that could as well go one way as the

other I prefer to give effect to the written directions in the policies, which Jerry did not see fit to have changed.

Roman v. *Smith*, cited by the majority, is not in point. There the settlement recited that the husband would pay the wife $40,000 and deliver to her $1,800 of U.S. bonds. In fact he gave her $1,780 in cash instead of the bonds, and it was noted on the agreement that "Cash $1,780 substituted for Bonds." It was to the husband's direct pecuniary interest to substitute cash for the bonds and not to have the bonds reissued in his name before their maturity. Hence in that case there was not the slightest doubt about the husband's intention to exclude his wife from participation in the proceeds of the bonds. Here the facts are so materially different that the *Smith* case is not authority for today's decision. I would reverse the decree.

Ward, J., joins in this dissent.

COFFELT *v.* GORDON

5-3605 390 S. W. 2d 633

Opinion Delivered May 31, 1965.

Kenneth Coffelt, for appellant.

House, Holmes & Jewell, By: *Ed B. Dillon, Jr.,* for appellee.

FRANK HOLT, Associate Justice. The appellants filed separate complaints for malicious prosecution against the various appellees. The appellees demurred to both complaints and when appellants refused to plead further, the trial court dismissed the complaints. The cases are consolidated for appeal. For reversal appellants contend that "the complaints are good as against the demurrers."

In each complaint it is alleged that appellees "conspiring together, wilfully, maliciously, and without probable cause, filed and caused to be filed, a petition for contempt citation against" appellants in a chancery court proceeding. The appellants sought compensatory and punitive damages for the alleged malicious prosecution.

It is true that a demurrer admits the verity of all facts that are well pleaded in a complaint in testing its sufficiency. *Southwestern Publishing Co.* v. *Ney,* 227 Ark. 852, 302 S. W. 2d 538. However, before one can successfully maintain an action for malicious prosecution his complaint must contain the essential allegation that the proceeding about which he complains has terminated in his favor. *Haglin* v. *Apple,* 65 Ark. 274, 45 S. W. 989; *Twist* v. *Mullinix,* 126 Ark. 427, 190 S. W. 851; *Engler* v. *Creekmore,* 196 Ark. 717, 119 S. W. 2d 497. See, also, 34 Am. Jur., Malicious prosecution, § 6. In the case at bar a review of the two complaints reflects that in neither is it alleged that the contempt proceedings filed against the appellants had terminated favorably to either of them.

The rationale for the necessity of alleging a favorable termination is well expressed in 34 Am. Jur., Malicious Prosecution, § 27:

"* * * The rule is founded on the necessity of proving that a prosecution which itself puts in issue the truth of the charge on which it is founded is without probable cause. Until a complaining party has shown that the action against him was unsuccessful, he has not shown that he has suffered any damage, and if he were permitted to

sue before he had won the first suit, he might secure a recovery for the bringing of an action which the Court entertaining such cause may find to be well brought."

Neither can it be said that appellants' allegation of a conspiracy corrected the deficiency in their complaints. *Ragsdale* v. *Watson,* 201 F. Supp. 495 (Western District, Arkansas, 1962). There the court quoted with approval:

"* * * an act which, if done by one alone, constitutes no ground of an action on the case, cannot be made the ground of such action by alleging it to have been done by and through a conspiracy of several."

Also see *Southwestern Publishing Co.* v. *Ney, supra.* Therefore, before the allegation of the existence of a conspiracy can benefit the appellants it is still necessary that they allege the prior proceeding has terminated successfully for them.

Since this essential element is lacking in appellants' complaints, we hold that the trial court was correct in sustaining the demurrers and dismissing the complaints.

Affirmed.

Robinson, J, not participating.

5-3382 391 S. W. 2d 29

Opinion delivered June 7, 1965.

[redacted]

John F. Gibson, for appellant.

N. L. Schoenfeld, for appellee.

CARLETON HARRIS, Chief Justice. This is a child custody case. The parents are Joseph Young Lee, the father, and Bicky Chau Lee, the mother. The child involved is Cosmo Lee, three years of age at the time of the trial.

Immediately following the marriage of the parties, they went to Dumas, Arkansas, where Joseph's father was in business and made their home. In February, 1962, Bicky left the Dumas home, and went to New York City, New York, where her parents resided. In September of the same year, Joseph went to New York, taking Cosmo with him, resuming the marital relationship with Bicky until February, 1963, at which time he moved out of the home occupied by his wife and her parents, and obtained living quarters of his own. Apparently, Joseph took

Cosmo with him, for on February 26, Bicky applied for a Writ of Habeas Corpus, commanding Joseph to bring the child before a New York justice. The writ was issued, and the child was returned to appellee by agreement between the parties. An action was instituted by appellee in the New York courts for permanent separation in April, 1963, and a temporary support order was granted, but not entered immediately, pending reconciliation attempts.

On Sunday, July 14, 1963, Joseph, in accordance with an agreement with his wife, relative to visitation rights, took Cosmo from Bicky's home, but instead of returning him, left the state and returned to Arkansas. Upon reaching Memphis, Joe called his wife, and informed her that he was taking the child back to his home in Arkansas. On August 20, appellee filed in the Desha Chancery Court a petition for a Writ of Habeas Corpus, seeking the return of the boy. In the meantime, Joseph had commenced an action against Bicky for divorce, and custody of the child, and the court consolidated the two actions, as far as custody was concerned, and commenced hearings on August 28. The court denied a motion to hear the divorce case at the same time. Final testimony in the custody case was taken on February 6, 1964, and the court made extensive findings on February 19. A decree was entered in March, granting the custody of the child to the mother, Bicky. Joseph appealed, obtained a Writ of Supersedeas, and retained possession of the child. This appeal questions the correctness of the trial court's order in granting custody to appellee, appellant asserting that Bicky had deserted Cosmo, and that the court erred in failing to find that the best interest of the child required that it remain with its father, appellant herein.[1]

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[1] The court rendered a comprehensive order as a matter of protecting the rights of the parties, as follows:

1. This court has the sole and exclusive jurisdiction to determine the custody, care, support, education and general welfare of the child in issue in this action;

2. Bicky should be awarded temporary custody of Cosmo Joseph Lee;

3. Bicky should be granted permission to remove child from the jurisdiction of this court to the City of New York, New York;

We do not think the evidence establishes that the child was abandoned. Appellant testified that she left him and the child, but appellee says that Joseph would not permit her to take Cosmo with her. Joseph himself stated that he would not have permitted her to take the child, even if she had asked. At any rate, the parties were reunited, and resumed the marital relationship,

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4. That before Bicky is authorized to remove said child from the jurisdiction of this court she will (a) prepare or cause to be prepared and filed with the Clerk of this Court, a writing appointing the Clerk of this Court and his successor in office as her true and lawful agent for service of all orders and process in this action relating to the custody, care, support, education and welfare of said child and (b) file with the Clerk of this Court, a good and sufficient bond in the amount of $1,000.00, to be approved by the Sheriff of Desha County, Arkansas, payable to the State of Arkansas, for the use and benefit of Joseph Young Lee, conditioned that she will comply with the decree of this court in this action and any subsequent orders of this court made and entered herein relating to the custody, care, support, education and welfare of Cosmo Joseph Lee.

The Clerk of this Court should not issue any writ of attachment for the child in issue in this action until the above requirements have been fully satisfied by Bicky.

5. Upon the entry of the formal decree herein, Joe should deposit with the Clerk of this Court the sum of $150.00 for the use of Bicky. This amount to be used by her to apply on the expense of her trip from New York to Desha County, Arkansas, and return, to receive the custody of the child in issue.

6. The child is not to be removed from the United States without prior permission of this court.

7. The name of said child is not to be changed, nor any adoption filed or had without prior permission of this Court. Bicky, nor any person, will make any effort or effect a change of domicile of said child from Desha County, Arkansas, without prior consent of this Court.

8. Bicky will file or cause to be filed with the Clerk of this court a statement(s) showing the current address of the child at all times.

9. The court retains the issue of support for adjudication until such time as Bicky files a petition and makes proof on this issue.

10. Until the child in issue arrives at school age and begins to attend school, Joe should have the custody, for visitation purposes, during the months of June and July of each year. He should pay all expenses connected with said visitation.

11. Each out-of-custody parent should be granted the right of visitation with, and said child with him/her, at all reasonable times.

12. Should either party fail to surrender custody of the child, as directed by these findings, the Clerk of this Court, without further directions of the court, will, upon the filing of a verified pleading showing such failure, issue a writ of attachment to the proper officer authorizing and directing him to remove said child from the defaulting parent and deliver him to the other parent.

13. The court retains full and complete jurisdiction of this action for further orders relative to the care, custody, support, education and welfare of the child in issue."

subsequently in New York, and the child there lived with both parents.

The record is rather large in this case, but no good point would be served in detailing the testimony. There are no intricate questions of law to be passed upon, nor is there any feature of the case that would serve as a precedent. A fact question, only, is involved. We agree with the Chancellor that, morally speaking, both parties are qualified to have custody of the child. The record makes plain that all involved are intelligent and well educated, and the family background is interesting. Appellant's father is a prosperous grocer in Dumas, and appellee's father operates a large restaurant in New York City. He [appellee's father] formerly served in the Government of Chiang Kai-Shek, and subsequently became Controller with General Chenault's C. A. T. (transport successor to the Flying Tigers). Mr. Chau, the father of appellee, attended Columbia University, graduated from New York University, and is a citizen of the United States. Joseph works in his father's store, and Cosmo has been staying, during weekdays (8:00 A.M. to 7:00 P.M.) with a Mrs. Lee Sharp of Dumas. The child's meals are brought or sent to him from the grocery. Bicky is employed as a clerk at the Manhattan Savings Bank in New York City, and plans for her mother, 61 years of age, to look after Cosmo while she is working. The strongest evidence offered by Joseph was to the effect that his wife had been corresponding with one or two Chinese men, though, admittedly, no showing of adultery is made. Bicky's chief complaint appears to be that Joseph did not make a proper living for them. From her testimony:

"Well, the thing is his father, his parents want him to marry Chinese girl and they told me—and he told me if he wanted money from his father—and after Joe marry he has to tell his wife to work in store with them. And, they want, of course, a grandson for them. And, this is the main thing his married. His parents Idea. That he get married. And, he get married and all the expense from his father. At that time he didn't have any

regular income. If he has any money of course he has to ask his parents for money. * * *

"* * * After I came back to Dumas I try to pay all my attention to my child. I don't want to work in the store. And, I don't approve of his idea, to depend on his father or wait till his parents pass away and get the some money to support him. So, since I not work in the store his parents mad at him. And, his not make me to work in the store and the money they give him to marry me is their loss. They lost money. So, from that time they not give Joe any money. So, he cannot ask his parents for money he didn't have any income."

She testified that, while in New York, he lived with her parents, but paid no room and board; that he had a job, but would not tell her how much he made, or what he did with his money.

We have said many times that the paramount and controlling consideration in all custody cases is the child's best interest and welfare, and that each case presents a different factual situation. *Cushman* v. *Lane,* 224 Ark. 934, 277 S. W. 2d 72. We have also stated that the mother is given preference where the child is of tender age. See *Aucoin* v. *Aucoin,* 211 Ark. 205, 200 S. W. 2d 316, and cases cited therein. In *Aucoin,* the court found that the mother was guilty of some misconduct, but stated:

"The real question in the case involves the right to the custody of the three-year-old child. Appellant earnestly insists that the charge of adultery was well established and that this fact alone entitles him to the custody of the older child. * * * The trial court also decided that even though appellee was guilty of some infidelity, such determination would not change the award of custody to the mother in view of the child's tender age and the other circumstances in evidence. * * * Since we agree with the chancellor that the charge, if proved, would not necessarily change the award of custody in the instant case, we think it would be better for all concerned that the unsavory evidence adduced on this issue be left out of this opinion."

As stated, all of the circumstances in custody cases must be taken into consideration before making an award. When this is done, we are unable to say that the Chancellor's findings were against the preponderance of the evidence. The trial court retained jurisdiction of this cause, and, of course, is empowered to change the custody order, if circumstances arise that would make such change advisable.

Affirmed.

JOHNSON, J., dissents. For good cause shown, an immediate mandate is ordered.

See *Tassin* v. *Reynolds,* 222 Ark. 363.

SCHULTE *v.* WALTHOUR.

5-3582 393 S. W. 2d 242

Opinion delivered June 7, 1965.

[Rehearing denied September 20, 1965.]

Warren & Bullion, for appellant.

H. B. Stubblefield, for appellee.

CARLETON HARRIS, Chief Justice. Melvin Holmes was the contractor in the construction of three houses on properties owned by his wife, Reba Holmes. J. D. Wal-

thour, trustee, appellee herein,[1] held four mortgages on these properties. The Holmeses were financially unable to finish with the construction, and closed down the jobs in October, 1963. Thereafter, the following events occurred:

Walthour filed suit to foreclose his mortgages on October 17, 1963, and summons was served on Mr. and Mrs. Holmes on October 22, 1963, in Faulkner County, their residence. In his suit Walthour not only sought to foreclose the mortgages, but sought priority for the mortgages over Big Rock Stone and Material Company, and Robinson Lumber Company, who were claiming materialmen's liens. These two companies were made parties, and served with summons. W. C. Schulte, appellant herein, was the painting contractor on the jobs, but was not made a party defendant by Walthour.

On October 29, 1963, Schulte filed an Intervention in Walthour's suit, and summons was issued and served upon Walthour, and summons was issued for the Holmeses, but a *non est* return was made. On November 14, Schulte obtained an order permitting him to intervene in the litigation. Walthour filed an answer to the Intervention, denying appellant's right to a lien. Thereafter, Walthour, with the permission of all the parties, advanced sufficient money to complete the construction of the houses. By agreement with appellee, Schulte completed the painting, and on February 28, 1964, was paid $250.00 by Walthour, to be credited upon the amount claimed by Schulte under his original contract, said amount being $1,245.00. In the meantime, on February 12, Mr. and Mrs. Holmes had formally entered their appearance in the suit as to Big Rock. Subsequently, the court entered its decree, rendering judgment for Walthour, and ordering the property sold. The order directed that the proceeds of the sale be paid into the registry of the court, in order to give the lien claimants the opportunity to establish any amounts due them. Thereafter, a final decree was entered, in which the court

[1] The suit was instituted by "J. D. Walthour, Trustee, and J. D. Walthour (individually)." The singular term, "appellee," will be used in this opinion.

held that Schulte's "Intervention does not relate to the subject matter of this action, and that said Intervenor does not have any lien, but is entitled to judgment against Melvin C. Holmes and Reba M. Holmes for nine hundred ninety-five ($995.00) dollars." From this final decree appellant brings this appeal.

The amount of the alleged mechanics' and materialmen's lien is not disputed, nor is it disputed that the Intervention was filed within one hundred twenty days of the date of the furnishing of the last material. Admittedly, no service was had upon Mr. and Mrs. Holmes when the Intervention was filed by appellant (a *non est* return being made), and the principal question is whether it was necessary that service be had on the owner and contractor before a lien could be claimed by virtue of the filing of the Intervention. Appellant contends that, under our decisions, service is not necessary where the Intervention is filed with the permission of the court. Appellee contends to the contrary. The filing of this pleading (if service were unnecessary) obviated the necessity of complying with the provisions of Ark. Stat. Ann. § 51-613 (Supp. 1963) as to filing claim for lien. *Plant* v. *Cameron Feed Mills*, 228 Ark. 607, 309 S. W. 2d 312, and cases cited therein.

In 67 C.J.S. "Parties," Section 67(d), it is pointed out that some jurisdictions require notice from an Intervenor to original parties that the Intervention has been filed, but other jurisdictions do not require such notice, but hold that a defendant, once served, is bound to take notice of pleadings filed by new parties. Among states mentioned, as holding that service of process on an original defendant is unnecessary, is our own state.

In *Board of Directors of St. Francis Levee District* v. *Raney*, 190 Ark. 75, 76 S. W. 2d 311, this court said:

"The intervention is not an independent proceeding, but is ancillary and supplemental to the main case. The landowners of Pecan Point were those to whom the Levee District was to pay the sum agreed upon. The complaint filed by Mixon sought to prevent the consummation of

this agreement, and a decree in accordance with the prayer of his complaint would necessarily effect the rights of the landowners. * * *

"Intervention is not a common-law right, but has long been recognized by the courts upon the principle that a party should be permittted to do that voluntarily which, if known, a court would require to be done. In the original or main suit the petitioners here voluntarily submitted to the jurisdiction of the court by entering their appearance and filing an answer. * * *

"* * * If it be conceded that the landowners by an independent suit could sue the levee district in Crittenden County only, that did not prevent them from intervening in a suit in which they were interested in the subject-matter, where jurisdiction over the persons of the defendants had already been acquired. 'Where jurisdiction would not obtain in an independent suit, an intervening proceeding may nevertheless be maintained as ancillary and supplemental under jurisdiction already subsisting.' (Citing cases.)

"Section 1204, Crawford & Moses' Digest,[2] cited to support the contention that there must be process issued and served against the cross-defendant, has no application to proceedings by intervention. That section refers to a defendant already in court, and allows him to file a cross-complaint against persons other than the plaintiff where he has a cause of action affecting the subject-matter of the suit against a co-defendant or a person not a party to the action.

"In a suit where there is an intervention, the original parties are already in court, and must take notice of all subsequent proceedings in that action relating to the subject-matter of the suit. This includes intervening petitions. (Citing cases.) * * *".

Likewise, in *Arkansas Bonding Company* v. *Harton,* 191 Ark. 665, 67 S. W. 2d 52, we again said:

[2] This statute is presently Ark. Stat. Ann. § 27-1134 (Repl. 1962).

"Appellant complains that the judgment by default was rendered without summons having been issued on the intervention or served on it, and it had no notice that the intervention had been filed. This would be of no avail to the appellant. An intervention is not an independent proceeding where it is against the plaintiff in the original action, but is ancillary and supplemental to the main case. In a suit where there is an intervention, the original parties are already in the court and must take notice of all subsequent proceedings relating to the subject-matter, including intervening petitions."

We think appellant properly intervened in the litigation, since he was interested in establishing his lien, the same as the other two lien claimants, and his lien could only be satisfied through a sale of the houses, which the Chancellor ordered sold. The trial court was evidently not disturbed by the failure of appellant to obtain service on Mr. and Mrs. Holmes, for a personal judgment was rendered in favor of Schulte against those two; however, the court held that Schulte was not entitled to a lien, and refused to permit appellant's claim to be satisfied from the money which had been paid into the registry of the court (from the sale of the property).

Let it be pointed out here that no complaint is being made by Mr. and Mrs. Holmes; they apparently were not interested in how the money was distributed among the other claimants. No relief was sought by them. Appellee *was* served with a summons, and, on the record, was aware at all times of the contention advanced by Schulte.

It is also interesting to note that Schulte completed his painting contract after Walthour took over the construction, and, in fact, appellee paid $250.00 to appellant on February 28, 1964, said sum applying on the indebtedness due under Schulte's original contract with the Holmeses. This amount reduced Schulte's claim from $1,245.00 to $995.00.

Summarizing, this is not a case wherein a new party was brought into a lawsuit, or where the determination

of an unrelated issue was being sought. Walthour's original action essayed, *inter alia,* to establish priority of liens between himself, as mortgage holder, and the lien holders, Big Rock and Robinson Lumber Company. Accordingly, it was entirely in order for the court to permit appellant to intervene, since the same property was involved, and since his claim presented the same legal question.

Mr. and Mrs. Holmes were parties to the litigation, and the Chancellor rendered judgment against them in favor of appellant. Under our cases, and the facts in this litigation, it would appear that the lien contended for by appellant was established.

Reversed.

DAVIS *v.* ARK. BEST FREIGHT SYSTEM.

5-3495 393 S. W. 2d 337

Opinion delivered June 7, 1965.

[Rehearing denied September 20, 1965.]

Tom Gentry, for appellant.

Thomas Harper, for appellee.

ED. F. MCFADDIN, Associate Justice. This is a workmen's compensation case. Sidney Davis (claimant and appellant), an employee of Arkansas Best Freight System (appellee) claimed that on December 30, 1960 he suffered a heart attack which arose out of and in the course of his employment. He testified that on December 30, 1960 he drove a truck and trailer loaded with pipe from Little Rock to Crossett; that he experienced considerable difficulty in Crossett in detaching the trailer from the truck and thereby overexerted himself; and that he suffered a heart attack shortly thereafter. The employer resisted the claim, insisting that there was no causal connection between the work appellant did and his heart ailment. The Referee disallowed the claim; the Full Commission disallowed the claim; the Circuit Court affirmed the Commission; and the case is here on appeal. There is no necessity to state the facts in detail because this appeal does not challenge the finding of the Commission on the sufficiency of the evidence. Rather, the challenge here is that the Commission committed errors of law. We will discuss the more important ones that appellant urges.

I. *Allowing A Witness To Read From A Book On Direct Examination.* At the hearing before the Referee the employer called Dr. Drew Agar as its witness and he testified that in his opinion there was no causal connection between claimant's work and his heart attack. On *direct examination* the Referee allowed Dr. Agar to support his opinion evidence by reading typewritten excerpts from several medical textbooks and writers.[1] The

[1] Here is the way it occurred. Dr. Agar testified: "It is my professional opinion that there is no causal relationship between the work he was doing and myocardial infarction. . . . I have testified on several cases concerning myocardial infarction and for that reason I selected three or four of the widely accepted textbooks on heart disease—or on myocardial infarction with which we are dealing here, namely, Friedberg, Paul Dudley White, Levine, Cecil's Medicine; and none of those four says that exertion is a causative factor in the production of myocardial infarction. I can read this verbatum if you would like me to.

"Q. If you would.

"MR. GENTRY:

Now is that his opinion or is that the opinion of some other doctor he's reading?

claimant duly preserved his objections and so we now have before us the question whether a doctor—on direct examination—may support his own opinion evidence by reading excerpts which he has copied from medical textbooks and from the writings of other doctors.

It is true that the Workmen's Compensation Commission is an administrative agency and that the technical rules of evidence do not apply to its procedure (Ark. Stat. Ann. § 81-1327 [Repl. 1960]),[2] nevertheless it has been repeatedly held that a litigant has the right to cross-examine a witness. In 58 Am. Jur. 339 the text summarizes the holdings:

"The cross-examination of witnesses is one of the safeguards to accuracy and truthfulness. The test of cross-examination is the highest and most indispensable known to the law for discovery of truth. When a witness has been examined in chief, the other party has the right to cross-examine for the purpose of ascertaining and exhibiting the situation of the witness with respect to the parties and to the subject of the litigation, his interest, his motive, his inclinations, his prejudices, his means of obtaining a correct and certain knowledge of the facts to which he has borne testimony, the manner in which he has used those means, and his powers of discernment, memory, and description. The purposes of the cross-examination is to test the truthfulness of the witness, to sift, modify, or explain what has been said, to develop new or old facts in a view favorable to the cross-examiner, or to discredit the witness, and, if he is the plaintiff, to test his good faith—the righteousness of his case . . . In a judicial investigation the right of cross-examination is absolute, and not a mere privilege of the one against

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"DR. AGAR:

This is the opinion—these are the opinions—These are excerpts from highly recognized textbooks on heart disease. Dr. Levine in his *Clinical*—

"MR. GENTRY:

(Interrupting) Without the textbook being here, if your Honor please, I want to object."

[2] We construed our statute in *Ward Furn. Co.* v. *Reather*, 234 Ark. 151, 350 S. W. 2d 691; and *Holstein* v. *Quality Excelsior Co.*, 230 Ark. 758, 324 S. W. 2d 529. See also 15 Ark. Law Rev. 141, *et seq.*

whom a witness may be called. In a civil action a party has the right to cross-examine witnesses against him whether the evidence is given ore tenus or by deposition."

Certainly, here, the claimant had no opportunity to cross-examine the writers of the textbooks and medical treatises which Dr. Agar used to support and bolster his own testimony. We have held that in a court trial a doctor cannot support his own testimony by reading from a medical textbook.[3] In *Moore* v. *State,* 184 Ark. 682, 43 S. W. 2d 228, we said:

"The extracts from the medical and law books were not competent, and the court did not err in refusing to permit appellant to introduce them.

" 'It is very generally recognized that extracts from medical books are not admissible in evidence, and for the very sufficient reason that the author does not write under the sanctity of an oath and has not been subjected to a cross-examination, and the decisions of this State are to the effect that statements from these books may not be presented as such in the arguments of counsel or introduced by the means of questions put on cross-examination as by reading an opposing opinion from textbooks, and asking the witness if it is or is not true; for this would have the effect of putting the statement in evidence and thus accomplishing by indirection what is for-

[3] In 100 C.J.S. 539, "Workmen's Compensation" § 537, the text reads: "It may be proper in a compensation proceeding to permit a physician to read a statement from a medical book, and the quotation may be competent evidence if the physician testifying represents the quotation to be an accurate statement of medical knowledge on the subject." To sustain the text there are cited two cases, being *Nicotra* v. *Bigelow* (Conn.), 189 A. 603; and *In re Sutton* (Idaho), 361 P. 2d 793. An examination of these cases reveals that in each instance the situation was different from that in the case at bar. In the Idaho case the Court said: "Dr. Johnson's quotation from medical treatises, upon which his opinion was, in part, based, was not assigned as error by appellant, but was discussed only inferentially." The Connecticut case of *Nicotra* v. *Bigelow, supra,* is based on a compensation act which reads entirely different from our act. The Connecticut statute says that the Commission "shall not be bound by the ordinary common law or statutory rules of evidence or procedure, but may make inquiry in such manner, through oral testimony or written and printed records, as is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit of this chapter." This is a much broader power than that contained in our Act.

bidden.' *State* v. *Summers,* 92 S. E. 328. "The correct rule is that an attorney may use a medical book to aid him in framing questions to be asked of a physician testifying as an expert, but it is not permissible to read from such books to the jury . . .

"The witness, Dr. Foltz, put on the stand by the appellant, and was on direct examination. On cross-examination of an expert witness, where he bases his opinion on a textbook, he may be cross-examined, and for the purpose of impeaching him, extracts from the authorities may be read; but it is never proper to introduce the books, or extracts from them, except on cross-examination."

The Commission may quote from medical books to explain the findings; but a doctor called to express his opinion must express his own opinion so that he may be cross-examined. He cannot on direct examination bolster his own opinion by quoting from some other doctor who is not subject to cross-examination.

II. *Refusal To Allow A Letter For Impeachment.* After Dr. Agar testified on direct examination the claimant's attorney sought to impeach him by a letter which Dr. Agar had written involving another patient. Dr. Agar had been testifying that work did not cause a heart attack and he had written a letter which indicated the contrary. The claimant's attorney offered the entire letter, but the only part allowed was the last sentence. In order to get the setting, we quote the last paragraph of the letter and emphasize the only sentence in the letter that was allowed for cross-examination and impeachment:

"It would appear from the history that Mr. Holmes has suffered two coronary occlusions, the first in 1957 doing heavy work and the second in 1960 again doing heavy work. It also appears from the history that during the time Mr. Holmes was engaged in light work as a result of his first heart attack he had practically no symptoms of cardiac disease. However when he again engaged in heavy work involving the lifting of 75 to 100

pound weights he again had chest pains and had another coronary occlusion. *It would appear therefore that there was a causal relationship between his work that he was doing on June 24th, 1960 and his subsequent heart attack. It is my professional opinion that there is a definite relationship in this case.*"

In order to get the full effect of the attempted impeachment, certainly the claimant should have been allowed to introduce the letter and not merely one sentence from it.

III. *Refusal To Allow Claimant To Offer Rebuttal Evidence.* On December 6, 1962 the Commission closed the case and heard arguments. While the Commission had the case under consideration it caused the claimant to be examined by Dr. Kahn, who wrote the Commission a six page typewritten letter on March 30, 1963 telling in detail of the examination, the answers the claimant had made, and the doctor's opinion as to the claim. Then on May 2, 1963 the Commission reopened the case for a further hearing, at which time Dr. Kahn offered his letter and testified, and claimant's attorney cross-examined the doctor. The claimant then filed his motion that he be allowed to call two doctors in rebuttal to the testimony of Dr. Kahn. Here is the record of claimant's offer:

". . . . after the Commission has called another witness upon this subject after the case has been closed, it is our contention that the case has been reopened for all purposes, and for the Commission to deny the claimant the right to introduce other proof denies him of his substantial right of due process, and, therefore, we make the offer that if the claimant was permitted to do so, we would introduce two doctors, qualified internists who would testify, in their opinion, that Mr. Davis suffered a coronary occlusion at the time alleged and at the time that Dr. Kahn testified that he had, and that such coronary occlusion and the resulting myocardial infarction bore a causal relationship to his employment, and that it at least aggravated his condition to such an extent that under the law it would be compensable . . ."

The Commission denied the claimant the opportunity to call witnesses in rebuttal to Dr. Kahn's testimony; and we hold the Commission was in error. As aforesaid, the record was closed on December 6, 1962 and the case argued; the Commission then reopened the case on May 2, 1963 to hear further evidence, that of Dr. Kahn. Certainly when the Commission reopened the case to call a witness of its own selection, it should not have refused the claimant the right to offer evidence to rebut the testimony of such new witness. In 88 C.J.S. p. 226, "Trial" § 111, there is a discussion in regard to the reopening of a case to admit further evidence and the holdings are summarized under the subject, "Right of Adverse Party to Reply: If the other party can show that he can probably repel the evidence which the court permits to be introduced after the reopening of the case, and that it takes him by surprise, the court should permit him to do so, and should postpone, adjourn, or continue the case, on his request that the court should do so, . . ."

We can perceive no good reason why the Commission should have denied the claimant the right to offer evidence to rebut the testimony of Dr. Kahn when the Commission had reopened the case to have him testify.

CONCLUSION

This case involves only procedural matters but we have seen fit to go into these procedural matters in some detail because the Commission is entitled to have guidelines in these matters. We have a fine hard working Commission and these guidelines will be advantageous to the Commission. The judgment of the Circuit Court is reversed and the cause is remanded, with directions that the case be returned to the Commission for procedure not inconsistent with this Opinion.

HARRIS, C. J., and SMITH, J., dissent.

HARRIS, C. J. and GEORGE ROSE SMITH, J. (dissenting). I would likewise reverse the case, for I agree with the majority on Point II, listed as "Refusal to Allow

a Letter for Impeachment." However, I disagree with the majority on the other two points, which are also listed as reasons for reversal.

I think it was entirely proper for the doctor to read from a medical textbook. As stated in 100 C.J.S., Workmen's Compensation, § 537, p. 539:

"Since a compensation tribunal may not be bound to observe or follow the technical or strict rules as to the admissibility of evidence, as discussed supra § 525, such a tribunal has great leeway in the acceptance or rejection of medical testimony, and medical testimony may be admitted in a compensation proceeding although the same evidence would not be admitted were the case other than a compensation proceeding. It may be proper in a compensation proceeding to permit a physician to read a statement from a medical book, and the quotation may be competent evidence if the physician testifying represents the quotation to be an accurate statement of medical knowledge on the subject."

I also disagree with the majority in permitting the case to be reopened. The matter of taking additional proof should properly lie within the discretion of the Commission, and I see no abuse of discretion in this instance. Counsel for appellant received, in advance of the final hearing, a copy of Dr. Kahn's report, and thus knew what the doctor would testify to. In other words, the testimony was not a surprise, and appellant was afforded every opportunity to cross-examine the neutral witness. The majority quotation from C.J.S. refers to **court trials.**

It seems to be that, under the majority holding, the Commission will never feel that it can close a case, as long as one party is requesting the right to offer additional evidence. This simply means that the claim for compensation can drag on interminably. In my opinion, the Commission did not abuse its discretion in refusing to permit additional evidence.

I am authorized to state that Mr. Justice George Rose Smith joins in this concurrence and dissent.

5-3598 391 S. W. 2d 17

Opinion delivered June 7, 1965.

[redacted]

Hardin, Barton, Hardin & Jesson, for appellant.

Byron Goodson and *Royce Weisenberger, Jr., Autrey & Goodson,* for appellee.

ED. F. MCFADDIN, Associate Justice. This is a case involving damage by fire claimed to have been caused by the train of appellant; and the facts are similar to those in *K. C. Ry. Co.* v. *Beaty et al.,* 239 Ark. 187, 388 S. W. 2d 79.

The appellees, Whisnant and Parks, own lands north of the main track of the appellant, Kansas City Southern Railway Company, in Sevier County, Arkansas. Some time after noon on October 30, 1963 one of the appellant's freight trains passed near the appellees' lands; fire was immediately discovered on the railroad right of way; there was a strong wind from the south and the fire spread from the right of way to the lands of the appellees and caused the damages here sought. The landowners filed separate actions, which were consolidated for trial. The amount of the damage of each landowner was stipulated; but the appellant railroad company vigorously denied that the fire was caused by its train. Trial of the causes to the Court without a jury resulted in findings and judgments for the landowners, and this appeal resulted. Only one point is urged on appeal: "The evidence is not sufficient to support the verdict and judgment."

We find no merit in appellant's point. Shortly after the train passed near the lands the fire was discovered. Mr. Ted Brown, a disinterested witness, saw the train pass near the Whisnant land and saw the fire and testified that the conductor from the caboose of the train pointed out the fire to the witness. The railroad company never called the conductor to dispute the testimony of the witness Brown.

The town of Mineral is a short distance from the lands of the appellees; and, without objection, the witness J. E. Smith testified as to the fact that the train was setting fires on the right of way at Mineral. The testimony of this witness as abstracted by the appellant is as follows:

"While I was sitting at the table drinking coffee, I saw the fire beginning to burn and I broke and ran and got over there and wiped out two fires and about the time I got the third fire out the caboose of the train passed and the conductor was sitting there looking out of the window and I was beating on the fire and I showed him that he was setting fire. I didn't see any sparks coming out of the train. I don't know whether it came from the stack or whether it was a hot box, I just know the train was setting fires. The fire was beginning to burn at the time the train was pulling through. I pointed this out to the conductor. Later I learned about the fire at Mr. Whisnant's place and on Mrs. Parks' land. I could see the fire on Mrs. Parks' land from where I was. Later I went down there and saw it, the right of way was still burning. We were having extremely dry weather at that time and the wind was blowing from the South."

Mrs. J. E. Smith testified, as abstracted by the appellant, as follows:

"My name is Mrs. Joseph E. Smith and my husband just testified. I saw the fire when it ignited at the Mineral crossing. I was at the window watching. The train was going North and it was shortly after noon. I just went in to wash the dishes and of course I'm interested

in the trains because I have a little dog and I watch the train to see where my dog is. When the train passed I saw fire come from the engine and it ignited immediately. I saw it when it lit and it just flared up."

Witnesses for the railroad company testified that it was physically and mechanically impossible for any of the five diesel engines here involved to have caused fires; yet the two disinterested witnesses, Mr. and Mrs. Smith, testified that one or more of these identical diesel engines did set fire to the railroad right of way only a few miles from the appellees' lands. Certainly the testimony of the appellant's witness was rebutted.

There is no necessity to detail all of the evidence. It is sufficient to say that there was ample evidence to support the verdict and judgment. As we said at the outset, this case is strikingly similar to the case of *K. C. Ry. Co.* v. *Beaty, supra.*

Affirmed.

BURNETT *v.* HOLIDAY INNS OF AMERICA.

5-3619 391 S. W. 2d 27

Opinion delivered June 7, 1965.

Thomas & Finch, for appellant.

Ben M. McCray, for appellee.

PAUL WARD, Associate Justice. On March 5, 1964 John Burnett and his wife, appellants, entered into a written contract with Holiday Inns of America, Inc., appellees. In this contract appellants agreed "to enter into a lease within thirty (30) days from date hereof . . ." covering 3 acres of land (definitely described) upon which appellees were to construct a 48 room motel.

According to the contract the lease was to contain, among other things, the following items:

1. The lease to run 10 years and to be renewable for 9 additional 10 year periods.

"2. Lessee shall pay to lessor the sum equivalent to three per cent (3%) of gross room sales plus one per cent (1%) of all food and beverage sales. Lessee guarantees lessor a minimum monthly rental of $150 per month."

3. Appellees to have right to purchase property at the end of 10 years for $35,000.

4. If appellees should build a filling station on the property they were to pay an additional sum of $50 per month.

5. Provision for tax payments, and appellees' right to connect onto a sewer line.

6. Appellees to have the right to build onto the 48 room motel as needed.

Before the 30 days (mentioned in the contract) had expired the agent of appellees tendered to appellants a written lease (covering in detail each item in the contract) consisting of 8 pages in the transcript. Appellants refused to accept and sign the proffered lease because, they said, it did not conform to the terms of the contract.

On May 4, 1964 appellees filed a complaint in chancery court to force appellants "to specifically perform their contract," and to execute the lease previously presented to appellants. To the above complaint appellants filed an answer, pointing out wherein the lease differed from the contract. After a full hearing the trial court

found that the lease did not conform to the contract, but gave appellees 20 days to offer a conforming lease, pointing out the changes for appellees to make in the lease. Later, the court, after having found the suggested changes had been made, ordered appellants to execute the lease.

In addition to the above items the proffered lease contains section 10 which gave appellees the right, at the termination of the lease (whether at the end of 10 years or 100 years), to remove all assets placed on the land. No such provision is mentioned in the contract. Other changes were made in the lease but we do not deem them material.

Not only is it obvious from the above that the lease did not comply with the terms of the contract, but the trial court so found, and we think properly so. The trial court then attempted to reform the lease to conform to the contract and ordered appellants to accept it. This the court had no authority to do. In the case of *Refrigeration Discount Corporation* v. *Haskew,* 194 Ark. 549, (p. 551), 108 S. W. 2d 908, we clearly announced the rule that "Courts are not permitted to make contracts for persons *sui juris,* but only construe such as they have made."

There was a legal obligation on appellees to present to appellants a lease in conformity with the contract, and when appellees failed to do so, appellants, in effect, rejected the contract. In the case of *Smith* v. *School District No. 89,* 187 Ark. 405 (p. 409), 59 S. W. 2d 1022, we said:

". . . where an offer is made the acceptance must be unequivocal and unconditional; that, where the acceptance is conditional or a new element is contained in it, there is no agreement, but such condition or new matter engrafted is to be deemed and treated as a rejection of the offer."

In our opinion there were material differences between the contract and the lease prepared by appellees, and consequently, appellants were justified in rejecting the same.

While the contract called for 3% of "gross room sales" the proffered lease contained the following deductions: credits or refunds made to customers, guests or patrons; customary motel rebates and allowances; customary commissions and fees paid to travel agents for business referral; all sums and credits received in settlement of claims for loss or damage to merchandise; telephone, telegraph, laundry, dry-cleaning, valet, house service, food beverage and other charges normally and usually charged to or included in guest room statements or bills; rental value of rooms complimented by the lessee and the rooms occupied by members of the lessee's staff, including the family of the innkeeper.

The contract obligated appellees to pay to appellants 1% "of all food and beverage sales" but the lease excepted therefrom all sales by vending machines; refunds made to guests or patrons; rebates to hotels and restaurants; commissions and fees paid to travel and booking agencies for business referrals; cover charges collected from any customers; food and beverage bills or statements complimented by the lessee; and food and drinks supplied to lessees' staff and family of the innkeeper. The rule above announced was cited with approval in *Tucker Duck & Rubber Co.* v. *Byram,* 206 Ark. 828 (p. 830), 177 S. W. 2d 759.

It was also the obligation of appellees to present an acceptable lease to appellants within 30 days from the date of the contract. This is clearly pointed out in 17 Am. Jur. 2d Contracts § 35 in the following language:

"An offer which specifies a period of time for its duration terminates, of course, upon the lapse of the time therein specified."

The decree of the trial court is reversed and the cause of action is dismissed.

Reversed and dismissed.

HARRIS, C. J., dissents.

5-3597 391 S. W. 2d 13

Opinion delivered June 7, 1965.

[redacted]

Mann & McCulloch, for appellant.

Daggett & Daggett, By: *James R. Van Dover,* for appellee.

SAM ROBINSON, Associate Justice. Elizabeth McGowen and Emogene Gatling, sisters who were separated from their husbands, lived with their eleven children in a four room frame house at Forrest City. Elizabeth had five and Emogene had six children. Emogene worked at a hospital; Elizabeth stayed home and looked after the children.

On the night of March 3, 1964, about 9 p.m., Elizabeth and the eleven children were at home; Emogene was not there. It was raining, thundering and lightning; the house caught fire and burned down. Elizabeth and six of the children did not escape from the flames. Five children did escape; two of them, Evelyn Reese and one other, were burned to some extent.

Appellant herein, Hanna Reeves, mother of Elizabeth McGowen and Emogene Gatling, filed two suits against appellee, Arkansas Louisiana Gas Company; one as next friend of Evelyn Reeves, and one personally and as administratrix of the estate of Elizabeth McGowen, alleging that the gas company negligently failed to repair gas leaks in the house or to turn off the gas; that lightning struck the house igniting the escaped gas causing the injuries and damages complained of. The actions were consolidated and tried.

After the plaintiffs had rested, the court directed verdicts for the defendant. The verdicts were directed on the theory that it was not the duty of the gas company to repair or maintain the gas pipes and appliances in the house involved. This is ordinarily true, but here it is shown that the gas company had been notified about the odor of gas and took no steps to repair the leak or to shut off the gas. In a situation of this kind, the principle on which the court directed the verdicts may not apply.

But we have reached the conclusion that the directed verdicts were proper for another reason. There is no substantial evidence that a dangerous amount of gas had escaped; there is no showing that there was a gas explosion; there is no showing that gas burned in the house; there is no showing that escaped gas was the proximate cause of the damages complained of. It is firmly established that a correct ruling will not be reversed, although erroneous reasons may have been given for such ruling. *Millsaps* v. *Nixon,* 102 Ark. 435, 144 S. W. 915; *Union Life Insurance Co.* v. *Brewer,* 228 Ark. 600, 309 S. W. 2d 740; *Southern Farm Bureau* v. *Reed,* 231 Ark. 759, 332 S. W. 2d 615.

The only issue is whether there is any substantial evidence that there was an explosion of gas or that burning gas was a proximate cause of the tragedy. The appellant introduced evidence to the effect that for about three weeks immediately preceding the fire there had been a smell of gas in the house; that on three occasions the gas company had been notified and each time had

promised to investigate the matter, but failed to do so. In testing the correctness of the action of the trial court in directing the verdicts we must give the evidence of the plaintiff its strongest probative force. *Harper* v. *Mo. Pac. Rd. Co.,* 229 Ark. 348, 314 S. W. 2d 696.

First, appellant argues that it is the duty of the gas company upon being notified that gas is escaping in a house to either repair the leak or turn off the gas. But we need not discuss this point because there is no substantial evidence, direct or circumstantial, that gas was in any manner involved in the fire. In fact, the circumstantial evidence is to the contrary. There is no evidence that the smell of gas was any stronger on the night of the tragedy than when it was first noticed. During this time there had been open flames in the house daily. There were three gas stoves in the house, one in the living room, one in the front bedroom, and a cooking stove in the kitchen; all produced open flames. In addition, there was a pilot light on the cooking stove; sometimes it would go out and would be relighted with a match, and some of the occupants smoked cigarettes which they would light with an open flame. The evening of the fire the occupants had cooked supper on the kitchen stove. There is no showing that lightning would be more likely to ignite escaping gas than would any other kind of open flame. The fire started in the back bedroom. The children that were burned to death were in that room, but there was no stove or gas connection in that room.

Earnest Howard testified that he lives across the railroad tracks from the burned house; that he had laid down across the bed about 6:30 and was awakened by a loud explosion (the house burned about 9 p.m.); that it sounded like a sonic boom; that he looked out the window and saw the house on fire, flames were shooting out the windows and doors like a flamethrower. He further testified that the house was completely aflame when he first saw it and that it could have been burning for 30 minutes. "Part of the decking was still there." In view of Evelyn Reeves' testimony, Howard's state-

ment cannot be construed as substantial evidence going to prove that the noise he heard was an explosion of gas in the home that burned.

Evelyn testified that she was in the living room talking over the phone to a boyfriend, Charles Smith; that two other girls and her mother were in the living room; her mother was looking at TV. Evelyn stated that she heard a "boom"; that whatever the noise was it did not shake the house and she did not stop talking on the phone; that the first she knew of the fire she heard her mother, Elizabeth, say "Evelyn, this house is on fire. Help me get the children out." At that time her mother had not been injured; the flames were coming from the back bedroom.

Evelyn further testified that it was warm that evening; no stoves were needed; that she, Shirley Ann and her mother were in the living room; the thunder and lightning had been going on about two or three minutes at the time of the boom. "I don't know how long the fire had been burning before I heard the boom. It could have been burning five minutes or more." She first saw the fire coming from the back bedroom; none of the doors in the house were closed.

Emogene Gatling testified that she called home that night before the fire; that "Diana answered the phone and I said 'Let me talk to Elizabeth' and she said all of them was in bed and she said everything was o.k." She also testified that the house was loosely constructed and had no underpinning.

The evidence of Evelyn is that she was talking over the phone to a boyfriend; that her mother was looking at TV, and there were two other children in the living room at the time the fire started.

To sustain the argument that escaped gas in the house was a proximate cause of the fire, appellant cites several cases, but none of the cases would sustain a finding that there is substantial evidence that burning gas was a proximate cause of the fire. Appellant cites the following Arkansas cases:

Gibson Oil Co. v. *Sherry,* 172 Ark. 947, 291 S. W. 66. The oil company drained gasoline into the street. No doubt about the gasoline catching fire and causing the damage.

Little Rock Gas & Fuel Co. v. *Coppedge,* 116 Ark. 334, 172 S. W. 885. Occupants of house were asphyxiated by gas. No doubt about cause of injury and deaths. The only question was whether the gas company had negligently allowed the pressure in the pipes to get so low that stoves went out and then the gas pressure was increased.

City Electric Street Ry. Co. v. *Conery,* 61 Ark. 381, 33 S. W. 426. There was substantial evidence that electric company negligently allowed electricity to escape. The positive and uncontradicted evidence was that the electricity injured a pedestrian who came in contact with a wire charged with electricity.

Arkansas Louisiana Gas Co. v. *Strickland,* 238 Ark. 284, 379 S. W. 2d 280. The only point on appeal was that the judgment was excessive.

Dixie Furniture Co. v. *Deason,* 226 Ark. 742, 293 S. W. 2d 706. The furniture company moved a stove; left pipe uncapped; no doubt that escaping gas exploded.

Tri-County Gas & Appliance Co. v. *Charton,* 229 Ark. 989, 320 S. W. 2d 103. No doubt that escaping butane gas caused fire.

Sinclair Refining Co. v. *Gray,* 191 Ark. 175, 83 S. W. 2d 820. Injury to four year old boy caused by an explosion of gas tank owned by appellant.

Martin v. *Camden Gas Co.,* 179 Ark. 481, 17 S. W. 2d 309. Gas meter exploded causing fire.

Pine Bluff Water & Light Co. v. *Schneider,* 62 Ark. 109, 34 S. W. 547. Gas pipe was broken and leaking; explosion occurred when employee struck match looking for leak.

Pulaski Gas Light Co. v. *McClintock,* 97 Ark. 576, 134 S. W. 1189. McClintock was found dead with his face over an open gas pipe.

In none of the foregoing cases was there any question about the proximate cause. There were serious questions about evidence of negligence, but not about the proximate cause. The proximate cause was shown in each case. Here, there is no showing of the proximate cause of the fire.

To say what caused the fire would be pure speculation, sustained by no substantial evidence. It could have been caused by lightning, but no one says that lightning struck the house. At the time Eveleyn heard a boom she was talking over the phone; it did not interrupt her conversation; it did not shake the house. But regardless of what started the fire, there is no evidence that any gas was ignited. There was no explosion in the house; Evelyn was not injured while talking over the phone; her mother had not been injured at the time she said "This house is on fire." There is no indication that there was any more gas in the house than there had been for about three weeks, during which time there had been open flames in the house much of the time. True, the fire spread rapidly, but the evidence is that the frame house was loosely constructed, there was no underpinning, and the windows and doors were open. The fire had gained headway when Elizabeth made the remark about the house being on fire. Flames were coming from the back bedroom, but as heretofore mentioned, there was no gas connection or outlet in that room.

An analogous principle regarding proximate cause was involved in the case of *Jeffery* v. *Gordon,* 236 Ark. 180, 365 S. W. 2d 128. There, Gordon parked a truck loaded with hay near an overpass which was under construction by Jeffery. The hay caught fire, causing considerable damage to the overpass. Jeffery filed suit against Gordon alleging that the defendant negligently parked the hay, a highly inflammable and combustible commodity, in close proximity to the overpass. As in the case at bar, the trial court directed a verdict for the defendant. In affirming the judgment this court held that although assuming the defendant was negligent in parking the hay near the overpass, it was not shown that

such negligence was the proximate cause of the resulting fire. The court said: "The law is well settled in this State that before one can be held liable for an alleged negligent act, the act must be the proximate cause of the injury complained of . . ." Likewise, in the case at bar, assuming that the defendant was negligent in not turning off the gas, there is no substantial evidence that the gas exploded or burned; there is no showing that the assumed negligence was a proximate cause of the fire.

In *Kapp* v. *Sullivan Chevrolet Co.,* 234 Ark. 395, 353 S. W. 2d 5, the court quoted from *Glidewell* v. *Arkhola Sand & Gravel Co.,* 212 Ark. 838, 208 S. W. 2d 4, as follows:

" 'Conjecture and speculation, however plausible, cannot be permitted to supply the place of proof,' and in *Turner* v. *Hot Springs Street Railway Company,* 189 Ark. 894, 75 S. W. 2d 675, we find this language:

'The trial court was correct in directing a verdict for appellee, because the testimony adduced by appellant was not sufficient to show that the injuries received were proximately due to any negligence of appellee. No witness testified that appellant's fall was proximately due to the small pieces of snow and ice afterwards seen in the vestibule of the street car. It is true, the jury might have guessed or speculated that her fall was caused by stepping upon the small pieces of ice and packed snow in the vestibule of the street car, but, on the other hand, it was equally probable that her fall was caused by packed snow or ice which had accumulated on her own shoes. The point is, juries are not permitted to guess or speculate as to the proximate cause of an alleged injury, the burden resting upon appellant to show by a preponderance of the evidence that her injuries were caused by some negligent act or omission of appellee.'

In the same case, quoting from an earlier case, we said:

'It is not allowable, under the rules of evidence, to draw one inference from another, or to indulge presump-

tion upon presumption to establish a fact. Reasonable inferences may be drawn from positive or circumstantial evidence, but to allow inferences to be drawn from other inferences, or presumptions to be indulged from other presumptions, would carry the deduction into the realm of speculation and conjecture.' "

Affirmed.

KING, ADM'R *v.* BEAN, JUDGE.

5-3622 391 S. W. 2d 24

Opinion delivered June 7, 1965.

Jeff Mobley and *William R. Bullock,* for appellant.

Wright, Lindsey, Jennings & Shults and *Gordon & Gordon,* for appellee.

SAM ROBINSON, Associate Justice. On the 10th day of October, 1964, in Pulaski County, an automobile occupied by Clayton E. King and Suzanne Seago collided with an automobile occupied by Varnold Stobaugh, Carolyn Stobaugh, Hurl D. Boyer and Margaret Boyer. King and Suzanne Seago were residents of Pulaski County; the Stobaughs and Boyers were residents of Conway

County. King died from the injuries he received in the collision.

Six days after the mishap, L. E. King, administrator of the estate of Clayton E. King, and Suzanne Seago filed separate suits in Pulaski County for damages alleged to have been caused by the collision. Both of the Stobaughs and both of the Boyers were named as defendants in each suit. The plaintiffs in each suit caused summonses to be issued for all four defendants. Summonses in each case were placed in the hands of the Sheriff of Pulaski County, and like summonses were sent by registered mail to the Sheriff of Conway County.

At the time the summonses were placed in the hands of the Sheriff of Pulaski County it was known that the defendant Varnold Stobaugh, a resident of Conway County, was confined to a hospital in Pulaski County; the Sheriff of Pulaski County was given this information. Margaret Boyer, who lived in Conway County, was also confined to the same hospital as Stobaugh in Pulaski County, but the attorney for the plaintiffs did not have that information, nor did the Sheriff of Pulaski County. The Pulaski County Sheriff served the summonses on Varnold Stobaugh that had been issued in both cases filed in Pulaski County.

On the 16th day of October, the same day suits were filed in Pulaski County, the heretofore mentioned summonses which had been issued and directed to the Sheriff of Conway County, were sent by registered mail to the sheriff of that county. The next day, October 17, an attempt was made by postal employees to deliver the registered mail containing the summonses to the Sheriff of Conway County, but the sheriff was not in his office and the postman would not leave the registered mail without the sheriff personally signing for it, but written notice to the sheriff of the registered mail was left at the sheriff's office. Again on October 21, written notice to the sheriff of the registered mail was left at the sheriff's office. The sheriff got neither notice.

The Sheriff of Conway County finally got the registered mail and served the summonses on October 28.

In the meantime, on October 19, Margaret Stobaugh and the Boyers filed suit in Conway County against L. E. King, administrator of the estate of Clayton E. King, and Suzanne Seago. On October 20, summonses were placed in the hands of the Sheriff of Pulaski County and served on that date.

The plaintiffs in the Pulaski County actions filed motions to dismiss the suits filed by Margaret Stobaugh and the Boyers in Conway County, alleging that the Pulaski Circuit Court had first acquired jurisdiction by reason of the actions having been first commenced in Pulaski County. The Conway Circuit Court overruled the motions to dismiss. King, the administrator, and Suzanne Seago, have petitioned this court for a writ of prohibition to prevent the trial of the cases in the Conway Circuit Court.

There are two points involved. First, was there a commencement of the actions within the meaning of the statute against all the defendants when summonses were placed in the hands of the Sheriff of Pulaski County? Second, was there a delivery of the summonses issued out of the Pulaski Circuit Court to the Sheriff of Conway County within the meaning of the statute when the postal employee attempted to deliver the registered mail on October 17, which was two days before the actions were filed in Conway County?

We do not need to deal with the first point, because we have reached the conclusion that there was a delivery of the Pulaski summonses to the Sheriff of Conway County within the meaning of the statute when the registered mail containing the summonses was taken to the sheriff's office by the postman on October 17.

In several cases prior to 1961 this court held that in races to obtain service the winner was the one fortunate enough to have summons actually served on his adversary before he himself was served. In some instances, the one who was first to place the summons in the hands of the sheriff was not the one who won the race for favorable venue because of a sheriff's procasti-

nation in serving the summons, or for other reasons. Of course, there is no way to compel the sheriff to serve the summons at any particular time. If the sheriff was friendly he might serve the summons immediately, but if he was not too friendly, he might require considerable time to get around to attending to the matter.

To alleviate this situation, the General Assembly of 1961 amended Ark. Stat. Ann. § 27-301 (Repl. 1962) dealing with the commencement of action, 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 [2] 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 the 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."

Under the provisions of the foregoing statute, if the summons issued out of Pulaski County was placed in the hands of the Sheriff of Conway County before the summons issued in Conway County was placed in the hands of the Sheriff of Pulaski County, the Pulaski Court first acquired jurisdiction and the petition for prohibition should be granted.

The issue turns on the point of whether the attempt to deliver the registered mail to the Sheriff of Conway County at the sheriff's office on October 17 was placing the summonses in the hands of the sheriff within the meaning of the statute. Section 58 of the Civil Code clearly states when an action is commenced. This sec-

tion of the Code was brought forward as Section 1049 of the C. & M. Digest, Section 1251 of Pope's Digest, and it was Section 27-301 of Arkansas Statutes, until amended in 1961. Prior to the amendment, the statute read: "When Commenced. 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."

In many cases, in accordance with the statute, this court held that an action was commenced when the complaint was filed, the summons issued and placed in the hands of the sheriff. *St. Louis, A & T R. Co.* v. *Shelton,* 57 Ark. 459, 21 S. W. 876; *Sims* v. *Miller,* 151 Ark. 377, 236 S. W. 828. The summons must have been delivered to the proper officer with directions to serve. *Burks* v. *Sims,* 230 Ark. 170, 321 S. W. 2d 767.

But in 1952, in the case of *Healey & Roth* v. *Huie,* 220 Ark. 16, 245 S. W. 2d 813, this court held that a suit in a transitory cause of action was not commenced until the sheriff had actually served the summons. Subsequently, Healey & Roth was followed in several cases, including *Woodruff Electric Cooperative Corp.* v. *Weis Butane Gas Co.,* 221 Ark. 686, 255 S. W. 2d 420; *Carnes, Admx.* v. *Strait, Judge,* 223 Ark. 962, 270 S. W. 2d 920; *Carpenter* v. *Baskin,* 224 Ark. 315, 273 S. W. 2d 25; *Rhinehardt* v. *Light, Judge,* 225 Ark. 1045, 287 S. W. 2d 463; *Hicks* v. *Wolfe, Judge,* 228 Ark. 406, 307 S. W. 2d 784.

The statute, however, still read that the action was commenced when the complaint was filed in the proper court and summons issued. Thus, seemingly there was a conflict between the statute and the decisions of this court. Moreover, under our decisions, regardless of how diligent a party might be in attempting to commence an action, it was within the power of the sheriff to determine when the action would be commenced.

Undoubtedly, in amending Ark. Stat. Ann. § 27-301 (Repl. 1962), it was the intention of the General Assembly to return to a litigant the power to determine when he would commence the lawsuit. If we should now

hold that the statute means the summons must be literally placed in the hands of the sheriff in a situation of this kind, we would be perpetuating the evil that the General Assembly attempted to correct. There is no surer way a litigant could get a summons to the sheriff and be able to prove the time of delivery than to send it by registered mail. Here, the petitioner did that very thing.

We hold that the summonses were placed in the hands of the sheriff, within the meaning of the statute, when the postal employee took the registered mail containing the summonses to the sheriff's office and attempted to deliver it, and upon being unable to do so, left a written notice that the registered mail was at the Post Office. It necessarily follows that petitioners' action was commenced in Pulaski County before their adversaries' action was commenced in Conway County.

Petition for Writ of Prohibition is, therefore, granted.

WARD, J., dissents.

SAVAGE *v.* HAWKINS.
BRENTS *v.* HAWKINS.

5-3591-92 391 S. W. 2d 18

Opinion delivered June 7, 1965.

Thorp Thomas, for appellant.

Gordon & Gordon and *Jack L. Lessenberry,* for appellee.

JIM JOHNSON, Associate Justice. These appeals arise from two writs of prohibition.

On October 14, 1964, appellant Leon Brents, a Conway County justice of the peace, upon receipt of an affidavit for warrant of arrest alleging that appellee Sheriff Marlin Hawkins had on May 12, 1958, committed the offense of "obtaining personal property by false pretense," issued a warrant of arrest for appellee. After service, appellee appeared before appellant and asked for a change of venue, which was denied. A petition for writ of prohibition was filed in Conway Circuit Court on October 15, 1964, and the circuit court ordered appellant to appear October 20, 1964, to show cause why the writ should not be granted.

On October 19, 1964, another Conway County justice of the peace, appellant Walter Savage, issued a warrant for appellee's arrest on an affidavit for warrant of arrest alleging that appellee had "obtained personal property by false pretense" on June 25, 1955. A petition for writ of prohibition was filed in Conway Circuit Court that same day and appellant Savage was directed to appear the following morning at 9:00 A.M. and show cause why the writ should not be issued.

The following morning, October 20, 1964, the circuit court heard both cases and granted the writs, from which come these two appeals.

For reversal, both appellants urge that the court erred in granting the writs since the justice of the peace courts had jurisdiction to hear the matters as examining courts.

Arkansas Stat. Ann. § 41-1901 (Repl. 1964) describes the offense of obtaining personal property by false pretense as follows:

"Every person, firm or corporation who with intent to defraud, cheat or avoid payment therefor, shall designedly by color of any false token or writing, or by any other written or oral false pretense, obtain a signature to any written instrument, or obtain any money, personal property, right of action, service, information or other valuable thing or effects whatever, upon conviction thereof, shall be deemed guilty of larceny, and punished accordingly."

The affidavits for warrant of arrest in the records before us describe offenses which, if timely filed and proven, would fall squarely within this statute. *Lamb* v. *State,* 202 Ark. 931, 155 S. W. 2d 49.

Arkansas Stat. Ann. § 43-1602 (Repl. 1964) provides as follows:

"No person shall be prosecuted, tried and punished for any other felony [other than capital] unless an indictment be found within three [3] years after the commission of the offense; Provided, that in cases of embezzlement of funds by an administrator, guardian, or curator the limitation shall not begin to run until an accounting has been had and such administrator, guardian, or curator has been ordered by a court of competent jurisdiction to pay over the funds and in other cases of embezzlement of trust funds the limitation shall not begin to run until the defalcation is discovered."

Clearly, the offense of "obtaining personal property by false pretense" does not fall within one of the exceptions provided in the statute of limitations. This being true, we are bound by the historic rule that penal statutes are to be strictly construed in favor of the accused and courts are not permitted to enlarge the punishment provided by the legislature either directly or by implication. *State* v. *Simmons,* 117 Ark. 159, 174 S. W. 238. It follows therefore that in felony prosecutions the state must prove the commission of the felony within three years next preceding the filing of the information or the finding of the indictment. *Oakes* v. *State,* 135 Ark. 221, 205 S. W. 305; *Willis* v. *State,* 221 Ark. 162, 252 S. W.

2d 618. See generally, *Grayer* v. *State,* 234 Ark. 548, 353 S. W. 2d 148. Unlike some of the civil statutes of limitation which are waived unless pleaded, this limitation of prosecution statute (§ 43-1602, *supra*) is jurisdictional. Under the express wording of the statute that "No person shall be prosecuted, tried and punished for any felony unless an indictment be found within three years after the commission of the offense," after three years (unless the running of the statute is tolled) a court is without power to try the case. On the face of the record it is manifest that the justice of the peace courts here were without jurisdiction to try the alleged offenses occurring in 1955 and 1958 for which warrants were issued in 1964. (See *Pate* v. *Toler,* 190 Ark. 465, 79 S. W. 2d 444; *McIlwain* v. *State,* 226 Ark. 818, 294 S. W. 2d 350.) Thus "the writ of prohibition, as here defined [Ark. Stat. Ann. § 33-103 (Repl. 1962)], is an order of the Circuit or Chancery Court to an inferior court or tribunal, prohibiting it from proceeding in a cause or matter over which it has no jurisdiction" and was properly issued.

Appellant Savage urges that the court erred in fixing the time for hearing the writ sought against him in less than two days, and relies on Ark. Stat. Ann. § 33-106 (Repl. 1962):

"For hearing and determining all such petitions [for prohibition], the Circuit and Chancery Courts shall be open at all times and upon the written application of the petitioner or any other interested party, it shall be the mandatory duty of the judge or Chancellor having jurisdiction, to fix and announce a day of court to be held no sooner than two [2] days and no longer than seven [7] days thereafter, to hear and determine the cause."

This statute is expressly mandatory. Appellant Savage should have received the minimum two days notice. However in this particular instance it would serve no useful purpose to remand this cause for further development, where as here the face of the record conclusively shows that appellant justice of the peace was clearly

without jurisdiction since the alleged offense occurred without the limitation of prosecution and there could be no further development by the circuit court.

Affirmed.

McFaddin, J., dissents.

Ed. F. McFaddin, Associate Justice (dissenting). I would reverse the Circuit Court judgment in both of these cases. One reason for my dissent is because prohibition was not the proper remedy for Sheriff Marlin Hawkins to pursue in either case. In the Brents case the additional reasons for my dissent are because of (a) the failure of the Circuit Court to allow the respondent Brents the statutory time for defense; and (b) the fact that Sheriff Hawkins filed a motion for change of venue, and thereby submitted to the jurisdiction of the Justice of the Peace Court. But I will discuss only the improper use of the writ of prohibition.

We have a long line of cases which hold that the writ of prohibition does not issue to prohibit a lower court from erroneously exercising its jurisdiction. *Bassett* v. *Bourland,* 175 Ark. 271, 299 S. W. 13; *Terry* v. *Harris,* 188 Ark. 60, 64 S. W. 2d 80; *Ritholz* v. *Dodge,* 210 Ark. 404, 196 S. W. 2d 479. When the existence or nonexistence of jurisdiction depends on contested facts which the inferior court is competent to inquire into and determine, prohibition will not be granted although the superior court should be of the opinion that the claims of fact had been wrongfully determined by the lower court. *Merchants & Planters Bank* v. *Hammock,* 178 Ark. 746, 12 S. W. 2d 421; *Crowe* v. *Futrell,* 186 Ark. 926, 56 S. W. 2d 1030; *Chapman & Dewey Lbr. Co.* v. *Means,* 191 Ark. 1066, 88 S. W. 2d 829; *Byrd* v. *Taylor,* 224 Ark. 373, 273 S. W. 2d 395.

There can certainly be no doubt that the Justice of the Peace Court has jurisdiction (a) to handle prosecutions for misdemeanors as the Savage case involved, or (b) to conduct examining trials as the Brents case involved. The only defense suggested by the appellee

in these cases is that the claimed offenses were barred by limitations; but limitations is a plea of defense. It does not deprive the Trial Court of jurisdiction but is a defense that the defendant may or may not offer, as he sees fit. Sheriff Hawkins should have offered the plea of limitations as a defense in each Justice of the Peace Court; and if the plea had been disallowed he could have then appealed to the Circuit Court.

The fact that limitations is a plea of defense is true both in civil cases[1] and criminal cases; and the plea of limitations may be made under the general plea of not guilty. *State* v. *Gill,* 33 Ark. 129; *Oakes* v. *State,* 135 Ark. 221, 205 S. W. 305. In 22 C.J.S. 1264, "Criminal Law" § 449, the general rule is stated: "Limitations must be set up at the trial to be available . . . A plea of limitations is a plea in bar, and if the statute is relied on it must be set up at the trial, either by special plea or under the general issue." It is only in cases of contempt where the alleged contempt is stale that prohibition is the proper remedy. See *Pate* v. *Toler,* 190 Ark. 465, 79 S. W. 2d 444. In all other cases the plea of limitations is a plea of defense and must be set up like any other plea in the Trial Court and not raised by prohibition.

Because of the erroneous use of the writ of prohibition by the Circuit Court, I would reverse these cases.

[1] For civil cases see those collected in West's Arkansas Digest, "Limitation of Action" § 182.

FEDERAL LIFE & CASUALTY CO. *v.* WEYER.

5-3603 391 S. W. 2d 22

Opinion delivered June 7, 1965.

Kirsch, Cathey & Brown, for appellant.

Robert Branch, for appellee.

JIM JOHNSON, Associate Justice. This appeal involves Ark. Stat. Ann. § 66-3238 (Supp. 1963), a statute allowing penalty and attorneys' fees in certain suits against insurance.

The facts are not disputed. In 1957, appellant Federal Life and Casualty Company issued a policy to appellee Zieba Weyer providing for payment of $100.00 per month for twelve months if she became totally disabled as a result of sickness. Early in 1963, appellee made a claim for benefits and was paid for a period from February to May 1963. Appellant determined that the insured had resumed work in April, 1963, and wrote her several letters demanding repayment of the last $100 payment. On October 15, 1963, appellee's attorney wrote appellant that appellee was totally disabled, enclosed medical reports from two doctors verifying the disability, and admitted that the insured had been overpaid $100, which should "be credited against the amount which you now owe her". On October 28, 1963, appellant wrote appellee's attorney that it had proof that appellee worked through July of 1963, that "benefits for total disability as the result of an illness are payable when the insured is totally and continuously disabled and under the regular care of a duly licensed physician" and, "since appellee returned to work on April 20, we feel she is not entitled to benefits after that date".

On January 10, 1964, appellee filed suit in Greene Circuit Court against appellant, alleging the existence

of the policy, that during February of 1963 appellee became totally disabled and claimed and was paid benefits by appellant, that she attempted to resume work in April and continued to attempt to work periodically until August 12, 1963, since which time appellee has been totally disabled. The complaint stated that appellant was entitled to $100 credit for the benefits paid in April; that appellee had given appellant notice of her claim which appellant refused to pay and denied liability under the policy. The complaint prayed for judgment for $400 plus any additional amounts which might accrue during pendency of the suit, plus twelve percent penalty, attorney's fee and costs.

Appellant filed a plea in abatement and answer, praying that the suit be abated until appellee filed notice of claim and proof of loss, that appellant be given a reasonable time within which to determine its position with regard to such claim, and to be permitted to file further responsive pleadings. Appellant thereafter filed its amended answer, conceding that based on a medical report it was liable to appelle for the benefits sued for, subject to credit for the $100 previously paid, and prayed judgment be rendered in accordance with its answer but that no penalty or attorney's fee be assessed. On October 16, 1964, appellant's motion for summary judgment came on for hearing. It was stipulated that the only issue was appellee's prayer for twelve percent penalty and attorney's fee. After taking the matter under advisement, on December 30, 1964, the trial court granted judgment for appellee with twelve percent penalty and attorney's fee; from which comes this appeal.

For reversal appellant urges that the circuit court erred in awarding any penalty or attorney's fee in this case.

The applicable statute reads as follows:

"§ 66-3238. Suits against insurers—Damages and attorney fees on loss claims. In all cases where loss occurs . . . and the . . . insurance company . . . liable therefor shall fail to pay the same within the time speci-

fied in the policy, after demand made therefor, such . . . corporation . . . shall be liable to pay the holder of such policy, in addition to the amount of such loss, twelve (12%) damages upon the amount of such loss, together with all reasonable attorneys' fees for the prosecution and collection of said loss; . . ."

The policy in its "Time for Payment of Claims" clause states: "Subject to due written proofs of loss, all accrued indemnities for loss for which this policy provides periodic payment will be paid monthly and any balance remaining unpaid upon the termination of liability will be paid immediately upon receipt of due written proof."

As we have seen, the policy here involved required that benefits be paid monthly. The benefits were not paid monthly—in fact benefits were not paid at all until judgment was confessed at a time subsequent to accrual of all benefits. There is no question here as to whether the amount sued for was collected.

Loss commenced August 12, 1963. Notice of the claim, together with medical reports, was given the company by appellee's attorney on October 15, 1963. The policy requires that the company, upon receipt of a notice of a claim, furnish the claimant forms for filing proofs of loss. There is no evidence that such claim forms were ever provided by appellant. An insurance company, by its conduct, may waive the requirement for proof of loss. *Farmers Mutual Ins. Co.* v. *Benniston,* 237 Ark. 768, 376 S. W. 2d 252. Further, appellant's denial of liability in its letter of October 29, 1963, was effective waiver of formal proof of loss.

It is well settled that attorney's fee and penalty attach if the insured is required to file suit, even though judgment is confessed before trial. *Equitable Life Assurance Society of the U. S.* v. *Gordy,* 228 Ark. 643, 309 S. W. 2d 330. Demand was made and liability under the contract established. The requirement of the statute being thus satisfied, *LaSalle Fire Insurance Company* v. *Jenkins,* 185 Ark. 484, 47 S. W. 2d 792, it follows that in the

absence of a showing by the insurance company that its actions come within the many exceptions to liability for the statutory penalty and attorney's fee, the judgment is affirmed.

PARKER *v.* HENDRIKS.

5-3571 393 S. W. 2d 251

Opinion delivered June 7, 1965.

[Rehearing denied September 20, 1965.]

Arnold & Hamilton, for appellant.

N. L. Schoenfeld, for appellee.

FRANK HOLT, Associate Justice. A local option election was held in Ouachita County on November 6, 1962 with results being certified in favor of prohibition. The election was promptly contested by certain wets. When the issue reached this court we dismissed the wets' appeal by a per curiam order on October 12, 1964. Their petition for rehearing was denied and our mandate was issued on November 10, 1964 and filed with the Ouachita County Circuit Clerk on November 12, 1964. The county remained wet while the election contest was pending in the courts because the filing of the contest suspended

the election results. *Hedrick* v. *Hickman,* 225 Ark. 273, 280 S. W. 2d 406; Ark. Stat. Ann. § 48-826—7—8 (Repl. 1964).

On November 3, 1964 another local option election was held in Ouachita County and the result this time was declared in favor of the wets. Thereupon the drys, appellants, promptly filed an election contest which is still pending in the Ouachita County Court. Following this the prosecuting attorney advised that as a result of the present contest the county was dry effective November 12, 1964, the date of the receipt and filing of our mandate in the previous contest, and that the various alcoholic beverage dealers in the county had sixty days in which to dispose of their stock. The appellees, the wets, then filed a petition for a declaratory judgment in the Ouachita Chancery Court and the appellants intervened. The Chancellor heard the case on stipulated facts and decreed that since it was duly certified that a majority had voted for the manufacture and sale of alcoholic beverages in the November 1964 election, that such election was determinative of the issue before the court and, therefore, the county was wet pending the outcome of the present election contest in view of Act 212 of 1957 [Ark. Stat. Ann. § 48-826—7—8)(Repl. 1964)].

On appeal appellants contend for reversal that the trial court erred in holding that the filing of the election contest by them did not suspend the result of the November 1964 election pending the final determination of the contest. We must agree with the appellants.

The case of *Hedrick* v. *Hickman, supra,* is controlling in the case at bar. There the basic issue was the same as now presented. The drys had apparently won a local option election and the wets contested the election. The wets contended that their contest suspended the election results. We agreed and in determining this contention we said:

"*On the merits the question is whether the filing of a contest can suspend the effect of a local option election until the contest is decided.* It cannot be doubted that

such a suspension was contemplated by the Thorn Liquor Law of 1935. By that act the county board of election commissioners was required to certify the election result to the county clerk. The clerk was directed to keep the certificate until the next regular term of the county court, when it became the duty of the county judge to have the certificate spread of record in his court. Ark. Stats. 1947, § 48-809. Ordinarily the dry law then became effective at the expiration of sixty days from the recording of the certificate. § 48-810. If, however, a contest were filed the law directed that the certificate not be recorded. § 48-820. It was also declared that contests should be governed by the laws applicable to the contest of any election of county officers. Ibid. The statutes so referred to permit appeals to be taken with or without supersedeas. § 3-1204. *Thus under the procedure adopted in the Thorn Liquor Law the institution of a contest suspended the effective operation of the election, not only by the withholding of the certificate from the public records but also by the authorization of writs of supersedeas on appeal.*" [Emphasis added]

However, appellees forcefully argue that Act 15 of 1955 and Act 212 of 1957 have the effect of superseding *Hedrick* v. *Hickman, supra* (1955) and the pertinent statutes construed therein. We have carefully considered both acts and neither affects our decision in that case. Act 15 of 1955 merely restricts local option elections to the general election date every two years and expressly states it is cumulative to initiated Act No. 1 of 1942 which was considered by us in *Hedrick* v. *Hickman, supra.* Act 212 of 1957 [Ark. Stat. Ann. § 48-826—7—8] merely provides that when a local option election is favorable to the drys the retail dealers shall have sixty days to dispose of their stock after the final determination of the result of the election and that a final determination, when the election is contested, means the date of the issuance of the mandate by the court finally determining the election contest. So it must be said that there is nothing expressly or by implication in this act which repeals the election laws governing local option contest procedure as construed by us in *Hedrick* v. *Hickman, supra.* Neither act

covers anew the entire subject considered by us in that case. Nor are these two acts in irreconcilable conflict with the statutes on the subject before us.

Appellants also contend that pursuant to Ark. Stat. Ann. § 48-827 Ouachita County became legally dry not later than November 10, 1964, the date of the issuance of the mandate of this court finally determining the November 1962 election contest between the wets and the drys.

However, for good cause shown it is directed that an immediate mandate be issued and that appellees be allowed sixty days from the date of the issuance of this mandate in which to dispose of their stock. This does not prejudice the right of appellees to file a petition for rehearing.

The decree is reversed and the cause remanded with directions to enter a decree not inconsistent with this opinion.

Reversed and remanded.

IZARD *v.* ARK. SAVINGS & LOAN ASSOCIATION BOARD

5-3583 393 S. W. 2d 245

Opinion delivered June 7, 1965.

[Rehearing denied September 20, 1965.]

Thomas Harper, for appellant.

William H. Bowen, for appellee.

FRANK HOLT, Associate Justice. Appellants bring this appeal from a judgment of the Circuit Court of Pulaski County affirming a decision of the Arkansas Savings and Loan Association Board denying appellants' application for a charter to do business as a savings and loan association in Van Buren, Crawford County, Arkansas.

Ark. Stat. Ann. § 67-1824 (Supp. 1963) [Act 227 of 1963] requires that before approving a charter application the Board must affirmatively find: (1) that all the prerequisites for the approval of a charter set forth in the act have been compiled with; (2) that the applicants are financially fit and qualified as to integrity and responsibility; (3) that there is a public need for the proposed association and prospects for its successful operation exist; and (4) that the granting of the application would not unduly harm any existing savings and loan association or other financial institution. The Board conducted a hearing and found from the evidence adduced that appellants had met all the enumerated requirements except the showing of a public need for the proposed association and that the venture would be successful. Accordingly, the application was denied. The findings of the Board are conclusive if supported by substantial evidence. Ark. Stat. Ann. § 67-1811. On appeal appellants contend for reversal that there is no substantial evidence to sustain the Board's denial of the application.

The granting of the application was protested by five building and loan associations of Fort Smith, Arkansas. They presented two witnesses who are officials from those organizations. They testified, *inter alia,* that in their opinion there was no need for a savings and loan association in Van Buren and if one were chartered, it had no prospect of a successful future. It was stipulated by the parties that other officials of these organizations would corroborate this testimony. A careful review of

the record reflects that the testimony of the protestants is largely a matter of conclusions without a sufficient or satisfactory explanation of the facts upon which the conclusions or opinions are based. We have held that such evidence is insubstantial in nature. *Arkansas State Highway Comm.* v. *Byars,* 221 Ark. 845, 256 S. W. 2d 738; *Couch* v. *Rockafellow,* 205 Ark. 1153, 172 S. W. 2d 920. See, also, *Hawkins* v. *Celebreeze,* 210 F. Supp. 351 (Western Dist. Arkansas 1962).

Appellants presented numerous local witnesses in behalf of their application. These witnesses were representatives from banking, insurance, real estate, farming, city officials, the chamber of commerce, school officials and other professions. They testified there was a definite need for the proposed facility in Van Buren and Crawford County although they admitted they had no "quarrel" with the protestants. It is undisputed there is no savings and loan association in Van Buren [population 6,787, 1960 census] or Crawford County [population 21,318, 1960 census]. The five protestants are located in Fort Smith in an adjoining county five miles distant across the Arkansas River. The next nearest savings and loan association is located in Clarksville in Johnson County which is 55 miles distant. There was evidence that ten savings and loan associations are being operated successfully in the state in various cities having considerably less population than Van Buren. In one of these smaller cities there are two successful savings and loan associations. There was evidence that Van Buren has one of only four of the Port Authorities in Arkansas and is enjoying an unusual period of growth with the building construction in the past year being phenomenal. Since 1958 the two banks in the county [Van Buren and Alma] have doubled their business operations. There has been a steady increase in school enrollment requiring an expansion of the school facilities. The tenor of appellants' evidence is that the proposed savings and loan association is needed and would be a successful venture.

We are of the opinion that the appellants met the requirement that a public need existed for the proposed

association in Van Buren and Crawford County, that it would be a successful operation, and, further, there is no substantial evidence to the contrary.

The judgment is reversed and the cause remanded to the circuit court with directions to enter a judgment requiring the Board to grant the application.

Reversed and remanded.

5-3617 393 S. W. 2d 616

Opinion Delivered September 13, 1965.

[redacted]

Earl J. Mazander, for appellant.

Dorsey D. Glover, for appellee.

CARLETON HARRIS, Chief Justice. This appeal relates to the dismissal of a Malvern police officer, Clyde Warwick, appellant herein. Warwick was notified on November 20, 1962, by the Civil Service Commission that he had been relieved of his duties because of insubordination, the charge alleging that he did not report for regular duty with the Police Department from Monday evening, November 5, 1962, until Friday evening, November 9, 1962. Subsequently, the charges were amended to include conduct unbecoming an officer, violation of Section 4, Article 3, of the Civil Service Rules and Regulations (parking patrol car and leaving post of duty without being relieved, or without notifying a superior officer), and violation of Section 7, Article 3 (failure to pay debts).

Following a request by Warwick, the commission held a hearing, and, after completion of the testimony, found that the evidence was sufficient to sustain the charges made against appellant. He was thereupon dis-

charged from the Malvern police force. In due time, Warwick appealed these findings to the Hot Spring County Circuit Court, which heard the case on the record taken before the commission, and also additional evidence which was offered before the court. At the conclusion of this hearing, the Circuit Court held that Warwick had been absent without leave a sufficient number of times to warrant disciplinary action, and found that the ruling of the Civil Service Commission should be affirmed. From the judgment so entered, appellant brings this appeal.

Let it first be stated that appeals from a Civil Service Commission are reviewed by the Circuit Court on the record presented before the commission and any additional competent evidence that may be offered. On appeals from the Circuit Court to this court, we review the entire record *de novo,* as in chancery cases. *Campbell* v. *City of Hot Springs,* 232 Ark. 878, 341 S. W. 2d 225; *City of Little Rock* v. *Tucker,* 234 Ark. 35, 350 S. W. 2d 531. Appellant argues that we can only concern ourselves with whether he was absent from duty without leave from the proper authorities a sufficient number of times to warrant disciplinary action, since that was the only finding made by the Circuit Court, *i.e.,* the court made no specific findings affirming the commission on the other charges, and appellant apparently feels that the net result of the Circuit Court's order is to find him innocent on these particular counts. From the cases just cited, it is obvious that appellant is in error in this assertion, as this court reviews the entire record *de novo.*

Actually, the abstract of the record is insufficient in that all proceedings and evidence taken before the commission have not been abstracted, and we would be justified in affirming the trial court on that basis. Appellant only abstracted the evidence relating to absence from duty without proper leave, but we think this evidence alone was sufficient to justify that tribunal in upholding the commission.

While the particular charges relative to failure to report for duty relate only to the period from November

5 to November 9, 1962, the record reflects some twenty instances, commencing on August 1, and running until November 16, when appellant either did not report at all, or went home while on duty. An excuse, or reason, was given for absences on some of these occasions, but in by far the greater number of instances, no explanation is shown for the absence. Warwick contends that most of the absences were due to neck and back injuries that he testified had been sustained in October, 1960, while making an arrest, and which, he stated, continued to incapacitate him. During the specific November period here in question, appellant's evidence reflects that his wife called the Police Department on Monday, November 5, and Tuesday, November 6, advising that her husband was sick and would not be at work (though this second call is disputed under the evidence). Admittedly, neither the chief, nor any other officer, was notified of appellant's whereabouts on Wednesday, November 7, or Thursday, November 8. Warwick stated that he should have reported, "but I was on the bed and couldn't get up." Apparently, the department had been rather lenient with Warwick as to past absences, and the subsequent absences, wherein no notice was given to the Police Department that appellant did not intend to report for work, together with leaving his post, we think, justified disciplinary action. With reference to his leaving for three or four hours while on duty, appellant stated, "The reason I didn't report in sometimes the chief wasn't in and every hour I was off was on account of this injury."

Testimony reflected that on one occasion Warwick reported that he had to go to the office of his physician in Malvern, Dr. White, for a treatment, but within five minutes, he was seen at the Barlow Hotel,[1] drinking coffee. There was testimony from one of the officers that, on another occasion, appellant left his police car (parking it at the station), and was gone from 2:30 A.M. until 5:00 A.M. without advising where he could be located. This was disputed by Warwick, but the court heard and saw these witnesses testify, and was in a bet-

[1] The Chief of Police complained that Warwick spent too much time at the Barlow Coffee Shop.

ter position to determine which parties were correctly relating the facts. Other alleged instances of neglect of duty appear in the transcript, but no good purpose would be served by detailing them. Although, as stated, appellant contended that illness was responsible for his absences, it is noticeable that while six physicians [2] are mentioned by Warwick as having examined or treated him, not one line of evidence was offered by any doctor (or any other person) to corroborate his testimony that he was prevented from working because of his physical condition. It is, of course, particularly essential that a police officer regularly and properly report his whereabouts, for the very nature of his duties requires that this be done. When murder, burglary, or other felony is committed, prompt pursuit and early investigation are necessary; efficient law enforcement demands timely and immediate action. This cannot be provided if officers, supposedly on duty, cannot be located.

The record also reflects that Warwick had permitted himself to become deeply involved in debt, even to the extent of finally borrowing money from a mail-order finance company in Omaha, Nebraska.[3] One of the charges against appellant was violation of Article 3, Section 7, which provides that "Every member of the Police Department shall at all times pay their debts promptly. Failure to do so shall make a member subject to dismissal." Of course, circumstances, over which an individual would have no control, could place one in debt, but, in the main, the bills owed by appellant did not appear to be due to the purchase of "necessities." [4]

All in all, a reading of the transcript clearly conveys the impression that appellant lacked interest in his employment, and we agree with the trial court that the findings of the commission should be upheld.

Affirmed.

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[2] Drs. White, Jordan, Murphy, Lester, McHaney and Thompson.

[3] Interest rates were described as "high."

[4] He did, however, state that his reason for spending the "uniform allowance," given by the department, for other than the allotted purpose, was that his wife had to go to a specialist in Little Rock.

Opinion Delivered September 13, 1965.

[redacted]

No brief filed for Appellant.

Bruce Bennett, Atty. General, By: *Joe Bell, Asst. Atty. General,* for appellee.

ED. F. MCFADDIN, Associate Justice. Appellant James S. Nelson was convicted of robbery (Ark. Stat. Ann. § 41-3106 *et seq.* [Repl. 1964]) and sentenced to imprisonment. From that conviction there is this appeal. The motion for new trial contains five assignments which may be summarized into three points now to be discussed.

I. *Sufficiency Of The Evidence.* This issue is presented by Assignments 1 to 3, inclusive; and there was ample evidence to support the verdict. There is no necessity to detail the evidence, in view of our holding on the third point in this Opinion.

II. *Time To Prepare For Trial.* The information was filed against the appellant on March 15, 1961, and he was arrested that day and admitted to bail. Several at-

torneys appeared for defendant, and trial of the case was continued by consent from time to time until June 15, 1964. Thus, the appellant had more than three years to prepare for trial and cannot now be heard to complain that his finally chosen counsel was "rushed into a trial."

III. *The Voluntariness Of The Confession.* This is the point that has given us most serious concern. The trial of the appellant in the Circuit Court was on June 15, 1964, and the Circuit Court proceeded under rules that had been held proper by the Supreme Court of the United States in *Stein* v. *New York,* 346 U. S. 156, 97 L. ed. 1522, 73 S. Ct. 1077. The Circuit Court, in line with our holdings,[1] submitted to the jury the issue of the voluntariness of the confession along with the issue of guilt or innocence. But on June 22, 1964, the United States Supreme Court overruled its own holding in the Stein case, and held that the issue of the voluntariness of the confession could not be initially submitted to the jury along with the issue of guilt or innocence. This about-face holding of the United States Supreme Court was in the case of *Jackson* v. *Denno,* 378 U. S. 368, 12 L. ed. 2d 908, 84 S. Ct. 1774, 1 A. L. R. 3d 1205.

Naturally, the holding in *Jackson* v. *Denno* was not anticipated by the Trial Court in the case at bar; and yet, we must now follow the United States Supreme Court holding in the case of *Jackson* v. *Denno.* The result is, that in cases tried after *Jackson* v. *Denno* there must be a finding that the confession is voluntary before the guilt or innocence of the defendant is submitted to the jury trying such issue.[2] But in *Jackson* v. *Denno* the United

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[1] Some of our cases on such procedure are listed in the case of *Nolan and Guthrie* v. *State,* 205 Ark. 103, 167 S. W. 2d 503.

[2] The Majority Opinion in *Jackson* v. *Denno* had this language: "It is both practical and desirable that in cases to be tried hereafter a proper determination of voluntariness be made prior to the admission of the confession to the jury which is adjudicating guilt or innocence. But as to Jackson, who had already been convicted and now seeks collateral relief, we cannot say that the Constitution requires a new trial if in a soundly conducted collateral proceeding, the confession which was admitted at the trial is fairly determined to be voluntary." For a later case involving the holding in *Jackson* v. *Denno,* see *Boles* v. *Stevenson,* 379 U. S. 43, L. Ed. 2d 109, 85 S. Ct. 174. For some comments on *Jackson* v. *Denno,* see: 51 ABA Journal (Feb. 1965) p. 173; 18 Vanderbilt Law Review 237; and 78 Harvard Law Review 211.

States Supreme Court stated that in a case tried before June 22, 1964 the issue of the voluntariness of the confession could be subsequently determined.[3]

The Attorney General in his splendid brief in this Court has correctly asked that this cause be remanded for determination of the voluntariness of the confession in line with the holding of the United States Supreme Court in *Jackson* v. *Denno*. The Attorney General says:

"Even though there is sufficient evidence to sustain the verdict, defendant is entitled to a hearing in the Circuit Court of Pulaski County, Criminal Division, to determine whether or not his confession was voluntary. If it is found that the confession was voluntary, the decision below should be affirmed. If the confession is found to be involuntary, . . . the defendant [should] be given a new trial to determine his guilt or innocence, without evidence of the admissions being considered."

Accordingly, we remand this cause to the Trial Court to reinvest it with jurisdiction to proceed in a manner not inconsistent with this Opinion.

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[3] The Majority Opinion in *Jackson* v. *Denno* had this language: "It does not follow, however, that Jackson is automatically entitled to a complete new trial including a retrial of the issue of guilt or innocence. Jackson's position before the District Court, and here, is that the issue of his confession should not have been decided by the convicting jury but should have been determined in a proceeding separate and apart from the body trying guilt or innocence. So far we agree and hold that he is now entitled to such a hearing in the state court. But if at the conclusion of such an evidentiary hearing in the state court on the coercion issue, it is determined that Jackson's confession was voluntarily given, admissible in evidence, and properly to be considered by the jury, we see no constitutional necessity at that point for proceeding with a new trial, for Jackson has already been tried by a jury with the confession placed before it and has been found guilty. True, the jury in the first trial was permitted to deal with the issue of voluntariness and we do not know whether the conviction rested upon the confession; but if it did, there is no constitutional prejudice to Jackson from the New York procedure if the confession is now properly found to be voluntary and therefore admissible. If the jury relied upon it, it was entitled to do so. Of course, if the state court, at an evidentiary hearing, redetermines the facts and decides that Jackson's confession was involuntary, there must be a new trial on guilt or innocence without the confession's being admitted in evidence."

Opinion Delivered September 13, 1965.

[Rehearing denied October 11, 1965.]

Holt, Park & Holt, for appellant.

Bruce Bennett, Atty. General, By: *Beryl F. Anthony, Jr., Asst. Atty. General,* for appellee.

PAUL WARD, Associate Justice. Appellant, Fred Nolen, together with two accomplices was indicted for robbing Robert Fox on May 11, 1963. The accomplices were Irvin Steele (alias Irvin Perry) and Wayne Ogles. Steele and Ogles pleaded guilty soon after the robbery occurred. Steele was given twenty one years in the penitentiary and Ogles was given a three year suspended sentence. Appellant pleaded not guilty, was tried and convicted on December 15, 1964, and was sentenced to five years in the penitentiary.

Before examining appellant's contentions for a reversal we deem it expedient to set forth a brief description of some of the *parties* involved, and also a *summary* of pertinent facts.

Parties. Fred Nolen (appellant) is forty four years old, is a very substantial farmer near Paragould, he has a wife and family, and has never before been convicted of any crime. *Irvin Steele* (alias Irvin Perry) admits he

has previously been convicted of felonies five or six times, and his wife is the bartender at Wink's Tavern in Paragould. *Wayne Ogles* was seventeen years of age in 1963; he had known Steele for about three years during which time they had been close associates; he admits they had been together on four or five "jobs"; and, he admits he has pleaded guilty to four or five criminal charges but has never been punished. *Robert Fox* (who was robbed) is a young man who lives with his parents a few miles from Paragould. He admits to having been convicted of such offenses as drunkenness, driving while drunk, disturbing the peace and fighting in Arkansas, Texas, Iowa, Arizona, Idaho and Missouri; and, he admits to having been convicted three times since he was robbed on May 11, 1963.

Summary of Facts. The following facts are not in dispute. About 8 p.m. appellant left his farm and drove unaccompanied to Wink's Tavern in Paragould. Here appellant joined Fox and Steele and they all drank some beer. Appellant was not acquainted with Fox but did know his father. Later that evening Fox stated he would have to hire a taxi to take him home. Steele offered to take him home but Fox refused his offer and then accepted appellant's offer to take him home. Around midnight the three left the Tavern, and Fox and appellant started home in appellant's car. Each had purchased two cases of beer which they took with them. When appellant and Fox were a short distance out of Paragould they stopped to drink some beer. Each say they stopped at the suggestion of the other. Presently a man, recognized by Fox to be Steele, with a stocking over his face and with the aid of a toy gun, forced appellant and Fox to give him all the money they had. After the robbery they proceeded homeward, but just before they reached appellant's home Fox accused appellant of framing the robbery with Steele. Then they drove on to Fox's home grabbed the key to appellant's car, ran toward the house and yelled for his father to bring out the shotgun. A fight ensued, and appellant was arrested for fighting and having too much beer in his car.

A careful reading of the entire record and a study of the pertinent decisions of this court presents a close and troublesome question regarding appellant's guilt, but we have reached the conclusion that there is substantial, competent evidence to support the verdict of the jury.

The basic statute here involved is Ark. Stat. Ann. § 43-2116 (Repl. 1964) which, in pertinent part reads:

"Testimony of accomplice: A conviction cannot be had in any case of felony upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows that the offense was committed, and the circumstances thereof."

Steele testified that he and appellant conspired to rob Fox. He further testified that after the robbery the money which was taken from appellant was returned to appellant's wife. This was not denied by her. Ogles' testimony was to the same effect. Ogles testified that he sat in the car while Steele went down the road a short distance and robbed Fox. He further testified that Steele gave him part of the money and that he then went with Steele to appellant's house where Steele left the money he had taken from appellant. However, under the statute just quoted the above testimony alone is insufficient to sustain the verdict. It must be corroborated by other independent facts and circumstances tending to prove appellant entered into a plan with Steele to rob Fox.

In the case of *Thompson* v. *State,* 207 Ark. 680, 182 S. W. 2d 386, this Court, in commenting on the above mentioned statute and quoting from *Underwood* v. *State,* 205 Ark. 864, 171 S. W. 2d 304 had this to say:

"The corroborating testimony required by this statute must be of a substantial character which, of itself and independently of the statement of the accomplice, tends in some degree to connect the defendant with the commission of the crime, although such evidence need not in itself be sufficient to support a conviction."

There is in the record other independent evidence which, we think, is sufficient to sustain the jury's verdict.

Lola Dill Mitchum testified that shortly before the robbery took place she sat at the same table with appellant and Steele in Wink's Tavern and heard them discuss a plan to rob Fox.

Q. "Knew him (Steele) well enough, he and Fred let you sit (at) the table while they planned the robbery?

A. "Yes, sir."

Q. "Did this defendant and Steele have a discussion about how they were going to perpetrate the robbery?

A. "Said, meet them out on the road as they went home.

Q. "Who?

A. "For Steele to meet Fox and Nolan on the road as they were going home.

Q. "Mr. Nolan was going to take Fox home?

A. "They were riding together, my understanding."

Later on, after the robbery, the same witness testified about a conversation she heard between appellant and Steele:

Q. "Who?

A. "Fred Nolan and Irving Steele.

Q. "I see.

A. "About the $135.00, because he said, 'It will take what I got from Robert Fox to pay an attorney to keep from winding up in jail.'

Q. "Any mention in the conversation about how much money Mr. Fox was robbed of?

A. "Yes. $170.00.

Q. "$170.00 you say, Fred Nolan and Irving Steele were arguing among themselves, about how much money he got?

A. "Yes."

Also, Fox testified appellant insisted on stopping at the place where the robbery occurred. This testimony was disputed by appellant, but the jury had a right, of course, to choose which one to believe. The fact that appellant's wife did not deny she received the money from Steele was a circumstance which the jury had a right to consider.

As previously pointed out this is a close, difficult case, but in cases of this nature we have recognized that much latitude is sometimes necessary in the introduction of testimony in order to prove conspiracy.

In *Hearne* v. *State,* 121 Ark. 460, 181 S. W. 291, the following language is found on page 472:

"Conspiracies are often difficult to prove by direct testimony and rarely can any express understanding or agreement be shown, and the law does not require that it shall be. Large latitude is allowed, necessarily, in proof of a conspiracy, and the jury should be permitted to have before them all the facts which will enable them to come to a correct conclusion. Much discretion is left to the trial court in the admission of testimony tending to establish the fact and if all the evidence shows that a conspiracy actually existed, it is not material whether the conspiracy is established before or after the detailing in evidence of the acts and declarations of the conspirators. *Easter* v. *State,* 96 Ark. 629, 132 S. W. 924; *Parker* v. *State,* 98 Ark. 575; *Chapline* v. *State,* 77 Ark. 444."

Finding no error the judgment is affirmed.

Holt, J., not participating.

Opinion Delivered September 13, 1965.

[redacted]

Moore & Webber, for appellant.

Bruce Bennett, Atty. General, By: *Beryl Anthony, Jr., Asst. Atty. Gen.,* for appellee.

SAM ROBINSON, Associate Justice. The appellant was convicted on the charge of burglary. On appeal she contends, first, that the Court erred in permitting a certain hat to be introduced in evidence; and, second, that there is no substantial evidence that appellant entered Eula's Grocery and Market, where the burglary is alleged to have occurred, with the intention of committing larceny.

Ark. Stat. Ann. § 41-1001 (Repl. 1964) provides: "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."

Under the provisions of the foregoing statute, if the appellant entered the store with the intention of committing larceny, she is guilty of the crime of burglary.

About 11 A.M. on the morning the crime is alleged to have been committed, the appellant, accompanied by a

man dressed in dark clothes and wearing a small-brim hat, went into a restaurant near Eula's Grocery and Market and ordered breakfast. A short time later, a man wearing dark clothes and a small-brim hat went into Eula's Grocery and Market and asked for baby food. When told that the baby food was located at the back of the store, he stated that he could not read and, therefore, needed help in getting it. On the representation that he could not read, Mrs. Cook, the clerk in the store and the only person in the store at the time, went to the back thereof with the man to help him select the baby food.

Mr. Harold Porterfield, a State Policeman, who was not on duty at the time, but was preparing to go squirrel hunting, went into the store. He saw the appellant lying on her stomach on the floor of the store with something white in her hand (this later proved to be a check). He immediately realized that she was in the act of committing a larceny and ordered her to stand up and put up her hands. Thereupon, the man in the back of the store, supposedly selecting baby food, attempted to run over Porterfield. The policeman tried to hold both the man and woman, but the man got away after losing his hat.

The hat was similar to the one worn by the man who had breakfast with appellant that morning, and was admissible in evidence as a circumstance going to prove that he was acting in concert with appellant when he inveigled Mrs. Cook to the back of the store in order to give appellant an opportunity to enter the store and commit a larceny.

When Mrs. Cook came back to the front of the store, she saw appellant drop something into the wastebasket; it was $27.00 and a check for $8.00 which had been taken from Mrs. Cook's purse that was lying under the counter near where the appellant was lying on her stomach when first seen by Officer Porterfield.

The evidence is substantial to the effect that appellant entered the store with the intention to commit larceny, and is, therefore, guilty of burglary.

Affirmed.

Opinion Delivered September 13, 1965.

Rex W. Perkins and *James E. Evans,* for appellant.

Hugh R. Kincaid, for appellee.

JIM JOHNSON, Associate Justice. This appeal is from a conviction for disturbing the peace and assault and battery.

Appellant Richard Coger was arrested on December 4, 1964, on a warrant issued by the Fayetteville municipal clerk on an affidavit for warrant of arrest made by a private individual. After making bond, appellant appeared in municipal court on January 7, 1965. He moved that the prosecuting witness be required to post a cost bond [under Ark. Stat. Ann. § 44-301 (Repl. 1964)], whereupon the city attorney of appellee City of Fayette-

ville, after asking leave of court, filed an information against appellant on the same charges. The municipal court then proceeded to trial and appellant, after pleading not guilty, was convicted of the misdemeanors. On appeal to Washington Circuit Court, on March 9, 1965 appellant again moved to require a bond of the prosecuting witness, to quash the information and warrant and to quash the jury panel. These motions were denied. The circuit court jury found appellant guilty of disturbing the peace and assault and battery, from judgment on which comes this appeal.

Appellant urges for reversal that the court erred in failing to grant his motion to quash the warrant and information.

Arkansas Stat. Ann. § 44-301 (Repl. 1964) provides: "In all prosecutions and cases less than felonies in courts of Justices of the Peace and in other inferior Courts, the prosecutor, or some person for him, shall enter into bond, with good and sufficient surety, for the payment of all costs which may accrue in said prosecution." This court in *Payne* v. *State,* 124 Ark. 20, 186 S. W. 612, held the terms of this statute to be mandatory. However in *Thebo* v. *State*, 161 Ark. 619, 256 S. W. 381, the word "prosecutor" was in effect held to mean the prosecuting or complaining witness and was not applicable to a sheriff. Clearly the statute has no application to law enforcement officials in the performance of their duties; in fact, § 44-305 goes even further and provides that the Justice may permit a private individual who has been maltreated to prosecute without giving the bond. Obviously the evil the statute seeks to reach is capricious prosecution by persons unlearned or unskilled in the law or its enforcement. Thus the municipal court's error in failing to require a cost bond (in the absence of a finding of maltreatment suffered by the affiant so as to constitute the exception provided for in § 44-305) was cured by the filing of the information by the city attorney prior to trial.

It is undisputed that appellant was actually before the court on the earlier warrant when the information was filed immediately prior to the municipal court trial at

which time appellant was informed of the state charges against him. The issuance of an additional warrant at that time to compel appellant's presence to answer the charges against him when he was at the moment present for the purpose of answering the identical charges contained in the information would have been a redundant gesture.

We have held repeatedly that a defective warrant, and even the absence of a warrant, is no basis for overturning a conviction. *Perkins* v. *City of Little Rock,* 232 Ark. 739, 339 S. W. 2d 859. See also *Thebo* v. *State, supra; Blakely* v. *State,* 194 Ark. 276, 108 S. W. 2d 477; and *Mayfield* v. *State,* 160 Ark. 474, 254 S. W. 841.

Appellant's principal point urged for reversal is that the circuit court erred in failing to strike the jury panel on appellant's motion.

When trial in circuit court commenced on March 9, 1965, appellant determined on *voir dire* that none of the jury panel had registered under the voter registration procedures prescribed by Amendment 51. Appellant moved to quash the entire panel for the reason that they were not at that time qualified electors under the laws of the State of Arkansas and in particular Amendment 51 to the Constitution, which motion was overruled by the court.

Arkansas law provides that jurors be electors and formerly possession of a current poll tax receipt was requisite to be a qualified elector. In 1964 the voters of Arkansas adopted Constitutional Amendment 51, "Arkansas Amendment for Voter Registration Without Poll Tax Payment." Amendment 51 became effective January 1, 1965, with the proviso that persons who were qualified electors as of December 31, 1964, should be permitted to vote in any elections held before March 1, 1965. Amendment 51 was adopted November 3, 1964, and the drafters obviously contemplated that voter registration machinery would be in operation by March 1, 1965. Such was not the case. Litigation over several aspects of the amendment had to be terminated before registration

could begin or the registration forms even be printed. See *Faubus* v. *Fields,* 239 Ark. 241, 388 S. W. 2d 558. When it became apparent that this pending litigation would prevent registration of voters for some months, the legislature, then in session, passed various acts such as Act 187 and Act 126 to bridge this gap. Act 187 on special elections is not pertinent or under consideration here; Act 126 is. This act, entitled, "An Act to provide interim qualifications for Arkansas citizens to be qualified jurors between the dates of March 1, 1965, and October 1, 1965, . . ," provides simply that all persons who are otherwise qualified under applicable statutes to be grand or petit jurors and who have paid a poll tax between October 1, 1963 and October 1, 1965, are declared to be eligible grand or petit jurors.

Appellant contends that the legislature is without power to change the qualifications for electors set forth in Amendment 51, and thus this jury panel ceased to be qualified as such after March 1, 1965, although they had been qualified at the beginning of the court term prior to March 1st; in essence, that such legislation is clearly unconstitutional.

Amendment 51 does not spell out qualifications for jurors, nor have we been directed to *any* part of the Arkansas Constitution that does. Qualifications of jurors are regulated by statute. Examination of the relevant statutes and Act 126 convinces us that Act 126 of 1965 is valid legislation and an effective means of ensuring the continuity of justice and our precious jury system during this interim period.

Affirmed.

5-3621 393 S. W. 2d 620

Opinion delivered September 13, 1965.

[redacted]

W. K. Grubbs, Sr., for appellant.

Robert M. Smith, for appellee.

FRANK HOLT, Associate Justice. This is an appeal from a probate court order allowing the claim of appellee against the estate of the decedent, Lamar Grisham. The appellants are co-executors of the estate. Appellee filed his claim against the estate for: "Balance Due On Note Covering Merchandise Purchased By Lamar Grisham From Joe B. Baker.

Balance on note	$3,117.98
Interest accumulated to June '62	2,548.64
Total of claim	$5,666.62".

The claim was seasonably filed within the statutory period of six months. Ark. Stat. Ann. § 62-2601 (Supp. 1963). The executors refused to pay the claim and when the matter was set for hearing the court directed the claimant to amend his claim. No note was filed with the claim. The claimant then filed his amended claim which indicates that according to an audit by Wm. C. Clement, a Certified Public Accountant, as of June 24, 1953 there was a balance of $5,742.98 due from decedent to appellee on an open account instead of a note. The total amount of the amended claim was $5,507.77 after applying credits and interest. This amendment was filed after the expiration of the six months allowed for filing of claims.

The appellants responded stating the original claim was on a note which had long since been paid and that the amendment set up a new claim on an open account and being a changed and different claim was barred since it was filed after the six months time allowed for the filing of claims against the estate and, further, pleaded the three-year statute of limitation.

The court held that the amended claim did not state a new cause of action but related back to the original filing of the claim and was not barred by the statute of nonclaim nor the three-year statute of limitation. The court found that according to the competent evidence, including the records of the decedent, there remained due to the appellee the sum of $4,547.23 as principal and interest.

On appeal appellants contend that the amended claim constituted a new cause of action and was barred by the statute of nonclaim. Ark. Stat. Ann. § 62-2601. Appellants are correct if the amended claim is a new cause of action. In support of their position appellants rely upon *Shelton* v. *Harris,* 225 Ark. 855, 286 S. W. 2d 20. We do not consider this case to be analogous to the case at bar for in the *Shelton* case we said the amendment asserted a cause of action upon a separate and different contract. In the case at bar the original claim and the amended claim clearly arose out of the same transactions and only one contract was involved.

In the instant case the decedent purchased from appellee a butane gas business in 1948 and in 1952 completed payment of the purchase price which was evidenced by certain notes. The claim in question is predicated upon the purchase of various items of merchandise by decedent not included in the original purchase price. Mr. Clement, the CPA, testified that as of June 24, 1953 the decedent owed appellee $5,742.98 and that the decedent assisted him in making an inventory and audit of decedent's and appellee's transactions. Furthermore, the decedent appeared to be pleased with the audit and paid one-half the cost as did appellee. It is significant that the $3,117.98 principal balance allegedly due in the *original claim* was apparently determined by deducting $2,625.00 of undisputed cash credits from the $5,742.98 balance balance due as reflected by the June 1953 audit.

In the case at bar the amended claim was not a new cause of action but was merely a clarification of the original claim which contained allegations upon which the amended claim was predicated. Therefore, it related back to the original filing of the claim. *Bridgman* v. *Drilling,* 218 Ark. 772, 238 S. W. 2d 645; 34 C.J.S. Executors and Administrators § 417 f.

Appellants' assertion that the claim is barred by the three-year statute of limitation is of no avail since a payment was made on the account within three years of the filing of the original claim.

Appellants also urge that there is no competent evidence to prove either the original or the amended claim. There was ample competent proof submitted by the claimant, some of which consisted of the business ledger sheet of the decedent. Such records, made in the regular course of his business, are admissible evidence and not in violation of the Constitution of Arkansas, Schedule, § 2, known as "the dead man's statute". *Pierce* v. *Pierce,* 236 Ark. 412, 366 S. W. 2d 276. In addition to decedent's records and the contract of purchase which provides for the payment of interest, there was the testimony of Mr. Clement, the CPA, Mr. Gober, the executor and decedent's book-

keeper, and Mrs. Baker, appellee's wife. The testimony of these individuals was admissible since none of them were parties to the transactions involved in the disputed claim. *Mabry* v. *Corley,* 236 Ark. 306, 365 S. W. 2d 711.

Certainly we cannot say that the findings of the trial court are against the preponderance of the evidence. Affirmed.

5-3625 393 S. W. 2d 861

Opinion delivered September 20, 1965.

[redacted]

W. Q. Hall, for appellant.

James R. Hale, for appellee.

CARLETON HARRIS, Chief Justice. This is a will contest. Cora Wilson, a resident of Huntsville, executed her will on January 27, 1961, and died on June 13, 1963. The will was admitted to probate by the Probate Court of Madison County, and appellees, in due time, filed a petition contesting the provisions of Item 16 of the instrument. Numerous bequests are provided in prior sections, but are not at issue here. The contested provision is as follows:

"I direct that the rest and residue of the assets of my estate be used to finance the construction and completion of a Church House (which at this time has the foundation completed) at the Wesley Cemetery at Wesley, Arkansas, along with the installation of a reasonable number of seats in said Church House and I direct that Mr. Boyd Roberts of Huntsville, Arkansas, be given preference to do construction of such building and said Executrix is to contract with him for the construction of such building as such Executrix sees fit, and such is to be built, after the above bequests, only if and under the express conditions that said Church House be available

for any and all denominations and, further, that it be designated and called the 'Robert Wilson Memorial Church' and, provided further, that the costs of said completion shall not exceed the value of that portion of my estate which I have herein provided for that purpose."[1]

Item 17 sets out that a piano, owned by Mrs. Wilson, shall be placed in the church, when the building is completed, and shall become a part of the church property. Item 18 reads as follows:

"If any or all of the above bequests should fail or lapse or be found invalid for any reason, I devise and bequeath the rest and residue of my estate to my four nephews by marriage, Noid Wilson, Leo Wilson, Earnest and Clyde Wilson, in equal parts, it being my main and one desire that said Church be built, but in the event that it not be for any reason, then I desire that my said nephews by marriage have the rest and residue of my estate."

The background of this litigation is as follows:

R. B. Wilson purchased lands (containing the acre here in question) in 1915 from J. A. Wilson and other Wilson heirs. Subsequently, R. B. Wilson married Cora, and in 1944 conveyed one acre to the Wesley Memorial Chapel and Elbert Mitchell[2] for the following purposes:

"That all Christian Denominations or Organizations may have the free use of said building for such purposes and shall arrange by and through the trustee, above named, his successors and assigns and the Christian Organizations who desire to conduct services in said building, the day and date which each Christian Organization, aforesaid, shall conduct their services in said building and providing that there be no conflict between the day and dates of said services. It is further intended

[1] There is no reference to any particular amount, or portion of the estate, for the construction of the building, at any place in the will.

[2] Mitchell was a trustee of the chapel. While it seems to have been understood that a building was to be constructed on the one acre, no specific direction to this effect is included in the deed. Subsequent provisions quoted in the body of the opinion make clear that this was to be done.

that said buildings may be used in which to conduct funerals and general community gatherings. That no church nor organizations, as above defined, shall have the exclusive right to the use or occupancy of said building which would conflict with the provisions of said Deed. It is further understood that if said building is not erected within five years after the cessation of World War #2, that the land above described shall revert to the Grantors, their heirs, executors, administrators and assigns."

Cora Wilson relinquished all of her interest and dower rights in the property. It might be here stated that nothing was ever constructed on this one acre except a foundation for a building, which, according to testimony, was "more than twenty years ago." Thereafter, this particular area grew up in weeds, brush, and trees.

On September 1, 1945, R. B. Wilson executed a deed to his wife, Cora, purportedly conveying the lands obtained by the grantor in 1915. Appellants, in their brief, however, concede that this deed did not convey any title since only a part description was used. R. B. Wilson died intestate and without issue in 1946 or 1947.

The evidence establishes that Mrs. Wilson subsequently deeded the property (purportedly conveyed to her by her husband) to Lavon Watson, but this deed does not appear in the record. There is testimony from Watson that he thought Elbert Mitchell had deeded the one acre (received from R. B. Wilson) back to Cora, but such a deed does not appear in the transcript, has never been found, and apparently did not exist.

Several questions are raised relative to the validity of Section 16 of the will, but we are of the opinion that one contention definitely disposes of the litigation, and accordingly, a discussion of other allegations is unnecessary. The contention referred to is simply the fact that Cora Wilson does not appear to have held title to the one acre upon which she directed that the building be placed.

If the deed from R. B. Wilson to Elbert Mitchell, trustee, was not void because of violation of the rule

against perpetuities, or because of inadequate description (and it is not argued by any party that this deed was invalid), the property reverted back to the heirs of R. B. Wilson, since the requirements in the original deed from Wilson to Mitchell were not complied with.[3] The record does not reflect who constructed the foundation, but it is made clear that this was as far as any construction was advanced, and apparently those interested in constructing the building abandoned the project. The property certainly did not revert back to Cora Wilson, since she only held a dower interest at the time of the conveyance to Mitchell, and the greatest interest that she could have held in the one acre at the time of her death was as a tenant in common with Wilson's collateral heirs.[4] This would also be true if the 1944 conveyance from Wilson to Mitchell was originally void. Of course, Mrs. Wilson could not legally nor properly direct that a building be placed on lands in which a legal interest was held by others.

We agree with the Chancellor's finding that the deed from R. B. Wilson to his wife, Cora, was void for uncertainty (because of the deficient description). It might also be pointed out that simple logic would indicate that Wilson had no intention of conveying the one acre (on which the building was to be constructed) to his wife, since his conveyance to Mitchell was only about a year earlier than the one to his wife—and, under the first deed, persons interested in constructing the building (under terms set out in the deed), still had five years (counting from the end of hostilities) to complete construction.

While the above finding disposes of the litigation, it might be of interest to note that, from the record, no desire is evidenced in the community to enforce Provision 16 of the will, since no witnesses were presented to testify as to the need of the local populace to take advantage of the bequest. In fact, one of the cemetery trustees testified that a building would not be desirable, and that he

[3] Hostilities in World War II ceased in August, 1945, but the war was not officially over until December 31, 1946.

[4] In such event, her interest would have amounted to an undivided one-half.

did not want the gift. No other trustee came forward to contradict this testimony.

We are unable to say that the court's findings were against the preponderance of the evidence.

Affirmed.

DURHAM *v.* CLARK.

5-3600 393 S. W. 2d 769

Opinion delivered September 20, 1965.

Wootton, Land & Matthews, for appellant.

Travis Mathis, for appellee.

ED. F. MCFADDIN, Associate Justice. This is a malpractice case. Linda Clark was a little girl eight years of age when the appellants, Drs. Durham and Murray performed an operation on her leg in June 1962, which operation is the cause of this malpractice action. When Linda was fifteen months old she suffered an attack of poliomyelitis, which retarded the growth of her *left* leg. From 1957 to 1962 the appellants examined Linda from time to time, and finally recommended an operation on Linda's *right* leg, which was the good one. Linda's left leg had not grown in length as rapidly as had her right leg. It was the opinion of the appellants that they would

perform an operation on the right leg, known in medical terminology as "Blount staple epiphyseal arrest," whereby staples were to be inserted in the epiphyseal plate to arrest the growth in the right leg. It was the prognosis that the left leg would continue to grow and the operation would retard the growth of the right leg, and thus in a few years Linda would have both legs equal in length.

The operation was performed on June 29, 1962, in a hospital in Hot Springs, but appellants operated on the wrong leg. This fact they frankly admit. As a result of the operation Linda claims that her condition was worsened instead of improved; and by her father (John Clark), as next friend, she filed this action[1] for damages for malpractice.

The appellants in their answer frankly conceded that they operated on the wrong leg: "they admit that the left leg which was the leg in which there was a retarded growth was inadvertently stapled when it was the right leg that was intended to be stapled." We can find nothing in the record that shows how the mistake occurred. But the appellants claim that no damage resulted from the mistake and they prayed that the complaint against them be dismissed. Trial to a jury resulted in a verdict and judgment in favor of Linda and against the appellants in the sum of $50,000.00; and on this appeal the appellants urge only these two points:

"I. There was no permanent damage to Linda Clark.

"II. The award of $50,000 in favor of Linda Clark, a minor, was grossly excessive, contrary to all of the medical testimony in the case, and should be reduced to such sum as would fairly represent the damages as proven by the evidence."

We will have no necessity to consider the matter of legal liability for malpractice since the only points relate to the evidence as to damages and the amount of the

[1] Her father and mother, Mr. and Mrs. John Clark, also sought damages, but the only verdict was for Linda individually and that is the one here involved.

verdict; and we will consider these two points together. Appellants insist that the mistake in the operation was discovered while Linda was still in the recovery room; that she was returned to the operating room, again anesthetized, and within 45 minutes the six staples were removed, which had been mistakenly placed in her bad leg;[2] and that they thereby prevented permanent damage to Linda. The appellants testified that Linda has not and will not suffer any permanent injury from their mistake. A number of doctors supported the appellants in this latter point, and one could almost conclude that some of the witnesses would lead the jury to believe that the mistake made by the appellants was a benefit to Linda rather than a detriment. But the jury saw the little girl and there was ample evidence that the operation was a detriment; that as a result of it Linda will be permanently impaired; and that she has suffered and will suffer mentally and physically as a result of the malpractice. Linda testified, without objection:

"Q. Now, Linda, before the operation could you get around and play with the other children, like to play ball and other games with the children?

"A. Yes, sir.

"Q. Can you do that now?

"A. No, sir.

"Q. Before the operation, Linda, did you have to support your knee in any way to walk around?

"A. No, sir.

"Q. After you walk around now—walk for a distance now, do you have to support your knee?

"A. Yes, sir.

"Q. How do you do that, Linda?

"A. Well, I put my left hand on my left leg."

Linda's father, Mr. John Clark, testified:

[2] Still no pins were placed in the good leg, as was the original purpose of the operation.

"Q. Have you observed any difference in the manner in which she gets around now than she did before the operation?

"A. Very much so.

"Q. Would you describe to the jury the difference that you have noted?

"A. Well, before they operated on her she used to be able to get out and run and play ball, and walk and do most anything that any other normal child could do; but since that time, even up to now, it gets worse. She can't get around near as good as she did. If she walks a block and a half or two blocks, well, her leg gets tired or something. She puts her left hand on her knee to support it, and she don't run and play ball with the boys like she used to because she just can't get around.

"Q. Did you ever notice her place her hand on her knee for support before the operation?

"A. No, sir."

Linda's mother, Mrs. John Clark, testified:

"Q. Now, have you noticed any difference in the manner in which she gets about now and the manner in which she got about before the operation?

"A. Yes, sir.

"Q. And explain to the jury what difference you have noticed.

"A. Well, she just can't run and play like she used to. She used to get out and play ball with the boys, and well, do almost everything that normal children do, but she just can't do it now. She can walk just a little piece, maybe a block and a half or two blocks at the most, and that leg begins to hurt, and she just can't do it. She just can't walk any further, or play like other children.

"Q. Does she in any way support her leg?

"A. Yes, she does, with her hands.

"Q. Have you noticed any difference in her attitude now after she has walked for some distance than her attitude before?

"A. I most certainly have. She gets gripy and grumpy and just won't walk. She complains that her leg is tired and she just gives out."

A qualified orthopedic specialist had examined Linda in October 1963, in January 1964, and again in August 1964. He testified:

"Q. All right. Now, Doctor, my question again is, based upon your background and training, your experience, and your examination of Linda Clark, do you have an opinion based upon a reasonable medical certainty, as to the cause of this knock-kneedness and the condition you found upon her in August?

"A. The cause is obvious. I mean, you can't operate on anybody without inflicting a certain amount of trauma.

"Q. And do you attribute the condition which you found in August, 1964, as being a result of the operation performed on June 28, 1962?

"A. It . . . appears to be so.

"Q. What is your opinion, Doctor?

"A. I think it is."

There is evidence of an increasing physical defect and the opinion of the expert that the condition is the result of the malpractice operation. While the appellants had a vast amount of expert opinion to the contrary, the jury was free to decide whom to believe; and there is ample competent evidence to support the jury verdict both as to permanent damages and the amount thereof.

Affirmed.

The Chief Justice would reduce the judgment to $25,000.00.

Carleton Harris, Chief Justice (dissenting). I would reduce the amount of judgment to $25,000.00 for

the reason that I do not feel that Linda Clark suffered permanent injury because of the error made by the surgeon. Dr. John H. Hundley testified that the major portion of disparagement in leg length could be corrected; *i.e.,* there was no permanent damage. Dr. Joe F. Shuffield stated that he did not attribute any of the shortness as a result of the pinning, and did not think that the stapling of the left leg in any way produced a weakness. It was his opinion that Linda's condition was due solely to the polio attack. Dr. Samuel B. Thompson likewise attributed her muscular weakness to poliomyelitis rather than the operation. Dr. Walter P. Blount of Milwaukee, former President of the American Academy of Orthopedic Surgeons,[1] and present Vice-President of the International Orthopedic Society,[2] testified that, in his opinion, the error committed had no ill effect on the limb, other than to produce scars. He also stated that the growth of the left thigh bone was temporarily accelerated. It was his opinion that Linda had not sustained any weakening of the left leg as a consequence of its having been stapled. Dr. Blount also testified that there was still time to correct the disability caused by the polio.

The only doctor who disagreed at all with these findings was Dr. Bennett. However, even Dr. Bennett testified that he felt the condition which he found could be corrected:

"I told her that we would probably have to wait until about summer before we would know. It looks like that approximately this summer that you can work on the good leg, then at that time correct the knock-knee on the bad leg. I think it will probably be this summer. It may be that she will wait a little longer. It depends on how much she develops."

The testimony of the doctors referred to convinces me that even if the mistake made in operating on Linda's

[1] The stapling procedure used on the normal leg, and which was the purpose of the operation on Linda, is named after Dr. Blount, and is known as "Blount staple epiphyseal arrest."

[2] Dr. Blount has written several medical articles relating to this subject, and some have been translated into French and German. He has studied in clinics in Europe, South America, and Canada, in addition to numerous clinics in this country.

left leg, instead of the right, caused any damage, there is (or was at the time of the trial) still plenty of time remaining in which to correct the condition.

As stated, I would reduce the judgment to $25,000.00.

[redacted]

RUSH *v.* SMITH.

5-3611 394 S. W. 2d 613

Opinion delivered September 20, 1965.

[Rehearing denied November 1, 1965.]

[redacted]

Hardin, Barton, Hardin & Jesson, for appellant.

Thomas Harper and *Franklin Wilder,* for appellee.

George Rose Smith, J. On April 23, 1962, the appellant, Virginia Rush, brought suit against her husband, Paul Rush, for a divorce on the ground of personal indignities. Three days later Paul Rush purportedly sold certain corporate stock to his sister, the appellee Frances R. Smith. Paul Rush was murdered on May 13, 1962. (Paul Rush's stepson, Fred Rush, was convicted of the murder, but we reversed the judgment and remanded the case for a new trial. *Rush* v. *State,* 238 Ark. 149, 379 S. W. 2d 29 [1964].) In June of 1963 Virginia Rush brought this suit to set aside the purported sale of the stock as a fraudulent transaction. After an extended trial the chancellor upheld the sale and dismissed the complaint for want of equity. The principal question here is whether the decree is against the weight of the evidence.

The facts must be narrated in some detail. Paul and Virginia Rush were married in 1949. For about seven years before their marriage they had been business associates in making furniture. They eventually organized two corporations, one of which operated a furniture manufacturing plant at Fort Smith and the other a similar plant at Waldron. Both Paul and Virginia Rush devoted their full time to the business, which prospered.

In 1957 about 61% of the stock in each company stood in Paul Rush's name. The other 39% was owned by third persons and is not involved in this case. In the year mentioned, 1957, the Rush 61% of the total stock was reissued in about equal shares to Paul and Virginia, he receiving a little less than 31% and she a little more than 30%. It is Paul Rush's part of the stock that is now in dispute.

As we have said, Virginia Rush filed suit for divorce on April 23, 1962, asserting that the parties had separated on April 20 of that year. The complaint asked that Virginia be awarded a half interest in all property that was owned jointly and in all property standing in Paul's name only, which would include the stock in question. Paul was served with a summons on April 24.

On April 26 Paul Rush and his attorney went to the First National Bank of Fort Smith, with which Paul did business, and ostensibly sold the stock to Paul's sister, Frances Smith. She, however, was not present. Rush and his attorney effected the purported sale with Sam B. Stevinson, the bank's trust officer. Paul Rush's stock appears to have been worth at least $200,000. Paul professed to sell this valuable stock to his sister Frances for its stated par value, which was $50,550. The bank purported to advance the purchase money as a loan to Frances, but it is evident that she never had dominion over the money or the stock. The bank retained the stock as collateral security for Frances's note for $50,550 (which she signed the next day). The bank deposited $550 of the purchase money to Paul Rush's account. It invested the remaining $50,000, at Paul's direction, in U. S. Treasury bills, which it held for Paul. Thus when the transaction was completed the bank had possession of the stock, the purchase money, and the Treasury bills. Paul had an added $550 in his bank account. Except for the fact that the stock had been reissued in her name Frances had nothing to show for her participation.

We think it almost too plain for argument that the supposed sale was in fact a sham that did not divest Paul Rush either of his ownership of the stock or of his control over it. A husband's colorable disposition of assets to defeat his wife's property rights in a pending or anticipated divorce suit may be found to be fraudulent. *Dowell* v. *Dowell,* 207 Ark. 578, 182 S. W. 2d 344 (1944); *Wilson* v. *Wilson,* 163 Ark. 294, 259 S. W. 742 (1924); *Austin* v. *Austin,* 143 Ark. 222, 220 S. W. 46 (1920). It cannot be doubted that Paul Rush's ostensible sale to his sister was intended to hinder Virginia Rush in the assertion of her property rights. In fact the banker, Stevinson, testified that he understood from his conversation with Paul Rush at the time of the sale that Rush hoped that the divorce suit would be withdrawn and that the sale of the stock would then be rescinded.

There are several other indications of a fraudulent intent. The transfer was to a close relative of Paul Rush.

Farmers' State Bank v. *Foshee,* 170 Ark. 445, 280 S. W. 380 (1926). The recited consideration was decidedly less than the value of the stock. *Smith* v. *Arkadelphia Milling Co.,* 143 Ark. 214, 220 S. W. 49 (1920). Paul Rush in effect retained possession of the stock, for we have no doubt that the bank would have cooperated in a rescission of the transaction. Continued possession by the vendor is a badge of fraud. *Wasson* v. *Lightle,* 188 Ark. 440, 66 S. W. 2d 652 (1933). It is not shown that Frances Smith was financially able to enter into a $50,550 purchase agreement. Finally, Paul Rush continued to act as general manager of the companies until his death, despite the fact that he had supposedly disposed of his interest in the business. After considering the proof as a whole we are convinced that the entire transaction was demonstrably a sham. Paul Rush was therefore the actual owner of the stock at his death. His widow is entitled to assert her claim to dower.

Other arguments made by the appellees merit discussion. There is testimony that Virginia Rush, soon after her husband's death, stated that he and she had divided their ownership of the corporations in 1957 and that thereafter neither had any interest in the other's stock. It is now insisted that these admissions by Mrs. Rush establish a valid postnuptial property settlement that precludes her from claiming dower in the corporate stock. We are cited to cases involving property settlements, such as *Godwin* v. *Godwin,* 231 Ark. 951, 333 S. W. 2d 493 (1960), and *Dunn* v. *Dunn,* 174 Ark. 517, 295 S. W. 963 (1927).

Virginia Rush's statements about the division of the stock in 1957 fall decidedly short of establishing a binding property settlement. The law has always been solicitous of a widow's dower. An antenuptial or postnuptial marriage settlement must be in writing. Ark. Stat. Ann. § 55-301 (1947); *Sims* v. *Roberts,* 188 Ark. 1030, 68 S. W. 2d 1001 (1934). Mrs. Rush's generalized references to the 1957 division of the stock do not indicate either that there was a written agreement or that it was intended to be in lieu of dower. We are unwilling to lay down a

precedent that a widow's right to a share in her husband's estate may be lost as a result of such vague admissions as those appearing in this record.

Next, a meeting of the stockholders in each corporation was held on June 21, 1962—about 40 days after Paul Rush's death. At that meeting the stockholders adopted a resolution reciting that Paul and Virginia Rush had owned, as tenants by the entirety, certain trucks used by the corporations. The resolution confirmed Virginia's ownership of this property as the surviving tenant by the entirety. There is no indication whatever that the recitations in this resolution were not true; so the appellees can derive no benefit from the fact that Virginia Rush accepted the trucks. She was entitled to them.

At this same meeting the stockholders also adopted a resolution reciting Paul Rush's so-called sale of his stock to his sister, pointing out that he was sane and solvent at the time of that transfer, and noting the fact that the stock had been reissued to Frances Smith and had been voted by her. The resolution concluded by declaring that the sale by Paul Rush to Frances Smith "be approved." All the stockholders, including Virginia Rush, signed this resolution. The appellees now rely heavily upon Virginia's joinder in the resolution as a basis for an estoppel against her present claim.

We are not impressed by this argument. It is plain that Mrs. Rush was not informed of her legal rights in the matter. Everyone else at the meeting, including the companies' lawyer, appears to have been hostile to Mrs. Rush. The very fact that such an unusual resolution was offered for her approval indicates pretty clearly that its proponents were attempting to strengthen their decidedly weak position. The meeting went on for four hours before Mrs. Rush finally joined in the resolution. She testified that she declined to approve the resolution until she had consulted a lawyer. It was suggested that she consult the bank's assistant trust officer, Charles Beasley, who was also an attorney. She did so, but he was (understandably, we think) unwilling to advise her about the resolution. She then discussed it with Stevinson.

who, according to her testimony, told her that the sale to Frances Smith was valid and could not be set aside. Her testimony is corroborated by Beasley himself, who states without contradiction that he heard Mr. Stevinson tell Mrs. Rush that he saw nothing wrong with her signing the resolution. In the circumstances Mrs. Rush's assent to the resolution was not a waiver of her rights, for she could not voluntarily abandon rights of which she was ignorant. *Sirmon* v. *Roberts,* 209 Ark. 586, 191 S. W. 2d 824 (1946). Nor is her conduct a basis for an estoppel, for there is no indication that anyone relied upon it to his detriment. *Schlumpf* v. *Shofner,* 210 Ark. 452, 196 S. W. 2d 747 (1946).

The appelles also argue with ingenuity (*a*) that Mrs. Rush cannot assert that the pretended sale was a fraud upon her right to a property settlement in her divorce suit, because that suit abated upon the death of Paul Rush, and (*b*) that Mrs. Rush cannot assert that the sale was a fraud upon her right to dower, because Paul Rush did not deliberately intend by the colorable sale to deprive his widow of dower. This argument is not sound. In the divorce case Paul's answer was a general denial, with no prayer for affirmative relief. Thus if Paul had lived and the case had been tried, Virginia would either have received her property rights if the divorce had been granted or would have retained her claim to dower if the divorce had been denied. Paul Rush's death had the effect, in the same instant, of abating the divorce suit and of bringing his widow's dower rights into choate existence. We are unwilling to say that in this instantaneous transition Mrs. Rush somehow lost her rights altogether.

It is also insisted that the bank, as administrator of Paul Rush's estate, was the proper plaintiff in a suit to set aside the fraudulent conveyance. Ark. Stat. Ann. § 62-2402 (Supp. 1963). We agree with the chancellor's conclusion that inasmuch as it is apparent that the bank would not have brought the suit it was proper for Mrs. Rush to bring it and to join the administrator as a defendant.

We reverse the decree and remand the cause for further proceedings. It appears that Mrs. Smith has paid interest to the bank upon her note. On the other hand, the principal of the loan represented by the note was invested in Treasury bills that seem to have provided income to Paul Rush or to his estate. These offsetting equities should be considered together in the final decree. It also appears that the two corporations have been liquidated and that, despite the disadvantages of a liquidating sale, more than $165,000 has been realized and paid into the registry of the court as liquidating dividends attributable to the stock now in dispute. The final order of distribution will adjust the equities to the end that neither Mrs. Smith nor the Paul Rush estate will reap a profit as a result of the abortive attempt to defeat Virginia Rush's rights. The court's purpose will be, as far as possible, to restore all concerned to their original position.

Reversed and remanded.

Supplemental opinion on rehearing P. 874.

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

CARLETON HARRIS, Chief Justice (dissenting). I feel that this court is in error in reversing this case. The overwhelming weight of the evidence, in my opinion, is to the effect that Virginia Rush, from the beginning, recognized that she had no right to, or interest in, this stock. Charles Beasley, Vice-President and Trust Officer of the First National Bank of Fort Smith, Sam Stevinson, another vice-president, and Pauline Plummer, the only natural child of Paul Rush, all testified that Mrs. Rush had told them that she had made a settlement with her husband in 1957, and, at that time, Paul Rush had given her approximately one-half of all his stock in the corporations here involved as her full share of all property claims against him. I can see no reason for these people to misstate the facts, since all stood to gain financially if the transfer to appellee Smith were set aside. As an heir of the estate, Mrs. Plummer, of course, would get a much larger share from the estate if the stock sale be set aside, and likewise, of course, the First National Bank, administrator of the estate, would get a larger adminis-

trator's fee, if the size of the estate were increased. The statements of these witnesses are disputed only by appellant, and there are discrepancies in her testimony. It is also noticeable that Mrs. Rush waited over a year after her husband's death before instituting suit to set the sale aside. Likewise, her explanation for signing the resolution, recognizing Mrs. Smith as the owner of the stock in question, is to the effect that she was pressured or coerced into signing. Again, we have only her statement, and this is denied by the others, except that, as pointed out in the majority opinion, Mr. Stevinson told appellant that he saw nothing wrong in her signing the resolution. I would hardly call such a statement pressure or coercion —and, since I am convinced that appellant originally recognized that she had no right to this stock, and the institution of the suit was based on an afterthought— I too would have to say that I see nothing wrong in her having signed the resolution.

In this case, we again have a situation where the Chancellor personally heard the testimony, observed the witnesses, and had every opportunity to notice their demeanor upon the stand, and to form his conclusions as to who was telling the truth. The trial court thus had an advantage that we do not have, and it is evident, from his decision, that he did not place full credence in all that was said by appellant.

I would affirm the case, and therefore, respectfully dissent. I am authorized to state that Justice McFaddin joins in this dissent.

Paul Ward, Associate Justice (dissenting). I agree with the majority in discarding five contentions made by appellees to affirm the decree of the trial court, but I am unable to agree with the one reason for reversing. As a ground for reversal the majority say: "After considering the proof as a whole we are convinced that the entire transaction was demonstrably a sham. Paul Rush was therefore the actual owner of the stock at his death."

There is no direct proof that Paul Rush never intended to sell the stock to his sister—no direct proof that the transaction was a sham. The trial court found it was

not a sham. If it was a sham, one of two conclusions must follow: either Paul Rush deceived his own attorney and the vice-president of the First National Bank of Fort Smith, or those two persons participated in the deception. There is, to my mind, convincing evidence that Paul Rush did in fact transfer the stock to his sister, Frances. She signed a note to the bank for $50,550 which the bank still holds. The vice-president testified Frances negotiated the loan to purchase the stock, and that he "personally gave her $50,550 in cash" (quote taken from the abstract). Frances testified she loaned Paul $5,000 to start the business, and that she was one of the original stockholders in the Rush Company and the Waldron Company; that Paul came to her home very much upset over the divorce action, and said he was going to sell his stock and get out of the business; that she tried to reason with him, telling him things might work out; she told Paul she couldn't buy the stock for what it shows on the books, and he said he never did have any faith in those figures; that they discussed the fact that the company was losing money, the effect of the divorce suit and the result of his leaving the company, and that she offered him par value for his stock. She further stated that she had kept the interest on loan paid, and that the stock certificates are in custody of the bank.

Under the above state of the record I feel that the trial court's decree is supported by the weight of the evidence, and that the decree should be affirmed.

5-3628 393 S. W. 2d 773

Opinion delivered September 20, 1965.

W. Q. Hall, for appellant.

Bob Scott, for appellee.

PAUL WARD, Associate Justice. On November 23, 1964 Joseph B. Gaspard and Otto Smith (appellees herein) requested that the County Clerk of Madison County grant permission to copy the lists showing who had voted (including those who had aplied for absentee ballots) in the general election held on the third of that month. This request was denied, and two days later appellees filed a petition for a Writ of Mandamus in chancery court to require Charles Whorton, Jr., the County Clerk, to comply with their request. The trial judge, after a full hearing, granted the writ.

Only the three parties mentioned above testified in the trial court, and there is no dispute about any material

fact. The principal issue concerns the proper interpretation of Ark. Stat. Ann. § 3-919 (Repl. 1956).

For a reversal, appellant relies on only one point: The court erred as a matter of law in granting the Writ of Mandamus.

Section 3-919 referred to above provides that in every election held in this state the precinct officials shall make an accurate list of all persons voting in such precinct and file the same with the county clerk. The section then provides:

"The original of such list filed with the county clerk shall be kept on file by said clerk in his office and shall be a *public record subject to inspection* of any . . . person interested therein. . . ." (Emphasis added.)
Ark. Stat. Ann. § 3-1133 requires the county clerk to also keep a list of all those voting by absentee ballots, and paragraph "Third" of the section provides such list "shall be made available for public inspection. . . ."

The above mentioned lists are the ones that appellees sought to copy, and are the lists included in the court's order. It is our conclusion that the trial court was correct, under the facts here presented, in ordering appellant to allow appellees not only to inspect but to copy (or photocopy) the lists in question.

We have repeatedly held that, ordinarily, public records are open for inspection by interested persons. See *Bowden* v. *Webb,* 116 Ark. 310, 173 S. W. 181; *Brooks* v. *Pullen,* 187 Ark. 80, 58 S. W. 682; and, *Baker* v. *Boone,* 230 Ark. 843, 327 S. W. 2d 85.

After a careful consideration of numerous authorities we are of the opinion that, in cases of this nature, the right to inspect public records carries with it the right to copy such records, with certain general limitations hereafter mentioned. In 45 Am. Jur. page 426 § 15, Right to Copy, it is stated:

"The right to inspect public records commonly carries with it the right to make copies, without which the right to inspect would be practically valueless."

The above statement is approved in cases from other jurisdictions cited and discussed in 84 A. L. R. 2nd at page 1265 et seq. We think the general rule above stated is reasonable. We also think, as was stated in the authorities just mentioned, that the rule is subject to certain limitations. In this connection we adopt the language used in § 16, 45 Am. Jur. at page 427:

"Without doubt, reasonable restrictions and conditions may be imposed with respect to the right to use public records. Even in the absence of any specific restrictions, the right implies that those exercising it shall not take possession of the registry or monopolize the record books so as unduly to interfere with the work of the office or with the exercise of the right of others, and that they shall submit to such reasonable supervision on the part of the custodian as will guard the safety of the records and secure equal opportunity for all."

Appellant argues that the rule above stated should not apply in this case because (as is shown by the record) he draws no salary. His remuneration comes from fees charged for making certified copies of records. He also says the rule should not apply here because appellees, who are members of the Republican party, wanted the records for no lawful purpose but only wanted to harass and annoy him. We find no merit in these arguments.

By statute appellant is allowed to charge for making certified copies of records but only when requested to do so, and no such request was made by appellees here. There is no evidence that appellees intended to harass appellant, but the record does affirmatively show appellees desired to make a study to determine if there had been any irregularities in the recent general election. We know of no law to prevent such a study.

Appellees, on cross appeal, contend the trial court erred in assessing the costs below against them, but we do not agree. Many times we have said that, in chancery cases, this is a matter within the sound discretion of the trial court. *Lyle* v. *Latourette,* 209 Ark. 721, 192 S. W. 2d 521; *Wilson* v. *Wilson,* 211 Ark. 1030, 204 S. W. 2d 479; *Thomas and Ozan Lumber Company* v. *Smith,* 215 Ark.

527, 221 S. W. 2d 408. We are unwilling to say the trial court abused its discretion in this instance.

Appellees further contend the trial court erred in failing to order appellant to permit them to make a copy of the list of those who applied for absentee ballots. We cannot agree for two reasons. The evidence fails to show appellees made such a request, and a cross-appeal on this matter, according to the record, was not perfected.

The order of the trial court is affirmed, and appellant is charged with the cost of this Court.

Affirmed.

GOINS *v.* EDENS.

5-3613 394 S. W. 2d 124

Opinion delivered September 20, 1965.

[Rehearing denied October 25, 1965.]

Crumpler & O'Connor and *Richard H. Mays,* for appellant.

Brown, Compton & Prewett, for appellee.

SAM ROBINSON, Associate Justice. In the year 1952, the appellant herein, who is now Doyce Olene Goins, married Murrell Edens. Three children were born of the marriage; a daughter, Deborah, 11; a son, Donald Glenn, 10, whose custody is involved in this litigation; and a daughter, Linda Karen, 9.

In September, 1958, appellant was granted a divorce from Edens. By agreement of the parties, appellant was awarded custody of the two girls, and Edens was awarded custody of the boy. Later, Edens married the appellee herein, Vera Nelle Edens; at a still later date, appellant married Bill C. Goins.

In June, 1964, Edens died, and appellant, Doyce Goins, natural mother of Donald Glenn, immediately attempted to get custody of the little boy, but Mrs. Edens, the stepmother, would not agree that the natural mother should have his custody. Hence, Mrs. Goins filed this action alleging the death of the natural father, Murrell Edens, and asked that she be awarded custody of her son. Vera Nelle Edens, stepmother of Donald Glenn, resisted the natural mother's petition and asked that she (Mrs. Edens) be awarded custody of the child. The child's paternal grandparents intervened and also asked that the stepmother be awarded custody. From an order awarding the stepmother, Vera Nelle Edens, custody of the little boy, the natural mother, Doyce Olene Goins, has appealed.

From the evidence it appears, without a doubt, that either party, Mrs. Goins, the natural mother, or Mrs. Edens, the stepmother, is a suitable person to have custody of the child. Both are good women, fully capable from every standpoint of rearing the little boy in a proper manner. In a situation of this kind, the law is firmly established that the natural mother has preferential rights to custody of the child.

Hancock v. *Hancock,* 198 Ark. 652, 130 S. W. 2d 1, was a similar situation; a contest between the natural mother and stepmother for the custody of a 13 year old boy. As in the case at bar, the trial court awarded custody to the stepmother. On appeal the decree was reversed. Judge FRANK SMITH, speaking for the court, said:

"The recent case of *Holmes* v. *Coleman,* 195 Ark. 196, 111 S. W. 2d 474, announces the rule which we think is applicable here. We there said: 'Courts are very reluctant to take from the natural parents the custody of their

child, and will not do so unless the parents have manifested such indifference to its welfare as indicates a lack of intention to discharge the duties imposed by the laws of nature and of the state to their offspring suitable to their station in life. . . .' "

In other cases this court has said:

"There is no doubt but that both the grandmother and mother are attached to the child, and it has affection for them. That is not unusual. 'The law recognizes the preferential rights of parents to their children over relatives and strangers, and where not detrimental to the welfare of the children, they are paramount, and will be respected, unless special circumstances demand that such rights be ignored.' *Johnston* v. *Lowry,* 181 Ark. 284, 25 S. W. 2d 436; *Loewe* v. *Shook,* 171 Ark. 475, 284 S. W. 726; *Herbert* v. *Herbert,* 176 Ark. 858, 4 S. W. 2d 513." *Pfifer* v. *Pfifer,* 198 Ark. 567, 129 S. W. 2d 939.

"Where not detrimental to the welfare of children, the law recognizes the preferential rights of parents to them over relatives and strangers. Paramount rights of parents will be respected, unless the special circumstances demand that such rights be ignored." *Herbert* v. *Herbert,* 176 Ark. 858, 4 S. W. 2d 513.

"There is no question in this case about the moral fitness of either the natural or the foster parents to properly rear the child. They are all described by their neighbors as 'Good people.' It is probably true that the Holmes are in position to give the child better advantages; but this question will not be considered unless and until it be established that its parents should be denied its custody. The natural parents will not be deprived of their child because some other person is willing and able to give it better advantages." *Holmes* v. *Coleman,* 195 Ark. 196, 111 S. W. 2d 474.

"We have concluded that a case was not made which would warrant or require us to deprive the father of his presumptive right to the custody of the child, . . ." *Grinder* v. *Harrell,* 208 Ark. 947, 188 S. W. 2d 307.

" 'There can be no question in the law that, as between a mother and grandparents, the mother is entitled to the custody of her child, "unless incompetent or unfit, because of poverty or depravity, to provide the physical comforts and moral training essential to the life and well-being of her child," . . .' *Loewe* v. *Shook,* 171 Ark. 475, 284 S. W. 726." *Servaes* v. *Bryant,* 220 Ark. 769, 250 S. W. 2d 134.

"Unless abandonment is clearly shown, or unless unnatural proclivities upon the part of the parents is established, such as cruelty or negligence amounting to parental indifference, the superior claim of a father or mother is given first consideration." *McGraw* v. *Rose,* 224 Ark. 96, 271 S. W. 2d 912.

There is no substantial evidence in the record indicating that Mrs. Goins abandoned her child or that she is not a proper person to have his custody. She is, therefore, according to many decisions of this court, entitled to his custody.

Reversed with directions to award custody of the child, Donald Glenn Edens, to his natural mother, the appellant herein.

ROWE *v.* FISHER.

5-3620 393 S. W. 2d 767

Opinion delivered September 20, 1965.

Roy Mitchell, for appellant.

Curtis L. Ridgway, Jr., for appellee.

JIM JOHNSON, Associate Justice. This is a boundary line dispute between adjoining landowners. In 1942 appellee Junnie Luker Fisher purchased from one W. T. Weaver a parcel of land which was bounded on the west by a section and range line. In 1946, one Grim purchased the property adjoining, on the west side of the section line, from Weaver. In 1948 Grim sold a strip of land 200 feet wide and over 600 feet in depth, lying on the west of the section line, to appellant Mildred Rowe Alewine for road access for appellants' land to the south. There existed on the west property (appellants' property) a fence which ran roughly parallel with the section line, varying from 30 to 90 feet west of that line. In late 1960 and early 1961, appellants removed the fence and constructed a new fence on the section line, following a survey which appellee had ordered, paid for, and later disclaimed. It is undisputed that appellant Alewine had record title up to the section line. Appellees, claiming title to the property up to the old fence line by adverse possession, filed suit on June 28, 1961, in Garland Chancery Court to enjoin appellants and to quiet title in appellees. Trial was held August 1 and 3, 1962, deposition of the county surveyor was taken February 13, 1963, and final decree was rendered November 24, 1964, which found that appellees had acquired title to the disputed strip of land by adverse possession and permanently enjoined appellants from encroaching on the property. From this decree appellants have prosecuted this appeal, urging that the chancellor erred in holding that appellees had acquired title by adverse possession.

The fence which appellees claim as a boundary line fence was an old field fence existing when Weaver owned

all of the property here mentioned. There was testimony that it was one of several field fences dividing Weaver's property into small pastures. (He operated a dairy there at one time.) There was also testimony that Weaver had once raised a garden on the strip in question, which is of no benefit to appellees' claim of adverse possession since Weaver owned all the property. The record contains no satisfactory evidence that this field fence was ever intended to be the dividing line between these two pieces of property. The fence meandered, was sporadically maintained, and its various locations are not clear from the record. Even appellee Fisher testified that part of the fence burned one time and it was patched by stringing barbed wire across near-by trees. Appellee made the bare assertion that "I have owned, cultivated and used the property up to that fence, and I understood when I bought it, that was my property." There was no further testimony on possession—no testimony of the type of cultivation, crops or use to which appellee alluded, with one exception. Appellee testified that three years before trial she let a Mr. Murphy use her property as a pasture for a year or less. He strung a "hot-wire" fence (apparently a single strand electrified wire) to contain his cattle. The location of the hot-wire, which existed about a year, is not clear from the record.

Reviewing the record before us as we do on trial de novo, we find that appellees have failed to meet their burden of proof to establish all of the essential elements of adverse possession. *Smith* v. *Kappler,* 220 Ark. 10, 245 S. W. 2d 809. "In order that adverse possession may ripen into ownership, possession for seven years must have been actual, open, notorious, peaceable, continuous, hostile, and exclusive. It must be accompanied with an intent to hold adversely—in derogation of and not in conformity with the right of the true owners." *Terral* v. *Brooks,* 194 Ark. 311, 108 S. W. 2d 489. "The owner must have knowledge or notice that possession is hostile." *Id.* Appellees' sole act of possession, if it was that, was permitting Murphy to use the property for pasture. "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." *Teer* v. *Plant,* 238 Ark. 92, 378 S. W. 2d 663. This single act, well within seven years prior to this lawsuit, without more is insufficient to establish adverse possession of the disputed strip of land. The decree of the trial court is, therefore, reversed and remanded for entry of a decree consistent herewith.

OLIVER *v.* FLETCHER.

5-3624 393 S. W. 2d 775

Opinion delivered September 20, 1965.

M. V. Moody, for appellant.

Howell, Price & Worsham, for appellee.

FRANK HOLT, Associate Justice. The appellant brought an action against appellee to recover damages for personal injuries inflicted upon him by appellee. Appellee responded that his actions were justified and in self-defense. A jury verdict was adverse to the appellant and he brings this appeal from the judgment on that verdict. For reversal appellant first contends that the trial court erred in refusing to give appellant's Instruction No. 9. This instruction told the jury "that the evidence is undisputed as to the fact that the Defendant committed an assault and battery upon the Plaintiff, and no complete justification therefor has been shown;" and that the appellant was entitled to an award of damages.

According to the appellee's evidence the appellant had communicated and personally voiced threats of bodily harm to appellee and his family; that on one occasion appellee's wife had to call the police when appellant appeared at their home; that appellant deliberately rammed his race car into appellee's during a stock car race in an effort to run him over the hump and off the race track; that when appellee crawled out of his car and onto the hood of appellant's and questioned him about his action, the appellant replied with an oath that he was trying to kill him and then reached toward the floor of his race car for an object, later identified as a pipe two inches in diameter and twenty-four inches long. Thereupon appellee, using his crash helmet, struck the appellant about the head causing his injuries. This evidence was corroborated by other witnesses. It was denied by the appellant who offered evidence that the attack upon him was unprovoked and occurred when he was defenseless sitting strapped in his race car following an accidental collision.

We think the trial court correctly rejected the requested instruction since the instruction, in effect, told the jury to disregard the testimony of appellee and his witnesses. This was a binding instruction and failed to incorporate appellee's theory of justification and self-defense. We have held that a binding instruction must contain all the essential conditions in the case. *Reynolds* v. *Ashabranner,* 212 Ark. 718, 207 S. W. 2d 304; *Phillips*

Co-op Gin Co. v. *Toll,* 228 Ark. 891, 311 S. W. 2d 171. An instruction which ignores a material issue about which evidence is conflicting and permits or directs a jury to return a verdict without considering that issue is erroneous. *George* v. *George,* 191 Ark. 799, 88 S. W. 2d 71.

Appellant next urges for reversal that: "The evidence in the within case is insufficient to support the verdict. The assault upon appellant by appellee was precipitated by appellee and was not in his necessary self-defense." On appeal the evidence must be viewed in the light most favorable to the jury verdict. *Harkrider* v. *Cox,* 232 Ark. 165, 334 S. W. 2d 875. We do not disturb the finding of fact by a jury on conflicting evidence if there is any substantial evidence to support it. *St. Louis-San Francisco R. Co.* v. *Bishop,* 182 Ark. 763, 33 S. W. 2d 383.

In the case at bar there was ample evidence of a substantial nature upon which the jury could have based its verdict for the appellee.

The judgment is affirmed.

5124 393 S. W. 2d 856

Opinion delivered September 27, 1965.

Parker Parker, for appellant.

Bruce Bennett, Atty. General, By: *Reg E. Wallin,* Asst. Atty. Gen., for appellee.

CARLETON HARRIS, Chief Justice. Phillip H. Henson, A/K/A Robert Victor Scheick, appellant herein, was charged by Information with the crime of rape, it being alleged that Henson forcibly, violently, and against her will, raped a young woman of the age of 20 years in Yell County on June 8, 1964. The case proceeded to trial on June 30, 1964, and at the conclusion of the evidence, the

jury found Henson guilty, and fixed his punishment at life imprisonment. From the judgment entered thereon, Henson brings this appeal. For reversal, appellant relies upon eight points, but inasmuch as we are of the opinion that the judgement must be reversed, a discussion of each alleged error becomes unnecessary.

Let it first be stated that there is ample evidence to sustain the jury finding. The prosecuting witness testified that she met Henson at a talent contest in Dover, and won first prize, which entitled her to sign a recording contract with Nimrod Records (a partnership with which he was connected). Subsequently, according to her testimony, Henson went to her home, and the two left together in an automobile, ostensibly for the purpose of Henson's introducing her to the other partners of the record concern. She testified that he later stopped on a side road, slapped and choked her, pinned her arms behind her, and then proceeded to rape her. The witness stated that he thereafter raped her a second time. Several witnesses verified the fact that her back was skinned and bruised, her neck and throat swollen, and that there were bruises also on her waist, legs and breasts. Dr. Douglas Lowrey of Russellville, who examined the prosecuting witness, testified that the hymenal ring had been torn within eight to twelve hours previous to his examination; that numerous spermatozoid were observed through a microscope in secretions inside the vagina. He likewise stated that she was bruised on both shoulders and the left thigh. The doctor was also of the opinion that she had been a virgin, stating,

"The hymenal ring had definitely been penetrated shortly before I saw this girl. There's no question about that. As to whether or not it had been penetrated before, I could not say absolutely and without any question. I would say, however, that from the appearance at that time, that it did not ever—it did not indicate that it had ever been pentrated before."

Henson admitted having intercourse with the prosecuting witness, but insisted that it was done with her

consent. This conflict of evidence, of course, was for the jury to determine. The evidence was definitely sufficient to support the jury's findings.

Appellant asserts that the court erred in not granting a motion for change of venue. It is sufficient to state that no proper showing was made that appellant could not obtain a fair trial in Yell county, and the trial court did not abuse its discretion in refusing to grant the motion.

It is also alleged that the court committed reversible error in permitting Dr. Walter Harris, of Danville, to testify. This alleged error is predicated on appellant's contention that Harris' testimony was based on privileged communications between the doctor and Henson. On June 14, 1964, a petition was filed on behalf of appellant, asking that he be committed to the State Hospital for a 30-day period of observation. The court then ordered that Henson be examined by two doctors, one of which was Dr. Harris. Subsequent to an examination made by Harris, the motion was withdrawn, but the examination had already been made. Dr. Harris testified that, from his examination, it was his opinion that Henson was a sexual psychopath, and the doctor then stated that "a sexual psychopath is an individual, neither insane nor mentally deficient, but in a state of mental apprehension that renders him unable to control the impluses in sex offenses." Dr. Harris testified, "A patient suffering from this disorder may obtain partners either willingly or by force, fraud or some other method, and I think that they could be dangerous." We do not agree with the contention that the admission of this testimony constituted error. In 58 AM. Jur., Section 418, Page 239, it is stated that privilege does not attach when a consultation with, or examination by, a physician is not for the purpose of treatment, but rather for some individual purpose known to the person examined.

"It follows that a physician who at the direction of a prosecuting attorney or a court makes an examination of a defendant for the purpose of determining his physi-

cal condition is competent to testify regarding the information he gained if he does not assume to act as the physician for the defendant or proffer to the latter his professional aid."

In *City and County of San Francisco* v. *Superior Court,* 231 P. 2d 26 (Cal.), Justice Traynor, speaking for the court, stated:

"The confidence that is protected is only that which is given to a professional physician during a consultation with a view to curative treatment; for it is that relation only which the law desires to facilitate."[1]

Likewise, in *State* v. *Fackrell,* 271 P. 2d 679 (Wash.), quoting from *State* v. *Winnett,* 92 P. 904, it said:

"There is nothing here tending to show that the relation of physician and patient existed between them, or that any confidential relation whatever existed. The record does not indicate, but presumably, the examination was made at the instance of the state, and was made for the purpose of publishing the result of the examination. No confidential relation appears to be violated. The case does not come within the spirit or reason of the law which prohibits physicians from giving information acquired in attending a patient, and no error was committed in admitting the testimony objected to."

It is urged that the court erred in failing to quash the warrant of arrest, since the appellant was arrested without a warrant. This did not constitute error. Our statute (Ark. Stat. Ann. 43-403) permits a peace officer to make an arrest where he has reasonable grounds for believing that the person arrested has committed a felony. We think the evidence obtained by Sheriff Brinkman in his investigation on the night of June 8 clearly indicated that the prosecuting witness had been raped,

[1] Our statute, Ark. Stat. Ann. § 28-607 (Repl. 1962) also provides that a doctor or nurse shall not be compelled to disclose any information "which he may have acquired from his patient while attending in a professional character, and which information was necessary to enable him to precribe as a physician or do any act for him as a surgeon or trained nurse."

and that the officer had reasonable grounds for believing that appellant had committed the offense.

We are of the view that prejudicial error was committed by the court in permitting two young women to testify for the state on rebuttal. The circumstances were as follows: In an effort to establish his good character, appellant offered the testimony of Carol Jan Gray, Ann Page (both by deposition), and Mollie Mayhan. Miss Gray testified that she had been alone with appellant at times, and that he had never made any improper advances toward her. Miss Page testified that she took guitar lessons from Henson, and that he had never made any improper advances. Miss Mayhan stated that she had worked as a babysitter for Henson and his wife for about two and a half months, and that appellant had never made any advances toward her. Over objection, the court then permitted the state to offer in rebuttal (to the evidence of Misses Gray, Page and Mayhan) the testimony of the two young women mentioned in the opening sentence of this paragraph. One testified that Henson, whom she had just met, had asked her to go to Little Rock with him for the purpose of making a record; that appellant raped her twice on this tirp, but that it was never reported to the authorities because she did not want to "get in a scandal."

The other young woman testified that appellant also raped her in an automobile after placing a knife to her throat. All of this testimony—both on the part of the defense and the state—was inadmissible. In 20 Am. Jur., under "Evidence," § 326, pp. 305 and 306, it is pointed out that the generally prevailing rule is that testimony to prove the good or bad character of a defendent in a criminal prosecution

"must relate and be confined to the general reputation which such person sustains in the community or neighborhood in which he lives or has lived. Thus, evidence on behalf of the state in a criminal prosecution attacking the character of the accused for the purpose of impugning him as a defendant, where he puts his good character

in issue by introducing evidence to sustain the same, must be confined to his general reputation for the particular traits involved in the offense charged. Evidence of specific acts or of conduct of a person upon particular occasions, bearing upon his character, is usually held to be inadmissible. The admission of such evidence would raise collateral issues and divert the minds of the jurors from the matter at hand. It is manifestly unfair to compel a party to defend specific acts alleged as proof of bad reputation or character, although he must be prepared to defend his general reputation. This rule is applicable to evidence in rebuttal as well as to original testimony. Thus, the state in rebutting the evidence of the defendant's good character is confined to evidence showing his general reputation as to having a bad character, and not to specific acts derogatory to his good character."

Our rule in Arkansas is in accord. In *Shuffield* v. *State,* 120 Ark. 458, 179 S.W. 650, this court stated that "it is well-settled that neither good nor bad character can be proffered by specific acts or deeds." The state defends the introduction of this evidence on the basis of the fact that appellant had first offered specific instances of good behavior, thus opening the door for the prosecution to offer specific instances of bad behavior as a matter of counteracting appellant's testimony. However, two wrongs do not make a right. The evidence offered by appellant was clearly inadmissible, but this did not justify the state in offering inadmissible evidence. In *United States* v. *Beno,* 324 F. 2d, 582 (1963), after the government had concluded its case in chief, the court permitted the defense to offer testimony relating to the question of the defendant's character. Thereupon, three witnesses testified of specific instances, where Beno acted honorably, but it was clear that none of the witnesses were competent to testify as to the defendant's community reputation for honesty, veracity, or any other trait commonly classified as relevant to character. Thereafter, the government proceeded to offer evidence of specific instances of conduct on the part of the defend-

ant, which amounted to criminal violations. In reversing the conviction, the court said:

"We are left to determine whether the defendant, by calling witnesses Candee, McCracken and Nagle to testify as to specific occasions on which Beno acted honorably, thereby 'opened the door' to all of the testimony offered, both on cross-examination and through the prosecution's rebuttal witnesses, as to the specific instance on which his conduct was improper in one fashion or another. In determining this issue, we must first distinguish two different situations from the present case. It is true, as the government has noted that where a defendant, in his direct testimony, falsely states a specific fact, the prosecution will not be prevented from proving, either through cross-examination or by calling its own witnesses, that he lied *as to that fact.* (Citing cases) The rationale behind this rule is not difficult to perceive, for even if the issue injected is irrelevant or collateral, a defendant should not be allowed to profit by a gratuitously offered mistatement.

"Further, where a defendant has offered *proper* character testimony through witnesses who testify to his good reputation in the community, it is permissible to ask these witnesses whether they have 'heard' of rumors which could injuriously affect their evaluation, provided that the prosecution acts in the good faith belief that the incidents to which the questions allude actually occurred, and the jury is instructed as to the limited weight which such 'evidence' may be given. (Citing cases) The often-stated purpose for permitting such questions, even when they refer to a defendant's prior arrests, is that they better enable the jury to evaluate the character testimony which has been proffered. If a witness has heard of these damaging 'rumors' and adheres to his statement that the defendant's reputation is good, some light will have been shed upon the standards which he has employed; alternatively, if he has not heard of these 'rumors,' some doubt will have been cast upon his ability to speak on behalf of the community.

"But neither of these rules suggests that once a defendant has offered irrelevant and incompetent evidence on certain specific facts, the prosecution is immediately entitled to explore without restraint and at great length *any* specific occurrence which might tend to create an abhorrent image of the defendant. (Citing cases) *For it makes little sense to insist that once incompetent evidence is erroneously admitted, the error must of necessity be compounded by 'opening the door' so wide that rebutting collateral, inflammatory and highly prejudicial evidence may enter the minds of the jurors.*[2] In short, a small advantage improperly obtained does not compel the exaction of a gross disadvantage in penalty, particularly where a tarnished verdict is the inevitable result.

"As we have already indicated, a criminal defendant is entitled to have his guilt or innocence determined on the specific offense charged and not risk the possibility of conviction for a series of prior specific acts collectively suggested that his career had been reprehensible. The force of this principle, which lies at the heart of our criminal law system and seems a vital part of our definition of due process of law, is in no way blunted merely because a defendant has, in seeking acquittal, introduced evidence of less than questionable relevance.

* * *

"* * * To put it succinctly, once a man * * * has been shown to be fundamentally immoral, a jury will hardly be influenced by the fact that there were days when he did not do anything dishonest."

Here, too, the testimony of the two young women that Henson had raped them, was bound to have its effect upon the minds of the jurors, and, if believed, certainly established appellant as being fundamentally immoral. We feel, unquestionably, that this evidence was prejudicial, and requires a reversal of the judgment.

Several alleged errors need not be discussed, since the questioned instances will not arise on a retrial. For

[2] Emphasis supplied.

example, appellant strongly urges that the court erred in refusing to grant a continuance to enable him to obtain the deposition of Clyde Bias, who, according to appellant, would have testified that he had talked to the prosecuting witness on the date of the alleged rape, less than one hour after it purportedly occurred; that this witness would have stated that the young woman had not complained of any rape or mistreatment by Henson; further, that her clothing and personal appearance did not indicate a struggle. Appellant's counsel had attempted to subpoena this witness, but the sheriff was unable to locate Bias. As stated, since the case is being reversed, a detailed discussion of this point is not necessary, but it does appear that, in the interest of justice, appellant should have been granted a reasonable continuance for the purpose of trying to locate the witness, particularly since the case was tried only three weeks after the alleged offense was committed.

It is also asserted that the court should have granted a continuance for the purpose of permitting appellant's counsel time for a proper investigation, but this, of course, is no longer important. Likewise, appellant complains of the manner in which the jury was selected, but this alleged error will likely not arise in another trial.

Appellant asserts that the court erred in failing to give seven instructions that he offered, and also alleges that the court erred in giving one of its instructions. We have examined the proffered instructions, and find that they either do not correctly state the law, or were covered by other instructions given by the court. It was not error to tell the jury that the female's subsequent silence and conduct could be considered as bearing on the question of whether she consented to the act, unless the jury found that the prosecuting witness was in fear of her own safety when she failed to report the incident to strangers.

Other assignments of error have been examined, and found to be without merit.

Because of error committed by the trial court, as herein set out, the judgment is reversed, and the cause remanded.

LINDSEY *v.* CITY OF CAMDEN

5-3612 393 S. W. 2d 864

Opinion delivered September 27, 1965.

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

Gaughan & Laney, for appellee.

ED. F. MCFADDIN, *Associate Justice.* This is a zoning case. Appellants sought the rezoning of four pieces of property in the City of Camden from Residential (R-2) property to Business (B-2) property. After the Camden Planning Commission unanimously refused the request, and after the City Board of Directors likewise unanimously refused the request, the appellants filed suit in the Chancery Court. They alleged, *inter alia*:

"The action of the city in refusing to rezone the property from residential to business or commercial zone was arbitrary, without legal foundation, and is depriving plaintiffs of their property without due process of law in violation of their constitutional rights under both the state and federal constitutions. Plaintiffs allege that the said property is in fact commercial property and that it should have been rezoned as such."

There was an extended and patient hearing in the Chancery Court. More than a score of witnesses testified. The record before us contains 560 pages with several scores of exhibits, consisting of maps, diagrams, and photographs. The Chancery Court found that the petition was without equity and dismissed it. From that decree appellants bring this appeal, urging only one point:

"The action of the Chancellor in restricting the growth of an established business district is arbitrary, and his findings are contrary to the preponderance of the evidence."

To abstract the testimony, even briefly, would serve no useful purpose. Witnesses for the appellants supported their claim; and witnesses for the City testified equally strong in opposing the claim for rezoning. If we would believe the appellants the Planning Commission and the City Board of Directors of Camden are opposed to all development of the business district of Camden. If we would believe the appellee then the appellants are real estate speculators who purchased their holdings for the purpose of reaping an enormous profit from rezoning, and this seems to be the third attempt to get such rezoning.

Which side is right? The Chancellor—and he was a splendid and discerning Judge—heard the witnesses and knew the property. He found that the petition for rezoning "was without equity." In *City of Little Rock* v. *Garner,* 235 362, 360 S.W. 2d 116, we pointed out: (a) that in the chancery court the burden was on the petitioners to prove by the preponderance of the evidence that the action of the City—in refusing rezoning—had been arbitrary; and (b) that when the case reaches this Court on appeal the question before us is whether the finding of the Chancery Court is contrary to the preponderance of the evidence. Testing the present case by our previous holdings, as reflected by the Garner case, we are unable to say that the Chancery decree is against

the preponderance of the evidence; so the decree is affirmed.

Robinson, J., dissents.

LYLES *v.* UNION PLANTERS NATIONAL BANK

5-3630 393 S. W. 2d 867

Opinion delivered September 27, 1965.

Ralph E. Wilson, for appellant.

Swift & Alexander, for appellee.

ED. F. MCFADDIN, Associate Justice. This is a usury case. The appellee, Union Planters National Bank, filed action in replevin against appellant Lyles to repossess a motor vehicle purchased by Lyles on time payments. Lyles pleaded usury. The Trial Court held there was no usury because the law of Tennessee governed the trasaction; and from that holding Lyles brings this appeal.

The cause was submitted to the Trial Court on the original contract and a stipulation, from which we copy the germane portions:

"1. That on the 25th of May, 1964 Robert C. Lyles, who at that time resided at 933 Jackson Avenue, Memphis, Tennessee, purchased a motor vehicle . . . from McCaa Chevrolet Company at its place of business at West Memphis, Arkansas.

"2. That a conditional sales contract was executed on said date at West Memphis, Arkansas in favor of Union Planters National Bank of Memphis, Tennessee . . .

"3. That at the time said contract Robert C. Lyles was a resident citizen of Memphis, Tennessee, where he was employed . . . . and where he had been extended credit on several occasions by the plaintiff [appellee]; and that on or about October 16, 1964, the defendant Lyles moved to and resided in Osceola, Arkansas . . ."

It is agreed by all parties that the amount of the "finance charge" (*i.e.,* interest) exceeds 10%. It is also agreed that if the law of Tennessee governs the transaction there is no usury, but if the law of Arkansas governs the transaction there is usury under our cases, some of which are: *Hare* v. *General Contract,* 220 Ark. 601, 249 S. W. 2d 973; *Winston* v. *Personal Finance,* 220 Ark. 580, 249 S. W. 2d 315; *Strickler* v. *State Auto,* 220 Ark. 565, 249 S. W. 2d 307; and *Commercial Credit* v. *Kitchens,* 231 Ark. 104, 328 S. W. 2d 335. Futhermore, if there was usury in the original contract then the transfer of the contract to the appellee bank did not eliminate the purchaser's right to plead usury. *German Bank* v. *Deshon,* 41 Ark. 331; and *Hare* v. *General Contract,* 220 Ark. 601, 249 S. W. 2d 973.

Ordinarily in a case like this one, the *lex loci contractus* (*i.e.,* the law of the place of the making of the contract) governs unless: (1) there is an agreement between the parties that the law of another State shall govern; and (2) there is a reasonable and bona fide basis for the parties so agreeing. *Cooper* v. *Cherokee Village,* 236 Ark. 37, 364 S. W. 2d 158; and *Hutchingson* v. *Republic Finance Co.,* 236 Ark. 832, 370 S. W. 2d 185. These cited cases are our most recent holdings on the issue of

the law applicable to such transactions. In the Cooper case we held that the law of New York applied to the transaction because: (a) the contract was made in New York; (b) it was to be performed in New York; and (c) the parties expressly stated that the law of New York was to govern. In the Hutchingson case we held that the law of Iowa did *not* govern because: (a) the contract was made in Arkansas; (b) the work was done in Arkansas; and (c) the law of Iowa bore no reasonable relationship to the transaction, even though the payments were to be made in Iowa. In the Hutchingson case we said:

"To hold that the mere fact that the note was payable in Iowa made the agreement subject to Iowa law, when all other essential elements of the contract were entered into, and were to be performed in Arkansas, would be to henceforth furnish a loophole whereby an unscrupulous individual, or company, from a state which permitted liberal interest rates, could enter into contracts in this state, and simply by making the note payable in his, or its, own state, safely evade the usury laws of this jurisdiction. Arkansas has a strong public policy on this subject, as indicated by the fact that the penalty against a seller or lender exacting usury is indeed heavy, and this court, particularly for the last 10 years, has been zealous in guarding against any attempt to evade our constitutional provisions relative to usury."

After a careful study we conclude that the law of Arkansas governs the transaction involved in this case. The contract was made in Arkansas and provided: "The time balance is payable at the seller's office designated below or at such office of any assignee as may be hereafter designated." The "seller's office" was designated in the contract as West Memphis, Arkansas; and no other place of payment was ever designated. By endorsement the contract was assigned to the appellee bank; but the fact remains that the contract was made in Arkansas, and there is no language in the contract that even suggests that the law of Tennessee was intended to govern the transaction. Therefore, the case at bar falls within the rule of the Hutchingson case.

Appellee claims that the provisions of the Uniform Commercial Code require that the law of Tennessee govern the transaction here involved; but we do not agree with such claim. Ark. Stat. Ann. § 85-1-105 (Addendum 1961) is a part of the Uniform Commercial Code; and the germane portion reads:

"Territorial application of Act-Parties' power to choose applicable law.—(1) Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this Act applies to transactions bearing an appropriate relation to this state.

In the case at bar, even if it could be said that the transaction "bears a reasonable relation" to Tennessee, nevertheless the parties did not *agree* that the law of Tennessee would govern. Futhermore, Ark. Stat. Ann. § 85-9-201 (Addendum 1961) is also a part of the Uniform Commercial Code; and the germane portion reads:

". . . Nothing in this Article [chapter] validates any charge or practice illegal under any statute or regulation thereunder governing usury, small loans, retail instalment sales, or the like, or extends the application of any such statute or regulation to any transaction not otherwise subject thereto."

The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this Opinion.

5-3554 393 S. W. 2d 865

Opinion delivered September 27, 1965.

[redacted]

Gordon & Gordon, for appellant.

Smith, Williams, Friday & Bowen and *William H. Sutton,* for appellee.

GEORGE ROSE SMITH, J. This is a three-cornered lawsuit involving personal injuries suffered by Woodrow Wilson Canady, a minor, in a three-car collision. Only two issues now remain in the case. On direct appeal young Canady, by his father as his next friend, contends that the trial court erred in directing a verdict in favor of Alphus Mitchum, one of the other two drivers involved. On cross appeal Mitchum in turn contends that the trial court, after having directed a verdict in his favor, erred in requiring him to contribute as a joint tortfeasor to the $22,000 judgment that Canady and his father obtained against Linda Allen, the third driver. (Linda and her husband also took an appeal, but in this court they elected to dismiss it.)

There is no essential dispute in the controlling facts. After dark on the evening of December 27, 1963, young Canady was driving a borrowed car on a highway in Conway county. Minor engine trouble developed, and Canady stopped on the right-hand shoulder of the road with the intention of fixing the car himself. It was too

dark for him to see the engine without a flashlight. A few minutes later a young friend of Canady's, Alphus Mitchum, stopped and offered to help. Under Canady's supervision Mitchum parked his own car on the shoulder in front of the disabled vehicle. Mitchum's car was facing the wrong way with respect to traffic, so that his headlights would provide illumination while Canady worked on his own engine. While the two cars were thus face to face Linda Allen, driving her husband's car, ran into the rear end of the Canady car and caused the personal injuries for which young Canady and his father recovered judgment.

We think the court was right in directing a verdict in favor of Alphus Mitchum. Counsel for Mitchum cite authorities such as *Haralson, Admx.,* v. *Jones Truck Lines,* 223 Ark. 813, 270 S. W. 2d 892, 48 A.L.R. 2d 248 (1954), holding that even a good Samaritan may expose himself to liability if he acts carelessly. (Canady contends that Mitchum was negligent in parking his car on the wrong side of the road with its lights on.)

The rule in question does not quite reach this case. Here Canady consented to Mitchum's conduct and even participated in it by pointing out exactly where Mitchum should park. Thus the case falls within the rule stated in § 892 of the Restatement of Torts (1st Ed., 1939): "A person of full capacity who freely and without fraud or mistake manifests to another assent to the conduct of the other is not entitled to maintain an action of tort for harm resulting from such conduct." See also *Yelvington* v. *Mitchell,* 191 Ark. 909, 88 S. W. 2d 817 (1935). This principle is undeniably just. It goes against the grain even to suggest that a person in distress may solicit another's assistance, dictate the exact form of that assistance, and then turn upon his benefactor when it is really his own judgment that proves to have been wrong. He alone is to blame.

Secondly, the court submitted interrogatories on the issue of comparative negligence. The jury divided the fault in the ratio of 90% to Linda Allen, 10% to Alphus

Mitchum, and none to Woodrow Canady. In entering the judgment the court required Mitchum to contribute his proportionate share to any amount that the Allens may be compelled to pay.

This part of the judgment is wrong. As we have seen, any negligence on the part of Mitchum must be imputed to Canady. In an analogous situation we have held that a passenger who is found to have assumed the risk of his own driver's negligence must submit to a proportionate reduction in his judgment for damages against the other driver. *J. Paul Smith Co.* v. *Tipton,* 237 Ark. 486, 374 S. W. 2d 176 (1964). Thus the trial court was right in having the jury fix the degree of Mitchum's fault, but the judgment should have exonerated both Mitchum and the Allens from liability for the corresponding proportionate part of Canady's damages. Canady has no standing to recover from either of them for that part of his own damages attributable to conduct to which he consented.

Affirmed on direct appeal, reversed on cross appeal.

ARK. STATE HIGHWAY COMM. *v.* PONDER, JUDGE

5-3656 393 S. W. 2d 870

Opinion delivered September 27, 1965.

Murphy & Arnold, for Respondent.

Phil Stratton, Virginia Tackett and *Mark Woolsey,* for Petitioner.

GEORGE ROSE SMITH, J. The State Highway Commission has brought an eminent domain proceeding to condemn certain land in Independence county. Several of the defendant landowners filed discovery interrogatories, Ark. Stat. Ann. §§ 28-355 and -356 (Repl. 1962), seeking to obtain the names of the persons who had appraised the land for the Commission, a copy of the instructions given to these appraisers, a copy of the appraisals, information about the appraisers' study of comparable sales, and similar data. The trial judge held that the opinions and appraisals of the prospective expert witnesses were privileged, but he directed that the other requested information be supplied.

The Commission then filed the present petition for a writ of certiorari to quash the trial court's order. The petitioner contends that the discovery statutes do not apply to agencies of the State and, alternatively, that all the information sought by the landowners is privileged.

We think the writ must be denied on the authority of *Arkansas Motor Coaches* v. *Taylor, Judge*, 234 Ark. 803, 354 S. W. 2d 731, 95 A. L. R. 2d 1227 (1962). There the defendant sought a writ of prohibition to prevent the trial court from compelling it to answer certain discovery interrogatories, on the ground that the information sought was privileged. We denied the writ, holding that the discovery order was interlocutory and not appealable. Since the court had jurisdiction to make the order, prohibition could not be used as a substitute for an appeal from the final judgment in the case. Similarly, certiorari cannot serve as a substitute for an appeal. *Morgan* v. *Hess,* 210 Ark. 207, 194 S. W. 2d 871 (1946).

This petitioner insists that if it complies with the trial court's order, under protest, its remedy by eventually taking an appeal from the final judgment will be inadequate, for, even if we should hold that the discovery order was an error, the harm will already have been done. In effect it is argued that if the cat is ever let out of the bag it can never be gotten back into the bag. An identical argument can be made whenever a discovery order is objected to. To sustain the argument in this case would

mean that we should have to make a similar piecemeal decision whenever an application for discovery is unsuccessfully resisted at the trial level. We have repeatedly held that we cannot review interlocutory orders in this fashion.

Writ denied.

TRINITY UNIVERSAL INS. CO. v. STOBAUGH

5-3602 395 S. W. 2d 24

Opinion delivered September 27, 1965.

[Rehearing denied November 15, 1965.]

Smith, Williams, Friday & Bowen and *William H. Sutton,* for appellant.

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

PAUL WARD, Associate Justice. This action involves a question of coverage under an automobile liability insurance policy. There is very little, if any, dispute as to the facts involved.

A Mrs. Estes and her daughter who are residents of Pecos, Texas came to Conway County (this state) in July, 1963 on a visit. They came in a car insured by appellant—Trinity Universal Insurance Company—a Texas corporation. On July 8, 1963 there was a collision in Conway County between Mrs. Estes' car and a car owned (and being driven at the time) by appellee—Syble Stobaugh. The Estes car was being dirven at the time of the accident by one Bob Millsaps with the consent of Mrs. Estes. At the time of the collision it was evident that appellee's car was slightly damaged, but there was no indication or claim that appellee was injured. Mrs. Estes promptly agreed to pay for the damage to appellee's car, and in a few days she and her daughter returned to their home in Texas. Mrs. Estes did not notify appellant of the accident for several days as is later pointed out.

On September 10, 1963 appellee's attorneys wrote Mrs. Estes a letter stating that appellee had been injured in the accident; that they presumed she had notified her insurer and that a suit would likely be filed. A copy of this letter was sent to the Producer's Insurance Agency at Pecos, Texas—an affiliate of appellant. At any rate appellant's agent contacted Mrs. Estes promptly and had her sign a Reservation Agreement which gave appellant the right to investigate the case and even defend the proposed suit without waiving any of the policy provisions designed to protect its rights.

Later appellee sued Mrs. Estes and Millsaps and secured a judgment against Millsaps (on March 17, 1964) in the amount of $10,000 for alleged personal injuries, but no judgment was entered against Mrs. Estes. Attorneys employed by appellant defended that suit for Mrs. Estes and Millsaps.

Pleadings. On May 29, 1964 appellee filed a complaint against appellant in the Circuit Court of Conway County alleging in substance: she secured judgment against Millsaps in the amount of $10,000 on March 23, 1964; that appellant defended Millsaps in that action; that said judgment had not been paid by appellant; and, that she understands $5,000 is the limit of appellant's

liability under its policy. The prayer was for judgment in the sum of $5,000. In appellant's answer the only defense to the above complaint was (in effect) that

"... the insured must immediately notify the defendant company upon the happening of an accident for which coverage was to be claimed. No person claiming insurance under the defendant's policy gave notice to the defendant of the accident of July 8, 1963 within the time specified by the policy."

In reply appellee stated that Millsaps was operating the automobile owned by Mrs. Estes with her permission; that under the provisions of the insurance policy Millsaps was an "insured," and that no Reservation Agreement was ever obtained from Millsaps; and, that the acts of the insurance company (appellant) constituted a waiver of the provisions of the policy concerning notice.

In appellant's brief it is stated: "Appellant defended on the ground that notice was not given 'as soon as practical' as required by the policy."

Upon a trial the jury returned a verdict in favor of appellee in the sum of $5,000 for which amount judgment was entered. The trial court also gave appellee judgment in the amount of $600, being a 12% penalty, and allowed a $2,000 attorneys' fee.

1. It is first contended by appellant that the trial court should have directed a verdict in its favor at the close of all the testimony because it is undisputed that appellee did not give notice of the accident until some forty days after it occurred, and that, as a matter of law, this was not a proper notice. It would serve no useful purpose to answer all the arguments presented on this point because, as hereafter set out, we have concluded the matter of adequate notice was a question for the jury under the facts of this particular case.

2. After a careful review of the record and the pertinent decision we hold that the jury had a right to decide whether proper notice (under the provisions of the policy) was given to appellant in this case, and we also hold there is in the record sufficient evidence to support

a finding by the jury that proper notice was given. The pertinent portion of the policy relating to notice reads as follows:

"In the event of an accident, occurrence or loss, written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place and circumstances thereof . . . shall be given by or for the insured to the company or any of its authorized agents as soon as practicable."

It would serve no useful purpose to detail all the testimony because beyond doubt there is sufficient evidence from which the jury could have made the following findings: when the accident occurred on July 8, 1963 there was nothing to indicate to Mrs. Estes that appellee had suffered any physical injury for which a claim would be made against her or Millsaps; appellee did make known (through her attorney) to Mrs. Estes some time in September, 1963 that a claim for personal injuries would be made against her and Millsaps; and, Mrs. Estes notified appellant (through its agent) of the claim almost immediately after she was advised of it.

Appellant appears to take the view that since appellee (or Millsaps in this instance) did not give notice of the accident until some 40 days had elapsed, the trial court should, as a matter of law, have found no proper notice was given. We do not agree with this view. The rule which we think reasonable, and which has been uniformly adopted by this and other courts, is that the insured need not give notice to the insurer if the accident appears trivial unless a claim is anticipated. *Home Indemnity Co.* v. *Banfield Brothers Packing Company, Inc.*, 188 Ark. 683, 67 S. W. 2d 203; *American Fidelity & Casualty Company, Inc.* v. *Northeast Ark. Bus Lines, Inc.*, 201 Ark. 622, 146 S. W. 2d 165; *Maryland Casualty Company* v. *Waggoner,* 193 Ark. 550 101 S. W. 2nd 451. Appleman, Insurance Law & Practice, Vol. 8, Sect. 4743 States: "It has been held that the insured need not report every trivial accident, but if an ordinary prudent individual acting reasonably would consider, under all the circumstances, that the accident was inconsequental and that no

claim for damages would be made, notice need not be given the insurer."

Therefore we hold that the trial court was correct in submitting to the jury the question of proper notice. Appellant objects to two instructions given to the jury on this point, but we have carefully examined the same and find that they are in accord with the rule just stated.

3. Since there is no way of knowing on what ground the jury based its finding in favor of appellee (the case not being presented to the jury on interrogatories) it becomes necessary to consider whether the question of waiver of notice was properly presented to the jury. The only objection under this point is to Instruction No. 3 given by the court. It reads:

"You are instructed that the Plaintiff contends that the insurance company waived the provision of said policy requiring the giving of notice as soon as practicable of the accident. You are instructed that waiver is a voluntary and intentional relinquishment of a known and existing right, or such conduct as warrants an inference of the relinquishment of such right.

"If you find from the evidence that the insurance company did not obtain a 'non-waiver' or 'reservation agreement' from Bob Millsaps, and if you further find that the conduct of the insurance company, its agents and servants, in investigating the accident, employing attorneys to defend the action, and filing pleadings amounted to a waiver of the policy provision concerning notice of the accident, then you are told that the insurance company cannot now defeat said policy by pleading a breach of the policy on account of the failure to give notice as soon as practicable."

The objection made by appellant to the giving of said instruction was that there was no proof in the record to sustain a finding of waiver on behalf of appellant. We do not find that the basis of this objection is sustained by the record. It is true that on January 30, 1964 appellant wrote a letter to Mrs. Estes and sent a copy to Millsaps at his home address. In this letter appellant stated that it would

defend the lawsuit brought by appellee against them, but without waiving any of its rights under the provisions of the insurance policy—such as proper notice. The record discloses, however, that previously appellant had undertaken an investigation of the matter and had (through its attorneys) filed an answer for Millsaps in the suit wherein he was being sued by appellee. These facts, we think, justified the trial court in submitting to the jury the question of waiver.

4. We find no merit in the contention that the trial court erred in allowing appellee to file a reply more than 20 days after appellant's answer was filed. Ark. Stat. Ann. § 27-1137 (Repl. 1947) relied on by appellant has no application. That section applies where the answer contains a counterclaim or set-off, which is not the situation here.

5. In view of the conclusions we above set out it follows, without question, that the court was correct in assessing the 12% statutory penalty against appellant, and in allowing a reasonable attorneys' fee. The reasonableness of the amount of the fee herein fixed is not questioned.

Affirmed.

Supplemental opinion on denial of rehearing P. 982.

RUSSELL *v.* KEENE

5-3594 394 S. W. 2d 131

Opinion delivered October 4, 1965.

[redacted]

Trantham & Knauts, By: *C. W. Knauts,* for appellant.

Gus R. Camp, for appellee.

CARLETON HARRIS, Chief Justice. Appellee, R. E. Keene, a resident of Clarkton, Missouri, instituted suit against Lloyd Russell, appellant herein, a resident of Clay County, Arkansas, for the sum of $1,600.00 plus interest, alleging that appellant had threshed thirty-four acres of lespedeza, belonging to appellee, and had converted the seed to his own use. This suit was based upon the fact that Keene had allegedly entered into an oral agreement with the City Council of Gideon, Missouri, on November 10, 1960, to the effect that he (Keene) would keep clean the waste land adjacent to and adjoining the runways of the Gideon Municipal Airport. Keene agreed to mow and cut off briars and weeds, and, in return, was given the privilege of using the land for hay operations. According to appellee's evidence, this contract was to be reduced to writing by the City Attorney, and the parties would then execute the written agreement. However, the testimony reflects that the City Attorney subsequently died, and no written contract was ever prepared. Following the oral agreement, appellee

entered into possession, and thereafter, according to his testimony, maintained his part of the agreement for 1960, 1961, 1962, 1963, and on into 1964. Russell, according to evidence, obtained permission from a member of the City Council in 1963 to perform the same service (stating that the airport property was not being kept clean), and thereupon cut the lespedeza and stored the seed. Keene demanded the seed, or the value thereof, and upon refusal, instituted the instant suit.

Russell filed an answer denying allegations, and specially pleaded the Missouri statute of frauds, which requires all contracts entered into by a city (along with some other political subdivisions) to be in writing. On trial, the jury returned a verdict for Keene in the amount of $600.00, and from the judgment so entered, appellant brings this appeal.

The amount of the judgment is not here in issue, though the parties disagreed as to the value of the seed. Likewise, though appellant offered evidence that no oral agreement was entered into between Keene and the City Council of Gideon,[1] the jury found otherwise, and that question is not really at issue on this appeal. The answer to this litigation depends upon the effect of the Missouri statute of frauds upon the oral agreement.

Section 432.070, Volume 3, of the Missouri Revised Statutes for 1959 provides:

"No county, city, town, village, school township, school district or other municipal corporation shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, nor unless such contract be made upon a consideration wholly to be performed or executed subsequent to the making of the

[1] W. H. Lunbeck, who was Mayor of Gideon in 1960, corroborated appellee's testimony that the city had entered into the verbal agreement with Keene, and Lunbeck stated that the vote of the council had been unanimous. Tom Bradshaw, present Mayor of Gideon (having defeated Lunbeck at the last election), and member of the council in 1960, testified that no agreement was entered into with Keene. Bradshaw testified that he gave Russell (who owns the funeral home in Gideon) permission to mow the airport property, after telephoning and calling upon two of his fellow aldermen, and obtaining their approval.

contract; and such contract, including the consideration, shall be in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing."

The Missouri Supreme Court has held in several cases that the provisions of the section are mandatory, rather than directory, and that such a contract, not in writing, is void. Russell therefore vigorously argues that, since any agreement between Keene and the City of Gideon was void, appellee has no standing in court. The cases, heavily relied upon by appellant, involve situations where an individual was endeavoring to enforce an oral contract with the city. We very quickly agree with appellant that Keene could not enforce his agreement against the City of Gideon, but it does not follow that Russell is entitled to the benefits of the Missouri statute here under discussion.

Under the general rule, the defense of the statute of frauds is not available to strangers to the agreement. In 49 Am. Jur., Section 589, Page 896, we find:

"The defense of the statute of frauds is a personal one available only to a party to the contract to which the statute is alleged to apply and his representatives and privies. * * *

"As has been said, it does not rest with a stranger to say that the parties to the oral agreement will not abide by the same regardless of the statute; it is for the party himself (or his privy) to decide whether he shall avail himself of the defense. If he feels that he should discharge the moral obligation although he may have a perfect legal defense, no stranger or third party not privy to the contract can complain. *This rule applies even under statutes which provide that such agreements are void unless reduced to writing and signed by the party charged.*"[2]

Further, in Section 590, Page 898:

[2] Emphasis supplied.

"Tort-feasors and fraudulent intermeddlers will not be permitted to use the statute of frauds as a defense to a wrongful act or as a means of consummating a fraudulent design. Under this rule, one who inflicts injury upon land in the possession of another under an oral contract of purchase, or who wrongfully seizes or retains goods claimed by another under an oral contract unenforceable against the previous owner on account of the statute, or who commits other such tortious acts, cannot defend upon the ground that the plaintiff's right or interest exists only by virtue of a contract unenforceable under the statute of frauds, where the other party to the contract has not rescinded or repudiated the contract upon the ground that it is not binding upon him."

Missouri holdings are in accord with this general statement of the law. In *Bauer* v. *White,* 29 S. W. 2d 176, the Kansas City Court of Appeals said:

"The statute of frauds is inapplicable for it is well established that if both parties to a contract waive the requirements of the statute and carry the contract into execution, a third person cannot be heard to question its effect.

See also *Doerflinger Realty Company* v. *Fields,* 281 S. W. 2d 609. These cases do not relate to contracts with cities, but we see no reason why the same standard, herein discussed, which seems to be the rule throughout the various jurisdictions, would not apply.

We have reached the conclusion that this primary defense, urged by Russell, is available only to the City of Gideon, and appellant, being a stranger to the agreement, is in no position to say that the parties to the agreement cannot abide by same, regardless of the statute of frauds. Other allegations of error have been examined, and found to be without merit.

Affirmed.

5-3474 394 S. W. 2d 128

Opinion delivered October 4, 1965.

[redacted]

Guy H. Jones, for Petitioner.

Gordon & Gordon, for Respondent.

ED. F. MCFADDIN, Associate Justice. This is a *certiorari* proceeding, seeking review of an order of the Conway Chancery Court of June 26, 1964, holding the petitioner, Bobby Harrison, to be guilty of civil contempt.[2]

The petitioner, Bobby Harrison, and Lola Harrison were divorced by decree of the Conway Chancery Court dated September 12, 1962, and the following are portions of so much of the divorce decree as are germane to this present proceeding:

"The Court further finds that during their marriage plaintiff and defendant were the owners as tenants by the entirety of the following lands: [Described] . . . "That defendant sold said lands for $6,000.00 and now has said money in his possession. That plaintiff is en-

[1] The distinction between civil contempt and criminal contempt is discussed in *Blackard v. State,* 236 Ark. 20, 364 S. W. 2d 155. Certiorari as the remedy for review in contempt matters is discussed in *Blackard* v. *State* (*supra*) and in *Ex parte Johnson,* 221 Ark. 77, 251 S. W. 2d 1012. The extent of review by this Court is also discussed in *Ex parte Johnson* (*supra*) and in *Blackard* v. *State* (*supra*). A recent case on contempt is *Ex parte Coffelt,* 239 Ark. 324, 389 S. W. 2d 234. An interesting annotation may be found in 12 A. L. R. 2d 1059.

titled to one-half of the proceeds derived from the sale of said property . . . .

"The Court further finds that defendant is the owner of ten (10) head of cattle and that plaintiff is entitled to one-third of the value of said cattle. That the defendant is given thirty (30) days in which to purchase plaintiff's one-third interest in said cattle, and if defendant has not paid plaintiff for her one-third interest in said cattle, within 30 days then it is directed that said cattle, or so much thereof as is necessary to pay plaintiff for her one-third interest, to be sold and plaintiff paid for one-third of the value of said cattle."

On June 15, 1964 Lola Harrison filed her motion alleging the provisions in the divorce proceedings; and we copy pertinent excerpts of the motion:

"The Court further found that defendant had sold said lands for $6,000.00 and that defendant had said money in his possession, and ordered the defendant to pay plaintiff $3,000.00 for her one-half interest in the proceeds of the sale.

"That defendant has failed and refused to obey the order of the court and has failed to pay said money to plaintiff. That said money is in cash and cannot be reached by execution or any other action to enforce said decree.

"That defendant should be required to show cause why said money has not been paid and that he should be directed by this Court to deliver the said $3,000.00, together with interest from the date of the decree, to the plaintiff, and upon his failure to do so he would be punished for contempt.

"Further plaintiff states that said decree of September 12, 1962, found that defendant was the owner of ten head of cattle and plaintiff was awarded a one-third interest in said cattle. That defendant has now disposed of cattle and has failed to deliver to plaintiff her one-third interest. That defendant should be required to

show cause why said money has not been delivered to plaintiff, and upon his failure to do so he should be punished for contempt."

The Chancery Court conducted a hearing on the said motion, at which hearing Bobby Harrison was present in person and represented by counsel. The evidence taken *ore tenus* is shown on some sixty pages of the transcript before us; but none of such evidence has been completely abstracted by the petitioner or the respondent. At the conclusion of the hearing the Chancery Court entered its order of June 26, 1964; and we copy the germane portions:

"That on September 12, 1962, decree was entered by the Chancery Court of Conway County, Arkansas, in which said Court found among other things that the defendant had sold certain lands owned by the plaintiff and defendant as tenants by the entirety for $6,000.00, and that the plaintiff, Lola Harrison, was entitled to one-half of the proceeds of said sale, to-wit: $3,000.00. And the Court further found in said Decree that the defendant, Bobby Harrison, was the owner of ten head of cattle and the said Lola Harrison was entitled to one-third of the value of said cattle.

"The Court Further Finds that the said defendant, Bobby Harrison, did not pay to the plaintiff, Lola Harrison, the sum of $3,000.00, and that he has failed to comply with the Order of September 12, 1962, and that the said defendant, Bobby Harrison, should be and is hereby held in contempt of this Court.

"The Court further finds that the defendant, Bobby Harrison, has disposed of the ten head of cattle mentioned in the Decree of September 12, 1962, and that the plaintiff, Lola Harrison, is awarded the sum of $3,000.00, representing one-third of the value of said cattle.

"The Court further finds that the defendant, Bobby Harrison, shall be committed to the custody of the Sheriff of Conway County and by said Sheriff committed to the Conway jail until the above amounts, together with interest from September 12, 1962, are paid, ..."

It is from the aforementioned order of June 26, 1964 that this *certiorari* proceeding is prosecuted. Since the oral testimony is not abstracted, the burden of the petitioner's argument is, that he is about to be imprisoned for debt in violation of his constitutional rights under Article 2, Section 16 of the Arkansas Constitution. We thus have before us the bare question of whether the order of the Conway Chancery Court of June 26, 1964 shows on its face, that petitioner, Bobby Harrison, is about to be imprisoned for debt, rather than to be punished for contempt of court in a civil case. The answer to the question is found in our holding in *Meek v. State,* 80 Ark. 579, 98 S. W. 378, wherein we said:

"It is first contended on behalf of the petitioner that imprisonment for debt in a civil action is the effect of of the order of commitment, and that this is forbidden by the Constitution (art. 2 § 16, Const. 1874).

"There are some courts which hold, in view of constitutional provisions forbidding imprisonment for debt, that disobedience of an order for payment of money under a judgment or decree can not be punished as a contempt; but, according to the decided weight of authority, an order directing the payment of specific funds adjudged to be in the possession or control of the person at the time of the trial may be enforced by contempt proceeding, and punishment may be inflicted for disobedience of the order. *State* v. *Becht,* 23 Minn. 411; *In re Milburn,* 59 Wis. 24; *Leach* v. *Peabody,* 58 Vt. 485; *Eikenberry* v. *Edwards,* 67 Iowa 619; *Pritchard* v. *Pritchard,* 18 Ont. 173, *Ex parte Cohn,* 55 Cal. 193.

"In one of the cases cited above the Supreme Court of Minnesota said: 'In the case at bar the imprisonment is for the contempt in refusing to obey an order of the court. It is true that the order relates to the debt evidenced by the judgment against the relator, but this in no way alters the fact that the imprisonment is for the contempt, not the debt. And the contempt does not consist in the relator's neglect or refusal to pay the debt, but in his disobedience of the order directing him

to hand over certain property to the receiver. The fact that the property in question is to be handed over for the purpose of being applied to the payment of the judgment is in no way important. The commitment is, nevertheless, in no proper sense imprisonment for debt.'

"The Supreme Court of Wisconsin, in the Milburn case, *supra,* said: 'The attempt to conceal and keep from the receiver money and choses in action, thus ordered to be delivered up, and upon which the creditor, by such equitable levy, had procured such equitable lien, was not only a fraud upon the rights of the creditor, but a contempt for the authority of the judge. The mere fact that the contempt was in proceedings supplementary to a judgment founded upon a contract did not make it any the less a contempt, nor prevent its being punished as such.' "

Writ denied.

BURTON *v.* KEMP

5-3631 394 S. W. 2d 622

Opinion delivered October 4, 1965.

[Rehearing denied November 8, 1965.]

Griffin Smith, for appellant.

Gus Causbie, for appellee.

GEORGE ROSE SMITH, J. The appellants, Mr. Burton and his wife, and the appellees, Dr. Kemp and his wife, own adjoining parcels of land in Sharp county. In January of 1960 the Kemps conveyed to the Burtons a narrow strip of ground lying on the Kemp's side of the common boundary. A disagreement arose about the true location (with reference to the Government survey) of a fence that was mentioned in the deed.

Early in 1962 the Burtons brought a suit in chancery to quiet their title to the narrow strip. By answer and counter-claim the Kemps asserted that the description in their deed to the Burtons had been erroneous and that the deed should be reformed. The Kemps also averred that the strip being claimed by the Burtons was actually still a part of the half acre originally owned by the Kemps. In their counter-claim the Kemps asked that their title to the half acre tract be quieted and confirmed.

On June 11, 1962, the chancellor entered the final decree that gives rise to the present litigation. By that decree, which now appears to have been much too brief, the court quieted the Burtons' title to the narrow strip and dismissed the Kemps' counterclaim for want of equity. There was no appeal.

About a year later the Burtons filed the present suit, in which they invoke the doctrine of *res judicata* as a basis for claiming title to the entire half acre that was formerly owned by the Kemps. On September 10, 1963, the chancellor rejected the Burtons' claim to the whole half acre and held that they own only the narrow strip originally in controversy. Upon the first appeal we were unable to tell from the record whether the ownership of the entire half acre had been "considered and determine by the court" in the first suit. *Burton* v. *Kemp,* 238 Ark. 95, 378 S. W. 2d 667 (1964). We remanded the case for a determination of that issue.

Upon remand the chancellor directed for the first time that his court reporter transcribe the oral testimony that was taken in the first case and that she also make

available the exhibits that were introduced. After having thus had the benefit of the complete record in the first suit the chancellor again concluded that the only effect of the 1962 decree was to confirm the Burtons' title to the narrow strip. In taking this second appeal the Burtons again invoke the doctrine of *res judicata* as a basis for claiming all the Kemp land.

If the language of our first opinion permitted the trial court, on remand, to review the complete record in the earlier case, the decree now before us is unquestionably correct. The Burtons had no shadow of a claim to the entire half acre except for a tax title which was casually mentioned in their pleadings and which was shown by the undisputed proof to be void. Thus it is not conceivable that the chancellor, in dismissing the Kemp's counterclaim for want of equity, meant to award to the Burtons a piece of property to which they had no legal or moral claim.

The Burtons, however, insist that our first opinion limited the issue on remand to the single question of whether certain documents were in evidence in the first case. We do not so construe our words. The ultimate question, which we set forth in italics, was "whether ownership of the balance of the half-acre was an issue *considered and determined by the court* in the first suit." We went on to point out that extrinsic evidence may be taken into account in determining what questions were involved in a jugment that is pleaded as *res judicata.* Although on the meager record then presented it did seem that the pivotal question might be controlled by a determination of what documents had been introduced at the original hearing, it certainly was not our intention to bring about a demonstrable injustice by limiting the chancellor's investigation to those documents alone.

Affirmed.

5-3638 394 S. W. 2d 123

Opinion delivered October 4, 1965.

Frank Lady and *H. M. Ellis,* for appellant.

Wayne Boyce and *Fred M. Pickens,* for appellee.

GEORGE ROSE SMITH, J. This is an action by the appellant, Clara Andrews, to recover damages resulting from her wrongful discharge by the appellee, her former employer. Upon two earlier appeals we remanded the case for further proceedings, holding in each instance that a prior judgment rejecting the appellant's claim for unemployment compensation was not *res judicata* in the present case. 235 Ark. 568, 361 S. W. 2d 19 (1962); 237 Ark. 540, 374 S. W. 2d 816 (1964). After the second remand the trial court, without a hearing on the merits, entered a summary judgment dismissing the appellant's complaint on the ground that she was not a party to the

collective bargaining agreement that had assertedly been violated and that therefore she has no standing to sue upon that contract. This appeal is from that order of dismissal.

Upon the second appeal we quoted that paragraph in the employer's contract with the union which provides that any employee may be discharged or suspended "for cause." Here Mrs. Andrews contends that her discharge was in violation of that provision in the contract.

By the decided weight of authority, especially among the more modern cases, an individual employee may maintain an action upon a collective bargaining agreement to enforce rights that are personal to him as distinguished from those that accrue to the union as a whole. A wealth of authority to that effect is collected in cases such as *Narens* v. *Campbell Sixty-Six Express,* Mo., 347 S. W. 2d 204 (1961); *Jones* v. *International Union of Operating Engineers,* 72 N. M. 322, 383 P. 2d 571 (1963); and *Springer* v. *Powder Power Tool Corp.,* 220 Ore. 102, 348 P. 2d 1112 (1960). We reached a parallel conclusion in *H. B. Deal & Co.* v. *Marlin, Judge,* 209 Ark. 967, 193 S. W. 2d 315 (1946), holding that the plaintiff employees were third party beneficiaries of a contract between their employer and the Government and could maintain an action to enforce minimum wage provisions inserted for their benefit.

The appellee relies upon an 1897 decision, *St. L., I. M. & S. Ry.* v. *Matthews,* 64 Ark. 398, 42 S. W. 902, 39 L. R. A. 467. That was an action by Matthews for damages attributable to his discharge in violation of rules agreed to by the the railroad company and the Brotherhood of Locomotive Engineers. We held in effect that the contract of employment lacked mutuality, in that Matthews had not agreed to work for a definite period of time. Hence we concluded that he had no cause of action.

In the years since 1897 the doctrine of mutuality has come to be much more clearly understood than it

was then. As we observed in *Lindner* v. *Mid-Continent Petroleum Corp.*, 221 Ark. 241, 252 S. W. 2d 631 (1952), what the doctrine really means is that each party's binding duty of performance must be a sufficient consideration for the other's promise. In the case at hand the collective bargaining agreement contained an interchange of promises more than sufficient to create a valid contract. The union, for example, bound itself not to engage in a strike or slow-down during the five-year term of the contract. Such a clause can be enforced by the employer. *Lion Oil Co.* v. *Marsh,* 220 Ark. 678, 249 S. W. 2d 569 (1952). Thus Mrs. Andrews is in a position to assert her rights as a third party beneficiary of a valid agreement between the employer and the union. We need not determine the extent of her rights under any individual contract of employment that she may have had with the appellee.

Finally, it is insisted by the employer that Mrs. Andrews should have exhausted her remedies under the collective bargaining agreement by first appealing to the grievance committee created by the contract. It appears, however, that it was the employer who first breached the contract; so it cannot complain of a later breach by the employee. *Cummings* v. *Lord's Art Galleries,* 227 Ark. 972, 302 S. W. 2d 792 (1957).

The contract (see our opinion upon the second appeal) requires the employer, upon discharging an employee, to give both the employee and the president of the union, within 24 hours, a written statement of the reason for the discharge. This clause in the agreement affords substantial protection to the employee, for it compels the employer to make a statement, in black and white, that the employee may then lay before the grievance committee. Upon the record as it stands at this point it is an undisputed fact that the employer did not give the necessary written notice of its reason for discharging Mrs. Andrews. Inasmuch as its breach of the contract prevented her from asserting her grievance with

the certainty that she should have had, the appellee cannot complain of her election to seek redress in court.

Reversed and remanded for a trial on the merits.

KEALY *v.* LUMBERMEN'S MUTUAL INS. CO.

5-3640 394 S. W. 2d 629

Opinion delivered October 4, 1965.

[Rehearing denied November 8, 1965.]

Dickson, Putman, Millwee & Davis, for appellant.

Wade & McAllister, for appellee.

PAUL WARD, Associate Justice. On January 26, 1963 a fire destroyed or damaged a building belonging to the A & A Produce Company (hereafter referred to as "company"), causing the destruction of personal property belonging to Pete Kealy, Glen Scott and Harry Lane (appellants herein). Later appellants recovered a judgment against the company in the sum of $1,786.45 for loss of the personal property.

It is undisputed that The Lumbermen's Mutual Insurance Company (appellee herein) had issued an insurance policy to the company covering the loss. When the company failed to pay the said judgment appellant filed a direct action against appellee. Upon trial in circuit court the judge granted summary judgment in favor of appellee on the ground that appellants had not given ". . . any notice to the defendant insurance company

within the twenty (20) days statutory time to plead." The trial court also found that a "substantial compliance" with the terms of the policy is not sufficient.

We have reached the conclusion that, under the facts of this case, it was for a jury to decide whether notice was given within time (20 days) for appellee to answer the suit against the company. The section of the policy relative to notice of suit against the insured reads:

"If claim is made or suit is brought against the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative."

There is in the record testimony showing: that the attorney for appellants notified appellee's agent promptly that suit had been filed; that another agent of appellee promised to pick up the "papers" from the company; that appellee's agent said he was referring the claim to the adjustment company. The suit in question was filed September 25, 1963. The attorney who filed the suit testified that on the same day he telephoned the adjuster, and that the adjuster inquired where he could pick up the "papers". Said attorney also testified that on or about September 26, 1963 a Mr. Biddle (an adjuster) visited him in his office and was told about the suit. Although some of his testimony was disputed there can be no doubt that the matter presented a jury question as to a material fact. That being true it was error for the trial court to enter a summary judgment. Ark. Stat. Ann. § 29-211 (c) (Repl. 1962) is to the effect that a moving party is entitled to a summary judgment only when "there is no genuine issue as to any material fact. . . ." *Epps* v. *Remmel,* 237 Ark. 391, 373 S. W. 2d 141, and *Jones* v. *Comer,* 237 Ark. 500, 374 S. W. 2d 465.

It is our opinion that if appellee did in fact receive notice in ample time to properly defend the suit against the company, then it should not be allowed to escape liability merely because the provisions of section 11 of the policy were not strictly complied with. In the case

of *Lee* v. *Travelers Insurance Company,* 184 A 2d 636, the court made an announcement with which we agree. It was:

"An insurer should not be held liable without reasonable opportunity to investigate and to properly defend, but when given such opportunity the insurer should not be allowed to escape liability because the notice which furnished the opportunity comes from someone other than the insured."

Similarly, this Court, in the case of *Southern Farm Bureau Casualty Insurance Company* v. *Robinson,* 236 Ark. 268, 365 S. W. 2d 454, said:

"There is substantial evidence that appellant received notice of the suit and that it was not prejudiced by the delay in receiving notice. . . ."

The issue in the case here under consideration is very similar to the one in *Trinity Universal Insurance Co.* v. *Syble Stobaugh* (opinion by this Court delivered September 27, 1965). In that case we said ". . . the jury had a right to decide whether proper notice (under the provisions of the policy) was given to appellant. . . ." We have carefully compared the provisions relative to notice contained in the two insuranc policies involved and find them essentially the same.

The judgment of the trial court is accordingly reversed and the cause is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

MARTIN *v.* RAULSTON, COUNTY JUDGE

5-3633 394 S. W. 2d 133

Opinion delivered October 4, 1965.

Edward H. Patterson, for appellant.

Carl S. Whillock, for appellee.

SAM ROBINSON, Associate Justice. Appellants filed a claim in the sum of $400 against Newton County for about one acre of land taken by the county to improve a public road adjacent to appellants' property. The claim was denied by the County Court; appellants appealed to the Circuit Court. There, after appellants had rested their case, the trial court directed a verdict for the county. The landowners have appealed to this court.

Two witnesses testified in the case. First, the appellant, Virgil Martin, testified that about one acre had been taken to improve the road, and, in his opinion, the particular acre taken was worth $500. He testified, however, on cross-examination, that there was some enhancement in value to the property remaining to him which was caused by the improvement in the road. When asked whether, in his opinion, the remainder was worth less than the entire property was worth before the taking, he answered: "No, I didn't say it was worth less."

One other witness testified, and his testimony can be construed to the effect that the part of the property

remaining after the taking was worth more than the entire property was worth before the taking, and that the enhanced value was due to the improvement of the road. In this state of the record the trial court directed a verdict for the county.

Ark. Stat. Ann. § 76-521 (Repl. 1957) provides: ". . . any court or jury considering claims for right-of-way damages shall deduct from the value of any land taken for a right-of-way the benefits of said State highway to the remaining lands of the owner."

We have held that under the foregoing statute, the landowner is not entitled to recover anything for the taking of a part of his property to improve a road where the remainder of land left to him is enhanced in value in an amount equal to or greater than the value of that part taken. *Bridgmen* v. *Baxter County,* 202 Ark. 15, 148 S. W. 2d 673; *Herndon* v. *Pulaski County,* 196 Ark. 284, 117 S. W. 2d 1051. Here, the trial court was of the opinion that the undisputed evidence showed there was such an enhancement in value.

But, there is another point to be considered. The landowner is precluded from recovering only where the enhancement in value is special and peculiar to the particular property remaining to the landowner after the taking. *Lazenby* v. *Ark. State Highway Comm.* 231 Ark. 601, 331 S. W. 2d 705; *McCahan* v. *Carroll County,* 238 Ark. 812, (Dec. 14, 1964). This is a question of fact, *Bradgemean* v. *Baxter County,* supra, and the burden is on the one who takes the property to show the peculiar and special benefits to the remainder. Hence, even if it can be said that the evidence in the case at bar shows an enhancement in value to the property remaining to the landowner equal in value to the part taken, there is no showing that such enhancement is special and peculiar to the remainder. The cause must, therefore, be reversed and remanded for a new trial.

It is so ordered.

Opinion delivered October 4, 1965.

[Rehearing denied October 25, 1965.]

Bon McCourtney & Associates, By: *H. M. Ellis* for appellant.

Bruce Bennett, Atty. General, By: *Richard B. Adkisson,* Chief Asst. Atty. General, for appellee.

FRANK HOLT, Associate Justice. The bodies of Leonard Dever, his wife, and four of their children were found in the ruins of their home which was destroyed by fire on the night of December 20, 1963. Two other children escaped and made their way to the home of a neighbor. The appellant was subsequently convicted and sentenced to life imprisonment for the death of Leonard Dever. The appellant was then charged by information with the joint crimes of the murder of Mrs. Dever and her four children. A jury found him guilty of murder in the first degree and assessed his punishment at death in each of the five cases. Upon appeal we reversed and remanded each of the cases for a new trial because we deemed inadmissible and prejudicial the testimony of one of the surviving children and, also, the other upon proper objection being made. *Harris* v. *State,* 238 Ark. 780, 384 S. W. 2d 477. Upon a retrial a jury found the appellant guilty of the alleged crimes and fixed his punishment at death in each of the five cases. From these judgments appellant appeals.

For reversal the appellant first contends that count no. 1 of the information alleges two separate and distinct charges of first degree murder in the disjunctive and that the court erred in overruling a demurrer to that part of the information. Count no. 1 of the information alleged that the appellant "did unlawfully, wilfully and feloniously, with malice aforethought, kill and murder Mrs. Martha Dever while in the perpetration of or attempt to perpetrate the crime of robbery and/or arson." We think the court was correct in overruling appellant's demurrer. An indictment or information, except as provided in Ark. Stat. Ann. § 43-1010 (Repl. 1964) our joinder statute, must charge only one offense, however, if it could have been committed by different modes and means the indictment or information may allege the modes and means in the alternative. Ark. Stat. Ann. § 43-1009 (Repl. 1964). In the case of *Franklin* v. *State,* 153 Ark. 536, 240 S. W. 708, we said: "* * * Under our law murder is a single crime and must be so charged, but if committed in different modes or by different means it is permissible to allege the different modes or means in the alternative. * * * In other words, the same murder may be charged in the same indictment either by poisoning or by force in the alternative, the means or modes being inconsistent." See also Ark. Stat. Ann. § 41-2202 (Repl. 1964).

In the case at bar count no. 1 in the information charged appellant with only one offense, namely murder, while in the perpetration of or the attempt to perpetrate either robbery or arson or both. By this permissible pleading a defendant knows with certainty that he is charged with a single offense. And, further, upon acquittal or conviction a defendant has available to him the plea of double jeopardy in any future prosecution.

The appellant argues that the court erred in overruling his motion for a supplemental bill of particulars as to count no. 1 of the information. In counts 2, 3, 4 and 5 the State alleged that the defendant murdered the four children in the perpetration of arson. In his motion for a supplemental bill of particulars as to count no. 1

appellant asked that the State be required to state further "the means, methods, act or acts of the defendant whereby Martha Dever came to her death." Certainly count no. 1 of the information fully apprised the appellant of the information he sought by his supplemental bill of particulars. Furthermore, by his previous trial he was fully aware of the information he sought. Also, the record discloses the appellant was advised that the State elected to conduct the prosecution under the provisions of Ark. Stat. Ann. § 41-2205 (Repl. 1964).

The appellant contends that it was error for the court to refuse his motion to quash the regular and special jury panels on the ground that none of the members of said panels were qualified electors since they were not registered voters as required by our newly adopted Amendment 51, Arkansas Constitution. This contention has recently been decided adversely to appellant. Qualifications of jurors are prescribed by statute and not by the Constitution. *Coger* v. *City of Fayetteville,* 239 Ark. 688, 393 S. W. 2d 622. By the provisions of Act 126 of 1965, which was held by us to be valid legislation in the *Coger case,* these jurors were qualified and, therefore, the court correctly overruled appellant's motion to quash the jury panels.

The appellant also contends there is no substantial evidence to support the verdicts of the jury and the court erred in overruling his motions for directed verdicts. In determining the sufficiency of the evidence we must review it in the light most favorable to the appellee and affirm if there is any substantial evidence to support the verdict. *Clayton* v. *State,* 191 Ark. 1070, 89 S. W. 2d 732; *Higgins* v. *State,* 204 Ark. 233, 161 S. W. 2d 400; *Stockton* v. *State,* 239 Ark. 228, 388 S. W. 2d 382.

About 10 P. M. on December 20, 1963 the home of Leonard Dever was observed as being on fire. Following the fire the bodies of Leonard and Martha Dever, his wife, and four of their children, Nelle, age 8, Joanne, age 5, Sharon, age 4, Janette, age 1, were found in the ruins. Two of the children, Ronald, age 9, and Mary, age 6,

escaped from the burning home and through zero weather walked approximately one and one-half miles to the house of a neighbor. An autopsy was performed on the charred bodies of Leonard and Martha Dever. An x-ray disclosed that there were leaden pellets in that portion of Leonard Dever's body from the neck down to the middle part of the stomach. An x-ray disclosed the presence of leaden pellets in the elbow portion of Mrs. Dever's right arm. The autopsy revealed that Mr. Dever died from gunshot wounds and that it was uncertain as to whether Mrs. Dever died from gunshot wounds or the fire. A partially burned single-barreled 20-gauge shotgun was found in the ruins of the fire on a couch near Dever's body. An expended 20-gauge shell was found in the barrel of the gun. One unburned and expended 20-gauge shell was found outside the house, as was Dever's cap and a trail of blood leading to the house. According to the evidence both shells had been fired from this gun.

Within a few hours after the fire and the discovery of the bodies, appellant was apprehended at his home. He appeared to be drunk and had a patch on a bleeding cut under his right eye. He related conflicting stories as to his activities that night. He said that he had been to Poinsett County to buy some whiskey from a Negro. He denied that he was acquainted with the Dever family and that he had any knowledge of the alleged crimes. Sometime later, however, he admitted that he knew the Devers and went to the Dever home the night of the fire to get some moonshine whiskey. He took his shotgun and seven shells with him and left the shotgun with Mr. Dever as payment for two gallons of whiskey. He admitted that he and Mr. Dever gambled and drank together and that the cut on his eye was the result of Mr. Dever hitting him when he [appellant] intervened in a dispute between Mr. Dever and his wife. According to him Dever shot his wife with appellant's gun. He left to escape from Mr. Dever's attack and observed the house afire. He returned and through a window saw Mrs. Dever's body and was unable to rescue the screaming children. He left

the scene in his car and abandoned it in a gravel pit off the road when the lights stopped functioning. He walked to the house of an acquaintance who took him home by an out-of-the-way road as he directed. A five-gallon can containing approximately one gallon of kerosene was found in the locked trunk of his car. There was blood on this can as well as the left front fender of his car and at the entrance of the left front door of his car. He stated that he told his wife that he had been gambling with Dever and that he gave the money to her. As he was being transported by the police from his home to the police station that night he threw his billfold out of the car window. It was found the next day containing approximately $30.00. The night appellant was taken into custody the officers returned to his home and found a partially burned Mackinaw coat in a stove in his garage. Appellant admitted he burned his coat. The coat had a strong odor of kerosene or fuel oil. Leonard Dever was known to carry large sums of money. He customarily carried two billfolds. One of his billfolds was found empty the day following the fire and was introduced into evidence. The defendant, by his own admission, knew that Dever had "a big roll" of money. Although appellant never admitted the alleged crimes, the evidence in this case is substantial and the court properly overruled appellant's motion for directed verdicts.

Appellant contends also that the trial court was in error in admitting certain photographs into evidence. Some of these pictures portrayed the condition of the surviving children on the night their home was burned. There was evidence that these children suffered from burns about their bodies and clothing which was reflected by these pictures. Other pictures portrayed the condition of the appellant on the night of the crime when he was apprehended and revealed the existence of a wound on his right cheek. Other pictures were of appellant's automobile found in the gravel pit. There was also a picture of the kerosene can found in the trunk of the car. Witnesses properly identified these pictures and testi-

fied that they fairly represented the objects protrayed. The admissibility and relevancy of photographs is largely discretionary with the trial judge and, further, photographs are admissible when they enable the witness to better describe and aid the jury to better understand the evidence. *Bailey* v. *State,* 227 Ark. 889, 302 S. W. 2d 796 and *Lee* v. *State,* 229 Ark. 354, 315 S. W. 2d 916. We find no abuse of the trial court's discretion in the admission of these photographs and we think they were an aid to the jury in understanding the evidence.

Appellant argues that certain exhibits were erroneously admitted into evidence. These questioned exhibits, properly identified, including Leonard Dever's billfold and cap; the pellets taken from the body of Leonard Dever; the five-gallon kerosene can with blood on it taken from appellant's car; and articles retrieved from the house, such as an alarm clock, a 25-caliber pistol, the burned 20-gauge shotgun containing the exploded 20-gauge shell and pellets taken from the stovepipe found in the ruins. The clock had stopped at 10 o'clock or about the time the fire was observed. Appellant also objected to the introduction into evidence of two 22 rifles and two 12-gauge shotguns found in a group in a corner of the front room. Other than the 20-gauge shotgun, none of these weapons contained any shells. We think all of these exhibits were relevant to the issues as alleged in the information.

Appellant urges that the trial court erred in giving an instruction relative to circumstantial evidence. We think the court correctly gave an instruction on this subject since much of the evidence was of that nature. *Covey* v. *State,* 232 Ark. 79, 334 S. W. 2d 648.

The appellant asserts that the testimony of two witnesses, Mr. Frierson and Mrs. Rowan, was improperly admitted. They testified that they were well acquainted with Leonard Dever and that he was in the habit of carrying large sums of money on his person. Their testimony was pertinent to the issues.

The appellant urges that the testimony of Mr. and Mrs. Grimes was irrelevant to the issues in the case. They testified that they observed the surviving Dever children when brought to a clinic immediately following the fire. According to them the clothes on the Dever children and parts of their bodies showed evidence of burns. Also there was an odor of kerosene or fuel oil about the children. Certainly this was relevant testimony.

The appellant further contends that it was error to permit the State to read into evidence the testimony of Mr. Wilcox given at the former trial of the appellant. The sheriff testified that this witnes was out of the jurisdiction of the court and was no longer employed by the Arkansas State Police. This evidence was admissible pursuant to Ark. Stat. Ann. § 28-713 (Repl. 1962). Also see *Mode* v. *State,* 234 Ark. 46, 350 S. W. 2d 675.

The appellant asserts that the court erred in admitting into evidence testimony of Dr. Matthews relating to a kerosene analysis and paraffin test made by him. The appellant objected generally on the grounds that it did not "tend to prove any of the charging part of the information" or "connect this defendant" with the alleged crimes. This evidence was relevant and pertinent to the issues. A can containing kerosene, as confirmed by chemical analysis, was found in appellant's car near the scene of the alleged crime. According to the paraffin test there was some evidence of particles of nitrates or gun powder on his left hand.

The four remaining points urged by appellant for reversal concern evidence relating to the death of Leonard Dever. Appellant argues that this evidence was inadmissible because he was not charged with the death of Mr. Dever in this trial. We do not agree. The rule of inadmissibility of other crimes has no application when other crimes are an inseparable part of the alleged crime. If crimes are mingled to such an extent that they form an indivisible criminal transaction and the full proof of any one of them cannot be presented without showing the others, then evidence of any or all of them is admis-

sible against a defendant on trial for any offense which is itself a detail of the whole criminal scheme. *Banks* v. *State,* 187 Ark. 962, 63 S. W. 2d 518; *Perry & Coggins* v. *State,* 232 Ark. 959, 342 S. W. 2d 95; *Lauderdale* v. *State,* 233 Ark. 96, 343 S. W. 2d 422. In the case at bar the evidence cannot be restricted to the proof of the murder of Martha Dever and her four children. Without the jury knowing the details of the death of Leonard Dever and the condition of the surviving children it would be impossible for the jurors to have a comprehensive picture of the occurrences on that tragic evening.

After considering every objection made as we must do in capital cases, Ark. Stat. Ann. § 43-2723 (Repl. 1964) and *Hays* v. *State,* 230 Ark. 731, 324 S. W. 2d 520, and finding no errors, the judgments are affirmed.

Opinion delivered October 11, 1965.

[redacted]

H. M. Ellis and *Bon McCourtney,* for appellant.

Bruce Bennett, Atty. General, By: *William Powell Thompson,* Asst. Atty. General, for appellee.

CARLETON HARRIS, Chief Justice. Carl Thompson, appellant herein, was charged with the crime of Forgery and Uttering. The Information alleged that he had forged the name of W. J. Wilson, as drawer, to a check in the amount of $25.00, made payable to Thompson, a notation appearing in the lefthand corner, "labor," the check being drawn upon the Mercantile Bank of Jonesboro, Arkansas. Count Two in the information charged Thompson with uttering and publishing the check, knowing it to be forged, and cashing it at Guy's Cash Store in Trumann. On trial, the jury found Thompson guilty of uttering, and fixed his punishment at imprisonment in the State Penitentiary for a period of two years. From the judgment so entered, Thompson brings this appeal. For reversal, appellant simply contends that there is not sufficient evidence to sustain the conviction.

The state offered two witnesses. Mrs. Guy Beard, who works in the store, testified that Thompson came into the store, bought a pair of blue-jeans, and a western

shirt, and, after identifying himself, presented the aforementioned check to her:

"* * * I looked at it and not knowing this Mr. Wilson, I was hesitant about taking it. I conferred with my brother-in-law in the store and asked if he knew Mr. Wilson and he said yes, and he thought the check would be all right, so I took it. This is the address he gave me, Route 1, Harrisburg, Arkansas, c/o Pete Collins. I put that address on the check."

Thereafter, the check was deposited, and, subsequently, was returned with a notation, "Unable to locate." Mrs. Beard stated, "I don't think we ever were able to locate the Mr. Wilson."

Tony Futrell, Assistant Cashier of the Mercantile Bank at Jonesboro, testified that he could not find any record at his bank of an account in the name of W. J. Wilson "within the past twelve to fifteen years." This was all of the testimony presented by the state. Appellant moved for a directed verdict, which motion was denied. The defense then rested, and the motion for directed verdict was renewed, but again denied.

We agree that this evidence was insufficient to sustain the conviction. Certainly there was no showing that Thompson had forged the name of W. J. Wilson, an actual person, and the state's theory is that "Wilson" was a fictitious person. This apparently was the purpose in calling Futrell to testify that he could find no such account. While Futrell's evidence was competent for that purpose, we think it falls short of establishing that W. J. Wilson was a fictitious person, particularly since Mrs. Beard testified that her brother-in-law stated that he knew Wilson. This last mentioned evidence is, of course, diametrically opposed to the state's theory. However, even without this statement from the witness, we think the evidence insufficient to establish the state's contention. Merely showing that W. J. Wilson had no account at the Mercantile Bank in Jonesboro did not prove that there is no such person as W. J. Wilson. The drawer could well have made a mistake in using the Mercantile Bank check instead of some other bank in

Jonesboro where he might have an account. Apparently no effort was made to contact the other banks. While Mrs. Beard stated that she did not "think" that "we" were able to locate Wilson, no testimony or evidence was offered to show what efforts were made by the state to locate this person. No subpoena was issued for Wilson; nor was any evidence offered to the effect that the check, and endorsement, by Thompson (appearing on the back), were evidently in the same handwriting.

The state relies upon th case of *Tarwater* v. *State,* 209 Ark. 687, 192 S. W. 2d 133. There, appellant was convicted of uttering, the proof reflecting that he had cashed a check in a grocery store, made payable to himself (Tarwater), and ostensibly signed by one M. E. Marderd. The state's testimony reflected that appellant went to the Robertson Grocery Store and received cash on the check. Robertson presented the check to the bank on which it was drawn, and was told that the drawer was unknown, and had never had an account with the bank. The same answer was received when inquiry was made at other banks in the city, along with the information that appellant had no account. After Tarwater was arrested, he informed the officers that the check had been given to him in payment of money he had won in a crap game at Moffet, Oklahoma, though appellant had previously told Robertson that he had received the check in payment of hogs and cattle that he had sold. The state caused a summons to be issued for the drawer of the check, who could not be found, and a summons was then sent to officers at Moffet, which was not served for the same reason. These facts were all established in testimony, and Tarwater did not take the stand to testify. Tarwater was convicted of uttering on the basis of a finding that the name signed to the check was that of a fictitious person, and we held that the aforementioned testimony was sufficient to sustain the conviction.

Here, the state's witnesses did not testify to any conflicting stories by appellant; in fact, as far as this record is concerned, he gave his correct address, which Mrs. Beard noted on the back of the check. As previously pointed out, no inquiry was made at other banks in the

city to ascertain if the drawer carried an account, and no subpoena was issued for "Wilson." If the name "Wilson" was fictitious, it was essential that the state make a substantial showing that this was true. Obviously, there is quite a difference in the quantum of proof offered in the *Tarwater* case, and in the present case.

The judgment is reversed, and the cause remanded.

BRYANT *v.* THROWER, EXECUTOR

5-3636 394 S. W. 2d 488

Opinion delivered October 11, 1965.

Phillip H. Loh, for appellant.

Carroll W. Johnston, for appellee.

ED. F. MCFADDIN, Associate Justice. This is a contest involving the will of A. R. Wilson. Appellee, Fred Thrower, claims as a sole beneficiary under the will; and appellant, Lois Wilson Bryant, claims as the pretermitted child of A. R. Wilson. The Probate Court found that Lois Wilson Bryant was not a child of A. R. Wilson; and the correctness of that finding is the sole issue on this appeal. It is conceded that Lois Wilson Bryant was not named or referred to in any way in the will of A. R. Wilson, so if she is in fact the legal child of A. R. Wilson, then she is entitled to the rights of a pretermitted child

under the statute.[1] But Appellee Thrower insisted below and insists here, that Lois Wilson Bryant is neither the legal nor the adopted child of A. R. Wilson.

It is conceded that A. R. Wilson and Eva (Evve) Helen Wilson were legally married; that Eva Helen Wilson died October 18, 1943; and that A. R. Wilson died February 18, 1964. Lois Wilson Bryant introduced a duly certified copy of her birth certificate, which shows that she was born on October 12, 1917, as the child of A. R. Wilson and Eva (Evve) Helen Johnson Wilson. This was a delayed birth certificate (Ark. Stat. Ann. § 82-506 [Repl. 1960]), signed by Eva Helen Wilson and filed June 8, 1942, almost 25 years after the date of the birth shown. Under our statute (Ark. Stat. Ann. § 82-505 [Repl. 1960]) this birth certificate was "prima facie evidence in all courts and places of the facts therein stated." So the birth certificate made a prima facie case that Lois Wilson Bryant was the child of A. R. Wilson. In addition to the birth certificate, Lois Wilson Bryant testified that she was the child of A. R. Wilson and Eva Helen Wilson; that she had always been their child; and that they and each of them had always held her out to the world as their child. Several neighbors corroborated such testimony.

However, for the appellee there were numerous witnesses who testified that Lois Wilson Bryant was neither the born child nor the adopted child of A. R. Wilson and Eva Helen Wilson. Joe Abrams testified that he was a cousin of A. R. Wilson; that A. R. Wilson and Eva Wilson never had any children; that Eva had a sister named Jessie who had two children by Harrison Robinson; that Lois Wilson Bryant was the youngest of these two children; that on the death of Jessie Robinson, A. R. Wilson and Eva Wilson took Lois when she was a "tiny baby" and raised her and treated her as their child.

[1] Ark. Stat. Ann. § 60-507 (1963 Cum. Pocket Supp.) is the 1949 restatement of Ark. Stat. Ann. § 60-120 (1947), so the cases involving § 60-120 are enlightening when we are considering, as here, § 60-507. See *Graham* v. *Hill*, 226 Ark. 258, 289 S. W. 2d 186; and see also *Jacobs* v. *Jacobs*, 146 Ark. 45, 225 S. W. 22; and *Culp* v. *Culp*, 206 Ark. 875, 178 S. W. 2d 52.

Isaac Johnson, the brother of Eva Helen Johnson Wilson and Jessie Johnson Robinson (and therefore a maternal uncle of Lois Wilson Bryant), testified: that Jessie Johnson married Harrison Robinson and had two children named Hazel and Lois; that Harrison Robinson was in the military service of the United States in the First World War when his wife Jessie died on December 9, 1918; that the witness arranged for her funeral; that Eva Helen Wilson and A. R. Wilson took the two little girls (Hazel and Lois) home from the funeral, and raised Lois from infancy; and that Hazel is living somewhere in Kansas City. Ten or more witnesses testified to the same effect as Abrams and Isaac Johnson: that A. R. Wilson and Eva Wilson took the infant Lois Wilson Bryant on the death of her mother and raised her as their child. The Chancellor found this to be true; and we cannot say that his finding is against the preponderance of the evidence.

There is no claim that A. R. Wilson ever adopted Lois as his child; and our statute on pretermitted children (Ark. Stat. Ann. § 60-507 [1947] is not broad enough to cover a child to whom the testator only stood in *loco parentis,* because birth or adoption, each, creates a permanent relationship; and the relationship in *loco parentis* is temporary. *Ford* v. *Donahue* (Colo.), 35 P. 2d 850; *Schneider* v. *Schneider* (N. J.), 52 A. 2d 564; and see also 67 C. J. S. 804.

Affirmed.

SHEPPARD *v.* STATE.

5133 394 S. W. 2d 624

Opinion delivered October 11, 1965.

[Rehearing denied November 8, 1965.]

George Howard, Jr., for appellant.

Bruce Bennett, Atty. General, By: *William Powell Thompson,* Asst. Atty. General., for appellee.

GEORGE ROSE SMITH, J. The appellant, John Henry Sheppard, aged 19, was charged with having murdered Annie Yocum Willett, aged 69, in the perpetration of rape. This appeal is from a verdict and judgment finding the accused guilty of murder in the first degree and sentencing him to death.

There is not, and hardly could be, any contention that the verdict is not supported by sufficient evidence. We briefly summarize the proof. Mrs. Willett and her husband lived on a farm about ten miles west of El Dorado. On the morning of July 1, 1964, Willett started for his place of work in the oil fields at about eight o'clock, leaving his wife at home alone. About an hour later the couple's grown son, Buford Willett, came by to see his mother, but she was not there. Buford became concerned about her absence, especially as he found that the kitchen stove had been pulled away from the wall and as he also remembered having thought that he had glimpsed a prowler in the barn on the preceding evening.

For several hours a search was conducted, at first by Buford alone, then by him and his father, and finally by police officers and volunteers. Frank Willett eventually discovered his wife's nearly nude body in a creek about half a mile from the Willett home. The body was marked by many scratches, bruises, and other evidences of violence. An autopsy revealed that Mrs. Willett had been raped and that her death had been caused by drowning.

There were indications that the assault occurred in a wooded area between the house and the creek. There the searchers found torn clothing that had been worn by Mrs. Willett, her broken glasses, and a pair of yellow plastic gloves positively identified by Buford Willett as belonging to the appellant Sheppard, who had worked for Buford as a tractor driver and farm hand. The officers made a cast of a footprint found in the mud by Mrs. Willett's body.

In the latter part of the morning Sheppard appeared at another farm some three miles from the Willett place. It was not his regular place of employment, but he spent the day there. There is testimony that he said that he had killed someone and that it made him feel funny. Sheppard was arrested that afternoon as he was going to his parents' home. About 30 minutes after his arrest, which was also about 15 minutes after he was taken to jail, he was interviewed by Officer Taylor. Sheppard freely admitted his guilt, giving an account that dovetailed with the physical evidence already discovered. Sheppard said that he had hidden in the Willett barn overnight and had entered the house after Frank Willett left for work. Sheppard surprised Mrs. Willett in the kitchen, dazed her with a blow, and dragged her to the wooded area. At first he denied the assault, but he admitted this part of the crime when he was informed that Mrs. Willett's body showed that she had been raped. Sheppard said that he had drowned Mrs. Willett by holding her head under the water.

There were recent scratches on Sheppard's arms and blood on his clothing. When one of his boots was compared with the cast made by the officers two identifying marks afforded positive proof that the footprint had been made by the boot that Sheppard was wearing when he was arrested. Without narrating the proof in further detail we think it sufficient to say that the evidence shows beyond any doubt that Sheppard committed the brutal crime for which he was tried.

I. The court was correct in overruling a motion for a change of venue. The two lawyers appointed to defend Sheppard testified that in discussing the case with people in the county they encountered a widespread belief in the accused's guilt, owing to newspaper, radio, and television reports. This fact, however, does not prove that Sheppard could not obtain a fair trial in the county. To the contrary, one of the attorneys stated that he had not heard anyone say that a fair trial could not be had, and the other testified that he had heard only a few people make that statement. There was other affirmative proof that the accused could receive a fair

trial in the county. Our study of the record convinces us that Sheppard was in fact tried fairly. We certainly cannot say that the circuit judge abused his discretion in refusing to grant a change of venue. *Leggett* v. *State,* 227 Ark. 393, 299 S. W. 2d 59 (1957). The case is unlike *Hildreth* v. *State,* 214 Ark. 710, 217 S. W. 2d 622 (1949), cited by the appellant, for here it is not shown, as it was in that case, either that many residents of the county thought that the accused could not obtain a fair trial or that the fear of public enmity prevented those citizens from making affidavits to support the request for a change of venue.

II. Before the trial the accused, a Negro, moved to quash the jury panel on the ground that there had been a systematic exclusion of Negroes from juries in Union county. In the first instance defense counsel offered no proof to support the motion. After the trial, however, Sheppard's present attorney adduced some evidence upon the point. Of course this testimony should have been offered in the first place, for otherwise the accused is in the position of having speculated upon the chance of a favorable verdict before making his attack upon the composition of the jury. In any event, however, we find no merit in this assignment of error.

There is almost no proof of discrimination in the selection of jurors in recent years. The case was tried at the September, 1964, term. During the preceding five years "quite a few" Negroes regularly sat on the jury. At least twelve were among the veniremen called for the September term. This number represents a ratio not demonstrably disproportionate to the ratio of qualified Negro electors in the county, though there is no indication that such a result was deliberately sought by the jury commissioners. Quite the opposite, the testimony indicates that the jurors were chosen without regard to color.

Perhaps the strongest circumstance tending to confirm the trial court's fairness and impartiality is the fact that one of the three jury commissioners appointed by the trial judge was a Negro—a man with fifteen years

experience as a school teacher and principal. Such an appointment goes far toward meeting the criticism frequently made, that the commissioners are not sufficiently acquainted with the Negro electors.

The single point in counsel's argument that finds support in the proof is the fact that the electors were designated by race in the list of qualified voters. Our attention is directed to *Avery* v. *Georgia,* 345 U. S. 559, 97 L. Ed. 1244, 73 S. Ct. 891 (1953), but the court did not hold that such a practice is in itself sufficient to establish discrimination in the selection of the jury. (It may be noted in passing that under our new system of voter registration the elector's race is not shown. *Faubus* v. *Fields,* 239 Ark. 241, 388 S. W. 2d 558 [1965].) We conclude that the court was right in refusing to grant a new trial upon the ground now urged.

III. It is insisted that the admissions made by Sheppard when he was first taken to jail were inadmissible. In conformity with the rule announced in *Jackson* v. *Denno,* 378 U. S. 368, 12 L. Ed. 2d 908, 84 S. Ct. 1774 (1964), the trial judge first heard the testimony in chambers and ruled that the confessions were voluntary. This ruling is supported by proof that is substantially undisputed. There is uncontradicted testimony that Officer Taylor warned Sheppard that he did not have to make a statement and that any statement he might make would be used against him. This officer also asked Sheppard if he wanted an attorney; the answer was "No." There is not even a hint in the record that Sheppard was mistreated or abused in any way. Indeed, the proof is so one-sided that counsel did not ask that the issue of voluntariness be submitted to the jury. The court was not required to submit the issue on its own motion. *Burton* v. *State,* 204 Ark. 548, 163 S. W. 2d 160 (1942).

In this court it is argued that Sheppard is of such low mentality that he was incapable of making an admissible confession or of intelligently refusing to request the aid of counsel. At the trial the court was not asked either to rule upon these points or to submit them to the jury. Our study of the record convinces us that neither point must be sustained as a matter of law.

Sheppard was confined to the State Hospital from August, 1960, until October, 1962. He was found to have a mild, idiopathic, mental deficiency, but he was without psychosis. His Intelligence Quotient was then 45, putting him in the class of a moron. Sheppard lived with his parents from the time of his release from the State Hospital until he was arrested for the offense now under consideration.

After his arrest Sheppard was committed to the State Hospital for examination. Tests similar to the earlier ones established an I. Q. of 59; other tests showed that he had the potential capacity to do better than that. Dr. Kozberg testified that Sheppard's mental age is between nine and ten years. This witness explained that the average person's mental age is fourteen. He also explained that an adult with a mental age of ten has, owing to his years of experience, much greater capacity than a ten-year-old child. It was the opinion of Dr. Kozberg and of the psychiatric staff that Sheppard was without psychosis and was not mentally ill to the degree of legal irresponsibility.

When the evidence is in conflict it is not our province to determine issues of fact. Had the present question been submitted to the jurors they would have been justified in finding from all the evidence that Sheppard was mentally competent to refuse the offer of counsel and to narrate the details of his crime. Thus there is no reversible error as a matter of law. Upon this record that concludes our inquiry.

IV. When Sheppard was taken to jail his boots were removed for comparison with the cast that had been made. It is now contended that this procedure was a violation of Sheppard's privilege against self-incrimination, so that the boots were inadmissible. The officers' action was permissible as an incident to a lawful arrest, *Harris* v. *U. S.*, 331 U. S. 145, 91 L. Ed. 1399, 67 S. Ct. 1098 (1947), and, furthermore, there was no objection to the introduction of this evidence.

V. Appellant's remaining arguments center upon the court's action in giving this instruction:

"You are further instructed that an adult defendant with the intelligence of a child from seven to nine years of age is mentally capable of committing a crime and that mere mental weakness or the fact that one had a mind below normal does not exempt him from the responsibility and punishment for his criminal acts, unless it is shown by the preponderance of the evidence that the defendant is insane under the above instructions." This instruction is not inherently wrong. Its language is almost an exact quotation from our opinions in *Chriswell* v. *State,* 171 Ark. 255, 283 S. W. 981 (1926), and *Jones* v. *State,* 213 Ark. 863, 213 S. W. 2d 974 (1948). Perhaps some of the wording in this charge might have been improved upon, but there was no specific objection calling for a modification.

Counsel now insist that this instruction does not fully define the defense of insanity and that therefore it ought to have been accompanied by an explanation of those tests of insanity that were approved in *Bell* v. *State,* 120 Ark. 530, 180 S. W. 186 (1915). A complete answer to this contention is that the trial judge himself thought that such a companion charge would be proper; he offered to give it. Defense counsel were successful in objecting to this suggestion, their preference being to submit only the matter of Sheppard's mental deficiency as distinguished from legal insanity. Needless to say, the appellant cannot complain of a ruling that was made at the insistence of his own attorneys.

It is also argued that since this instruction was not preceded by an explanation of the legal tests of insanity the jury may have been confused by the concluding reference to "the above instructions." Apparently the challenged phrase was inserted upon the assumption that the tests would be explained. When the defense succeeded in having that explanation stricken from the court's charge the phrase in question should also have been stricken. There was, however, no request for such a deletion. Moreover, the defendant's Instruction No. 1, as modified, set forth the defendant's theory that he was of such low mentality as to be incapable of forming an intent to kill. The instruction then went on to say that

if the defendant was mentally deficient to that extent then the jury should find him innocent of the charge of first degree murder, by reason of insanity. Our point is that the court's instructions as a whole did contain an explanation of a defense of insanity. Hence the court's earlier reference to that defense was not totally irrelevant, the only inaccuracy being that the reference was to "the above instructions" instead of to "the following instructions." Had the matter been called to the court's attention by a specific objection it cannot be doubted that this trivial ambiguity would have been corrected.

We have examined every objection in the record, as is our practice in capital cases. In our opinion the trial was conducted in a manner singularly free from prejudicial error.

Affirmed.

LOE *v.* MCHARGUE

5-3615 394 S. W. 2d 475

Opinion delivered October 11, 1965.

Coleman, Gantt, Ramsay & Cox, for appellant.

Mahony & Yocum, for appellee.

PAUL WARD, Associate Justice. This litigation began when suit was filed to collect a note given as part payment for used drilling equipment. The signers of the note—the purchasers—defended on the ground that the equipment was defective, and was therefore not as warranted by the seller.

Facts. The facts here set out are not in dispute. Appellees (Jim McHargue and J. C. Wolfe, d/b/a Falcon Drilling Company) purchased from appellants (Glen D. Loe and Bert Loe, d/b/a Loe Pipe Yard) certain drilling equipment for the price of $19,500. Of this amount appellees paid $15,000 in cash and gave their note in the amount of $4,500. When the note became past due and unpaid appellants filed suit. Appellees' defense was "that the plaintiffs warranted the drilling rig to be in sound mechanical condition and fit and suitable for the purpose for which it was designed and intended." (The principal contention regards the condition of the "caterpillar diesel" engine).

The trial court found that appellants did warrant the engine to be in A-1 condition; that it was defective; that appellees paid out (as result of the defects) the sum of $2,770.86; that appellants have judgment for the difference—$1,729.14. From said judgment comes this appeal. Appellees claim they should have been allowed greater deductions and so have taken a cross-appeal.

Appellants here contend (a) that the weight of the evidence does not show they warranted the equipment to be in A-1 condition and further (b) that, even if the evidence does show a warranty it was error to permit testimony to show such warranty.

(a) *Sufficiency of the evidence.* We have no hesitancy in affirming this portion of the trial court's finding. It is true that the testimony in this respect was not undisputed, but we think the preponderance lies with the finding of the Chancellor. There was definite testimony that Mr. Loe said the diesel was in A-1 condition. For example one of the appellees testified:

"Q. What, if any, representation did Mr. Loe make to you concerning the engine?

"A. He said that that engine was in A No. 1 shape.
"Q. At that time?

"A. And guaranteed it was expressly to be so, yes."

* * * * * * *

"Q. Mr. McHargue, you stated that Mr. Loe on more than one occasion represented this equipment to be in A-1 condition, is that correct?

"A. Yes, sir.

"Q. Did you rely upon that express warranty when you purchased the equipment?

(Objected to by Mr. Lile, attorney for Appellants).

"Q. Did you purchase it on the representations, regardless of what we want to call it, that Mr. Loe made of it being in A-1 condition?

"A. Yes, sir, I wouldn't have otherwise given him $15,000.00."

In the case of *Gentry* v. *Little Rock Road Machinery Co.,* 232 Ark. 580 (p. 582), 339 S. W. 2d 101, we said:

"A representation that a used truck was in A-1 condition has been held to be a statement of fact and hence a warranty rather than a mere expression of opinion."

There was also other testimony that the diesel engine was in A-1 condition, and there was no definite denial.

(b) *Oral Testimony.* The next contention made by appellants—that it was error to admit oral testimony to vary a written contract—presents an interesting question. It is well recognized, of course, that usually a written instrument cannot be changed or altered by oral testimony. Appellants further point out and rely on a statement contained in *Lower* v. *Hickman,* 80 Ark. 505, 97 S. W. 681, which reads:

"A warranty is so clearly a part of a sale that where the sale is evidenced by a written instrument it is incompetent to engraft upon it a warranty proved by parol." To the same effect appellants rely on other decisions of this Court, including *Old City Iron Works* v. *Belmont,* 177 Ark. 223, 7 S. W. 2d 772. This argument of appellants is based on the premise that there was such a written contract of sale in this case.

It is true there appears in the record a written instrument in connection with the sale here, but we do not think it constitutes a "sales contract" and especially not such a contract as would preclude the introduction of testimony with reference to a warranty. The instrument in question is captioned a "Security Agreement" an it appears to be just that—it refers almost exclusively to the matter of a lien on the equipment, the safeguarding of the property and the method of enforcing collections of the note. It is silent as regards a warranty of any kind. Also it is shown by the record that there was an oral sale of the equipment several days before the "Security Agreement" was signed. In the *Hickman* case, supra, the court said "The contract signed by Lower and Gann shows it is a complete contract between the parties embracing the subject-matter of their negotiations. . . ." That is not the situation in this case. The *Belmont* case, supra, was decided on an issue and on facts different from those present here. In that case the chancellor held there was an "implied" warranty.

In the case under consideration we have these factors; the warranty was made before the written instrument was signed; the written instrument made no mention of a warranty having been made; and, neither did it contain the entire agreement between the parties. In *Equitable Discount Corp.* v. *Trotter,* 233 Ark. 270, 344 S. W. 2d 334, this Court said:

"We have held that where a contract of sale is in writin and *recites that it constitutes the entire agreement between the parties,* parol evidence is not admissible to vary the terms of the contract."

(Italics ours.)

The Court further stated that:

"It is true that there are exceptions to this rule, and we have several times held that even though the contract provided that the written instrument constituted the entire agreement between the parties oral testimony was admissible to contravene this recitation."

In Louisiana, where most of the sale transactions took place, the court in the case of *Stewart* v. *Clay,* 10 La. App. 727, 123 So. 158 made these relevant statements:

"We cannot agree that the testimony with reference to the warranties as to the capabilities of the heater would tend to vary or contradict the provisions of the written contract, because that contract was completely silent with regard thereto. Had it contained any reference to the ability of the heater to heat a certain number of rooms, or to its inability to heat more than a certain numbers of rooms, it might well be said the testimony as to other warranties would tend to contradict or to vary the terms of the written contract, but, since it was absolutely silent in this regard, it is evident that the contract did not contain the entire agreement between the parties. . . ."

* * * * * * *

"It has often been held that testimony on a point on which the contract is silent does not tend to vary or contradict the contract. In *Davies* v. *Bierce,* 114 La. 663, 38 So. 488, our Supreme Court said:

" 'The test of admissibility in such case is whether the evidence offered tends to alter, vary, or contradict the written contract, or only to prove an independent, collateral fact about which the written contract was silent. In the former case the testimony is inadmissible; in the latter it is competent and proper.' "

The rule regarding express warranties may also apply to second hand articles. *Crawford* v. *Abbott Automobile Co.,* 157 La. 59, 101 So. 871; *Savoie* v. *Snell,* 213 La. 823, 35 So. 2d 745.

We do not agree with the contention that appellees necessarily waived any parol warranty by inspecting the

diesel engine. We held otherwise in *City of Paragould* v. *International Power Machine Co.*, 233 Ark. 872, 349 S. W. 2d 332. After the diesel engine had been used for sometime by appellees it broke down and was repaired by appellants. Following this, appellees resumed use of the engine without any further complaint. It is argued this incident means that, as a matter of law, appellees waived any previous warranty. It was held otherwise in the case of *Parrett Tractor Company* v. *Brownfiel*, 149 Ark. 566, 233 S. W. 706; *Ives* v. *Anderson Engine & Foundry Co.*, 173 Ark. 112, 292 S. W. 111; *Hall* v. *Magruder*, 175 Ark. 398, 299 S. W. 383.

In the light of the above decisions and under the testimony in the record we are led to conclude the trial court was correct in considering the oral testimony regarding a warranty of the condition of the diesel engine, and in finding such a warranty was in fact made.

Counterclaim. We find no merit in appellees' contention they should have been awarded damages caused by other defective items. In our opinion the preponderance of the evidence supports the trial court's finding to the effect that only the diesel engine was expressly warranted to be in A-1 condition. It was the one item about which the testimony was definite and specific.

It is our conclusion therefore that the decree of the trial court should be, and it is hereby, affrimed on direct and cross-appeal.

Harris, C. J. and Robinson, J., dissent.

Carleton Harris, Chief Justice, (dissenting). I do not think that the evidence established an express warranty as to the condition of the diesel engine, but even so, in my view, any warranty was waived by appellees. It is difficult to believe that Mr. Wolfe relied upon any representations made by Mr. Loe, since Wolfe commented that Loe did not know anything about diesel engines. A buyer hardly depends upon statements of a seller, unless he relies upon a superior knowledge by the seller— and this does not seem to be true in the present case. Not only that, but Mr. Wolfe, who has had more than forty years experience in oil drilling work, examined the engine three

times before closing the sale. In addition, an adjustment was made at the time of the signing of the agreement, wherein appellants procured a longer Kelly joint and bushing at an expense of $850.00 (after complaints by appellees), and it accordingly appears to me that, in accepting the adjustment, appellees waived any alleged oral warranty. I therefore dissent as to the affirmance on direct appeal.

I agree with the majority that there is no merit in the counter-claim, and the Chancellor's findings should, on that phase of the litigation, be affirmed.

I am authorized to state that Mr. Justice Robinson joins in this dissent.

CENTRAL ARK. MILK PRODUCERS ASSOCIATION *v.* ARNOLD.

5-3623 394 S. W. 2d 126

Opinion delivered October 11, 1965.

Thompson & Thompson, Smith, Williams, Friday & Bowen, By: *Frank Warden, Jr.,* for appellant.

Robinson & Rogers, N. D. Edwards, for appellee.

SAM ROBINSON, Associate Justice. This is an action of replevin which resulted in a judgment for defendants.

On the 17th day of July, 1964, appellant, Central Arkansas Milk Producers Association, filed a complaint in the Crawford Circuit Court naming as defendants Dale Arnold, Homer Minnick, Gladys Minnick, and Federal Land Bank. Plaintiff sought to replevy a 500 gallon vacuum tank. There was a judgment for the defendants, and the milk company has appealed.

The complaint alleges that on January 15, 1961, the plaintiff sold to defendant Homer Minnick, a 500 gallon vacuum tank, retaining title thereto, and the defendant gave his promissory note in the sum of $2,934.56, bearing interest at the rate of 7%, and payable $60.12 per month. The complaint further alleges that Minnick entered into a security agreement and financing statement to secure the debt; that the financing statement was filed for record on July 19, 1962, and that the defendant, Dale Arnold, had notice of the balance due on the obligation of $1,771.08; that Dale Arnold is in possession of the property, and that the Federal Land Bank owns a real estate mortgage on the real estate upon which the property is located.

Exhibit "A" to the complaint is a promissory note dated January, 1961, signed only by Homer Minnick. Exhibit "B" to the complaint is a financing statement signed by Homer Minnick and filed for record July 19, 1962. In the financing statement it is stated that it covers a 500 gallon vacuum tank. Plaintiff also filed an affidavit and bond to replevy the tank. The Federal Land Bank disclaimed any interest in the subject matter and was dismissed from the case. Service was had on the Minnicks by warning order, but they failed to appear, and no pleading was filed in their behalf.

Dale Arnold filed a general denial. Jimmy Miller and Cecil Miller filed an intervention in which they allege that prior to the filing of this litigation they purchased the real estate on which the vacuum tank was located; that at the time of such purchase they had no notice, actual or constructive, that the plaintiff claimed any interest in the tank.

In this state of the record the cause came on for trial. Plaintiff attempted to introduce a promissory note dated *August 31, 1960* and a conditional sales contract dated *November 29, 1960,* showing that the milk company sold the 500 gallon vacuum tank to one *Wilford Arnold* under a title retaining contract. The court would not permit the Wilford Arnold note and contract to be introduced in evidence. The court was correct in this holding. There is nothing to indicate that such documents were in any way relevant or material to the issues raised by the pleadings. No suit had been filed on the Wilford Arnold contract and note, Wilford Arnold is not a party to this litigation. There is no allegation that the Wilford Arnold contract and note had been assigned to any party to this litigation. No title is retained; the Minnick promissory note dated January, 1961, is not sufficient to support the action of replevin.

Even if it can be said that the Uniform Commercial Code, which went into effect January 1, 1962, is applicable, appellants' position would not be improved, because the financing statement which was filed merely gave notice of the security agreement, and here the instrument relied on a security agreement is simply a promissory note, nothing more. It does not purport to retain title or to create a lien.

Affirmed.

BEAUMONT *v.* FAUBUS, GOVERNOR

5-3718 394 S. W. 2d 478

Opinion delivered October 11, 1965.

Gene Worsham, for appellant.

Bruce Bennett, Attorney General, *Smith, Williams, Friday & Bowen* By: *H. Friday* and *John Echols,* for appellee.

JIM JOHNSON, Associate Justice. This case challenges the validity of Act No. 35 of the First Extraordinary Session of the Sixty-Fifth General Assembly of the State of Arkansas, approved June 9, 1965. Appellant, a citizen, resident and taxpayer of Arkansas, and the holder of both serial and term bonds of the State Highway Refunding Bonds dated April 1, 1941, issued under the authority of Act No. 4 of the Acts of Arkansas of 1941, prayed for a decree declaring Act No. 35 unconstitutional and enjoining appellees from taking any action pursuant to Act No. 35 This is a class action on behalf of the citizens, residents and taxpayers of the state and on behalf of the holders of the bonds authorized by Act No. 4. Appellees are the members and secretary of the State Board of Finance.

There are presently outstanding $43,063,000 in principal amount of Act No. 4 bonds, consisting of serial bonds maturing annually on April 1, 1966 to 1972, inclusive, and term bonds maturing April 1, 1972. The serial bonds are not callable prior to maturity, but the term bonds are callable prior to maturity to the extent of $1,000,000 on April 1 in each of the years 1966 to 1971, inclusive. The Act 4 bonds bear interest at the rates of 3% and 3½% per annum and are general obligations of the State of Arkansas. There is pledged to these outstanding bonds 70% of the first $10,250,000 of highway revenues collected each year, and there are presently being maintained in the State Treasury a highway bond and interest fund for the purpose of meeting the debt service requirements of the outstanding bonds and a debt service fund consisting of collections in excess of debt service requirements. The debt service reserve fund consisting of collections in excess of debt service requirements. The debt service reserve fund currently

contains cash and investments in direct obligations of the United States in an amount in excess of $7,800,000.

Act No. 35 authorizes appellees to issue and sell general obligations bonds of the state to be known as State Highway Refunding Bonds in the amount of $43,-063,000, maturing serially in each of the years 1966 to 1972, inclusive, for the purpose of accomplishing the advance refunding of the outstanding Act 4 bonds. The entire proceeds of the sale of the refunding bonds are to be deposited in the reserve fund and appellees are required to invest the necessary amount of money in the reserve fund in United States government securities having such maturity dates and bearing interest at rates as will make available sufficient moneys to meet the debt service requirements of the outstanding Act 4 bonds as they become due (including the annual redemption of term bonds to the maximum permissible amount). The United States government securities would then be deposited with a bank or trust company under an irrevocable trust agreement whereby the principal and interest received on the securities would be used solely for paying the outstanding bonds. The remaining balance in the reserve fund (which will be at least $7,800,000) will be used for constructing and reconstructing highways and bridge in the state highway system.

The trial court disposed of the case on the pleadings by sustaining appellees' demurrer to the complaint and after appellant declined to plead further, dismissed the complaint with prejudice. This appeal followed.

For reversal appellant relies on six points.

I. Appellant urges that Act No. 35 impairs the obligation of the contract between the state and the holders of the outstanding bonds.

When the outstanding Act 4 bonds were issued and delivered, a contract was made between the state and the bondholders with the provisions of Act No. 4, the covenants and pledges executed pursuant thereto and the bonds themselves constituting a part of this contract. *W. B. Worthen Co.* v. *Kavanaugh,* 295 U. S. 56, 79 L. Ed.

1298, 55 S. Ct. 555; *City of Little Rock* v. *Community Chest of Greater Little Rock,* 204 Ark. 562, 163 S. W. 2d 522; *Oliver* v. *Western Clay Drainage Dist.,* 187 Ark. 539, 61 S. W. 2d 442. If Act No. 35 and the action that will be taken by appellees thereunder do impair the obligation of the contract with the outstanding bondholders, it is in violation of Article I, Section 10 of the Constitution of the United States, Amendment No. 14 thereto, and Article II, Section 17 of the Constitution of the State of Arkansas. *Scougale* v. *Page,* 194 Ark. 280, 106 S. W. 2d 1023. Clearly Act No. 35 contemplates a change in the terms of the contract between the state and the Act 4 bondholders. However, not every change that affects a contract constitutes an impairment. *Seibert* v. *United States,* 122 U. S. 284, 30 L. Ed. 1161, 7 S. Ct. 1190; *Miller Levee Dist. No.* 2 v. *Evers, Collector* 200 Ark. 53, 137 S. W. 2d 915. The contract clauses of both the Federal and Arkansas Constitutions are designed to preserve practical and substantial rights, not to maintain paper rights and abstract theories. *Faitoute Iron & Steel Co.* v. *Asbury Park,* 316 U. S. 502, 86 L. Ed. 1629, 62 S. Ct. 1129. Every unilateral change in a contract may amount to a techniacl breach of that contract, but not every breach is an impairment of the contractual obligation. *Morgan Construction Co.* v. *Pitts,* 154 Ark. 420, 242 S. W. 2d 812. We are dealing here with constitutional law—a limitation on the exercise of the sovereign power by a state in a matter of vital public concern *Veix* v. *Sixth Ward Bldg. & Loan Asso. of Newark,* 310 U. S. 32, 84 L. Ed. 1061, 60 S. Ct. 792)—not just ordinary principles of contract law. "This principle of harmonizing the constitutional prohibition with necessary residuum of State power has had progressive recognition in the decisions of [the Supreme Court of the United States]." *El Paso* v. *Simmons,* 379 U. S. 497, 13 L. Ed. 2d 446, 85 S. Ct. 577.

"The inescapable problems of construction have been: What is a contract? What are the obligations of a contract? What constitutes impairment of these obligations? What residuum of power is there still in the States, in relation to the operation of the contracts, to

protect the vital interest of the community? Questions of this character, 'of not small nicety and intricacy, have vexed the legislative halls, as well as the judicial tribunals, with an uncounted variety and frequency of litigation and speculations.' Story, Const. § 1375." *Home Building & Loan Asso.* v. *Blaisdell,* 290 U. S. 398, 78 L. Ed. 413.

When there is a change in the method of enforcement of a contractual obligation, the test for determining whether the obligation has been impaired is whether the new procedure is as "adequate and efficacious" as the old, *Louisiana* v. *Pilsbury,* 105 U. S. 278, 26 L. Ed. 1090, or stated differently, whether the contracting party receives a substantial equivalent of what he has been required to give up. *Woodruff Electric Coop. Corp.* v. *Ark. Public Service Commission,* 234 Ark. 118, 351 S. W. 2d 136. No mechanical yardstick can be established, but each case must be decided on its own merits. *Seibert* v. *United States, supra; Faitoute Iron & Steel Co.* v. *Asbury Park, supra; Scougale* v. *Page, supra.* As stated in *Scougale* v. *Page, supra,* (194 Ark. 280):

" 'Impair' means to make worse, to diminish in quality, value, excellence or strength; to deteriorate. (Citing cases)."

The real obligation, from the standpoint of impairment of contractual considerations in the case of bond issues, is the obligation of the issuing authority to pay the bonds, principal and interest, when due. This is a matter that is of vital significance to the bondholders. *Faitoute Iron & Steel Co.* v. *Asbury Park, supra; Tipton* v. *Smythe,* 78 Ark. 392, 94 S. W. 678; *Fulkerson* v. *Refunding Board of Arkansas,* 201 Ark. 957, 147 S. W. 2d 980. Bondholders necessarily expect and have a right to be paid, but payment does not always have to be made from a particular fund or source. *Metropolitan Water Dist.* v. *Toll,* 1 Cal. App. 2d 421, 35 P. 2d 519; *City of Fort Lauderdale* v. *State,* 125 Fla. 89, 169 So. 584; *Oliver* v. *Western Clay Drainage Dist., supra.* As was stated by this court in *Morgan Construction Co.* v. *Pitts, supra,*

"There is a distinction between the breach of a contract and the impairment of the obligation of a contract, and where the state enacted a statute which had the effect of annulling or breaking the contract, but contained a provision for payment of the obligation, it does not constitute an impairment of the obligation of the Contract. *Caldwell* v. *Donaghey,* 108 Ark. 60, [156 S. W. 839]; *Morgan Engineering Co.* v. *Cache River Drainage District,* 115 Ark. 437, [172 S. W. 1020]."

It follows, therefore, that any change involving a substitution of security which does not diminish the prospects of, or adversely interfere with, expected payment does not constitute a contractual impairment.

With these principles in mind, we turn to the case at bar. Here, insofar as the basic right of payment is concerned, the bondholders will have obligations of the United States of America in the full amount necessary to pay their bonds, principal and interest, when due, substituted for a limited amount of cash and similar securities (approximately $7,800,000, but far less than the full amount necessary to pay the ouststading bonds) and a claim against the State of Arkansas primarily secured by highway revenues to be received over the years between now and date of payment. This substitution will leave the bondholders with government securities backed by the faith and credit of the United States, which is the foundation of all money values and without which there would be no financial security. *Taxpayers and Citizens of Shelby Co.* v. *Shelby County,* 246 Ala. 192, 20 So. 2d 36. The bondholders' prospects of payment are not diminished. Even though we are here dealing with a general obligation of the State of Arkansas, it is obvious that there is no constitutional impairment.

Appellant on this point further urges that unless the state board of finance does its duty with honesty and accuracy, the payment of principal and interest on the outstanding bonds will be impossible, and that even if the board completely performs its duty there is always the possibility that employees of the trustee will unlawfully dispose of the United States government securities

or the proceeds thereof and that the trustee will become insolvent.

The United States government securities, and the proceeds thereof, must be handled under the provisions of a trust agreement executed pursuant to Act No. 35. In order to afford maximum protection, we construe Act No. 35 to call for the type of irrevocable trust that will not be revoked upon the insolvency of the trustee and the corpus of which will not become assets of the trustee in the event of insolvency or in any other event. An Arkansas bank or trust company can enter into such a trust agreement, Ark. Stat. Ann. § 67-610 (Repl. 1957); *Grossman* v. *Taylor,* 185 Ark. 64, 46 S. W. 2d 13, as may banks and trust companies throughout the country. See annotation, 82 A. L. R. 46. There is a presumption that officials act in accordance with the law, *Jones* v. *Capers,* 231 Ark. 870, 333 S. W. 2d 242; *Matthews* v. *Bailey,* 198 Ark. 703, 130 S. W. 1006, do their duty and that their proceedings are regular. *Dawson* v. *State Bank,* 3 Ark. (3 Pike) 505; *Rice* v. *Harrell,* 24 Ark. 402. This being true, we must assume that the necessary precautions will be taken in the preparation and execution of the trust agreement and in the taking of all other steps requisite to accomplish the purpose of Act No. 35. "We are aware of no principle that requires us to attribute improper motives to public officers as a means of enabling us to declare an act invalid." *Carr* v. *Young,* 231 Ark. 641, 331 S. W. 2d 701. (See City of *Albuquerque* v. *Gott,* 73 N. M. 439, 389 P. 2d 207.) Of course, as to the question of whether the trust will be properly administered:

"In the absence of evidence to the contrary, the law will presume that a trustee intends to perform, and not to violate, his duties, and that he faithfully administers the trust. It is presumed that he does not traffic in or misappropriate the trust property or funds, and that he does not deal for his own profit with the property or moneys of a trust, expending and even wasting the same at his pleasure. It is also presumed that a trustee in accepting a trust knows the duties that he undertakes, and that if he transgresses, he must abide the conse quences." 54 Am. Jur., Trusts, § 605.

It is not our function to look into the wisdom of the legislative action embodied in Act No. 35 or the advisability of the public purpose sought to be accomplished (obtaining now idle funds for highway construction). Our function is to determine whether the Act meets constitutional standards. Having found that the holders of the outstanding Act No. 4 bonds will have at least the substantial equivalent in quality and accessibility of security, it follows therefore that Act No. 35 and the action proposed to be taken thereunder do not violate the impairment of contract clauses of either the Arkansas or the United States Constitutions.

II. and III. Appellant urges that an election pursuant to Amendment No. 20 to the Constitution of the State of Arkansas is necessary before the refunding bonds can be issued, and that Act No. 35 authorizes an increases in the indebtedness of the State and constitutes an illegal exaction in violation of Article XVI, Section 13 of the Constitution of the State of Arkansas.

Amendment No. 20 requires an election before the State of Arkansas shall issue bonds pledging the faith and credit of the state or any of its revenues "*except for the purpose of refunding existing outstanding indebtedness of the State.*" The indebtedness to be refunded under Act No. 35 was in existence at the time of approval of Amendment No. 20 in 1934, and its refunding is expressly permitted. The same indebtedness was refunded under Act No. 4 of 1941 and appellant argues that this was the only refunding permitted. We do not agree. Bonds merely evidence an indebtedness (*City of Los Angeles* v. *Teed,* 112 Cal. App. 319, 44 Pac. 580) and we see no reason to limit the number of permissible refundings of an indebtedness in existence at the time of the adoption of Amendment No. 20. Furthermore, apart from Amendment No. 20, the power to issue the outstanding bonds in the first instance carried with it the power to refund without an election so long as the indebtedness is not increased. *Talkington* v. *Turnbow,* 190 Ark. 1138, 83 S. W. 2d 71.

Appellant argues that the bonds authorized by Act No. 35 will not be refunding bonds because the outstand-

ing bonds will not be immediately retired. To properly consider this contention, it is necessary to review the basic concept of refunding. There are two methods of refunding—by exchange and by sale. In the exchange method the issuing agency exchanges the new bonds for the old, bond for bond, with no money changing hands. In the sale method, the new bonds are sold and the proceeds are used to retire the old bonds. The exchange method is subject to obvious difficulties, such as locating the bondholders and persuading them to make the exchange. Although some courts have held that the only permissible method of refunding is by exchange, the great weight of modern authority considers this view to be unrealistic and inconsistent with present day financing requirements. See discussion in *City of Albuquerque* v. *Gott, supra.* This court has approved the concept of refunding by sale. *Fulkerson* v. *Refunding Board of Arkansas, supra.* Such refunding has long been authorized in this state (see Section 7 of Act No. 297 of 1937, as ammended; Act No. 12 of 1945) and the realities of modern day financing, obviously recognized by bondholders, are that refunding may be accomplished by sale and the bondholders' security changed from the particular pledge involved to the proceeds of the refunding bonds and steps taken to insure their availability when needed for payment. The effect of the refunding is necessarily that, as of the date of the delivery of the refunding bonds and the receipt and depositing of the proceeds thereof in trust as required, the indebtedness evidenced by the outstanding bonds is discharged insofar as the issuing authority is concerned and is no longer outstanding. As was said in *City of Albuquerque* v. *Gott, supra,*

"The majority rule, which we feel is more persuasive, and in accordance with the practicalities is supported by decisions from Florida (Fleeman v. City of Jacksonville, 1939, 140 Fla. 478, 191 So. 840; State v. City of Miami, 1944, 155 Fla. 6, 19 So. 2d 410; State v. City of Orlando (Fla. 1955), 82 So. 2d 874; State v. City of Melbourne (Fla. 1957), 93 So. 2d 371); South Carolina (Kalber v. Stokes, 1940, 194 S. C. 339, 9 S. E. 2d 785);

Louisiana (State ex rel. Maestri v. Cave, 1939, 193 La. 419, 190 So. 631); Alabama (Taxpayers and Citizens v. Shelby County, [*supra*], 1944, 246 Ala. 192, 20 So. 2d 36); South Dakota (National Life Ins. Co. v. Mead, 1900, 13 S. D. 37, 82 N. W. 78); Idaho (Veatch v. City of Moscow, 1910, 18 Idaho 313, 109 P. 722); Texas (City of McAllen v. Daniel, 1948, 147 Tex. 62, 211 S. W. 2d 944); and Arizona (Citrus G. D. Assn. v. Water Users' Assn., 1928, 34 Ariz. 105, 268 P. 773; Allison v. City of Phoenix, 1934, 44 Ariz. 66, 33 P. 2d 927, 93 A. L. R. 354)."

See also annotation, 97 A. L. R. 452—457. Thus, there appears to be nothing novel about the advance refundin concept, since refunding by sale normally is accomplished by delivering the refunding bonds at one time and using the proceeds to actually pay the bonds being refunded later. Certainly as long as a public purpose is being served and the substituted security is equivalent or better there are no constitutional infringements. It is undisputed in the case at bar that there will be no increase in indebtedness in that the proceeds of the refunding bonds will be invested in United States government securities simultaneously with the delivery upon such terms that the principal and interest received from the securities will at least equal the principal and interest payments on the outstanding bonds. The bonds issued under Act No. 35 will be refunding bonds and no election pursuant to the provisions of Amendment No. 20 is required. There will be no increase in indebtedness and there is no illegal exaction.

IV. Appellant urges that Act No. 35 authorizes the lending of the credit of the state in violation of Article VI, Section 1 of the Constitution of the State of Arkansas, as amended by Amendment No. 13.

The state is using its credit under Act No. 35, not lending it. There is no violation of Article XVI, Section 1. *Hays* v. *McDaniel, Treasurer,* 130 Ark. 52, 196 S. W. 934.

V. Appellant urges that Act No. 35 delegates the legislative power of the state to the board of finance in

violation of Article V, Section 1 of the Constitution and Amendment No. 7 thereto.

The distinction between the unpermitted delegation of legislative power and the permitted conferring of authority or discretion as to its execution has been repeatedly recognized by this court. *Fulkerson* v. *Refunding Board of Arkansas, supra.* The authority conferred upon appellees is purely ministerial and falls within the permitted category. The appellees have not been given unlimited authority to act, or any authority whatever to legislate. Act No. 35 is not subject to the objection that it unconstitutionally delegates legislative power. See *Miles* v. *Gordon,* 234 Ark. 525, 353 S. W. 2d 157; *McArthur* v. *Smallwood,* 225 Ark. 328, 281 S. W. 2d 429.

VI. Appellant finally urges that Act No. 35 violates Amendment No. 7 to the Constitution of the State of Arkansas by declaring an emergency on legislation creating vested rights.

This argument is moot because Act No. 35 became effective on September 6, 1965, in any event. In the situation of an invalid emergency clause, an Act takes effect when it would have become effective without the emergency clause. *Barber* v. *State,* 206 Ark. 187, 174 S. W. 2d 545. It appears that no action has yet been taken under Act No. 35.

Finding no error, the decree of the learned Chancellor should be, and hereby is, affirmed.

McFaddin, George Rose Smith and Ward, JJ, dissent.

George Rose Smith, J., (dissenting). Almost twenty-five years ago the State, pursuant to Act 4 of 1941, refunded its bonded highway debt. The State pledged its full faith and credit to the payment of the refunding bonds. Some $43,000,000 worth of those bonds are still unpaid. They are secured by a pledge of certain highway revenues and of the Debt Service Reserve Fund, now amounting to more than $7,800,000, which is the cumulative excess of the pledged revenues over the amounts that have been needed to service the bonds.

By Act 35, now before us, the State is attempting to revoke its pledge of the Debt Service Reserve Fund so that those monies can be used for highway construction. The question here is whether that maneuver can be accomplished without an impairment of the State's contract with is bondholders. I regret that I cannot agree with the majority's conclusion that Act 35 is constitutional.

Act 35 is long, but its plan for what the briefs call the "advance refunding" of the 1941 bonds really involves only four essentially simple steps:

First: The State will sell $43,000,000 of new bonds for which it will again pledge its full faith and credit.

Second: The proceeds from this new bond issue will be invested in $43,000,000 worth of United States Government bonds so chosen that their interest and principal payments will be sufficient to pay the interest and principal of the 1941 refunding bonds as they come due.

Third: The Government bonds will be deposited with a bank under a trust agreement by which that bank will promise to use the interest and principal to pay the 1941 State bonds.

Fourth: When the first three steps have been completed, Act 35 declares that the State's liability upon the 1941 refunding bonds will be discharged. Thereafter the holders of those bonds will have no security except whatever rights they may have under the trust agreement. At the same time the State will make the $7,800,000 Debt Service Reserve Fund available for highway construction.

Among the several attacks that are made upon Act 35 I think that at least two should be sustained under the constitutional prohibition against the impairment of contracts.

One: Not the least important element in the security that was given in 1941 to the State's bondholders was the pledge of the State's full faith and credit. The pledge meant that if the specific liens upon the highway reve-

nues and upon the Debt Service Reserve Fund should fall short of discharging the bonded debt, the State gave its word that its other available resources would be used to make good the deficiency. By Act 35 the State admittedly repudiated its promise. (No doubt that action was taken to avoid the need for submitting the new bond issue to the voters for their approval in a state-wide election. If the State's faith and credit had been pledged to both bond issues Amendment 20 to our constitution would have required such an election.) In my judgment the State's unilateral decision to abrogate its promise to its creditors is on its face an impairment of the obligation of its contract with those creditors.

Two: The majority justify the State's abrogation of its 1941 agreement upon the theory that Act 35 provides the bondholders with a new form of security that is equally as good as the one they have lost. It seems to me that, to reach this conclusion, one must read a great deal into Act 35 that is actually not there.

Under Act 35 the sole security for the 1941 bonds will be the trust agreement created by Section 11 of the act. What do we know about that trust agreement? At this point, almost nothing, for the act contains but a single vague sentence about the trust agreement. In essence that sentence reads as follows: "[The following transaction shall be effected:] The deposit with a bank or trust company that is a member of the Federal Deposit Insurance Corporation (which bank or trust company shall be selected by the [State Board of Finance]) under an irrevocable Trust Agreement by and between the Board and said bank or trust company (called "Trust Agreement") of all of the direct obligations of the United States of America acquired under (b) above, upon such terms as shall insure that said investments and the proceeds thereof be used solely for the payment of the principal of, interest on and paying agents' fees in connection with the outstanding bonds, which Trust Agreement shall contain such terms and provisions as the Board shall determine necessary to insure the sole use of the investments and proceeds for the above specified purpose." That is all. There is no more.

It is impossible for me to understand how the majority can declare that this single sentence, with its cavalier treatment of a trust fund amounting to forty-three million dollars, provides the bondholders with a measure of security equivalent to what has been taken away from them. Neither the majority members of this court nor any one else in the world knows what the trust agreement is going to provide. The Board may select as the trustee the smallest bank in the state that is a member of the FDIC. What provision will there be against the possibility that the Government bonds may be stolen or destroyed by fire? What safeguard will there be against the possibility of embezzlement by those persons in the bank who must unavoidably handle the cash derived from the Government bonds? Why is there no requirement that the trustee bank give a fidelity bond? Is it because the State is unwilling to make an appropriation for the premium upon such a huge bond?

Most important of all, what assurance have the holders of the 1941 refunding bonds that the trust agreement will fairly protect their property rights? This is the one question that can be answered. The answer is: "None." This is so because the bondholders will have no voice in the preparation of the trust agreement. That agreement is to be between the trustee bank and the State Board of Finance. The bank, on the one side, will naturally be primarily interested in the paying agent's fees that it will receive for handling forty-three million dollars, plus additional millions in interest. The Board, on the other side, is composed of five State officers whose loyalty is understandably and properly to their employer, the State. Thus no one concerned with the drafting of the trust agreement will have any really vital reason for seeing that the bondholders are protected as they should be.

It must be remembered that when the trust agreement is finally prepared the new $43,000,000 refunding issue will already have been sold, the State's 1941 pledge of its full faith and credit will already have been revoked, and the holders of the 1941 bonds will already have been stripped of all their security except those

rights that the trustee bank and the Board may, in their uncontrolled discretion, see fit to give them. In my opinion there is no sound basis upon which this court can declare today, as the majority are doing, that Act 35 does not and cannot adversely affect the rights of the owners of our 1941 highway refunding bonds. Having that conviction, I must dissent.

McFaddin and Ward, JJ., join in this dissent.

Gibbons *v.* Bradley, Chancellor.

5-3639 394 S. W. 2d 489

Opinion delivered October 11, 1965.

Penix & Penix, By: *Bill Penix*, for Petitioner.

No brief filed for Respondent.

Frank Holt, Associate Justice. The question presented in this case is whether a temporary order in a

pending divorce suit is a contested case within the meaning of Ark. Stat. Ann. § 22-407.1 (Repl. 1962) [Act 6 of 1951]. This statute empowers the chancellor to "hear, adjudicate, or render any appropriate order with respect to, any cause or matter pending in any chancery court over which he presides," anywhere within the chancery district upon proper notice. This statute provides, however, that "no contested case can be tried outside the county of the venue of said case, except upon agreement of the parties interested."

The petitioner's wife, Nola Gibbons, filed suit against him in the Craighead County Chancery Court, Eastern District. In her complaint she asked for an absolute divorce, child custody, support and possession of their home. The complaint included a prayer for temporary awards. Petitioner was duly served with a summons which included a notice that on a certain date a petition would be presented to the chancery court in chambers at Blytheville, Mississippi County, for a temporary award of maintenance, suit money, and exclusive use of their home. The petitioner filed an answer denying the allegations of his wife's complaint. Petitioner refused to agree to the hearing on the matters, *pendente lite,* in the adjoining county, objected to the venue and asked that the hearing be held in Craighead County, Eastern District. The chancellor entered an order overruling petitioner's objection and held that a hearing, *pendente lite,* could properly be held by him outside the county of venue without agreement of the adverse party.

The petitioner argues that a writ of prohibition should issue because "the *pendente lite* hearing was a 'contested case' which cannot be tried outside the county of venue, except upon agreement of the parties."

It is true that an order *pendente lite* is final and suject to appeal. *Glenn* v. *Glenn,* 44 Ark. 46. However, we cannot agree with the petitioner that a temporary order incidental to a final hearing on the merits of a case, as in the case at bar, is a "contested case" within the meaning of this recent enactment of our legislature. In construing legislative intent we examine the language

of the statute, the subject matter, the object to be accomplished, the desired purpose, the remedy provided, the contemporaneous legislative history or other appropriate matters that enlighten us on the intent of the legislature. *Cheney, Commissioner* v. *Georgia-Pacific Paper Corp.,* 237 Ark. 161, 371 S. W. 2d 843.

Section 4 of the statute in question reads in part: "* * * the nature of litigation in chancery is such that the convenience of the parties and their counsel may frequently be served, expense minimized, and the dispatch of business expedited, by the hearing of causes by the chancellor in chambers, or elsewhere than at the county seat." The manifest purpose of this statute is to facilitate and expedite matters by authorizing the chancellor, without agreement of the parties, *to render appropriate orders* with respect to the pending cause. To construe the statute otherwise could result in a great hardship upon the petitioner's wife if the press of business or other circumstances prevented the chancellor from returning to the county of the venue for days or weeks.

Writ denied.

JOHNSON, J., dissents.

5150 394 S. W. 2d 608

Opinion delivered October 18, 1965.

Milham and *Weid,* for appellant.

Bruce Bennett, Attorney General, By: *Fletcher Jackson,* Asst. Atty. General, for appellee.

CARLETON HARRIS, Chief Justice. Appellant, Milton Tiner, was found guilty of the crime of manslaughter by a Saline County jury, the Information alleging that he feloniously killed the unborn quick child of Mary Mattison by striking Mary Mattison with an automobile in violation of Ark. Stat. Ann. § 41-2223 (Repl. 1964). His punishment was fixed at a fine of $1,000.00, and confinement for three years in the penitentiary. The jury recommended a suspended sentence, but the court only suspended the fine, and entered judgment sentencing Tiner to the prison term. From such judgment, appellant brings this appeal. For reversal, appellant urges a number of errors, which we proceed to discuss.

It is first asserted that there is insufficient competent evidence to sustain the verdict. Proof on the part of the state reflected that Tiner, who formerly lived in Saline County, but presently resides in Dallas, Texas, had returned to Benton with his older brother, who also lived in Dallas, for a visit with his mother. Appellant owned a 1955 black Ford automobile, which had been left at his mother's home. On March 15, 1964, in the late afternoon ("around 4, or 5, 6," according to Tiner), he left the home in Benton in this automobile for the purpose of returning to Dallas. On this same afternoon (between 5:30 and 6:00) Mary Mattison Brown, a resident of Benton, was walking west on the right side of Hazel Street, off the pavement, accompanied by her Mother. Mrs. Brown, who was unmarried at the time, was pregnant, and took a walk every afternoon. She remembered nothing, except that she was walking along at the side of the street: "I blacked out when I got hit." Mrs. Weaver, the Mother, testified that the occurrence took place on a Sunday afternoon around supper time, and that there was no traffic from either direction; that suddenly, "I heard a car coming behind us making a great roar." She stated that she was walking almost in a ditch by the side of the street, and that her daughter

was off the pavement. "She was along the frazzled edge." According to this witness, the driver of the car appeared to intentionally strike her daughter: "He kept hitting her and hitting her with me screaming, 'Don't, don't, stop, stop, stop!' He kept on hitting her like he was pushing a bulldozer. * * * After he hit her many times he used the automobile like a bulldozer and pushed her over to the telephone pole." Mrs. Weaver identified the car as a black Ford, and stated that only the driver was present in the car. After knocking Mrs. Brown to the ground, the driver sped away.

Mrs. Elaine Housley testified that on the Sunday afternoon in question, appellant gave her a ride to a store; that he was driving an old model black Ford. The witness testified that she was with him ten to fifteen minutes, and got out of the car around 5:15.

Louis Wright, of Malvern, testified that he was fixing a flat at Tom Gill's wrecking yard, located about two miles from Malvern, at approximately 6:30, when appellant drove up in a 1955 black Ford, which had a flat. Tiner was looking for a jack, and Wright told him, "He could use mine," whereupon, Tiner replied " 'No, that his brother would be by in a few minutes and he would wait for him.' " Wright noticed the bent fender, but paid no further attention until Tuesday morning when he heard on the radio that officers were searching for a black 1955 Ford with the right headlight out.

Bill Dyer, Deputy Sheriff of Saline County, and James Robinson, with the sheriff's department of Hot Spring County, testified that they found "a ball of hair that was stuck under the chrome piece on the top right front fender."

Tiner, after leaving his car at the wrecking yard, was picked up by his brother, who was on his way back to Texas. After being arrested, appellant denied that he had struck any person,[1] but admitted that the automobile in question belonged to him. He was unable to give any

[1] Tiner, during his testimony, stated that he did not know Mrs. Brown. Q. "Did you know the Mattison girl, Brown now, who was struck here?" A. "No, sir. I never saw her before."

reason for the right headlight being broken out, nor did he offer any explanation about the ball of hair that was found on the right side of the car. He stated that he drove from Benton to Malvern at about fifty miles per hour, and, after the tire went flat, stopped at the wrecking yard. From the record:

"Q. Did you inquire about a jack?

A. I did.

Q. It was either this man or some other man you inquired about, is that correct?

A. Correct.

Q. Did he tell you you could take the jack out from under the car and use it?

A. I don't remember about that.

Q. You didn't take the jack out there and put it under your car?

A. No.

Q. Why did you change your mind?

A. I was wanting to go on to Dallas."

To summarize, the testimony reflects that an automobile, admittedly owned, and operated, by appellant during the period of time when Mrs. Brown was struck (and conforming to the description of the car involved) was left in a strange town—with the right fender bent—the headlight knocked out—and with hair under the chrome on the right fender—and appellant was unable to explain these facts. In addition, he commenced the trip to Dallas in his own automobile, but only drove as far as Malvern, from Benton, when, simply because he had a flat tire, left his automobile at a wrecking yard, and proceeded to ride on to Dallas with his brother. The transcript does not reflect that Tiner gave any directions to any person for the disposal of the automobile. As far as the record discloses, he simply abandoned the vehicle. This evidence, though circumstantial, was, we think, sufficient to sustain the jury finding that Tiner was the operator of the automobile which struck Mrs. Brown.

Dr. Curtis Jones, Jr., testified that he arrived at the Benton Hospital about 6:30 P.M. for the purpose of making his "evening rounds;" that an ambulance arrived with a patient for the emergency room, and he was called to assist. Dr. Jones stated that Mrs. Brown was unconcious, had no pulse, and no blood pressure, and, in fact. appeared to be dead:

"Of course, our immediate concern was to try to establish a pulse and pressure, so we started plasma, and blood later. After that was started, examination revealed possible skull fracture. She had one pupil slightly dilated which indicates concussion or pressure of some sort. She was apparently 7-7½ months pregnant. No fetal heart tones. The baby was dead. She was bleeding vaginally, bright red blood. She was also leaking amniotic fluid. She had fractures of the left leg and ankle, both bones. She had multiple abrasions and lacerations. I had her up here about an hour and finally established pressure for her enough to transfer her to Little Rock.

* * *

"Q. Doctor, you say there was a leakage from the amniotic fluids?

A. The membrane apparently ruptured. Amniotic fluid, the membrane that contains the baby, has a very distinct, unmistakable odor to it. Obviously fresh, and of course bright red bleeding vaginally.

Q. What did that indicate to you, doctor?

A. The blow or accident she had been involved in, apparently she had been struck in the abdomen with force enough to cause separation of the placinta or a laceration of the uterus. The force of the blow itself would cause blood amniotic fluid to come through the birth canal and leaking externally. She had internal hemorrhaging, too."

Dr. James Porter of Little Rock testified that it first appeared as though Mrs. Brown would die; that she was carrying a child, and a hysterectomy was performed. According to his evidence, the uterus, tubes,

womb, overies, and the baby were removed during the surgery. The doctor testified that the baby was dead at the time of delivery, but he could not definitely say how long it had been dead, nor could he positively state that the blow received by the Mother had caused the death of the unborn child. However, he did definitely state that the length of time that the baby had been dead was a matter of hours, rather than a matter of days. According to his evidence, the baby was normal, and he testified that the Mother's injuries were sufficient to have caused the death of the child.

Mrs. Brown testified:

"I felt it move that day. It moved a lot. I felt it move that day."

We have concluded that the evidence was sufficient to support the conviction.

Appellant's Points Nos. 2 and 3 relate to the *voir dire.* It is asserted that the court erred in refusing to permit counsel to question the jurors relative to their qualifications, by asking if they were in any way connected with a civil suit filed on August 7, 1964, by Mrs. Brown, in which she sought damages from appellant in the amount of $125,000.00. Further, it is asserted that the court erred in refusing to permit counsel to ask the members of the jury if any were represented by either of the attorneys in the civil case. The court ruled that appellant was being tried on a criminal charge, and that there was no relationship between the criminal case and any civil litigation.

We find no prejudicial error in this ruling. The record reflects that the court had already asked the members of the jury if they were related to the litigants, and the record further reflects that the attorneys representing the state are not connected with the litigation. We have held that a criminal conviction cannot be given in evidence in a later civil suit to establish the truth of the facts in which it was rendered, *Horn* v. *Cole, Administrator,* 203 Ark. 361, 156 S. W. 2d 787, and we fail to see how it was relevant to inquire about a relationship to attor-

neys in a civil suit, not then before the court, and which, for that matter, might never come to trial. Appellant cites no authority for this argument, and, in fact, only devotes a six-line paragraph in his brief in support of it.

For alleged error No. 5, appellant contends that the court erred in refusing appellant the right to question the prosecuting witness relative to the facts alleged in her complaint against defendant in the civil action filed against him. Again, we find no error. The rule is stated in 22A C. J. S., "Criminal Law," Section 633, Page 489, as follows:

"Where not a part of the res gestae, * * * the conduct of the person injured, subsequent to the commission of the crime, is irrellevant, and thus the fact that the injured person filed a civil action against accused is generally not admissible in evidence."

It is asserted that the court erred in refusing to sustain defendant's objections to each of the jurors for the reason that they had not registered, and were therefore not qualified as electors, a requirement for jury service. Constitutional Amendment 51 provides for voter registration without poll tax payment, and became effective January 1, 1965. The amendment set out that persons who were qualified electors as of December 31, 1964, should be permitted to vote in any election before March 1, 1965. The drafters of the amendment apparently contemplated that voter registration machinery would be in operation by March 1, 1965, but this did not occur. When it appeared that pending litigation would prevent registration of voters for some period of time, the General Assembly passed Act 126, which provides that all persons who are otherwise qualified under applicable statutes to be grand or petit jurors, and who have paid a poll tax between October 1, 1963, and October 1, 1965, are eligible to serve as jurors. We upheld this act on September 13, 1965, in the case of *Richard Coger* v. *City of Fayetteville*. It follows that this point is without merit.

In point No. 7, it is alleged that prejudicial error was committed by the giving of the court's Instruction No. 1 over defendant's general objections, the instruction

defining murder in the second degree.[2] This did not constitute error. Ark Stat. Ann. § 41-2223 (Repl. 1964) provides as follows:

"The wilful killing of an unborn, quick child, by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be adjudged manslaughter."

It was necessary that murder be defined in order that the jury determine whether appellant was guilty of manslaughter in causing the death of Mrs. Brown's unborn child. Let it be remembered that the testimony of Mrs. Weaver, Mother of Mrs. Brown, justified this instruction, for certainly the testimony of this witness made a jury question as to whether appellant would have been guilty of murder if Mrs. Brown had died. Actually, subsequent instructions properly defined involuntary manslaughter, though this was not necessary since the Information (charge) was based on Section 41-2223. As stated, the questioned instruction was entirely proper, but were it otherwise, no prejudicial error occurred, for the jury only returned a verdict for manslaughter, and even recommended a suspended sentence.

Appellant complains that the Information charged him with the crime of involuntary manslaughter, but that he was convicted of manslaughter, and the conviction was thus of a higher degree than charged. This was no error. "Manslaughter" includes both voluntary and involuntary degrees. The punishment fixed by the jury was that of involuntary manslaughter, though actually, under Section 41-2223, it would appear that Tiner might have been adjudged guilty of voluntary manslaughter. Be that as it may, appellant cannot complain of any possible error that, if having any effect, inured to his benefit.

Several points can be disposed of together. In Point No. 6, it is contended that the court erred in permitting Sheriff Grant to testify as to statements made to him

[2] Appellant's Point No. 8 refers to the court's instruction defining malice, and Point No. 9 asserts as error the court's instruction dealing with killing an unborn child. These instructions were not error for the reason herein given under Point No. 7.

by the witness, Wilton Tiner. In *Carter* v. *State,* 230 Ark. 646, 326 S. W. 2d 791, we said:

"This alleged error was first raised by appellant in his motion for a new trial. It comes too late for this court to consider it. We have consistently adhered to the rule that before an alleged error, in felony cases of a lesser degree than capital, may be considered by this court on appeal, the complaining party must first make an objection, call for a ruling from the trial court, make and preserve an exception from an adverse ruling, and the matter complained of must be assigned as error in a motion for a new trial."

Here, appellant did not save his exception to the adverse ruling of the court, and we are accordingly unable to consider this point. For his eleventh point, appellant complains that the court erred in giving State's Instruction No. 4, but this alleged error is not brought forward in the motion for a new trial. Likewise, Points 13 and 14, which relate to the court's refusal to grant instructions which were asked by appellant, were not mentioned in the motion for new trial; however, it might be stated that he contents of these instructions were covered in other instructions given by the court, except for one phrase, which was incorrect.

For his final point of alleged error, appellant asserts that the court erred in permitting the prosecuting attorney to make certain remarks to the jury. Here too, appellant made no exception to the adverse ruling on his objection, and a discussion of the prosecutor's statement (which was only a matter of opinion) is unnecessary.

Finding no reversible error, the judgment is affirmed.

It is so ordered.

5-3651 394 S. W. 2d 630

Opinion delivered October 18, 1965.

[redacted]

M. V. Moody, for appellant.

Hubert E. Graves, for appellee.

ED. F. MCFADDIN, Associate Justice. After a trial on the merits before the Court (a jury having been waived), the appellee, Mrs. Varvil, was awarded a judgment against the appellant, Mr. Beavers, for $800.00; and on this appeal Mr. Beavers urges two points:

"I. The Lower Court Erred in the Construction Placed Upon the Memorandum of the Parties Under Date of October 29, 1963.

"II. The Court Erred in Denying Appellant's Motion for information with Reference to the Title to the Car."

We will consider these points in the order listed.

I.

Mrs. Varvil filed action against Mr. Beavers on a written instrument reading as follows:

"10-29-1963

"I, Buford Beavers, hereby agree to make good $800.00 hundred, or pay $800.00 cash, for 1959 Black, 4-door Cheve, owned by Mrs. Jean Varvil pay in cash November 4 or 5th, 1963. If anything happens to destroy

car I will still make full payment. /s/ Buford Beavers. 324 School St. NLR. Phone WI 5-1124."

Mrs. Varvil testified that she had been the owner of the Chevrolet car referred to in the instrument; that Mr. Beavers tested the car twice and agreed to buy it for $800.00 to be paid in one week; that he took possession of the car when he signed the written instrument; that she did not guarantee or warrant the car in any way; that on November 4th or 5th, 1963, she looked from her house and saw that Mr. Beavers had put the Chevrolet car in her yard; that she went out to inquire and he had driven away; that the car was still in her yard where he left it; and that he had not paid any part of the $800.00.

Mr. Beavers admitted his signature on the written instrument, but claimed an entirely different version of the affair. He testified that he never agreed to purchase the car; that he signed the instrument merely to get the car for a few days to test and also to see if he could sell a car he already owned; that he was unable to sell his car; and that he returned Mrs. Virvil's car to her and therefore owed her nothing.

These were the only two witnesses and their testimony presented a sharply disputed issue of fact. The Judge saw the parties; and he believed Mrs. Varvil's testimony. We cannot say that he was in error; so we find no merit in appellant's first point.

II.

After Mrs. Varvil filed the action in the Circuit Court, Mr. Beavers filed a motion, which read:

"Defendant moves the Court for an Order directing plaintiff to file a more definite statement in his complaint in the following matters:

"(1) The name of the person who registered the motor vehicle as alleged in the Complaint, and registrations and certificates as shown with the Arkansas State Revenue Department.

"(2) The number of the license plates of the alleged motor vehicle as set out in plaintiff's complaint.

"(3) The Motor number of the vehicle as alleged in plaintiff's complaint."

The motion was overruled, and Mr. Beavers now claims error. There are several answers to Mr. Beavers' point, but we need not state them all. Mr. Beavers filed an answer in which his only defense was a breach of warranty and return of the car.[1] The motor number, the license number, and all the other requested information, had no direct bearing on his defense, either as stated in his answer, or as stated in his testimony at the trial. It is, therefore, clear that Mr. Beavers was not prejudiced in any way by the action of the Court in denying his motion.

Finding no error, the judgment is affirmed.

[1] This is the wording of the answer: "Comes the defendant, Buford Beavers, and states that at the time the agreement to purchase the automobile alleged in plaintiff's complaint, the plaintiff warranted such automobile to be in good mechanical condition, and that the defendant relied upon said warranty by the plaintiff. That immediately after accepting delivery of the said automobile, the defendant examined same and discovered that same was not as warranted by the said plaintiff; that thereupon defendant duly notified plaintiff that he refused to accept said automobile in its present condition and offered to return and tendered the same to plaintiff; and that plaintiff did accept same, and that said automobile has been, is now and has been in possession of plaintiff prior to the filing of plaintiff's complaint herein, and defendant has fully satisfied and discharged any claim against him by delivery and acceptance of said automobile by plaintiff herein."

RUSSELL *v.* BAUMANN.

5-3646 394 S. W. 2d 619

Opinion delivered October 18, 1965.

[Rehearing denied November 29, 1965.]

M. V. Moody, for appellant.

House, Holmes & Jewell, for appellee.

George Rose Smith, J. Anna B. Melker died testate on September 30, 1963, leaving her property to a number of charitable organizations. Two of her sisters, the appellees, filed claims against the estate, asking that they be paid for personal services rendered by them to Mrs. Melker during the last eight and a half months of her life. This is an appeal by the executrix from an order allowing Gertrude Baumann's claim in the amount of $1,885.00 and Cecilia Miller's claim in the amount of $390.00.

The controlling rules of law are firmly settled. These claims are for services consisting, according to the claimants' affidavits, of "personal care, shopping, marketing, running errands, cooking, household duties, and other personal services." When such services are rendered by one member of a family to another it is presumed that they are attributable to the family relationship and are given without any expectation that they will

be paid for. *Williams v. Walden,* 82 Ark. 136, 100 S. W. 898 (1907). A contract for payment will not be implied unless the claimant proves that the services were of such an extraordinary nature that the recipient could not reasonably have expected them to be rendered without compensation. See *Lineback* v. *Smith,* 140 Ark. 500, 215 S. W. 662 (1919).

The proof offered to sustain Gertrude Baumann's claim falls decidedly short of bringing her case within the rules just stated. Miss Baumann moved into her sister's home on January 10, 1963, and lived with her until Mrs. Melker was taken to a hospital on June 24. During those months Miss Baumann was a full-time employee in a department store. Three days a week she left for work at 8:30 in the moring and got home at about 6:00 in the evening. Two days a week she left at eleven and got home at about nine. In her spare time she did the marketing, helped with the housework, and rendered other services of a kind to be expected in the situation that existed. One of her witnesses, Mrs. Henry Gill, conceded frankly on cross examination that she had not seen any activity on Miss Baumann's part that, as between sisters, would be considered unusual or extraordinary.

It does not appear that, during the months in question, Mrs. Melker was confined to her bed or was in need of special care. Another sister, Mrs. Kirspel, who is not shown to have had any reason to be prejudiced, testified that Mrs. Melker was up and about, did some of her own housework (a maid came once a week to do the cleaning), cooked for herself, and took her own baths. In the absence of proof that Miss Baumann rendered the "personal care" referred to in the affidavit to her claim, her services narrow down, in the words of that affidavit, to "shopping, marketing, running errands, cooking, household duties, and other personal services." It is hardly necessary to say that activities such as these, on the part of a woman living in the home of her sister, cannot be regarded as being of the extraordinary character that gives rise to an implied contract for payment.

The other claimant, Mrs. Miller, stands in a better position. She and her husband came up from Texas to

visit Mrs. Melker soon after she entered the hospital. There is proof that Mrs. Melker asked Mrs. Miller to stay and look after her, adding that she would see that Cecilia was "taken care of." Mrs. Miller yielded to her sister's request and let her husband return to Texas alone. She stayed in Arkansas for the remaining thirteen weeks of Mrs. Melker's life, visiting her at the hospital four times a day and preparing special food for her. We are unable to say that the trial court was wrong in finding an express or implied contract for the modest compensation sought by this claimant.

The judgment in favor of Miss Baumann is reversed; that in favor of Mrs. Miller is affirmed.

JOHNSON, J. dissents.

OLIN MATHIESON CHEMICAL CO. *v.* WHITE.

5-3659 394 S. W. 2d 632

Opinion delivered October 18, 1965.

[Rehearing denied November 8, 1965.]

Brown, Compton & Prewett, for appellant.

Spencer & Spencer, for appellee.

PAUL WARD, Associate Justice. This is a Workmen's Compensation case. The only question presented to us

by this appeal is whether the record contains substantial evidence to support the Commission's finding that there was a causal connection between John Lee White's work and his death.

John Lee White was an employee of Olin Mathieson Chemical Company (appellant herein) for some seventeen years before his death on October 30, 1962. During practically all (if not all) of his employment he checked lumber when it was stored or packed in railroad cars for shipping. It is undisputed that such employment called for no great physical effort.

After Mr. White's death his widow, Irma White (appellee herein), filed a claim for compensation which was disallowed by the Referee. On appeal to the full Commission the claim was allowed, and on appeal to the circuit court the Commission was upheld. On appeal by appellant to this Court a reversal is sought solely on the ground mentioned at the outset of this opinion.

In our opinion the finding of the Commission is supported by substantial evidence.

On Monday October 8, 1862 White complained about not feeling well. When he quit work that afternoon he told his wife about how he felt and she took him to a doctor. The doctor told White he thought the trouble was merely indigestion, but to come back that week-end for an electrocardiogram. White went to work on Monday (October 16) but when he complained of being ill at noon he was sent to the hospital with a suspected heart condition, and fifteen days later he died.

It would serve no useful purpose to discuss in detail the conflicting medical testimony relative to the cause of White's death. There is, however, the testimony of Dr. W. M. Hamilton (not available to the referee at the time of his decision) which, we think, supports the finding of the Commission in favor of appellee.

In substance Dr. Hamilton testified: In my opinion White's heart attack began on October 8, 1962, and the work he did after that aggravated his condition, lessened his chance to survive, and hastened his death; 85% to

90% of men in White's age group survive a coronary occlusion, and it is probable that he would be alive today if he had not continued to work.

The conclusion indicated above is supported by and in harmony with numerous decisions of this Court: See: "Harding Glass Company v. Albertson, 208 Ark. 866, 187 S. W. 2d 961; Baker v. Slaughter, 220 Ark. 325, 248 S. W. 2d 106; Farmer v. L. H. Knight Co., 220 Ark. 333, 248 S. W. 2d 111; E. P. Bettendorf and Company v. Kelly, 229 Ark. 672, 317 S. W. 2d 708; Bryant Stave & Heading Co. v. White 227 Ark. 147, 296 S. W. 2d 436; Safeway Stores, Inc. v. Harrison, 231 Ark. 10, 328 S. W. 2d 131; Reynolds Metal Co. x. Robbins, 231 Ark. 158, 328 S. W. 2d 489; Harper v. Henry J. Kaiser Construction Co., 233 Ark. 398, 344 S. W. 2d 856; McGeorge Construction Co. v. Taylor, 234 Ark. 1, 350 S. W. 313; Arkansas Best Freight System, Inc. v. Shinn, 235 Ark. 314, 357 S. W. 2d 61."

In the *Harding Glass* case, supra, this Court, after reviewing cases from other jurisdictions, said:

" 'The rule supported by the weight of authority, however, is employee's engaging in the employment, whether due to unusual or extraordinary condition or not, is to be deemed an accidental injury within the meaning of the statute.' "

In the *White* case, supra, it was stated that ". . . an injury is accidental when either the cause or result is unexpected or accidental, although the work being done is usual or ordinary."

In the *Robbins* case, supra, this Court, after stating that cases of this nature shall be broadly and liberally construed, and doubtful cases shall be resolved in favor of the claimant, made the following significant statement:

"But there is even a stronger rule, namely, our oft repeated holding that if there is any substantial evidence to support the findings of the Commission, we will not disturb such findings. This is the strongest rule in compensation cases, and the one carrying the greatest weight."

Appellant suggests that heretofore we have been too liberal (in favor of the claimant) in construing the word "accident" in cases of this nature, and urgently insists that hereafter we should modify our opinions accordingly. We have also received similar suggestions in the past by other litigants. We mention this matter at this time to take occasion to make clear that we have carefully considered these suggestions and feel no such change would be justified.

Affirmed.

MILLER *v.* STATE.

5126 394 S. W. 2d 601

Opinion delivered October 18, 1965.

W. B. Howard, Jack Segars and *John C. Watkins,* for appellant.

Bruce Bennett, Atty. General, By: *Russell J. Wools,* Asst. Atty. General, for appellee.

SAM ROBINSON, Associate Justice. The appellants were charged by felony information with the crime of grand larceny. Later, the information was amended by making the additional charge that appellant Jesse Miller had previously been convicted of the crime of burglary, and the additional charge that Leland Miller had previously been convicted of the crime of arson. A prior conviction increases the minimum penalty for the crime for which the defendant is then on trial. Ark. Stat. Ann. § 43-2328 (Repl. 1964).

At the beginning of the trial, defendants entered pleas of guilty, out of hearing of the jury, to that part of the information charging previous convictions, and pleaded not guilty to the principal offense charged. Counsel for defendants then filed a motion asking the trial court to instruct the prosecuting attorney not to read to the jury that part of the information charging

previous convictions, and not to mention the previous offenses in the presence of the jury. Defendants' counsel stated that the defendants would not testify in the case. The motion was overruled; the prosecuting attorney called the jury's attention to that part of the information charging previous convictions, and to the fact that appellants had pleaded guilty to that part of the information. The pleas of guilty to the charge of previous convictions were also mentioned by the court in the instructions to the jury.

The specific question before the court at this time is whether the action of the trial court in permitting the previous convictions to be called to the attention of the jury deprived defendants of a fair trial within the meaning of the U. S. Constitution, Amendments 5, 6, and 14.

The court said in *Lane* v. *Warden, Maryland Penitentiary,* 320 F. 2d 179 (1963): "It is a rule not now subject to challenge that constitutional due process of law requires a fair hearing in a fair tribunal. Although the Constitution does not demand the use of jury trials in a state's criminal procedure, where a jury trial is provided it must be a fair trial." Citing, *Irvin* v. *Dowd,* 366 U. S. 717, *Fay* v. *New York,* 332 U. S. 261, *Palko* v. *Connecticut,* 302 U. S. 319, *Hughes* v. *Heinze,* 268 F. 2d 864, *Baker* v. *Hudspeth,* 129 F. 2d 799. The court said in *Baker* v. *Hudspeth,* supra;

"The denial of a fair and impartial trial, as guaranteed by the 6th Amendment to the Constitution, is also a denial of due process, demanded by the 5th and 14th Amendments, and the failure to strictly observe these constitutional safeguards renders a trial and conviction for a criminal offense illegal and void and redress therefor is within the ambit of habeas corpus." Citing many U. S. Supreme Court cases.

The court said in *Michelson* v. *U. S.,* 335 U. S. 469: "Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good

character, *Greer* v. *United States,* 245 U. S. 559, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair suprise and undue prejudice."

Many times we have held that evidence of other crimes committed by a defendant is not admissible to prove his guilt of the crime for which he is then on trial. *Williams* v. *State,* 183 Ark. 870, 39 S. W. 2d 295; *Ware* v. *State,* 91 Ark. 555, 121 S. W. 927; *Alford* v. *State,* 223 Ark. 330, 266 S. W. 2d 804.

In the case at bar, previous convictions of crimes were charged in the information. The burden was on the state to prove previous convictions as charged. It can be argued that it was necessary for the jury to know about the previous convictions in order to fix the punishment as provided by statute where previous convictions are alleged in the indictment. It will be recalled, however, that the defendants had pleaded guilty to that part of the information charging previous convictions.

We have heretofore dealt with the question to some extent. In *Rowe* v. *State,* 224 Ark. 671, 275 S. W. 2d 887 (1955), it is pointed out that the information charged a previous conviction, and evidence was, therefore, admissible to prove the charge. The case is distinguishable from the case at bar because in the Rowe case there was no plea of guilty to the previous conviction; in the case at bar there was such a plea.

In *Clubb* v. *State*, 230 Ark. 688, 326 S. W. 2d 816, (1959), the defendant filed a motion to strike from the information the charge of a previous conviction. The motion was overruled. In affirming the trial court it was held there was no error in giving the state an opportunity to prove the charges.

Higgins v. *State*, 235 Ark. 153, 357 S. W. 2d 499 (1962) was reversed because the state was allowed to introduce *inadmissible* evidence in an effort to prove a previous conviction charged in the information. In that case we indicated disapproval of a procedure whereby the question of whether a defendant had been convicted previously would be determined by a jury at the same time the defendant's guilt or innocence of the current offense charged was under consideration. But we also said we thought a change in procedure should be adopted by the Legislature, and not by this court. The constitutional aspect of the matter was not discussed.

The Higgins case was decided prior to *Lane* v. *Warden, Maryland Penitentiary*, 320 F. 2d 179 (1963). In the State of Maryland, the procedure for proving a previous conviction was similar to the practice heretofore prevailing in Arkansas. The previous conviction was proved during the trial of the current offense for which the defendant was then accused. In *Lane* v. *State*, 226 Md. 81, 172 A. 2d 400, in the trial on the merits, the defendant, before the commencement of the trial, demurred to that part of the indictment charging a previous offense. The demurrer was overruled, and the action of the trial court in that regard was affirmed by the Supreme Court of Maryland. Certiorari was denied by the Supreme Court of the United States. 82 Sup. Ct. 611. Later, Lane filed in the U. S. District Court for the District of Maryland, a petition for a writ of habeas corpus alleging that by introducing evidence of a previous conviction the State of Maryland had denied him a fair trial on the principal charge on which he was tried. The petition was denied, and Lane appealed to the U. S. Court of Appeals, 4th Circuit. The Court of Appeals held that in trying the charge of a previous conviction along with the primary charge against Lane he was

denied a fair trial within the meaning of the 5th, 6th and 14th Amendments to the Constitution.

The state's position was much stronger in the Lane case than is the state's position in the case at bar. In the Lane case there was no plea of guilty to the charge of having been convicted of a previous offense, whereas in the case at bar there was such a plea, and here it was, therefore, unnecessary for the state to prove the charge. In *Lane* v. *Warden, Maryland Penitentiary,* supra, the court said: "We reach the conclusion that under the facts of this case the reading to the jury, at the commencement of Lane's trial, of that portion of the indictments relating to his prior convictions destroyed the impartiality of the jury and denied him due process of law."

In the case at bar, the state has cited *Breen* v. *Beto,* 341 F. 2d 96 (1951) as holding to the contrary of Lane. True, the Court of Appeals, 5th Circuit, did refuse to follow Lane decided by the 4th Circuit, but in the Breen case the court quoted from *Crocker* v. *State of Texas,* 385 S. W. 2d 392, as follows:

"Though the jury in this State assesses all punishment, except in those cases where the punishment is fixed by law, this Court has in the Salinas, Pitcock and McDonald cases, supra, approved the practice of permitting the accused to stipulate as to the prior convictions and thereby relieve the State of the necessity of reading to the jury that portion of the indictment which charges them and adducing proof before the jury of such prior convictions." *Salinas* v. *State,* 365 S. W. 2d 362; *Pitcock* v. *State,* 367 S. W. 2d 864; *McDonald* v. *State,* 385 S. W. 2d 253.

As heretofore pointed out, prior to the Lane case, in our own case of *Higgins* v. *State,* 235 Ark. 153, 357 S. W. 2d 499, we had expressed the feeling that it was not fair to introduce evidence of previous convictions during the trial for the primary crime then charged. We felt, however, that the change in procedure was a matter that addressed itself to the Legislature. But in the Lane case, the Federal Court has said that such procedure is uncon-

stitutional. We will follow that decision. It follows, therefore, that the trial courts can no longer follow the procedure in that respect which has heretofore been practiced, and it is now the duty of this court to outline an acceptable procedure to follow where a defendant is charged with a previous conviction:

That part of the indictment or information charging a previous conviction should not be read to the jury during the trial of the principal offense charged. If the defendant pleads guilty to the previous conviction charged, as was done in the case at bar, the matter can be handled by the court in charging the jury. The jury can be told that the minimum penalty is the minimum allowed when the previous conviction statute is taken into consideration. In other words, if the minimum penalty for the current offense charged is one year in the penitentiary and the defendant has pleaded guilty to one previous conviction, the court can tell the jury that in the event they find the defendant guilty they shall fix his punishment at not less than two years in the penitentiary, and not more than the maximum specifically provided by the statute for the principal crime charged.

If the defendant pleads not guilty to both the principal offense and the charge of a previous conviction, the question of guilt or innocence of the principal offense can first be submitted to the jury, the jury being informed as to the penalty for a first offense. If there is a verdict of guilty and the punishment fixed is a term in the penitentiary equal to, or exceeding the minimum allowed under the previous conviction statute, the matter is ended. There is nothing else to do insofar as the trial of the defendant is concerned.

If, on the other hand, there is a verdict of guilty and the minimum punishment assessed by the jury is less than that provided by the previous conviction statute, the defendant's guilt or innocence of the previous conviction charge can be submitted to the jury, and if there is a verdict of guilty on that charge, the punishment assessed by the jury on the principal offense can be increased to comply with the minimum provided by the previous conviction statute.

Of course, if there is a verdict of not guilty of a previous conviction, the punishment remains as fixed by the jury in the first instance. In the event the punishment is left to the court in the first instance, there would be no trouble at arriving at the punishment.

During the course of the trial in the case at bar, the court having recessed on Thursday until the following Monday, a local newspaper published a statement purported to have been made by the trial court criticizing jurors serving at that term of court for assessing minimum prison sentences. We believe it would be a good practice for all courts to refrain from making any statement, other than a judicial ruling, that might have a tendency to influence a jury in arriving at a verdict in a pending case.

The defendants did not testify in this case. Over their objections and exceptions, the court instructed the jury that it was the privilege of the defendants to testify in their own behalf or to decline to so testify. In his argument to the jury, the prosecuting attorney specifically called this instruction to the attention of the jury, repeated it, and said: "You are instructed this is a privilege to them to either testify or not to testify. That is what the court says in that instruction." Obviously, by arguing this instruction to the jury in that manner, attention was called to the fact that defendants had not taken the stand in their own behalf. This was error.

This court said in *Evans & Foust* v. *State,* 221 Ark. 793, 255 S. W. 2d 967: "Our law wisely provides that failure of a defendant to testify shall not create any presumption against him. The prosecuting attorney should carefully refrain from using any words or gestures which would be calculated to call a jury's attention to the fact that a defendant has not testified."

Reversed and remanded for new trial.

HARRIS, C. J. & MCFADDIN, J., concur in part and dissent in part.

CARLETON HARRIS, Chief Justice, (concurring in part; dissenting in part). I agree with the majority that the jury should not be informed of a defendant's prior criminal record during his trial for a current offense. Unquestionably, this could have some effect on the minds of the jurors in determining his guilt or innocence of the immediate offense charged.

However, after the defendant has been found guilty, I strongly feel that the jury should be apprised of the number of prior convictions, and should then fix the amount of punishment. Under the precedure set out by the majority, if a defendant, who has previously been convicted, pleads guilty to the previous conviction(s), the court, in its charge, will simply add one year to the minimum penalty for the offense charged (or 2 or 3 years, depending on the number of prior convictions), and the jury will never be aware that the defendant has a previous record. The majority say:

"If, on the other hand, there is a verdict of guilty and the minimum punishment assessed by the jury is less than that provided by the previous conviction statute, the defendant's guilt or innocence of the previous conviction charge can be submitted to the jury, and if there is a verdict of guilty on that charge, the punishment assessed by the jury on the principal offense can be increased to comply with the minimum provided by the previous conviction statute."

I strongly disagree with this procedure, and do not feel that it complies with thelegislative intent as ex-

I strongly disagree with this procedure, and do not feel that it complies with the legislative intent as ex-pressed in the habitual criminal act. Ark. Stat. Ann. § 43-2328 (Repl. 1964) provides:

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

[1] Emphasis supplied.

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

(3) If the fourth or subsequent offense is such that, upon a first conviction, the offender could be punished by imprisonment for a term [not][2] less than his natural life, then the person shall be sentenced to imprisonment for the fourth or subsequent offense for a determinate term not less than three [3] years more than the minimum sentence provided by law for a first conviction."

The majority do not permit the jury to consider the accused's past criminal record in determining whether more than the minimum sentence should be given. I consider this holding at variance with the provisions of the act. If the Legislature had intended to provide the procedure set out in the majority opinion, it would only have been necessary in Sub-section (1) to provide, "then the sentence to imprisonment shall be for one year more than the minimum sentence provided." But the act reads entirely different from such an interpretation, for it provides that for a second offense, [third, fourth or subsequent] the offender shall be imprisoned "for a determinate term *not less*[3] than one year [two, or three years, respectively] more than the minimum sentence provided." This language, to me, clearly means that the jury may fix the sentence at any amount within the minimum (added for the prior offense or offenses), and the maximum penalty provided by law for the crime committed.

The majority offer no authority for reaching the present conclusions. In Volume 7, Arkansas Law Review, Page 334, there appears an article written by Edwin E. Dunaway, a former justice of this court. This article is entitled, "Acts Affecting the Administration of the Criminal Law," and on Page 335, the author notes:

[2] The inclusion of this word is obviously an error in printing.

[3] Emphasis supplied.

"Many states have for years had habitual criminal laws in one form or another. Some have provided for doubling the penalties upon second and subsequent convictions. The original act in New York, the famous Baumes Law, provided for a mandatory life sentence upon conviction of a fourth or subsequent felony. Such stringent legislation led in practice to jury nullification, so that the trend in recent years has been toward allowing discretionary increases in penalties, but with higher minimum sentences *as a starting point.*"[4]

Comparison with procedures in other states is difficult to make, since statutes vary, but I have not been able to find a single state that permits only the adding of a short period of time to the minimum sentence of a convicted habitual criminal. In fact, several states add to the maximum penalty. In Michigan, for a second conviction, the defendant must be sentenced to imprisonment for a term not less than one-half of the longest term, and not more than one and one-half times the longest term prescribed for a first conviction. In New York, the law is similar—and there is no discretion in the trial judge. In Tennessee, one must have three felony convictions to be classed as an habitual criminal, but when this occurs, the defendant receives life with no parole, or reduced sentence for good behavior. In South Carolina, on the fourth conviction, the defendant receives the maximum prescribed for the crime involved. In Rhode Island, a person with prior convictions receives a twenty-five year maximum, in addition to any sentence imposed for the offense for which he was last convicted. Arizona, North Dakota, and Nebraska, likewise, provide substantial increases in the punishment for repeated offenders.

Summarizing, I am persuaded that it is a jury function to determine the punishment meted out to an habitual criminal; further that the Legislature intended that the jury should be informed of the defendant's past criminal record before setting the penalty, and, in my view, it is contemplated under the act that the punish-

[4] Emphasis supplied.

ment should vary between the minimum prescribed (for habitual offenders) and the maximum penalty provided by law.

I truly feel that the majority holding in this case has emasculated the habitual criminal act, and that the practical value of this act has been completely destroyed.

Mr. Justice McFaddin is also filing a written dissent in this case, and there is only one difference in our views, *viz,* he would have the jury first fix the punishment for the current case, and then the jury would hear the charges against the defendant as an habitual criminal. If he should be convicted on this count, the jury would (I presume) add additional punishment to the sentence that he had received for the current offense.

Under my theory, the jury would hear the current case, and determine only the man's guilt or innocence. If they returned a verdict of guilty, the evidence against the defendant as an habitual criminal would be submitted. The jury would then retire to the jury room to consider the punishment to be given the defendant, which procedure would, of course, permit them to take into consideration his prior record, if they found him to be an habitual offender.

For the reasons herein mentioned, I respectfully, but vigorously, dissent to the holding of the majority.

Ed. F. McFaddin, Associate Justice, (concurring in part; dissenting in part). I agree with what is stated in the Opinion of the Chief Justice. We are "plowing new ground" on this matter of submitting to the jury the situation as regards the habitual criminal act; and for the benefit of future legislation or future decisions I want to give a blueprint of my thinking as to how the situation should be handled:

1. In the trial of guilt or innocence of the offense charged, no mention should be made of previous convictions, whether admitted or denied.

2. The question of guilt or innocence and the fixing of sentence for the offense charged should be submitted to the jury as heretofore.

3. If the jury acquits on the issue of guilt or innocence, then the entire case is ended.

4. If the jury convicts the defendant of the offense charged, then the jury fixes the sentence for the offense.

5. After the jury has convicted and fixed the sentence, if prior convictions are involved, then the same jury is kept without discharge. If the defendant has pleaded guilty of prior convictions, the jury is so informed and told of the habitual criminal act and sent back to the jury room to deliberate on the matter of increase of sentence under the habitual criminal act; and the jury reports its verdict to the court on that issue and fixes additional sentence under the habitual criminal act.

6. After the defendant has been convicted under Paragraph 4 above, and if prior convictions are involved, then the same jury is kept without discharge. If the defendant has pleaded not guilty to previous convictions, the evidence is introduced to the jury on the previous convictions, with the right of the defendant to deny and offer counter evidence; and the issue is then submitted to the jury on previous convictions and the jury told of the habitual criminal act and sent back to the jury room to deliberate on guilt or innocence of previous convictions and increase of sentence under the habitual criminal act.

I think these steps, as I have outlined them, will take care of the situation in all instances and would be much better than the method contained in the Majority Opinion.

GASPARD *v.* WHORTON.

5-3629 394 S. W. 2d 621

Opinion delivered October 18, 1965.

Bob Scott, for appellant.

No brief filed for appellee.

JIM JOHNSON, Associate Justice. This appeal arises from dismissal of a petition for writ of mandamus. Appellant petitioners, Joseph B. Gaspard and others, sought to require appellee Charles Whorton, Jr., Madison County Clerk, to allow appellants to copy the list of applications for absentee ballots, the individual applications for absentee ballots and the accompanying absentee voters statements for the November 3, 1964, general election in Madison County. After hearing on January 6, 1965, the Madison Chancery Court found that appellants had failed to prove that appellee refused to permit them to photocopy these records and dismissed the petition, from which petitioners have appealed.

The trial court did not reach the question of entitlement—whether appellants were entitled to copy these records. The ruling turned on the fact question of whether proper request was made by appellants to appellee to permit them to copy these records. Our review

of the evidence discloses that an unmistakable request was made and permission clearly denied. Thus this court reaches the merits on trial de novo.

Appellants asked to copy (1) the list of applications for absentee ballots, (2) the applications for absentee ballots, and (3) the voters statements which accompanied the absentee ballots (as distinguished from the list of all persons who voted in the election). Ark. Stat. Ann. § 3-1127 and § 3-1133 (Repl. 1956) specify that the list of applications, the applications and the statements of voters "shall be made available for public inspection during regular business hours" and are therefore public records. This being true we find that appellants were entitled to copy these records and should have been given permission to do so. See *Whorton* v. *Gaspard,* (opinion delivered September 20, 1965), 239 Ark. 715, 393 S. W. 2d 773. *The denial to the public of reasonable access to public records by public officials is not conducive to the perpetuation of our form of government.*

The decree of the trial court is accordingly reversed and the cause remanded with directions that the writ of mandamus issue.

PER CURIAM ORDER

OCTOBER 18, 1965

SUPREME COURT OF ARKANSAS

Per curiam, October, 18, 1965.

The following rule of criminal procedure is hereby approved and adopted:

Criminal Procedure Rule No. 1.

(A) A prisoner, in custody under sentence of a circuit court and whose case was not appealed to the Supreme Court, claiming a right to be released, or to have a new trial, or to have the original sentence modified on the ground:

(a) that the sentence was imposed in violation of the Constitution and laws of the United States or this State; or

(b) that the court imposing the sentence was without jurisdiction to do so; or

(c) that the sentence was in excess of the maximum authorized by law; or

(d) that the sentence is otherwise subject to collateral attack;

may file a verified motion at any time in the court which imposed the sentence, praying that the sentence be vacated or corrected.

(B) If the conviction in the original case was appealed to the Supreme Court, then no proceedings under this rule shall be entertained by the circuit court without prior permission of this Court.

(C) If the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the trial court shall make written findings to that effect, specifying any parts of the files or records that are relied upon to sustain the court's findings.

(D) If the original motion (or a motion to take an appeal from the court's findings under Paragraph (C) above) should allege that the prisoner is unable to pay the cost of the proceedings, or to employ counsel, and if the court is satisfied that this allegation is true, the circuit court shall appoint counsel for the prisoner for hearing in the circuit and for an appeal to this Court.

(E) When a motion is filed in the circuit court, mentioned in Paragraph (A) above, and the court does not dispose of the motion under Paragraph (C) above, the court shall cause notice of the filing thereof to be served on the prosecuting attorney; and on the motion the court shall grant a prompt hearing with proceedings reported. The court shall determine the issues and make written findings of

fact and conclusions of law with respect thereto. If the prisoner desires to be present at the hearing for taking of testimony the court shall order his presence.

(F) If the circuit court finds that for any reason the prisoner is entitled to any relief then the circuit court may set aside the original judgment, discharge the prisoner, resentence him, grant a new trial, or otherwise correct the sentence, as may appear appropriate in the proceedings.

(G) The circuit court may award fees to attorneys representing indigent persons under this rule, as provided by Ark. Stat. Ann. Sec. 43-2415 *et seq.* (Repl. 1964).

(H) All grounds for relief available to a prisoner under this Rule must be raised in his original or ammended petition. Any grounds not so raised or any grounds finally adjudicated or intelligently and understandingly waived in the proceedings which resulted in the conviction or sentence or in any other proceedings that the prisoner may have taken to secure relief from his conviction or sentence, may not be the basis for a subsequent petition.

(I) This rule shall become effective upon the filing of this order.

Endorsed:

Filed Oct. 18, 1965
Philip N. Gowen, Clerk

The foregoing rule adopted pursuant to motion of the Attorney General filed September 22, 1965.

Opinion delivered October 25, 1965.

[Rehearing denied November 22, 1965.]

James L. Sloan, for petitioner.

Bruce Bennett, Atty. General, By: *Joe Bell,* Asst. Atty. General, for respondent.

CARLETON HARRIS, Chief Justice. This is a motion by Henry Turney for permission to file a petition for a writ of error *coram nobis* in the Circuit Court of Lonoke County, Arkansas. Turney was convicted of the crime of burglary and grand larceny on November 10, 1962, and he was sentenced to serve a term in the Arkansas Penitentiary. On January 27, 1964, this court affirmed the

conviction, and a petition for reharing was denied on March 9, 1964. Subsequently, on petition of Turney, this court stayed its mandate until the present motion could be briefed and passed upon. In filing this motion, counsel for Turney argues several points, which we proceed to discuss, though not in the order listed in petitioner's brief.

It is argued that Turney was deprived of his rights under the Fifth Amendment to the Constitution of the United States by virtue of the fact that he was tried and convicted upon an Information filed by the Prosecuting Attorney, rather than upon an Indictment rendered by a grand jury. We do not agree with this contention. The United States Supreme Court, in *Hurtado* v. *California,* 110 U. S. 516, and subsequent cases, has held that it is proper for a defendant to be tried in a state court upon an Information. We, likewise, have rejected this argument on several occasions. *Moore* v. *State,* 229 Ark. 335, 315 S. W. 2d 907, *Boone* v. *State,* 230 Ark. 821, 327 S. W. 2d 87.

It is asserted that Turney's rights were violated under the Fourth Amendment provision against unlawful search and seizure. This point was raised on direct appeal, and decided by this court adverse to petitioner's contention. There, after a thorough discussion of the contention, we held that Turney waived any rights (here allegedly violated) by giving his consent to the search, and we see no need to reopen this question.

It is next contended that Turney was not advised of his rights under the Fifth Amendment to the Constitution of the United States, and that he was not permitted to have the advice of counsel pursuant to the Sixth Amendment to the Federal Constitution.

It is also urged that certain admissions, which petitioner construes as a confession were involuntarily made. Since these two contentions are so closely related, we will discuss them together.

Petitioner relies upon the case of *Escobedo* v. *Illinois,* 378 U. S. 478. Admittedly, Turney was not repre-

sented by counsel at the time of his arrest, and the evidence reflects he was not advised by the officers that he would not have to make any statement.

We do not think that *Escobedo* extends to the circumstances in the case at Bar. The facts in *Escobedo* are far different, and are, we think, distinguishable from the facts in the instant case. In *Escobedo,* the defendant was arrested by police officers in the evening, along with his sister, and taken to police headquarters. He was handcuffed, and was told that another person, then in custody, (DiGerlando) had named him (Escobedo) as the one who shot the deceased. Uncontradicted testimony from the defendant was to the effect that he was told by detectives that "they had us pretty well, up pretty tight, and we might as well admit to this crime." The defendant responded that he would like to have advice from his lawyer. The lawyer, who subsequently testified, went to police headquarters, and was told by the officer in charge that he could not see the defendant. The attorney requested permission from several other officers, identifying Escobedo as his client, but he was still refused permission to consult with the defendant: "He said I couldn't see him because they hadn't completed questioning." Finally, the attorney left headquarters at 1:00 A.M., still without seeing the defendant. Escobedo testified that, during the course of the interrogation by the officers, he repeatedly asked to speak to his lawyer, but was told that his lawyer "didn't want to see him." The testimony of the police officers confirmed these accounts in substantial detail. Other testimony reflected that the defendant, 22 years old, was handcuffed, and "was nervous, upset, and agitated;" further that one of the officers, acquainted with Escobedo's family, told the defendant that, if he made a statement against DiGerlando, Escobedo and his sister could go home. Defendant claimed that he made a statement because of this assurance, and it was this statement that was at issue in the case.

We see no resemblance in the facts related and the facts that are presently before us. Here, Officer Caldwell, of the State Police, arrested Turney at his resi-

dence on a Monday at approximately 4:30 A.M., serving a warrant of arrest, which had been issued by a Justice of the Peace. Caldwell testified that he asked Turney "point blank why would a man living in a house like he was, with his job, get involved in something like this, and he said he didn't know and that he must be out of his mind. He then admitted his part in the theft to me and told me at that time where the property was." Thereafter, Turney directed the officers to the location of the stolen property. It will be thus observed that Sergeant Caldwell was not carrying out a process of interrogation for the purpose of obtaining incriminating statements.[1] The simple statement, above quoted, was responded to by the spontaneous admission of guilt by Turney. Petitioner was not denied the service of an attorney, nor was an attorney even requested, as in *Escobedo.* No promises were used; no nerve-racking interrogation was attempted, nor mistreatment rendered, in order to obtain the statement from Turney; in fact, there is no evidence at all of any sort of coercion or duress.

Surely it cannot be said that, under the facts here enumerated, petitioner was deprived of any constitutional right. We do not think that, under *Escobedo, any* statement or remark of a defendant, though without counsel, is automatically precluded. Turney does not appear to have been completely ignorant of legal procedure, for at arraignment he entered a plea of not guilty, and was advised that he should obtain an attorney. He thereupon employed competent counsel, who represented him in the trial of the case.

Sergeant Caldwell detailed all of the facts heretofore enumerated to the jury, and there was no objection to this testimony. In fact, it does not appear that anyone, including Turney himself, made any contention at the trial that any statements were involuntarily made.

We have concluded that movant was not deprived of any constitutional right, either under the Federal or state constitutions, and it follows that the motion seeking

[1] Sergeant Caldwell testified: "It was not necessary to interrogate these men [Turney and Williams], because they voluntarily gave us the information."

permission to file a petition for a writ of error *coram nobis* is denied.

BRAY *v.* WILLEY.

5-3645 395 S. W. 2d 342

Opinion delivered October 25, 1965.

[Rehearing denied November 29, 1965.]

Terral, Rawlings & Matthews and *John I. Purtle,* for appellant.

No brief filed for Appellee.

ED. F. MCFADDIN, Associate Justice. This is a garnishment case; and the issue is the alleged liability of the garnishee to the judgment plaintiff. Although the amount here involved is very small in monetary value, the legal principles are so important that much time has been spent in research.[1]

On January 10, 1963, appellant Bray recovered a damage judgment against Dave Haneline for $215.97. On January 25, 1963 Bray caused a writ of garnishment after judgment (Ark. Stat. Ann. § 31-501 *et seq.* [Repl. 1962]) to be served on Ed Willey & Son (hereinafter sometimes referred to as "garnishee" or as "Appel-

[1] Indicative of the research this case has required, we call attention to the following cases, and/or notes: *Coward* v. *Barnes,* **232 Ark.** 177, 334 S. W. 2d 894; *Gossett* v. *Merchants Bank,* 235 Ark. 665, 361 S. W. 2d 537; *Day* v. *Bank of Del Norte* (Colo.), 230 P. 785; *Ralston* v. *King* (Mo. App.), 101 S. W. 2d 734; *Jacobs* v. *So. Bell Tel. Co.* (Ga. App.), 193 S. E. 487; *Orleans Mfg. Co.* v. *Hinkley* (Tex. App.) 61 S. W. 2d 865; *Russell* v. *Fred Pohl Co.* (N. J.), 80 A. 2d 191; *Paisley* v. *Park,* 222 Ill. App. 96; *Poncher* v. *Mohawk,* 224 Ill. App. 218; *Wunderlich* v. *Merchants Bank* (Minn.), 18 Ann. Cas. 212, and case note following opinion; *Wunderlich* v. *Merchants Bank* (Min.), 27 L.R.N.S. 811 and case note following opinion.

lee"). On January 31, 1963 the garnishee filed answer to the interrogatories, stating that the garnishee was not indebted to the defendant on and after the service of the writ of garnishment. Shortly thereafter the garnishee paid the defendant $34.35. On February 8, 1963 Bray controverted and denied the correctness of the answer of the garnishee, claiming that the garnishee had been indebted to Dave Haneline. Trial to the Court on February 10, 1965 resulted in a judgment discharging the garnishee; and from that judgment Bray prosecutes this appeal, relying on one point:

"That the Court erred in discharging the garnishee."

The evidence, viewed in the light most favorable to the judgment, as is our rule in law cases, discloses: that some time prior to the writ of garnishment Haneline had borrowed $75.00 from Willey, and was "working it out"; that on January 25, 1963 when the writ of garnishment was served, Haneline was actually indebted to Willey for $75.00 for a bona fide debt; and that after Willey filed his answer on January 31, 1963 he let Haneline have $34.35 for living expenses. It is this payment of $34.35 that gives rise to this appeal. It is not claimed that there was any collusion or fraud between Haneline and Willey to cover up assets in order to defeat Bray's judgment. It is a simple question of whether Willey had a right to deliver to Haneline $34.35 after the service of the writ of garnishment. Appellant insists that when the writ of garnishment was served on Willey, such service determined the status of the parties; and that Willey could not pay any amount of money to Haneline after that date; and appellant cites, *inter alia, Harris* v. *Harris,* 201 Ark. 684, 146 S. W. 2d 539.

Our cases hold with practical unanimity that if the garnishee makes any payment to the defendant after the service of the writ of garnishment he does so at his own peril. *Adams* v. *Penzell,* 40 Ark. 531; *Hockaday* v. *Warmack,* 121 Ark. 518, 182 S. W. 263; *Fox* v. *Pinson,* 172 Ark. 839, 81 S. W. 2d 833; and *Harris* v. *Harris,* 201 Ark. 684, 146 S. W. 2d 539. The authorities generally also recognize the right of offset; that is, if the defendant is indebted to the garnishee for some amount and the

garnishee has in his hands any goods, credits, or money belonging to the defendant, then the garnishee can keep enough of same to satisfy his claim against the defendant. In 38 C. J. S. p. 409, "Garnishment" § 183, the holdings are summarized:

"A garnishment lien or right is subject to equities and demands existing in favor of the garnishee at the time the lien or right attached, but is superior to claims which came into existence thereafter."

Likewise, in 6 Am. Jur. 2d p. 873, "Attachment and Garnishment" § 449, the holdings are summarized:

"As a general rule, a garnishee cannot be placed in any worse condition than he would be if the defendant's claim against him were enforced by the defendant himself, except in cases of fraud and collusion between the defendant and the garnishee. Consequently, the liability, legal and equitable, of the garnishee to the defendant, or the property of the defendant in his possession, is a measure of his liability to the plaintiff, and the plaintiff can have no greater right against the garnishee than the defendant."

We recognize all of these rules; but the question here is whether Willey has become liable to Bray for $34.35, which he could have offset against Haneline's indebtedness to him. Again we emphasize that there is no evidence or indication of fraud or collusion between Willey and Haneline to defeat Bray's judgment. If there had been, what we hereafter hold would not apply.

In view of what we have said, we therefore hold: that when Willey was garnished he had a right to offset $34.35 that he owed Haneline on the $75.00 debt that Haneline owed Willey. So when Willey paid Haneline $34.35 then as far as Bray was concerned, the debt of Haneline to Willey was reduced in that amount. If Willey had ever paid Haneline or credited to his account, more than $75.00, then for such excess over the $75.00 bona fide indebtedness Willey would have been liable to Bray. This is all in the absence of fraud or collusion. The situation here is not like that which existed in *Mabry*

v. *Manney,* 190 Ark. 154, 77 S. W. 2d 978. We emphasize again that the record here shows a bona fide indebtedness of $75.00 due from Haneline to Willey, and only $34.35 due by Willey to Haneline for service rendered. The payment of $34.35 could not be in addition to same credit on the note, but was the full amount due by Willey to Haneline.

We adhere to our rule that whenever the writ of garnishment is served, any moneys, credits, goods, or effects, in the hands of the garnishee due the defendant must be reported to the Court, and if any such is surrendered by the garnishee to the defendant, such surrender is at the peril of the garnishee. But, here, all such surrender was less than the indebtedness the defendant owed the garnishee; so the judgment rendered by the Court in this case was correct.

Affirmed.

WILLINGHAM *v.* SOUTHERN RENDERING CO.

5-3658 394 S. W. 2d 727

Opinion delivered October 25, 1965.

Wood, Chesnutt & Smith, for appellant.

Wootton, Land & Matthews, for appellee.

George Rose Smith, J. The appellant's wife and two foster children were killed in a head-on collision on the afternoon of November 15, 1961. This action for wrongful death and property damage was brought by the appellant, as an individual and as administrator of the three estates, against the owner and the driver of the tractor and tank trailer that collided with the Willingham car. The trial court directed a verdict in favor of the defendants. The question here is whether there was substantial evidence of negligence on the part of the defendant driver, Milton W. Winfrey.

Winfrey was the only survivor of the collision and thus was the only available eyewitness. He had delivered a tankful of tallow to Nashville, Arkansas, and was returning to Little Rock when the tragedy occurred. He testified that when he first saw the other vehicle it was coming toward him at great speed on the wrong side of the highway. Winfrey estimated his own speed at 40 or 45 miles an hour. The highway was wet. Winfrey says that he first applied only his trailer brakes and then applied his tractor brakes as well. He drove his rig completely off the pavement and onto the right-hand shoulder, but the Willingham car, out of control, carreened back and forth across the highway and was skidding sidewise down the shoulder when the collision took place. Winfrey estimated his speed at 10 or 15 miles an hour at the moment of impact.

The complaint alleged, among other things, that the tractor-trailer had defective brakes and that it was being driven at an excesive speed. We are of the opinion that there was substantial evidence to support both allegations.

Compressed air was used both to operate the trailer brakes and to empty the tank of tallow. There is proof that the two systems were so connected that it was possible for tallow to leak into the brake lines. There is also positive and disinterested testimony that when the

trailer was repaired after the accident the mechanics removed two gallons of tallow from the brake system. The jury could have found that the compressed air hoses in the braking mechanism were so obstructed by tallow that the trailer brakes were ineffective.

There is also evidence to support an inference that the tractor-trailer was traveling much too fast at the moment of its collision with the Willingham car. Despite the speed at which the car was assertedly traveling it was pushed backward for fifty-five feet from the point of impact. Moreover, several photographs indicate that Winfrey's 24,000-pound rig must have run over the automobile with inordinate force, for the body of the vehicle was so crushed that it was apparently only about a yard in height after the collision.

One of the children who were killed was four years old; the other was two. Any negligence on the part of Mrs. Willingham could not be imputed to them. *Stockton* v. *Baker,* 213 Ark. 918, 213 S. W. 2d 896 (1948); *Lockhart* v. *Ross.* 191 Ark. 743, 87 S. W. 2d 73 (1935). With respect to Willingham's claim for the destruction of the automobile it may also be true that his wife's negligence would not be imputable to him. *Mullally* v. *Carvill,* 234 Ark. 1041, 356 S. W. 2d 238 (1962). Hence, as far as these causes of action are concerned, it was enough for the plaintiff to adduce *some* substantial evidence of negligence in the defendants. From what we have already said it is plain that the proof presented issues of fact for the jury.

A more difficult question is raised with respect to Mrs. Willingham's own comparative negligence as a proximate cause of her death. Ordinarily the matter of comparing the negligence of the two persons concerned is within the province of the jury. *Wood* v. *Combs,* 237 Ark. 738, 375 S. W. 2d 800 (1964). When, as here, one of the drivers is the only survivor of the collision, the plaintiff necessarily labors under great difficulty in his effort to prove that the defendant driver's negligence exceeded that of the plaintiff's intestate. Here, as we have seen, the plaintiff succeeded in proving that Win-

frey may have been at fault in at least two particulars. In this situation we are reluctant to declare as a matter of law that Mrs. Willingham's negligence was greater than Winfrey's. The jury had the great advantage of observing Winfrey's demeanor as he testified. We are of the opinion that the comparative negligence on the part of Mrs. Willingham and of Winfrey was a matter for the jury to decide.

Reversed.

GOFORTH *v.* EADS

5-3653 394 S. W. 2d 728

Opinion delivered October 25, 1965.

Hout, Thaxton & Hout, for appellant.

Hodges & Hodges, for appellee.

PAUL WARD, Associate Justice. This litigation is the result of a dispute over the ownership of residential property in the City of Newport.

On May 30, 1959 appellant, Clara Andrews Goforth (referred to as "vendor") executed a contract to convey the property to Mr. and Mrs. Eads (referred to as "purchasers") for the price of $2,000, to be paid as follows: $50 per month for ten consecutive months beginning June 1st, 1959 and the balance payable thereafter at $25 per month.

The contract contained in essence the following additional pertinent provisions: (a) If the purchasers be in

default it is agreed that the vendor shall retain the cash payments as liquidated damages, and the contract shall thenceforth be at an end; (b) If purchasers fail to pay any installment the entire debt, at the option of the vendor, may be declared to be immediately due and payable; (c) The purchasers were to have possession "not later than May 30, 1959," and; (d) The purchasers were obligated to pay all taxes, pay for $1500 in insurance, and to keep the premises in good repair.

Mr. and Mrs. Eads promptly took possession of the property, but the $25 payments due on the first of October and November and December 1963 became delinquent. On December 28, 1963 the Eads executed a quit-claim deed conveying the property to Mr. and Mrs. Staton, who helped the Eads to make the delinquent payments and who have paid, or rather have attempted to pay, all accruing payments due appellant since that time.

On February 6, 1964 appellant filed a complaint in chancery court against Mr. and Mrs. Eads and Mr. and Mrs. Staton (appellees herein) alleging in substance: (a) On December 1963 Mr. and Mrs. Eads were in default; (b) She then declared the contract terminated and at an end; (c) The Eads abandoned the property, and Mrs. Eads signed a statement relinquishing all rights therein; (d) The Eads, without any interest in the property, conveyed it by quit-claim deed to Mr. and Mrs. Staton who forceably entered and took possession of the premises without her knowledge or consent, and; she has demanded possession of the property without success. The prayer was that the deed to the Statons be cancelled; that the sales contract be declared null and void, and that she be declared to have a clear title to the property. The issues raised by the complaint were properly controverted by appellees, and the cause was transferred to the circuit court for trial.

The trial judge (on exchange) who, by agreement, presided as a jury, made in substance the following findings: (a) The Eads did not surrender possession of the property to appellant; (b) Appellant waived the default payments; (c) The Eads made a bonafide effort

to keep up the payments, and; (d) the Statons were entitled to the title and possession of the property.

For a reversal appellant relies on four separate points, but, in view of the decision we have reached, it becomes necessary to consider only the first three.

One. It is first contended that after the last three payments due in 1963 became delinquent, the Eads surrendered possession of the house. The findings of this disputed fact, resolved by the trial court against appellant, is, we think, supported by substantial evidence. Although appellant testified to the effect that Mrs. Eads said they were giving up the contract and surrendering possession of the property, and although the Eads concede they moved to an apartment, this testimony is contradicted and explained.

Mrs. Eads testified:

> "Q. At the time you sold this property to Mr. and Mrs. Staton did you have any possessions in the house itself?
>
> "A. We had some furniture in there.
>
> "Q. Did you have it under lock and key?
>
> "A. Yes, Sir.
>
> "Q. Who was carrying the key?
>
> "A. I was.
>
> "Q. After you sold to Mr. and Mrs. Staton what did you do with the key?
>
> "A. I gave the key to Mr. Staton.
>
> "Q. Did you then finally turn possession over to them?
>
> "A. Yes, Sir.

Mr. Eads testified:

> "Q. At the time that you sold this property to Mr. and Mrs. Staton, did you and your wife still have this property under lock and key?
>
> "A. Yes, Sir.

"Q. And you had the key to the lock, is that right?

"A. That's right, yes.

"Q. You and your wife had not given up possession of this house then at that time, had you?

"A. No, we did not.

"Q. And did you and your wife still have some property in the house under that lock and key?

"A. We did."

Since the trial judge sat as a jury we must of course give his findings the same weight as the findings of a jury, and must approve them if they are supported by substantial evidence. In this instance there was substantial evidence to show the Eads had not surrendered possession of the house.

Two. Next, appellant says the trial court erred in finding that she waived the default payments, but we cannot agree. The contract provided that appellant had a right to declare the contract to "be at an end" if the purchasers became delinquent. However, she was not compelled to exercise that right. The undisputed testimony shows that Eads had previously been in default many times due to illness and other causes, but no forfeiture was declared. On the occasion in question here, according to the Eads, appellant offered to take $100 and reinstate the contract, and that this offer was accepted. This testimony was disputed by appellant. It would serve no useful purpose to set out all the testimony bearing on the question of waiver, because, as stated previously, the finding of the trial court on this question must be affirmed if supported by substantial evidence. Set out below is an excerpt from the testimony of Mr. Staton:

"Q. Did she (appellant) ever discuss with you the delinquent payments and whether or not she would accept the delinquent payments?

"A. The second time, yes, Sir, she did.

"Q. What did she say at that time?

"A. She said they were behind a hundred dollars; said, 'I told them if they would give me a hundred dollars that I would let them continue with the payments.'

"Q. Can you place that in time with relation to the date that you bought the property?

"A. It was the day before the contract was made.

"Q. In other words, the contract was made on the 28th day of December.

"A. Yes, Sir.

"Q. And she said that to you on the 27th day of December.

"A. Yes, Sir, she did."

Three. Finally, it is contended that the "Eads had no interest in the real property in question at the time of the attempted sale to "the Statons." To support the above it is stated that "the Eads" interest in the real property was terminated by appellant, Goforth. . . .," meaning of course the sales contract was void because appellant did not waive the default payments. This issue however has already been resolved against appellant by what we have previously said and held.

Affirmed.

STILL *v.* STILL

5-3600 394 S. W. 2d 733

Opinion delivered October 25, 1965.

J. Loyd Shouse, for appellant.

Kenneth R. Smith, for appellee.

SAM ROBINSON, Associate Justice. The appellant, Andrew Still, is the owner of a small farm in Searcy County, lying immediately south and adjacent to the Marion--Searcy County line. The appellee, Archie Still, owns 60 acres immediately north and adjacent to the Marion-Searcy County line and directly across from appellant's farm. In 1944, appellant, along with Roy Still, the then owner of appellee's property, caused a survey to be made in order to establish the true location of the Marion-Searcy County line. At the completion of the survey, fences were erected along the boundaries set out by the surveyor. Upon their agreement, however, Roy Still permitted appellant to erect a fence which deviated from the boundary so as to include about 1¼ acre of the Marion County land within appellant's fences. This was done in order to keep Roy Still's cattle away from appellant's home and barn and away from appellant's cattle.

Appellee, Archie Still, acquired the Marion County tract in 1961. Since that time he and appellant, Andrew Still, have continually disagreed as to the ownership of the 1¼ acre tract. Appellee finally filed suit for its possession in the Marion County Circuit Court. The cause was removed to equity, which court confirmed title in appellee, subject only to an easement in favor of appellant extending from appellant's home and property to the county road. Since no cross-appeal was taken as to the Chancellor's finding regarding the easement, the only question before this court is whether the Chancellor's finding that appellant's possession of the land was permissive and not adverse, is against the preponderance of the evidence.

Appellant relies on his original agreement with Roy Still and his subsequent use of the land for the required statutory period in order to establish title by adverse possession. We agree with the court below that no such title was established here. The testimony of several witnesses, along with the testimony of appellant himself, clearly indicates that appellant's possession was permissive. When asked to relate the basis of his agreement with Roy Still, appellant testified: ". . . when I would go to feed my stock, his stock would come over and give me lots of trouble and he gave me permission to build the fence there for both our conveniences." Appellant's wife testified: ". . . we have it in our possession to use, that was the agreement." Appellant's uncle, Charlie Still, telling about his recollection of the agreement stated that: "He gave him permission to use that land, that is all." It is well settled that the holding of land by permission can not ripen into an adverse or hostile right until notice is brought home to the owner and holding has continued thereafter for the statutory period. *Fry* v. *Grismore-Hyman Co.*, 151 Ark. 44, 235 S. W. 373; *Fulcher* v. *Dierks Lumber & Coal Co.*, 164 Ark. 261, 261 S. W. 645; *Harp* v. *Christian*, 215 Ark. 833, 223 S. W. 2d 778; *Bailey, Trustee* v. *Martin*, 218 Ark. 513, 237 S. W. 2d 16. A preponderance of the evidence does not show that appellant ever brought home such notice to Roy Still, or any other holder of record title. Appellant asserts that at one time in 1955 he forced appellee off the property, but the record shows that appellee did not acquire title until 1961.

The preponderance of the evidence supports the conclusions of the Chancellor that appellant's possession was permissive and not adverse. The decree is accordingly affirmed.

5-3450 394 S. W. 2d 725

Opinion delivered October 25, 1965.

[redacted]

Willis V. Lewis, for appellant.

No brief filed for Appellee.

JIM JOHNSON, Associate Justice. This is an appeal from a divorce decree. Appellee Sarah J. Gilliam filed suit for separate maintenance in Pulaski Chancery Court against appellant Claude E. Gilliam in 1959. Appellant cross-complained for divorce. The trial court denied the divorce, granted appellee's petition for separate maintenance and awarded her $250.00 per month permanent alimony. This decree was affirmed by this court in 1960. *Gilliam* v. *Gilliam,* 232 Ark. 765, 340 S. W. 2d 272.

In October, 1961, appellee filed an amendment to the complaint in her separate maintenance suit, seeking a divorce. In November appellant filed suit (a separate suit) in Pulaski Chancery for divorce on several grounds and in October, 1962, amended his complaint to include the ground of three years separation. Eventually these cases were consolidated. After a number of motions and hearings (including one in which appellant obtained a reduction of the alimony to $150 on the allegation that he had been discharged from the Air Force and deliberately withheld the fact that he had applied for reinstatement and was within a month reinstated and promoted in rank), the chancellor in June, 1964, granted the

divorce and awarded appellee $200 per month permanent alimony, *inter alia.*

For reversal appellant argues a number of points concerned with the findings and awards of the trial court. Appellant's conduct before the trial court entitles him to no relief on the matter of alimony. The trial court was subjected to harrassment, embarrassment and chicanery at the hands of appellant, and at least lack of cooperation from appellee. Our sympathies in this case lie with the judge. The trial court's findings are careful, extensive and objective, and the awards are generally well supported by the evidence. However, on trial de novo on the record, there is one point urged by appellant with which we are forced to agree. The court's finding that no partnership in a real estate agency existed between the parties is against the preponderance of the evidence. Testimony of both parties shows that in 1956, after the parties had moved to Little Rock from Texas, they took the real estate broker's examination. Appellant passed and was licensed as a broker; appellee failed and was licensed as a salesman. (Appellee testified that appellant had studied real estate, including real estate appraisal, at T. C. U. on the GI bill.) The real estate agency was opened on appellant's broker's license and appellee obviously ran the business and did the bulk of the work. It is also clear from testimony of the parties and four salesmen that appellant worked regularly in the business, hired and trained some of the salesmen, appraised property and assisted in the operation of the business. The agency purchased property and sold it; title to much of the property was taken in appellee's name since appellant's duties in the Air Force required his periodic absence. When appellant was sent to Japan he gave appellee his power of attorney, a forceful argument for the de facto existence of a partnership. Throughout the litigation, appellee contended that the property purchased in her name was her property alone, however at one point she testified: "I thought, I thought all of this property would be mine and Gil's [appellant] and not mine alone and not Gil's alone. We planned for him to take over this business at his retirement."

Since it is not clear from the record what the assets of the partnership amounted to at the time of the 1959 divorce a mensa et thoro, that is, property, notes and other choses in action, the cause is reversed and remanded for determination and division of partnership assets.

CHENEY *v.* ST. LOUIS SOUTHWESTERN RAILWAY CO.

5-3596 394 S. W. 2d 731

Opinion delivered October 25, 1965.

Lyle Williams and *Tom Tanner,* for appellant.

Smith, Williams, Friday & Bowen, for appellee.

FRANK HOLT, Associate Justice. This action tests the validity of an income tax statute. The appellee, engaged in interstate rail transporation, filed its 1962 income tax return with appellant. Appellee computed its income tax liability ($338,673.78) pursuant to Act No. 413 of 1961, § 1 and §§ 3—19 inclusive [Ark. Stat. Ann. § 84-2055 and §§ 84-2057—2073 (Repl. 1960) and Act No. 118 of the Acts of 1929, § 15, as amended, § 84-2020]. Appellant contends that appellee's taxable income should have been computed pursuant to the provisions of Arkansas Acts of 1929, No. 118, § 3 (e), Ark. Stat. Ann. § 84-2003 (e) and, therefore, a deficiency of $41,546.76 exists. Appellant and appellee agree that their respective math-

ematical computations are correct. In other words, appellant and appellee disagree as to which statute governs appellee's income tax liability. Appellee asserts that § 84-2003 (e) is unconstitutional and the trial court sustained appellee's contention.

On appeal the appellant first contends for reversal that the trial court erred in holding that § 84-2003 (e) is unconstitutional in that it delegates legislative power to the federal government contrary to and in violation of Article 5, § 1, as amended by Amendment #7 and Article 4, §§ 1 and 2 of the Constitution of the State of Arkansas. We think the chancellor was correct.

It is agreed that: "The statute relied upon by the Defendant for the assertion of the deficiency was enacted as part of the Income Tax Law of 1929. The particular section of the 1929 Acts has not been amended. The statute, in general, provides that the income taxable in Arkansas of any corporation engaged in the business of operating a steam or electric railroad, express service, telephone or telegraph business, or other such forms of public service, shall be a proportionate part of the corporation's gross revenues, deducting therefrom a proportionate part of all deductions. The revenues, deductions and the allocations thereof are to be determined under the Interstate Commerce Act pursuant to the Interstate Commerce Commission's standard classification of accounts." This standard classification of accounts is a system promulgated by the Interstate Commerce Commission in which various account headings are designated for use by interstate carriers to assure uniformity in reporting for ratefixing purposes and not income tax purposes. Paragraph 3 of § 20 of the Interstate Commerce Act gives the Interstate Commerce Commission discretionary authority to prescribe this uniform standard classification of accounts applicable to appellant. Pursuant to this authority and by congressional enactment many changes have been made due to business operations and advances in technology. The changes have affected the Interstate Commerce Commission's determination of "net income" for their rate-fixing purposes.

The tax deficiency here assessed by the appellant against the appellee was determined under the 1962 or the then current standard classification of accounts and not the standard that existed in 1928. This cannot be done since it in in effect surrenders to a federal agency the responsibility of determining for Arkansas the "net income" of appellee. This is a fluid formula since the standard varies as the Interstate Commerce Commission sees fit to make changes for its rate-making purposes. Thus, appellee's tax liability to Arkansas is based upon a formula subject to prospective federal legislation or administrative rules. It is unconstitutional. *Crowly* v. *Thornbrough,* 226 Ark. 768, 294 S. W. 2d 62. There we disapproved a statute which provided that minimum wages to be paid must be predicated upon the minimum wages determined by the Secretary of Labor of the United States.

In the case at bar, as in *Crowly* v. *Thornbrough, supra,* the state retains no control over the future action of a federal agency. Section 84-2003 (e) in effect delegates power to such an agency that is expressly reserved to our legislature by our constitution. Article 5, § 1, as amended by Amendment 7 and Article 4, §§ 1 and 2, Constitution of Arkansas. See, also, *McLeod* v. *Commercial National Bank,* 206 Ark. 1086, 178 S. W. 2d 496; *State* v. *Urquhart,* 310 P. 2d 261 (Wash. 1957); *Dawson* v. *Hamilton,* 314 S. W. 2d 532 (Ky. 1958); and the annotation in 133 A. L. R. 401.

It is true that the constitutionality of the Act in question has previously been approved by us. *Cook* v. *Taylor,* 210 Ark. 803, 197 S. W. 2d 738; *Commissioner of Revenues* v. *Transcontinental Bus System, Inc.,* 227 Ark. 811, 301 S. W. 2d 569; *Cheney, Commissioner of Revenues* v. *East Texas Motor Freight, Inc.,* 233 Ark. 675, 346 S. W. 2d 513. However, a careful review of these cases reveals that the point at issue was never considered by us.

Appellant also urges for reversal that the trial court erred in holding that the statute in question is void by reason of making an illegal incorporation by reference

and, also, is void for vagueness, indefiniteness or uncertainty. Since we are affirming the trial court's holding that the statute is unconstitutional as an illegal delegation of legislative authority we deem it unnecessary to discuss these points.

The decree is affirmed.

5-3611 394 S. W. 2d 613

Supplemental opinion on denial of rehearing delivered November 1, 1965.

[redacted]

GEORGE ROSE SMITH, J., on rehearing. In a petition for rehearing the appellees make the point that even if our decision is correct the transfer of stock should be set aside only with respect to the appellant's one-third interest. The case of *Bell* v. *Wilson,* 52 Ark. 171, 12 S. W. 328, 5 L. R. A. 370 (1889), is cited for the proposition that a fraudulent conveyance is nevertheless good not only between the parties but also against all the world except the defrauded creditors.

A statute adopted after the decision in the *Bell* case has been interpreted to reflect a legislative intention to assist the heirs of a fraudulent grantor. Ark. Stat. Ann. § 62-416 (1947), carried forward into the Probate Code, Ark. Stat. Ann. § 62-2402 (Supp. 1965); *Ives* v. *Ives,* 177 Ark. 1060, 9 S. W. 2d 1062 (1928); *Moore* v. *Waldstein,* 74 Ark. 273, 85 S. W. 416 (1905). Paul Rush's heirs, however, are not parties to the present proceeding; so we are not in a position to render a final ruling upon the question now raised by the appellees. This is a matter that may be fully explored in further proceedings upon the remand of the case to the trial court, when, too, any other necessary parties may be brought into the case.

Rehearing denied.

Original opinion P. 706.

SHELTON *v.* JACK.

5-3616 395 S. W. 2d 9

Opinion delivered November 1, 1965.

Harold C. Rains, Jr. for appellant.

No brief filed for Appellee.

CARLETON HARRIS, Chief Justice. On May 1, 1961, appellants instituted a suit in the Crawford County Chancery Court against appellees, alleging that appellants and appellees were the owners of adjoining lands, with a roadway running between said lands; that the roadway was a public road, and provided the appellants with their only access to the rear of their property. The complaint alleged that appellees had illegally closed this road, and had caused a fence to be constructed across it and onto the property of appellants, thereby closing the road, and also a portion of the property claimed by appellants. The prayer sought damages in the amount of $1,000.00, and asked that appellees be required to move the fence, and be permanently restrained from interfering with the use of the road by the appellants, their guests, and successors in title.

On January 3, 1962, this suit was dismissed without prejudice. Thereafter, on September 16, 1963, appellants filed another complaint in the Crawford County Chancery Court, alleging the same facts heretofore related, and, in addition, asserting adverse use of the roadway for more than seven years under a claim of right by appellants and their predecessors in title. It was prayed that the court find the road to be a public road, or, in the alternative, a private road, and the court was asked to

require appellees to remove the fences, and to enjoin appellees from interfering with the complete and unrestricted use of the roadway, and the property, alleged to belong to appellants. Damages were sought for alleged destruction of flowers, plants, and a shade tree, damages for trespass; also damages for the reduced value of appellants' property, and for injuries occasioned by water drainage upon the property in the total amount of $15,000.

After the filing of all pleadings in the case, and the announcement that the parties were ready for trial, appellees, through counsel, moved that the complaint be dismissed because of the fact that the present action was filed about twenty-one months after plaintiffs had taken a non-suit in the earlier case mentioned at the outset of this opinion. This motion was based on Ark. Stat. Ann. § 37-222 (Repl. 1962), which provides, *inter alia,* that, where the plaintiff takes a nonsuit, "* * * such plaintiff may commence a new action within one (1) year after such nonsuit suffered or judgment arrested or reversed.* * *" The court granted the motion, because the instant suit had not been filed within one year from the date of the taking of the nonsuit, and entered its decree, dismissing the complaint. From such decree, appellants bring this appeal.

The sole question before this court is whether Section 37-222 applies under the facts heretofore enumerated.

The complaint asserts that the fences were constructed in the early part of 1961, and appellants contend that accordingly, they have until the early part of the year 1968 in which to file an appropriate cause of action. This argument is sound, for this question has been determined in the manner argued by appellants. In *Mitchell et al,* v. *Federal Land Bank of St. Louis,* 206 Ark. 253, 174 S. W. 2d 671, we said:

"Appellants invoke the one-year nonsuit statute, which is § 8947 of Pope's Digest, pointing out that the orders of dismissal in the first foreclosure suits were made in February, 1938, and that the second foreclosure

suits were not filed until December, 1939 (22 months later). But this contention of appellants is without merit. Mr. Justice Frauenthal, speaking for the court, in *Love* v. *Cahn,* 93 Ark. 215, 124 S. W. 259, said: 'But the statute (Kirby's Digest, § 5083) which tolls the statute of limitation for one year where the plaintiff suffers a nonsuit does not narrow the period of limitation in which an action may be brought upon a claim which is not otherwise barred by the general statute of limitation applicable to such claim. This provision of the statute only applies to those causes of action which, under the general statute of limitation applicable to such cause of action, would otherwise be barred before the running of one year from the time of taking such nonsuit. The statute, instead of shortening the period of limitation, really extends the period provided by the general statute of limitation applicable to the cause of action.' To the same effect see *Dressler* v. *Carpenter,* 107 Ark. 353, 155 S. W. 108; *K. C. S. Ry. Co.* v. *Akin,* 138 Ark. 10, 210 S. W. 350; and annotation in 83 A. L. R. 486."

Also, in *Eades* v. *Joslin,* 219 Ark. 688, 244 S. W. 2d 623, it is stated:

"In 1939 the appellee brought suit to quiet her title to one 40-acre tract; took a voluntary nonsuit in 1940; and filed no suit thereafter until the present one, in 1949. Based on these facts, appellants plead the one year nonsuit statute (§ 37-222, Ark. Stats.) as a bar to the present suit. The case of *Mitchell* v. *Fed. Land Bank,* 206 Ark. 253, 174 S. W. 2d 671, decides this question against the appellants' because they are here seeking to invoke the one year nonsuit statute to shorten the plaintiff's rights, and such is not its purpose. The plaintiff could have brought suit to quiet title at any time before the defendants acquired title by adverse possession.* * *"

It follows, therefore, that the court erred in granting the motion to dismiss.

Reversed and remanded.

Opinion delivered November 1, 1965.

[redacted]

Van B. Taylor, Donald Poe, Hardin, Barton, Hardin & Jesson, for appellant.

Bruce Bennett, Atty. General, By: *Fletcher Jackson,* Asst. Atty. General, for appellee.

ED. F. MCFADDIN, Associate Justice. The appellant, Fred Rush, was convicted of second degree murder in the killing of his stepfather, Paul Rush; and there is this appeal. This is the second time this case has been before us. The first appeal was in *Rush* v. *State,* 238 Ark. 149, 379 S. W. 2d 29 (Opinion of May 18, 1964), wherein Fred Rush had been tried in the Sebastian Circuit Court and convicted of first degree murder and sentenced to life imprisonment. We reversed for the reasons stated in the Opinion and remanded the cause for new trial. Of course, on the second trial the greatest punishment the defendant could have received would have been life imprisonment.[1] *Sneed* v. *State,* 159 Ark. 65, 255 S. W. 895.

[1] Our holding in *Sneed* v. *State* is because of the wording of Ark. Stat. Ann. § 43-2153 (Repl. 1964). The holdings in some other jurisdictions are contrary to our holding. See *Stroud* v. *U. S.,* 251 U. S. 15, 64 L. Ed. 103, 40 S. Ct. 50.

On remand the case was transferred to Scott County, where Rush was tried and convicted of second degree murder; and from that judgment there is this appeal. The motion for new trial contains 53 assignments of error, but appellant's counsel have confined the argument to three points, which we now list and will discuss in the same order:

"I. The Court Erred in Refusing to Direct a Verdict of Acquittal.

"II. The Court Erred in Refusing to Admit Defendant's Exhibits 'G' and 'H'.

"III. The Trial Court Erred, and Denied Appellant his Constitutional Rights to a Fair Trial, in Instructing the Jury on Lesser Degrees of Homicide after the Case had been submitted to the Jury for more than 28 hours."

I.

The information filed by the Prosecuting Attorney on March 14, 1963 charged "the defendants, Frederick L. Rush, Raymond Wood, and Carolyn Brown, of the crime of murder in the first degree committed as follows, to-wit: the said defendants in the County, District, and State aforesaid, on the 13th of May, 1962, did unlawfully, wilfully, and feloniously and with premeditation and malice aforethought kill and murder Paul Rush by shooting him with a gun against the peace and dignity of the State of Arkansas."

The defendants sought and obtained a severance, and each was tried separtely. In both the first trial and the present trial of Fred Rush the State insisted that Fred Rush, Raymond Wood, and Carolyn Brown had formed a conspiracy to kill Paul Rush; that in keeping with the conspiracy Carolyn Brown drove the getaway car for Raymond Wood so he could flee without being seen after the murder; that Fred Rush lured Paul Rush to the basement of the V. & R. Sales Company building; that Raymond Wood fired the shot that killed Paul Rush and also fired a shot into the arm of Fred Rush to pro-

vide him with a better defense against being suspected of the murder of Paul Rush.

When this theory of the State was announced by the Prosecuting Attorney in his opening statement to the jury in the present case, the defendant moved for an acquittal, which motion was denied. The basis of the motion for acquittal was because the State had to admit that Raymond Wood and Carolyn Brown had each been acquitted of the murder of Paul Rush; and therefore since Raymond Wood was the man who fired the fatal shot and had been acquitted, Fred Rush could not be convicted. In other words, the defendant took the position that Fred Rush was at most an accessory to the killing that Raymond Wood committed, and that the acquittal of Raymond Wood as the actual murderer *ipso facto* worked the acquittal of Fred Rush.

We find no merit in the appellant's position. Under the evidence a jury could have found that Fred Rush was present, aiding and abetting in the killing, and without his work there would have been no killing. At the General Election in 1936 the People of Arkansas adopted[2] Initatied Act No. 3, captioned, "An Act to Amend, Modify, and Improve Judicial Procedure and the Criminal Law, and for Other Purposes." Section 25 of that Act, now found in Ark. Stat. Ann. § 41-118 (Repl. 1964), reads:

"ACCESSORIES AND PRINCIPALS. The distinction between principals and accessories before the fact is hereby abolished, and all accessories before the fact shall be deemed principals and punished as such. In any case of felony, when the evidence justifies, one indicted as principal may be convicted as an accessory after the fact; if indicted as accessory after the fact, he may be convicted as principal."

Some of our cases considering the 1936 Initiated Act are Wilkerson v. State, 209 Ark. 138, 189 S. W. 2d 800; *Fields* v. *State,* 213 Ark. 899, 214 S. W. 2d 230; and *Lauderdale*

[2] The full text of this Act may be found on Page 1384 *et seq.* of the Acts of 1937.

v. *State,* 233 Ark. 96, 343 S. W. 2d 422. In each of these cases we held that one who stands by, aids, and abets, may be tried as a principal. So when the State offered testimony that Fred Rush was standing by, aiding and abetting in the murder of Paul Rush, he could be tried as a principal regardless of what had happened in the cases of the State against Raymond Wood and Carolyn Brown.

II.

The appellant's second point relates to the refusal of the Trial Court to allow the defense to introduce in evidence certified copies of the judgments of acquittal of Raymond Wood and Carolyn Brown. As heretofore stated, Fred Rush, Raymond Wood, and Carolyn Brown were charged with the murder of Paul Rush; and each defendant claimed and received a severance. After the first trial of Fred Rush the State then tried Raymond Wood and he was acquitted on May 25, 1963. The State then tried Carolyn Brown and she was acquitted on July 11, 1963. At the present trial of Fred Rush he sought to introduce in evidence a certified copy of the judgment of acquittal of the said Raymond Wood, and a certified copy of the judgment of acquittal of Carolyn Brown. These were the Exhibits G and H, referred to heretofore. The Trial Court refused to allow such exhibits to be introduced, and the correctness of such ruling is the point now argued.

The Trial Court was correct. We do not know what the evidence was in either the Wood trial or the Brown trial. We do not know what the instructions were in either of those cases. To allow a certified copy of a judgment of acquittal to be introduced would shed no light on the evidence in those cases. In *Smith* v. *Dean,* 226 Ark. 438, 290 S. W. 2d 439, there was an attempt to introduce a certified copy of a judgment in a criminal case to support a claim against a party in a civil case. The Trial Court refused to allow such certified copy to be introduced; and in affirming the ruling we said:

"At the trial below the appellees introduced a certified copy of the judgement of conviction, but it is the settled

rule in this State that such a judgment is not admissible to prove the fact on which it was based. *Horn* v. *Cole, supra; Washington Nat. Ins. Co.* v. *Clement,* 192 Ark. 371, 91 S. W. 2d 265."

In *People* v. *Kief,* 126 N. Y. 661, 27 N. E. 556, the situation was quite similar to the one in the case at bar. There, the defendants were jointly charged but tried separately. The copy of the judgment acquitting one defendant was held to be inadmissible when offered at the trial of the other defendant. The reasoning of the New York Court is so clear that we quote at length:

"But with the change effected by the Penal Code the distinction between principal and accessory disappeared, and thenceforward he who aided, abetted, or counseled in the commission of a crime became equally guilty with him who committed it, and could be indicted, tried, and convicted as a principal. If it is immaterial, therefore, upon the question of his guilt, whether a party, engaged in the commission of a felony, directly committed the crime alleged, or only abetted in its commission, it must be quite immaterial whether one jointly indicted with him for the offense has been acquitted or not. The question of the one defendant's guilt cannot turn upon the establishment of the other's guilt; it is an independent issue, to be tried out alone. . . . "Now, the fact that Carrie Howard [the other indicted person] had been acquitted or convicted could not legally prove anything for or against this defendant, for he was not a party to that record. The general principle upon which the admissibility of evidence rests is its relevancy or its tendency to establish the issue upon trial. Carrie's acquittal would not prove this defendant's innocence of the charge in the indictment. At the most it would only prove that, being tried first, for some reason, she escaped conviction at the jury's hands."

The Supreme Court of Massachusetts in *Commonwealth* v. *Tilley* (Mass.), 99 N. E. 2d 749, in reaching the same conclusion as the New York Court, stated that what happened in the case of the other defendant was *"res inter alios acta"* in the trial of the current defendant.

In line with these cases, we hold that the Trial Court committed no error in refusing to allow the Exhibits G and H to be introduced.

III.

The third point by the appellant relates to the action of the Court in waiting until the jury had been out 28 hours before giving an instruction on second degree murder. Originally the Court instructed the jury that they should either find the defandant guilty of first degree murder or acquit him. The State requested no instruction on second degree murder, and none was given.

The case was submitted to the jury at 2:00 P.M. on January 29, 1965 on the sole issue of guilt or innocence of first degree murder. At 8:00 P.M. the jury announced that it was "hung." The Court at that time inquired of the foreman as to how the jury stood numerically, and the foreman replied, "ten and two." After further deliberation that night the jury was sent back to the motel for a night's rest, and returned to the Court for further deliberation at 9:00 A.M. Saturday, January 30, 1965. At 11:30 A.M. the jury returned to the courtroom, where inquiry was made by the Court as to progress in their deliberations; and the foreman announced, "We are locked." Thereupon, the Court proceeded to give the jury the so-called "get-together" instruction, which has been sanctioned in many cases.

The jury then returned to its deliberations until 12:45 P.M., at which time the jury went to lunch and then returned for further deliberations. At 3:50 P.M. the jury was again returned into Court and announced that they were hung. The Court said to the jury: "Are there any questions that you all have you feel you might properly ask the Court, or are there any questions pertaining to the law in this matter?" The foreman replied: "We have our instructions in there with us. Is that right?" The Court said, "Yes." The foreman then said: "I believe it is clear. We have the instructions and they are final in the ways to go?" The Court: "Those instructions embrace the basic law and they are final in

that respect and I will be frank with you, I don't know of any way I can enlarge upon them or explain them. If there is some particular part that you don't understand the legal terms or terminology that you don't understand, I might be able to help you with that. If the questions are put to me as to the forms of verdict I cannot offer you any alternative on that."

The jury took a brief rest and at 6:00 P.M. the Court called the jury back into the courtroom and, over the objection of the defendant, instructed the jury on second degree murder and manslaughter. The defendant's counsel said: "I am going to object to the giving of such instructions at this time; to the Court's instruction on second degree murder, on the ground that this lawsuit has been tried solely upon the theory that it was murder in the first degree, or that the man was innocent; and at this late stage, after the evidence has been adduced, instructions given, arguments made, and the jury has been out better than 26 hours and deliberated a great deal of time . . ."

At all events, the Court gave an instruction on second degree murder and manslaughter at 6:00 P.M. Saturday January 30, 1965; and at 7:00 P.M., one hour later, the jury brought in the verdict of guilty of murder in the second degree and fixed the punishment at twelve years in the penitentiary.

We cannot put the stamp of approval on the action of the Court in first ascertaining that the jury was hopelessly deadlocked on first degree murder, and then offering a charge on second degree murder. It was almost the same as "bargaining" with the jury. It is not a question of whether the Court should have given the instruction on second degree murder at the time the other instructions were given: the question, here, is the challenge to the Court's action, in waiting 28 hours and ascertaining that the jury was deadlocked, and then charging the jury on a lesser degree of the offense.

We find no Arkansas case directly in point on this, but we have found cases from other jurisdictions that bear on the matter. In *People* v. *Stouter* (Calif), 75

P. 780, the defendant was charged with a "lascivious act on the body of a child under the age of 14 years." He was tried for that offense and at conclusion of the evidence the Court told the jury it should render one of two verdicts: either guilty as charged, or not guilty. The jury retired at 9:00 P.M. on January 18th and was out fourteen hours without being able to agree. The jury came in and asked if the verdict must be either guilty or innocent, to which the Court gave an affirmative answer. Twenty-four hours after the case had been submitted to the jury they announced that they could not agree; and then, for the first time, the Court gave a new instruction to the jury to the effect that the defendant might be found guilty of an attempt to commit the crime charged; and a form of verdict was offered the jury on that phase of the case. In a very short time the jury returned a verdict of guilty of attempt to commit the crime. In holding that the Trial Court had committed error, the Supreme Court of California said:

"There is no doubt of the general rule that after a jury have retired for consultation they may be called into court for further instructions; but we think that it was erroneous and unfair to defendant to give the last instruction as to the attempt, at the time and under the circumstances at and under which it was given. The jury had been out for a very long time without being able to agree under the instructions which had been given them, and which had been on subsequent occasions repeatedly reiterated, and many of the jurors had practically told the court what their opinions were, and that if the instructions were changed so as to meet their views they could find a verdict of guilty, contrary to the former instructions. The project of instructing the jury for the first time, after they had been unable to agree for 24 hours, that they might, notwithstanding the former instructions, convict the defendant of the attempt, was clearly an afterthought suggested by the statements of the jurors as to how they then stood, and apparently intended to help them, not generally to arrive at a verdict, but to arrive at some sort of a verdict of guilty. Such a proceeding is, we think, a most dangerous inter-

ference with the right of a defendant to a fair trial. . . . Jurors exhausted by a long confinement, and naturally desirous of being released, are not in a suitable frame of mind to thoroughly consider an entirely new phase of the case under a new instruction which might fairly be construed as an expression of the court hostile to the defendant."

In the case of *State* v. *Anderson* (W. Va.), 185 S. E. 212, the Supreme Court of West Virginia had before it a case wherein the defendant was tried for murder and the Court instructed the jury that it must bring in one of three verdicts: murder in the first degree, murder in the second degree, or not guilty. After the jury had deliberated parts of two days and been unable to agree, the Court then instructed the jury on manslaughter; and the jury promptly rendered a verdict of manslaughter. The Supreme Court of West Virginia held that the Trial Court had committed an error prejuricial to the rights of the defendant in giving the instruction of the lesser offense under the facts and circumstances in the case.

In *Brown* v. *Commonwealth* (Ky.), 224 S. W. 362, the defendant was charged and tried for "detaining a female against her will for the purpose of having carnal knowledge of her." After the jury had deliberated for some time and informed the Trial Court of inability to agree on a verdict, the Court, for the first time, instructed the jury on assault and battery. A verdict was quickly returned for such lesser offense. The Court of Appeals of Kentucky held that the action of the Trial Court was improper in giving such additional instructions at the time and under the situation existing. In 16 C. J. p. 1089, and also in C. J. S. Vol. 23A, p. 1004, the text reads:

"It is error to give a new instruction covering a different phase of the case, after the jury have been deliberating for some time and have had the instructions repeated to them, but are unable to reach a verdict."

After carefully studying the record in this case, we are thoroughly convinced that when the Court gave the

instruction on second degree murder it had the effect of bargaining with the jury, and that the Court violated the rights of the defendant in giving the instruction after first ascertaining that the jury was unable to reach a verdict on the charge of first degree murder. For this error we reverse the judgment and remand the case for a new trial.

CATHEY *v.* ROBERTSON.

5-3666 395 S. W. 2d 22

Opinion delivered November 1, 1965.

Ed B. Cook, for appellant.

H. G. Partlow, Jr. for appellee.

GEORGE ROSE SMITH, J. In this proceeding the appellant, James M. Cathey, is contesting the will of his brother Barton on the ground of testamentary incapacity. Barton died January 8, 1964, at the age of 74. He was survived by the appellant, by a half sister, and by several nieces and nephews. His will, executed September 26, 1963, left all his property to one of his nieces, Erma Lorene Mays, aged 60. The probate court upheld the will. The only question on appeal is whether the trial court's decision is against the weight of the evidence.

For some three years, beginning in 1940, Barton was of unsound mind and was confined to the State Hospital. It does not appear that after his release from that institution any physician had an opportunity to consider the matter of Barton's sanity. No medical

expert testified at the trial. The contestant sought to establish by lay testimony that Barton was still suffering from insane delusions during the latter part of his life, when the will was executed.

The contestant called eleven witnesses, among whom the most outspoken were related to the Cathey family by blood or marriage. The proof most favorable to the appellant's attack upon the will indicates that Barton often made irrational declarations about himself and his powers. At times he claimed to be God, to possess supernatural gifts, and to have spirits available to do his bidding. He made various absurd claims, such as the ability to control the universe, to bring World War II to an end, to destroy every living person on earth, to use the lightning for his own purposes, and to silence a radio station. It is perhaps odd that the witnesses do not intimate that Barton appeared to be especially vehement or excited or overwrought in making these assertions. To the contrary, the witnesses seem to be narrating statements made in a conversational manner.

Regardless of what Barton may have *said* from time to time, we are impressed by the almost total lack of irrationality in what he is shown to have *done*. The contestant, James Cathey, testified that upon one occasion Barton set fire to one of James's fields and burned up seven or eight acres of beans, but this is about the only indication of activity that might be regarded as evidencing unsoundness of mind.

There is, we think, sufficient proof in the record, including some testimony adduced by the contestant, to support the decision reached by the trial court. Long before the execution of the challenged will Barton had inherited from his mother forty acres of farm land and from his father an undivided one-third interest in another forty. For years Barton managed his property himself, farming part of it and renting part of it to tenants. He looked after his own finances and, living with great frugality, accumulated a modest estate. In addition to his farming operations Barton had a blacksmith shop and is shown to have been an unusually skill-

ful mechanic. He had only a third grade education, but he read extensively and was able to follow the directions in magazine articles in carrying out creative projects in his shop.

An accountant who prepared Barton's income tax returns from 1957 through 1961 testified that he seemed to be mentally normal. A grocer with whom Barton traded for ten years described him as a sensible man. A neighbor who sold Barton farm machinery on credit testified that although Barton was eccentric he was always sharp in his business dealings. A salesman who sold Barton a car for $1,995 cash in 1960 or 1961 considered him to be "as sane as anybody." Albert Ellis, one of the contestant's witnesses, was recalled for cross-examination and testified that he considered Barton to be sane.

In our opinion the will does not, as the appellant contends, involve an unnatural disposition of the testator's estate. Barton is shown to have had a controversy with his brother, the contestant. He also bore a grudge against his sister, who predeceased him by a few months, because she had caused him to be committed to the State Hospital in 1940. In the circumstances there is nothing especially unusual in the testator's election to leave his property to his niece. With respect to the will itself we may add that both the attorney who prepared it and the secretary who acted as the other attesting witness testified in favor of the validity of the will.

It will be remembered that the will was executed in September of 1963. At that time there was a dispute between Barton and his brother and sister about the title to the forty acres they had inherited from their father. In October and November, after the execution of the will, this brother and sister negotiated, through their attorney, for an exchange of deeds by which the dispute about the title would have been settled. There is a manifest inconsistency between the appellant's insistence that Barton was incapable of making a will in September of 1963 and his efforts to obtain a deed from Barton later in the same year.

We are of the opinion that the judgment must be affirmed; it is so ordered.

ARK. STATE HIGHWAY COMM. *v.* CUNNINGHAM, JUDGE

5-3655 395 S. W. 2d 13

Opinion delivered November 1, 1965.

Phil Stratton and *Mark E. Woolsey,* for appellant.

Murphy, Arnold & Purtle, for appellee.

PAUL WARD, Associate Justice. This litigation stems from an attempt by T. H. Weaver to enforce an alleged oral promise by the Arkansas State Highway Commission (hereafter referred to as Commission) to "blacktop a loop of highway" through Charlotte in Independence County.

When a complaint was filed in chancery court by Weaver against the Commission for the purpose mentioned above, the Commission filed in this Court a "Petition for Writ of Prohibition," asking us to prohibit said chancery court and the Judge thereof from trying the cause of action. The only issues are the questions of law raised by the pleadings.

The complaint filed by Weaver sets out, in substance, the following allegations: (a) Plaintiff is a resident of Independence County and is the owner of certain

(described) land; (b) The defendants are (naming the five members of the Commission), and certain agents of the Commission—both "individually and in their representative and official capacities"; (c) State Highway No. 25 (which by-passes Charlotte) is located on Weaver's property; (d) When No. 25 was being relocated (to cross his land) he "entered into an agreement with" the defendants wherein he (Weaver) "would furnish the right-of-way (for No. 25) through his said property free of charge to the defendants and to Independence County" and in consideration thereof "the Arkansas Highway Commission would blacktop a loop of the highway through Charlotte"; (e) Pursuant to the above agreement he allowed defendants to construct No. 25 which severs his land and diminishes the value thereof; (f) After No. 25 was completed through his land the Commission failed and now refuses to fulfill its obligation to construct the "loop"; (g) He has no recourse except against these defendants, since the county is wholly without funds. The prayer was for specific performance of the said agreement, or (as alternatives) that the defendants individually and the general public be enjoined from using that portion of No. 25 which crosses his land, or that the right-of-way be restored to him, or that he be awarded damages in the sum of $20,000.

There are presented for our consideration two principal questions: *One,* does the Respondent have jurisdiction of the parties and the subject matter; and, *Two,* is prohibition the proper remedy.

One. We agree with the Petitioner that the Respondent has no jurisdiction to try any of the issues raised in the complaint filed by Weaver. The Arkansas Constitution, Article 5, § 20 provides: "The State of Arkansas shall never be made defendant in any of her courts." Certainly that language is too plain to require comment. The pertinent issue then is whether this suit against the Commission amounts to a suit against the State. This issue had been clearly resolved against the Respondent by many descisions of this Court. See: *Pitcock* v. *State,* 91 Ark. 527, 121 S. W. 742; *Watson* v. *Dodge,* Ark. 1055, 63 S. W.

2d 993; *Arkansas State Highway Commission* v. *Nelson Bros.*, 191 Ark. 629, 87 S. W. 2d 394; *Bryant* v. *Ark. State Highway Comm.*, 233 Ark. 41, 342 S. W. 2d 415.

In the *Pitcock* case, which involves a contract entered into by the State Penitentiary, this Court said:

"The first and only question necessary for us to determine in this case is whether or not this is a suit against the State; for, if it is, then the chancery court was wholly without jurisdiction to proceed, and all orders and judgments attempted to be rendered therein were void."

The court then held the suit to be against the State. In the *Watson* case, there appears this paragraph:

"In addition to the authorities just cited, this court held in *Caldwell* v. *Donaghey*, 108 Ark. 60, 156 S. W. 839, that the State could not be sued in her courts for specific performance of a contract made in her behalf."

In the *Bryant* opinion there appears a statement which is pertinent to the matter here under consideration:

"Indeed, the present proceeding has no purpose except to force the Highway Commission into court, where a claim for damages can be asserted against it by the appellants. We must conclude that this proceeding falls within the constitutional inhibition against suits against the State. If the appellants have a right to compensation —a point upon which we need not express an opinion— they are limited, as we said in the *Partain* case, *supra*, to filing an administrative claim for such relief as the State may see fit to provide."

It is pointed out that Weaver is not attempting to seek relief from anyone except the Highway Commission. In the complaint it is stated "that the Ark. Highway Commission would blacktop a loop highway through Charlotte."

Two. Respondent makes a well reasoned contention to the effect that prohibition is not the proper remedy because the Petitioner had the right of appeal from any adverse decision that might have been made by the trial court. In our opinion, however, the uniform decisions of

this Court refute such contention. In *Monette Road Improvement District* v. *Dudley,* [*Judge*], 144 Ark. 169 (pp. 175-176), 222 S. W. 59, there appears the following statements:

"So it is thus settled that where it appears that an inferior court is about to proceed in a matter over which it is entirely without jurisdiction under any state of facts which may be shown to exist, then the superior court exercising supervisory control over the inferior court may prevent such unauthorized proceedings by the issuance of a writ of prohibition. The essential thing is, that it must be shown that the inferior court is about to proceed beyond its jurisdiction, and that fact is said to be the jurisdictional one upon which the right of the supervising court to issue the writ of prohibition depends. "It is contended by counsel for the respondent that the remedy by prohibition not being an absolute one, but discretionary, the writ should be denied where there is a remedy by appeal or otherwise, even though the court sought to be restrained was about to proceed beyond its jurisdiction.

* * * * * * *

"If the absence of the right of appeal was essential to the issuance of a writ of prohibition, then that remedy would be entirely unavailable in any case, for under our Constitution the right of appeal is granted in all judicial proceedings. The true test is, as stated in the case already cited, whether or not the court is proceeding beyond its jurisdiction; and when that state of facts is shown to exist, the remedy by prohibition is the appropriate one."

Likewise in Ark. State Highway Commission v. Dodge [Judge], 181 Ark. 539 (p. 541), 26 S. W. 2d 879, we said: "The practice is well settled that, when it appears that an inferior court is about to proceed in a matter over which it is entirely without jurisdiction under any state of facts which may be shown to exist, then the Supreme Court, exercising supervisory control over the inferior court, may prevent such unauthorized proceeding by the issuance of a writ of prohibition."

In the case of *Faver* v. *Golden,* 216 Ark. 792 (p. 796), 227 S. W. 2d 453, this Court said:

"It is also true that the remedy by prohibition is discretionary with the court and is used cautiously . . . . Issuance of the writ depends on the inadequancy, rather than the absence, of the remedy by appeal. *Monette Road Imp. Dist.* v. *Dudley,* 144 Ark. 169, 222 S. W. 59. Hence, we have held that the great expense of money and length of time required in an election contest render the remedy by appeal inadequate as to petitioners."

In accordance with what we have said above, the Petition of the Commission is hereby granted.

McFaddin, J., dissents.

Ed. F. McFaddin, Associate Justice (dissenting). I respectfully dissent on at least two grounds: (1) this is not a suit against the State; and (2) the Chancery Court had jurisdiction to enjoin the trespass. These two matters will now be discussed.

I.

The complaint filed by T. H. Weaver in the Chancery Court was captioned as follows:

"T. H. Weaver.....*Plaintiff*

vs. No. 3490

Charlie Matthews, George Cavenass,

Ward Goodman, Floyd R. Oliver, Director,

Arkansas Highway Commission and Armil

Taylor, Glen F. Wallace, J. E. Crain,

Truman Baker and Wade Hampton, Members of

the Arkansas Highway Commission.....*Defendants.*"

It will be observed that Floyd R. Oliver was *identified* as a Director of the Highway Commission, and Taylor, Wallace, Crain, Baker, and Hampton were *identified* as members of the Highway Commission. *The Highway Commission itself, as an entity, was not sued.*

The situation here is the same as it was in *Federal Compress* v. *Call,* 221 Ark. 537, 254 S. W. 2d 319. In that case Mr. Call was the State Commissioner of Labor and Mr. Adkins was the Administrator of the Employment Security Division. The Federal Compress Company filed suit against these persons in the Pulaski Chancery Court, identifying their official capacities, and alleging that Call and Adkins had erroneously paid seasonal workers certain benefits. The prayer was for an injunction against the defendants. It will be observed that Call and Adkins were each State officials; and the question presented to us on appeal was whether the suit against Mr. Call and Mr. Adkins was a suit against the State. We held that the suit was not against the State, citing as our authority *Hickenbottom* v. *McCain,* 207 Ark. 485, 181 S. W. 2d 226; *Call* v. *Luten,* 219 Ark. 640, 244 S. W. 2d 130; and *Pitcock* v. *State,* 91 Ark. 527, 121 S. W. 742, 134 A. S. R. 88. Our quotation from the last cited case shows the distinction between a *suit against an officer* and a *suit against the State:*

" 'The only distinction found in these cases is that where the suit is against an officer to prevent him from doing an unlawful act to the injury of the complaining party, such as the taking or trespass upon the property belonging to the latter, the former cannot shield himself behind the fact that he is an officer of the state; and also where the officer refuses to perform a purely ministerial act, the doing of which is imposed upon him by statute. In either of such cases a suit against such an officer is not a suit against the State."

I submit that the case at bar is a suit against employees and officers of the State, and not a suit against the State Highway Commission, which was not named as a defendant. The individuals were identified as to their connection with the State Highway Commission, just as Mr. Call was identified as State Commissioner of Labor and Mr. Adkins as Administrator of the Employment Security Division in *Federal Compress* v. *Call.* Certainly since the Highway Commission was not sued as such in the Chancery Court, it could not properly ask us to issue

a writ of prohibition in favor of the Highway Commission, which was not a defendant in the Chancery Court.

II.

My second ground for dissent is that the Chancery Court had jurisdiction to enjoin the trespass. To demonstrate this point I copy certain allegations of the complaint in the Chancery Court:

"3. That State Highway No. 25 traverses the lands belonging to the plaintiff as above set out in its new location; that before the highway was moved to its new location it did not cross these particular lands; that at the time that Highway No. 25 was proposed and the relocation thereof contemplated the plaintiff entered into an agreement with Charlie Matthews, George Cavenass, Ward Goodman and the then members of the Arkansas Highway Commission and its Director, which agreement was in substance as follows: That the plaintiff would furnish the right-of-way through his said property free of charge to the defendants and to Independence County in consideration, however, that the Arkansas Highway Commission would blacktop a loop of highway through Charlotte, Arkansas, entering Charlotte from the Northeast and leaving Charlotte from the Southwest to join Highway No. 25 at each end of said loop; that this agreement was exceedingly important to the defendants and to Independence County because the action of this plaintiff was considered by all parties as the determinative factor in obtaining right of way for the length of the highway.

"4. Pursuant to this agreement the plaintiff allowed the defendants in their individual and representative capacities to enter upon his land and build, prepare, grade, roll, pack, sealcoat and pave a new roadway for Highway No. 25, which completely severed his lands and greatly diminished the value of his lands from its highest and best use.

"5. That after Highway No. 25 was built the defendants all the while re-assuring plaintiff of their obligation conducted two surveys for this loop, but that the defendants

have not as yet paved said loop or located said loop and have now refused to fulfill their obligation to the plaintiff.

"6. That because of this the plaintiff states that an unconscionable fraud has been perpetrated upon him in the securing and taking of his land without just compensation as required by the Constitution of Arkansas, and further, that the defendants and each of them wilfully, wrongfully and fraudulently deprived the plaintiff of his land; that the plaintiff further alleges that Independence County has no funds with which to pay plaintiff for this land, but that said County could have been made liable for the damages but for the fraud of the defendants; that plaintiff has no recourse whatever except as against these defendants.

"7. Plaintiff states further that he has no adequate remedy at law because the County is wholly without funds with which to make compensation to the plaintiff and, further, that a court of law cannot set aside the agreement for fraud; that the plaintiff further states that numerous and daily continuing trespasses are being committed by the defendants and the public at large to the great and irreparable harm of the plaintiff.

"Wherefore, the plaintiff prays that . . . . the plaintiff is entitled to an injunction to prevent the defendants individually and the general public from trespassing upon the lands unless sufficient bond be posted in open court to cover the fair market value of the land taken at its highest and best use as of the date it was taken . . . ."

Certainly the Chancery Court has jurisdiction to enjoin individuals from trespassing on the property of another. We can forget everything in the case except the prayer that these defendants individually be prohibited from trespasing on Weaver's lands. That makes a case for equity, and therefore a writ of prohibition should not issue. We have a number of cases recognizing the right of an owner of land to prevent persons from trespassing, particularly where the complaint alleges—as it does here—that suit for damages is unavailing and the only adequate relief for the plaintiff is injunction.

One such case is *Gray* v. *Malone,* 142 Ark. 609, 219 S. W. 742, wherein we said:

"The first contention of appellant is that the chancery court was without jurisdiction. This contention cannot be sustained for several reasons. True, the original complaint was defective and did not state facts sufficient to give the chancery court jurisdiction, because it failed to allege that the appellant was insolvent, and therefore failed to allege facts showing that the appellee had no adequate remedy at law for the trespasses of appellant of which the appellee complained. *Burnside* v. *Union Saw Mill Co.,* 42 Ark. 118, and cases there cited. But the chancery court had jurisdiction of the parties, and it had jurisdiction of the subject-matter of restraining trespasses on the lands of appellee if the pleadings raised the issue that the trespasser was insolvent. The pleadings did raise that issue."

Since equity had jurisdiction to enjoin a trespass, the writ of prohibition herein should not be granted. There is another good reason why this case should be heard and the facts developed in the Chancery Court. The plaintiff, T. H. Weaver, alleged that the employees and officers of the Highway Commission had made a contract with him whereby, if he would allow a road over one part of his land, he would receive a blacktop loop on another portion; that the employees now refuse to carry out the agreement; that such refusal nullifies the original contract for a road over his land; and that he is entitled to an injunction against trespassing.

The facts should be developed. The State should either require its employees and officers to fulfill their agreement, or to return to the landowner what the employees and officers received from him. Did these employees and officials of the State make this agreement? If they did, the facts should be developed. If they did not, they should be the last people on earth to keep the facts from being developed. By coming into this Court and asking for a writ of prohibition they leave the impression that they do not want the facts developed; that they did make such an agreement but now seek to hide

under the mantle of the sovereignty of the Arkansas Highway Commission. I maintain that the Sovereign should be just to the subject, and that the State should deal fairly with its citizens. I would like to see the facts in this case fully developed.

For the reasons herein stated, I respectfully dissent.

[redacted]

HOOVER *v.* GARRISON.

5-3657 395 S. W. 2d 19

Opinion delivered November 1, 1965.

[redacted]

Clark, Clark & Clark, for appellant.

Guy H. Jones, for appellee.

SAM ROBINSON, Associate Justice. Appellant, Paul Hoover, is the 14 year old son of appellant, James Hoover, Jr. On the 17th day of May, 1963, Paul, while driving his father's car, ran into an automobile owned by the appellee, Cecil Garrison. On November 12, 1963, Garrison's attorney wrote to James Hoover stating that his client's car had been damaged in the sum of $115.00 by the aforesaid collision, and demanded the payment of that amount. Hoover made no offer of settlement. On March 3, 1964, Garrison filed suit alleging the damages to his car amounted to $150.00. He asked for judgment for double that amount and for an attorney's fee under the provisions of Ark. Stat. Ann. 75-918 (Repl. 1957), which provides:

"In all cases wherein loss or damage occurs to property resulting from motor vehicle collision amounting to two hundred ($200.00) dollars or less, and the defendant liable therefor shall, without meritorious defense, fail to pay the same within 60 days after written notice of the claim has been received, such defendant shall be liable to pay the person entitled thereto, double the amount of such loss or damage, together with a reasonable attorney's fee which shall not be less than fifty dollars ($50.00), and court costs. This liability which is limited to damage to property, attaches when liability is denied and suit is filed."

The cause was tried to a jury. There was a verdict for the plaintiff in the sum of $150.00. On authority of the aforementioned statute, the court assessed an additional $150.00 by way of penalty, and an attorney's fee of $150.00.

On appeal, the Hoovers concede that the evidence is sufficient to support the jury verdict, but they contend that the trial court erred in giving effect to the foregoing statute by assessing an additional $150.00 as damages, and an attorney's fee. We see no valid reason why the statute should not apply in this case. The notice required by the statute was given, and the jury returned a verdict for the full amount asked by plaintiff. True, the notice stated damages in the sum of $115.00 and the suit was filed asking for $150.00, but appellants never at any time offered to pay any amount. This is not a case of plaintiff demanding a very small amount of damages thereby lulling the defendants into believing that only a trifle was involved and then filing suit for a much greater amount. Here, there is only $35.00 difference in the amount claimed as damages before suit was filed and the amount asked in the complaint. Moreover, when appellee filed suit for $150.00 appellants made no offer to pay the original amount demanded, or any other sum.

The court read to the jury the above mentioned statute providing for double damages and attorney's fee. Although it was not necessary to read the statute to the jury, we fail to see how the appellants were in any man-

ner thereby prejudiced. In fact, it appears that by informing the jury regarding the statute, the appellee's case could have been prejudiced.

Finding no error, the judgment is affirmed.

SHEPHERD *v.* KERR.

5-3634 395 S. W. 2d 11

Opinion delivered November 1, 1965.

Giles Dearing, for appellant.

James Robertson, for appellee.

JIM JOHNSON, Associate Justice. This appeal arises from a probate court judgment which denies payment of administratrix' fees, attorney's fee and court costs.

Preston Shepherd of Forrest City died intestate on December 18, 1962, leaving a widow and eight children, two of whom are minors. The widow, appellant Virgie Shepherd, petitioned for appointment as administratrix of Shepherd's estate in St. Francis Probate Court and letters of administration were thereafter issued to her. Mr. Shepherd owned eighty acres of land and a quantity of farming tools, machinery and equipment (inventoried at $22,870). Each year Shepherd had rented a number of farms and farmed extensively. Appellee W. O. Kerr had financed Shepherd in his farming operations, taking a mortgage on Shepherd's equipment and crops every

year to secure payment of his advances. Kerr also held a second mortgage on Shepherd's eighty acres, the first mortgage being held by the First National Bank of Eastern Arkansas.

Appellee's pleadings reveal that it was the custom of appellee Kerr to allow Shepherd to sell his crops, deposit the proceeds in his (Shepherd's) personal account and then pay Kerr. Just before Shepherd died he had sold most of his crops for that year and had deposited the money in his account. After paying Kerr $25,000 (leaving $27,999.68 owing on his 1962 account), there was $13,154.23 in Shepherd's bank account at the time of his death, which in due course was transferred to the administratrix' account. Following an order of the probate court, appellant administratrix employed labor, harvested the remaining crops, sold them for about $5,000 and deposited these funds to her account as administratrix.

Appellant on January 9, 1963, petitioned the court for authority to employ an attorney, which was granted. This attorney served until January 31, 1963, at which time the court permitted him to withdraw. In March, 1963, one of Shepherd's landlords, Edgar, filed suit in chancery against appellant for his rent of $4,000 and joined the bank and appellee as parties defendant. Appellant then requested instructions from the probate court relative to Edgar's chancery action and was authorized by the probate court to offer no defense. After payment of the $4,000 by appellant as administratrix, Edgar withdrew from the suit. Appellee Kerr filed an answer and cross-complaint in Edgar's chancery suit setting up his account (which totaled some $188,000 over a four-year period), mortgage and security agreement on the crops and farming equipment, alleging that he had a lien on the land, on all of Shepherd's personal property including the funds in the administratrix' account and twelve bales of cotton being sold by cotton factors, and prayed the court to direct appellant and the bank to pay him the balance in the administratrix' account. (On May 22, 1963, appellant petitioned the probate court for instructions and on May 23rd the court ordered her to

offer no defense to foreclosure of the liens held by Kerr on the decedent's real and personal property. (The record before us is silent as to any final disposition of this chancery action.)

On July 25, 1963, appellant again petitioned for authority to employ an attorney, stated that she needed counsel in passing on claims against the estate amounting to almost $200,000 and for defense in circuit court suits filed against the estate, and was given permission to employ her present counsel.

On September 27, 1963, appellant filed her final report as administratrix showing property of the estate in her hands including cash in the bank in the sum of $13,792.79, setting out class "a" and "b" claims, allowed and disallowed, asked that she be directed to pay first the class "a" claims, then "b" claims as far as the funds would go, and for discharge as administratrix. Kerr filed objections to the final account, alleging that he had a lien on all of the funds and farming equipment in appellant's hands and that the estate is without funds to pay any claims. On December 19, 1963, the probate court ordered appellant to pay without delay certain class "a" claims for labor (performed in the 1962 harvest) totaling about $1,700. The court also found that no fees, costs or expenses had been paid to appellant or her attorney, allowed these as class "a" claims in the amounts fixed by statute, and added that "such claims [for administratrix' and attorney's fees] are not to be paid until further order of this court." On January 14, 1965, the probate court entered its judgment on the final report, finding that appellee Kerr had filed his secured claim against the estate in the sum of $188,000, that appellee had filed an answer and foreclosure in Edgar's chancery action claiming security on all of decedent's personal property, foreclosure of his second mortgage, and also that appellant insisted that attorney's fees, court costs and administratrix' fees should be paid prior to the lien held by appellee. The court ordered "that administratrix and attorneys fee should be allowed according to Statute but said attorneys fees and administratrix fee are not paramount claims of Kerr, holder of

secured claim on specific property. The specific property under Financing Statement, Security Agreement or mortgage cannot be used to pay such claims.'' From the judgment appellant has prosecuted this appeal.

For reversal appellant urges first that appellee waived his lien on the proceeds of the crop sale made by decedent by permitting decedent to sell the crops and to deposit the proceeds in his (decedent's) personal bank account and then later pay appellee. The contention, in esse, is that the funds in the decedent's bank account, prior to his death, were free of appellee's lien and therefore passed to the administratrix free of the lien. This court has consistently held that where a mortgagee authorizes or gives consent to the mortgagor to sell the mortgaged property, the mortgage lien thereon is discharged (*Fincher* v. *Bennett,* 94 Ark. 165,, 126 S. W. 392; *Vaughn* v. *Hinkle,* 131 Ark. 197, 198 S. W. 705; *Mitchell* v. *Mason,* 184 Ark. 1000, 44 S. W. 2d 672; *May Way Mills Inc.* v. *Jerpe Dairy Products Corp.,* 202 Ark. 397, 150 S. W. 2d 615; *Farm Bureau Co-op Mill & Supply* v. *Swift & Co.,* 227 Ark. 182, 297 S. W. 2d 107; *Bank of Bentonville* v. *Swift & Co.,* 233 Ark. 808, 348 S. W. 2d 881); however, all reported Arkansas cases on this point of law involve the rights of some third party, usually a purchaser from the mortgagor. We find no cases and have been cited none applying this rule to an action solely between a mortgagor and mortgagee. A decision on this point is not necessary for a determination of this case. We defer passing on the point urged until such time as it is better presented inasmuch as the only question we are called upon to answer here is confined solely to the validity of the claims for administratrix fees, attorneys fees and court costs.

Appellant next contends that appellee is estopped from objecting to payment of the fees of the administratrix and the attorney for the estate by having acquiesced in and consented to their actions and accepted their services. With this contention we agree. Throughout the administration of decedent's estate, appellee has accepted appellant's services in marshalling and conserving the assets of the estate, never sought appointment

of receivers in foreclosure of his various mortgages although entitled thereto by the terms of his mortgages. Appellee did not ask that the administratrix be stopped from selling the crops on which appellee had a mortgage, but allowed her, if he did not in fact encourage her, to hire labor, harvest and sell the crops (and made no objection to payment of the laborers or the rent). Having accepted and taken advantage of the services of the administratrix and the attorney for the estate, appellee is estopped to deny them payment for these services. *Adams* v. *Woods,* 128 Ark. 441, 194 S. W. 849; *Harris* v. *Thackery,* 201 Ark. 881, 147 S. W. 2d 355. Accordingly, the cause is hereby reversed and remanded for entry of an order allowing payment of administratrix' fee, attorney's fee, and court costs, together with an additional attorney's fee for services to appellant in this court.

CONTINENTAL SOUTHERN LINES *v.* MOSES.

5-3665 395 S. W. 2d 20

Opinion delivered November 1, 1965.

Warren & Bullion, for appellant.

Howell, Price & Worsham, for appellee.

FRANK HOLT, Associate Justice. Appellee brought this action to recover damages allegedly sustained in a collision between his automobile and a bus belonging to appellant, a foreign corporation. This incident occurred in Memphis, Tennessee. A jury awarded damages in the sum of $10,000.00 to the appellee who had only sued for $9,999.00. Upon a remittitur of $1.00 being entered, a judgment was accordingly rendered against the appellant from which this appeal is brought.

At the time of the accident in 1963 appellee suffered from a slipped disc due to an injury in 1959. According to his evidence, by 1960 he had recovered to the extent that his physical activities were largely unimpaired. As a traveling salesman he was servicing his entire sales territory which consisted of parts of five states. As a result of the injuries received by him in the 1963 accident, his physical condition required him to reduce his territory to such an extent that his gross income was reduced by $2,000.00 per year and that his pre-existing disability has increased approximately 10%.

For reversal appellant contends the court erred in giving appellee's instruction #4 relating to aggravation of a pre-existing injury. The instruction reads as follows:

"If you find that the plaintiff is entitled to recover you are instructed that if you find from a preponderance of the evidence that the plaintiff received injuries which aggravated a condition or conditions from which he was suffering and that such injuries, if any, from which he was suffering or to which he was predisposed, if any, excited or caused the condition from which he now suffers, if you find he is suffering disability, then he is entitled to recover to the full extent of whatever you find his injury so received to warrant, notwithstanding the fact that you may find he was suffering from some abnormalities prior to the injuries sustained by him."

Appellant objected generally and specifically contending that the instruction was ambiguous, confusing, misleading, and an incorrect statement of the law. We agree with the appellant. This instruction can be construed to

tell the jury that if it finds the pre-existing condition of appellee's health caused the condition from which appellee now suffers, without considering any subsequent injury from the accident complained of, then the jury could compensate appellee to the full extent of his present disabilities.

A clear and concise statement of the law as to the aggravation of a pre-existing condition is stated by us in *Owen* v. *Dix,* 210 Ark. 562, 196 S. W. 2d 913, where we said:

"The rule appears to be well settled that when a defendant's negligence aggravates, or brings into activity, a dormant or diseased condition or one to which the injured person is predisposed, the defendant is liable to the injured person, for the full amount of the damages which ensue, notwithstanding such diseased or weakened condition."

Appellee's instruction # 4 incorrectly presented the applicable law to the jury concerning the aggravation of a pre-existing physical condition.

Appellant also contends the court erred in giving appellee's instruction # 5 to which appellant made general and specific objections. This instruction relates to the measure of appellee's permanent and future damages. Since we hold that the giving of appellee's instruction # 4 constituted reversible error it is unnecessary for us to discuss any defectiveness of instruction # 5. The subjects of both instructions are now covered by our recently adopted Arkansas Model Jury Instructions [AMI]. Therefore, the issues presented to us by instructions 4 and 5 should not arise again upon a retrial of this cause.

Appellant's final contention for reversal is that the jury verdict was contrary to the evidence. There was evidence presented by the appellee that he was proceeding in his proper lane of traffic and the driver of the bus negligently pulled in front of appellee's vehicle causing the accident and resulting in his personal injuries and property damage. Appellant contended to the contrary

that appellee's injuries resulted from the negligent manner in which he was driving when following the bus. We think there was ample evidence to support appellee's theory of the accident in the event the jury chose to believe his evidence.

The judgment is reversed and the cause remanded.

BROWN *v.* STATE.

5131 395 S. W. 2d 344

Opinion delivered November 8, 1965.

[Rehearing denied November 29, 1965.]

E. V. Trimble, for appellant.

Bruce Bennett, Atty. General, By: *Reg. E. Wallin,* Asst. Atty. General, for appellee.

CARLETON HARRIS, Chief Justice. Appellant, Walter Lonnie Brown, was convicted of murder in the first degree by a Jefferson County jury, which fixed his punishment at death in the electric chair. The information alleged that Brown killed Mrs. Hester Wares by shooting her with a pistol, while perpetrating the crime of robbery. Mrs. Wares was shot on July 15, 1964, and died the next day. From the judgment entered in accordance with the jury verdict, appellant brings this appeal. For reversal, appellant lists nine separate points, and the motion for new trial contains thirty-one assignments of error, though some of these overlap with the listed points. Pursuant to our procedure in capital cases, we have examined each point argued, and each assignment set out in the motion for new trial, as well as each objection made during the course of the trial.

We first proceed to a discussion of the evidence upon which the conviction was based. Raymond Jones, Jr., testified that he, Walter Brown (appellant herein),

Howard Brown, Jessie Anderson, and Joe Nathan Nelson, were together on the night of July 15, 1964. They had met as Geneva, Arkansas, and had planned to drive to Mississippi. The group was traveling in a 1956 two-tone Buick, owned by Howard Brown. According to Jones, they came to Pine Bluff about 11:30 that night, and appellant, together with Joe Nelson and Howard Brown, got out of the car for the purpose of robbing the Trio Liquor Store, located on Highway 65 in North Pine Bluff. All three were armed with 22 pistols. Nelson remained outside the store near a phone booth, and the two Browns went inside. When they returned to the automobile, Nelson asked appellant if he had shot the woman in the store, and the latter replied, "Yes." Jones stated that money was taken in the robbery, but he did not know the amount. The men then drove to Walter Brown's house in Little Rock, where they divided the money, and commenced gambling. The witness stated that he received $12.00, and that the others also received part of the money. Jones said that Walter Brown turned a short-barrel 22 pistol[1] over to him the next day, and he in turn gave it to the officers at the time of his apprehension. The witness also testified that, though all were drinking, none were drunk.

Officer Edward Shipman of the Pine Bluff police. force testified that he and Officer Holland passed the liquor store after midnight, during their patrol, and, noticing that the lights were still on in the building, went inside to investigate. They found Mrs. Wares lying on the floor behind the counter, and in the doorway of an adjoining room. She stated that two colored men, one tall, and one short, had come into the store, and that she had been shot by the tall one. An ambulance was called, and Mrs. Wares was removed to the hospital.

Dr. Joseph Robinette testified that he examined Mrs. Wares, and, during surgery, found that she had been severely injured from a bullet wound; he stated that she subsequently died as a result of that wound.

[1] The pistol is properly described as a 22 caliber German Rohm 6-shot revolver.

Dr. Frank Reed, Jefferson County Coroner, testified that he removed a small bullet from the body, and that her death was the result of a gunshot wound through the abdomen.

Buddy Garner, an employee of a movie theater near the liquor store, testified that he left his work around 11:30 on the night of July 15, and, while passing the Trio Liquor Store, saw someone run and jump into a '56 Buick, which was two-tone in color and which was occupied by several people.

Bulah Smithy, another employee of the liquor store, obtained Mrs. Wares' clothing at the hospital, and turned same over to Night Chief William Howard of the Pine Bluff Police Department.

Appellant was arrested in Little Rock on July 19 by Henry Atkinson, an investigator with the Criminal Investigation Division of the Arkansas State Police. Brown was taken to the Little Rock Police Department, and turned over to Sergeant W. A. Tudor of the State Police. Tudor testified that he talked with Brown, first advising appellant that he had a right to have an attorney, and further advising that Brown did not have to make any statement whatsoever. Tudor said that he made no promises to appellant, and did not abuse, threaten, or intimidate him in any manner. Appellant denied any knowledge of the killing, but admitted traveling to Pine Bluff, and participating in a robbery of the liquor store. Appellant said that he was not armed, but was present "when the woman fell to the floor." Brown stated that he had gone to Pine Bluff in Howard Jones' two-tone Buick. The officer said that appellant had been in custody about an hour and a half when he talked with him.[2] Subsequently, R. D. Bentley, a lieutenant of the

[2] On the same day that Brown was arrested, a hearing was held before the Judge of the Little Rock Municipal Court, Criminal Division, and following the hearing, Brown was turned over to Pine Bluff officers. Thereafter, still on the same day, Brown was charged with first degree murder in the Pine Bluff Municipal Court, and a hearing was held, the clerk testifying that the docket reflected, "Walter Lonnie Brown, first degree murder, the defendant advised of his constitutional rights, and attorney appointed for him, a preliminary hearing held and on the proof the defendant is bound over to the grand jury without bond."

Little Rock Police Department, together with Detective Goodwin, located two expended cartridge hulls at Brown's home.[3] These officers turned the cartridges over to Major Paul McDonald of the Arkansas State Police.

Officer William Howard, Assistant Chief of Police in Pine Bluff, talked with Brown on July 21. Chief Howard testified that Brown was not intimidated or abused, nor made any promises of immunity from prosecution. Accompanied by Deputy Sheriff Buck Oliger, Officer Howard and Brown started to the liquor store. On the way, Brown said that he would like to change his statement; that he was the one who shot the lady in the store, and that he shot her with his short-barrel 22 pistol. The appellant pointed out the liquor store, and described where the car had been parked. The officers then went inside with Brown, and appellant detailed how the crime was committed. According to Officer Howard:

"* * * He said that he walked into the liquor store turned to the left, which would be the north side of the liquor store and someone in his group asked for a fifth or some kind of liquor and the lady turned to go to the shelf, shelves of liquor which would be at the right of the storeroom door on the top shelf and he said the lady reached up on that shelf as she was going to get the fifth of liquor and that's when he went behind the counter and grabbed the lady from behind with his left hand over her mouth and he said that must have excited the lady because she jerked away from him as though she was excited and she had the bottle of liquor over her head and then he stepped back about two feet, he said, and pulled his gun, a short barrel gun, from his belt and shot the lady. * * *"

Brown then asked where the money was, and Mrs. Wares first stated that the boss had taken it to Little Rock, but when asked again, she replied that all the money was in the cash register.

[3] Information had been given to the officers by Nelson, and Nelson and Brown accompanied the officers to the premises. Brown's mother was told that they would like her permission to look for some expended cartridges, and she, along with her son, granted this permission.

Major McDonald of the State Police, a ballistics expert, after explaining the manner of conducting tests, testified that he had made tests with the pistol turned over to him by Officers Atkinson and Crump, and that, in his opinion, the fatal bullet had been fired by this 22 caliber, short barrel gun. He also testified relative to the dress that Mrs. Wares had been wearing, and stated that an examination of the hole in the dress showed that the gun was fired at close range. Deputy Sheriff Buck Oliger of the Jefferson County Sheriff's Office, testified that Brown had been advised of his constitutional rights, *i.e.,* he did not have to tell the officers anything, and he did not have to go with the officers to the liquor store to show how the robbery took place.

Appellant took the stand in his own behalf, and admitted that he had shot Mrs. Wares, but stated that the gun "went off."

From the testimony:

"A. * * * Howard went in first and when I came in she already had her back turned, she never did see my face, by the time I walked in the door Joe Nelson was right behind me and I walked in, walked right on to the left and walked right on behind the counter.

Q. In other words, you went around this counter behind the counter?

A. Yes sir, right around the end.

Q. What did you go around there for?

A. I was going to hold her.

Q. You were going to hold her and then the other boy, Howard Brown was going to take the money out of the cash register?

A. Either Howard or Joe, I don't know which one.

Q. Then what happened?

A. And when I reached her she had her right hand on a fifth of whiskey and was reaching around the door after the cigarettes. When I reached at her she turned around and when she turned around she started coming out

with the fifth of whiskey and my hand went up like that and I pulled the gun out and when I pulled the gun out it went off.

Q. You didn't pull the trigger to make it go off?

A. No sir.

Q. You mean, you are saying it was a total accident, is that right?

A. Well, I wouldn't say it was an accident or not 'cause, (interrupted)

Q. You mean you were then shooting at her to kill her?

A. No, no, I wasn't intending to shoot her. I was just going to pull her back, see, I knew she was a woman and I could handle her, but I had been drinking pretty heavy and when I pulled the gun out it went off."

The evidence was clearly sufficient to sustain the conviction.

The first four points raised by appellant all relate to the question of race prejudice, and are as follows:

1. Members of petitioner's race were intentionally, deliberately and systematically limited in the selection of petit jury panels.

2. Petitioner is a Negro and members of his race were deliberately and intentionally discriminated against in the selection of petit jury panels.

3. The jury commissioners allowed race to be considered as a factor in the selection of the petit jury panels.

4. The jury commissioners made no special effort to acquaint themselves with Negroes who were quailified for jury service.

The allegations under these points are completely without any foundation in the record, and it is puzzling as to why counsel raises points without any semblance of proof to support his position. There is absolutely *no evidence* that Negroes were "intentionally, deliberately

and systematically limited'' in the selection of the panel. Again, there is absolutely *no evidence* that the jury commissioners allowed race to be considered in selecting the petit jury panel, nor any evidence that they made no effort to acquaint themselves with Negroes qualified for jury service. The record reflects no objection to the manner in which the panel was selected, and no attempt to show that the jury commissioners practiced discrimination. None of the jury commissioners were called to testify on this point, nor did appellant offer evidence from any other source relative to the allegations here made. The record does not even reflect the names of the jury commissioners, and further, does not disclose how many Negroes were on the jury panel. As stated, the transcript is completely barren of any evidence on these points, and they apparently were listed only as a matter of ''form.''

Point No. 5 asserts that appellant's confession was coerced and involuntary. Here, again, no argument is presented, nor reference made to any portion of the record which might substantiate this allegation. As a matter of fact, it is apparent that appellant was given every protection that the Constitution affords, and *appellant himself,* who took the stand and testified, does not charge that he was coerced into making any statement. In fact, his only testimony concerning any sort of intimidation was a reference to Officer Roy Lewis, of the North Little Rock Police Department. Brown, in his testimony, stated that Lewis asked him about some robberies that had occurred in North Little Rock, and he (Brown) told him that he did not know anything about them. According to appellant, Lewis said that he was lying, and the officer started threatening him:

''* * * I told him that he wasn't going to make me say anything that, tell a lie on myself and he said that he would make me say I shot my mother if he wanted me to. I looked at him and gave him a smile. He got upon the table to hit me and another detective walked in and then both of them walked out.* * *

"Well, there was another officer that came in at the time he did he came back in and he had a long yellow sheet of paper and he read off some more robs and asked me did I do them and I told him 'naw' and he said it wouldn't be no use in lying that he would find out whether I did or not and I told him 'naw' I didn't do it and then Officer Tudor came in and asked me did I want to talk it over with him and he told me about everything I said would be held against me and all that.* * *"

Sergeant Tudor testified that he did not see anyone threaten appellant, but, at any rate, if threats were made as related by Brown, no prejudice resulted, for appellant stated that he did not tell Lewis anything. Admittedly, Brown was advised by Tudor that he did not have to make any statement; Tudor likewise said that he told Brown he had a right to an attorney, and that no promises nor threats, of any nature, were made. Officers Howard and Oliger, likewise, testified that no force or threats were employed as a matter of getting Brown to show them how the crime took place.

The evidence is uncontradicted that the statements were made free from duress. In addition, Brown admitted the killing, in open court, before the jury. It is true that he stated the gun "went off," but he very readily testified that the killing took place while he and his companions were engaged in robbing the liquor store, and this, of course, under our statute, constitutes first degree murder. There were some variances in his testimony from the statements made to officers, but they were not material. For instance, he stated that he did not show the officers the route followed before the robbery; that he did not "grab her," but only "reached to grab her;" that:

"* * * And when this fellow said that he had the bullet and the lead that came out of the gun, he was lying.
Q. The officer was?

A. Whoever said that he had the shell that the lead came out of. I put that bullet in my mouth and chewed it up, that's why I know he was lying. The gun had six shells in it, when I got to my house I took my little finger nail

right here, pulled the shell out and put it in my mouth and chewed it up and spit it out into the bathroom, and the other two shells were found down by the cedar chest."

It appears from the transcript that the holding in *Jackson* v. *Denno* [decided on June 22, 1964], 378 U. S. 368, was complied with. In that case, the United States Supreme Court said that, prior to submitting any confession to a jury, the court must first hold an evidentiary hearing, and determine for itself that the confession is voluntary. If the court finds that it was involuntary, then, of course, the confession is excluded; if, on the other hand, the court finds that the confession was voluntarily made, it is then submitted to the jury for their consideration, along with other evidence. Before the officers were allowed to testify before the jury as to statements made by appellant, the court first took evidence in chambers as a matter of determining if the confession was free and voluntary. While the court did not flatly state, "I find the statements voluntary," the transcript shows, at Page 150, that, after hearing evidence as to voluntariness, the court said, "Okay, the statement will be admitted." This appears to be an independent determination by the court, and, at the conclusion of the case, the court instructed the jury in regard to statements made by Brown.[4] Furthermore, as previously

[4] The court's instruction No. 11 was as follows: "The Court has admitted in evidence confessions alleged to have been made by the defendant. If you believe from the evidence beyond a reasonable doubt that these confessions were made by the defendant, voluntarily, without any hope of reward or fear of punishment, you should consider them along with all the other evidence in the case in determining the guilt or innocence of the defendant. If you are not convinced from the evidence beyond a reasonable doubt that they, or any of them, were voluntarily made, then those confessions, or any of them, should not be considered by you for any purpose whatever." Actually, this instruction went further than was necessary, under *Jackson* v. *Denno*, for the court, having determined that the confession was voluntary, left only the question of the weight or credibility of the confession to be passed on by the jury. However, defendant cannot complain that the jury was also instructed to pass on the question of voluntariness, as this phase of the instruction, if having any effect at all, could only inure to his benefit. The failure to distinguish between the issue of voluntariness, and that of credibility, is discussed in Footnote 13, *Jackson* v. *Denno*, *supra*. "A finding that the confession is voluntary prior to admission no more affects the instructions on or the jury's view of the reliability of the confession than a finding in a preliminary hearing that evidence was not obtained by an illegal search affects the instructions on or the jury's view of the probativeness of this evidence.

stated, appellant admitted the killing while testifying during the trial.

It is next asserted that the court erred in refusing to permit appellant to use all of his twelve peremptory challenges. Appellant had only used ten challenges when the jury was finally completed and selected. While the jury was being sworn, counsel for appellant suddenly announced that he desired to exhaust all of his challenges. No reason was given for this request, and it was denied, the court stating:

"The entire jury panel had been selected before any indication was made and while the Clerk was in the act of swearing in the jury the attorney interrupted the court with the statement that he wanted to exhaust all of his challenges without giving any reason and the jury having been selected the motion will be denied."

This ruling is fully in accord with our prior holdings. In *Jones* v. *State,* 166 Ark. 290, 265 S. W. 974, decided in 1924, this court said:

"It is the opinion of the majority that no error was committed in refusing to allow appellant to challenge peremptorily the two jurors who had been accepted. This question was recently considered in the case of *Brust* v. *State,* 153 Ark. 348, and we there quoted from the case of *Allen* v. *State,* 70 Ark. 337, as follows: 'Under the statutes of this State persons summoned as jurors, when called to serve in criminal cases, may be examined under oath touching their qualifications. As each one is called, he is first examined by the State, and then by the defendant, and, after each examination is completed, if the juror is found by the court to be competent, the State shall challenge him peremptorily or accept him; if accepted by the State, the defendant shall challenge him peremptorily or accept him. *Lackey* v. *State,* 67 Ark. 416.

"The failure to distinguish between the discrete issues of voluntarines and credibility is frequently reflected in opinions which declare that it is the province of the court to resolve questions of admissibility of confessions, as with all other questions of admissibility of evidence, the province of the jury to determine issues of credibility, but which then approve the trial court's submission of the voluntariness question to the jury."

Each party must challenge or accept in the order named when the court declares him competent. After he is accepted by both parties, he cannot be challenged peremptorily, without permission. The court, for good cause, may permit the challenge to be made at any time before the jury is completed. Sand. & H. Dig., §§ 2202-2217.'

"It is the opinion of the majority that appellant should have stated to the court the reason why he desired to challenge the jurors, after having accepted them, and that it was not sufficient to state merely that he had discovered reasons for believing that the jurors would not be competent. The court has a discretion in these matters, and a reversal will be ordered only where an abuse of this discretion is shown, and no abuse is shown when the accused fails to apprise the court of some fact or circumstance which has caused him to believe that an accepted juror is not acceptable. Where this is not done the court cannot know that appellant is not acting capriciously."

See also *Cascio* v. *State,* 213 Ark. 418, 210 S. W. 2d 897. This is in line with the general rule which is stated in 50 C. J. S., "Juries," § 282, as follows:

"Ordinarily there is no right to challenge a juror peremptorily after the juror or jury as a whole has been sworn to try the case or after the ceremony of swearing is begun."

Here, no reason at all was given for the sudden change of mind, and it may be that counsel made this motion in order that he might later attack the composition of the jury.[5] There was no error in the court's ruling.

[5] Under our cases, a defendant cannot complain of the composition of the jury if he does not exhaust his challenges. In *Benton* v. *State,* 30 Ark. 328, decided in 1875, Chief Justice English pointed out that this rule had stood as a precept of criminal practice in this state for a period of over twenty-two years. A cursory examination of our cases reveals over thirty-five criminal cases in which this rule has been cited and adhered to. *Wright* v. *State,* 35 Ark. 639; *Glenn* v. *State,* 71 Ark. 86, 71 S. W. 254; *Keese & Pilgreen* v. *State,* 223 Ark. 261, 265 S. W. 2d 542; *Johnson* v. *State,* 97 Ark. 131, 133 S. W. 596; *Morgan* v. *State,* 169 Ark. 579, 275 S. W. 918; *Rutledge* v. *State,* 222 Ark. 504, 262 S. W. 2d 650; and *Kurck* v. *State,* 235 Ark. 688, 362 S. W. 2d 713.

It is contended that the trial court erred in permitting Dr. Robinette to testify as to the treatment he administered to Mrs. Wares after she was shot, and it is also asserted that the court erred in permitting Dr. Frank Reed, the Coroner, to testify relative to an autopsy that he had made on the body of Mrs. Wares. Appellant does not point out the particular testimony he objects to, nor are these points argued by appellant. Certainly evidence as to Mrs. Wares' condition after the shooting, and the cause of death was material and pertinent to the charge, and both of these witnesses, medical physicians, were competent as experts to testify.

Under Point 8, of "Questions Presented," and Assignment No. 14 in the motion for new trial, it is asserted that the court erred in permitting the witness, Buck Oliger, to testify as to oral statements made to him by the defendant. Assignment 11 also asserts error in permitting Chief Howard to so testify. As previously stated, appellant had already been advised of his constitutional rights, prior to making the statements, and there is no contention that he was mistreated in any manner. Our previous discussion as to the confession covers this point.

Under Point 9 of his motion for new trial, appellant contends that the court erred in permitting Raymond Jones, Jr., to testify that, when appellant returned to the automobile after the robbery, he stated that he had shot the woman. We have held many times that statements and admissions by an accused, from which an inference of guilt may be drawn are admissible in evidence against him. This declaration against interest was voluntarily made, and it is not contended otherwise. See *Dearen* v. *State,* 177 Ark. 448, 9 S. W. 2d 30.

It is contended that the court erred in permitting the state to introduce five photographs as exhibits. These are simply photographs of the exterior, and interior, of the Trio Liquor Store. These photographs could well have been an aid to a better understanding of some of the evidence, and we certainly cannot see how the pictures could have been prejudicial.

It is also asserted in the motion for new trial that the court erred in permitting the dress, shell case, bullet, and pistol to be introduced into evidence, appellant complaining that none of these items were taken off the person of Walter Brown. Counsel did, however, state, "No objection to the dress, Your Honor." We do not agree that any error was committed. While the shell case, bullet and pistol were not taken from Brown, it was established that these items had been in the possession of defendant. Raymond Jones testified that appellant turned the pistol over to him the day after the killing. The bullet was removed from the body of Mrs. Wares, and the shell hull was found at Brown's home, in the presence of appellant. The state's testimony showed every link, step by step, in the chain of evidence from the possession by appellant to the possession of the articles by Major McDonald of the State Police. Of course, all of these items were relevant to the murder charge, since the bullet was removed from the body, and, according to the evidence, had been fired from the gun introduced, it being established that this pistol was in the possession of appellant at the time of the homicide. It is also alleged that there was error in permitting Major McDonald to show the jury the bullet hole in the dress. This testimony was, however, pertinent to the case in that it corroborated the evidence that Mrs. Wares was shot at close range.

Point No. 15 in the motion for new trial alleges that the trial court erred in giving to the jury upon the court's own motion, written instructions Numbers 1 through 15, inclusive. A general objection only was made to these instructions but all have been examined, and we find no prejudicial error.

Point No. 17 asserts that Ark. Stat. Ann. §§ 43-1921 and 43-1922 (Repl. 1964) are unconstitutional. This is a most unusual contention, in that on the one hand, appellant has stated that he was denied his twelve peremptory challenges to which he was lawfully entitled, and now on the other hand, he asserts that the statute is unconstitutional. Section 43-1921 allows the state ten peremptory challenges in capital cases, and 43-1922 allows the defend-

ant twelve peremptory challenges in capital cases. The point is not argued, and it is difficult to comprehend what this assignment has reference to; apparently this is tied in with appellant's Point 9, which asserts that "The court erred in permitting an all-white jury to try the defendant on murder in the first degree, and not sustaining defendant's motion for a mistrial, because no Negroes were permitted to serve on his jury." Appellant is evidently contending that a Negro defendant is entitled to have a Negro serve as one of the twelve members of the jury that hears the case. This contention was passed on adversely to appellant's allegation in the case of *Swain* v. *State of Alabama,* 380 U. S. 202. It was there also asserted that appellant's rights under the Fourteenth Amendment were violated, because the Negroes on the petit jury panel were stricken by the state through peremptory challenge. After stating, "The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry, and without being subject to the court's control," the court, in an opinion by Mr. Justice White, went on to say:

"* * * In the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause. To subject the prosecutor's challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge. The challenge, pro tanto, would no longer be peremptory, each and every challenge being open to examination, either at the time of the challenge or at a hearing afterwards. The prosecutor's judgment underlying each challenge would be subject to scrutiny for reasonableness and sincerity. And a great many uses of the challenge would be banned.

"In the light of the purpose of the peremptory system and the function it serves in a pluralistic society in connection with the institution of jury trial, we cannot hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case. The presumption in any particular case must be that the prosecutor is using the State's chal-

lenges to obtain a fair and impartial jury to try the case before the court. The presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes. Any other result, we think, would establish a rule wholly at odds with the peremptory challenge system as we know it. Hence the motion to strike the trial jury was properly denied in this case."

There are some other allegations of error, and various objections to rulings of the court during the trial; however, most of the objections have been covered in our discussion of the several assignments of error. At any rate, we have carefully reviewed and considered every assignment, and every objection, throughout the record, and find no merit in appellant's contentions, nor any erroneous ruling.

Affirmed.

INC. TOWN OF BONO *v.* UNIVERSAL TANK & IRON WORKS.

5-3647 395 S. W. 2d 330

Opinion delivered November 8, 1965.

Bon McCourtney, Claude B. Brinton and *Joe F. Atkins, Jr.,* for appellant.

Barrett, Wheatley, Smith & Deacon, for appellee.

ED. F. MCFADDIN, Associate Justice. Appellant, the Town of Bono (hereinafter called "Bono"), sought judgment against Universal Tank & Iron Works, Inc.[1] (hereinafter called "Universal") for $3000.00 as liquidated damages for breach of contract. Trial in the Circuit Court resulted in a finding and judgment for Universal; and Bono brings this appeal.

Some time in 1963 Bono decided to install a waterworks distribution system and retained Harold Smith & Associates of Hot Springs as architects and engineers. A large storage tank was an essential part of the water distribution system; and on August 26, 1963 Bono and Universal entered into a contract which provided that Universal would complete its entire contract by December 10, 1963. The contract was quite lengthy. One provision stated that time was of the essence; and another provision was for $50.00 per day as liquidated damages to be paid Bono should Universal fail to complete the contract by December 10, 1963. The provisions vital to this appeal relate to the power of the architect/engineer.

Universal let a subcontract to Hedger to construct the concrete foundation of the storage tank; and on October 9, 1963 it was discovered by Universal that the foundation constructed by Hedger was defective. A new foundation was constructed and this was not completed until November 18, 1963. About the time Universal completed the construction of the storage tank on the foundation, bad weather conditions existed so that it was not until February 10, 1964 that Universal completed the painting of the tank inside and out, as required by the contract, and made tender to Bono of the completed work. This last mentioned date was 60 days after December 10, 1963, the contracted date for complete performance by Universal. Bono claimed its liquidated damages of $50.00 per day, or $3000.00 for the delay in delivery; and filed this action for said amount.

[1] The Maryland Casualty Company, as surety on the performance bond of Universal, was also a defendant in the Court below, and is an appellee here, but we will state the case as though Universal was the sole defendant below and the sole appellee here.

Among other defenses pleaded by Universal were: (a) waiver of the time limit by the architect/engineer; (b) bad weather conditions as an act of God excusing delay; and (c) absence of any damages suffered by Bono. The finding of the Circuit Court, without a jury, was in favor of Universal on the first point; that is, that the architect/engineer had the power to waive and did waive Universal's delay in completing the contract. We confine this Opinion to that issue.

The architect/engineer stated that the President of Universal called him on October 24, 1963 and asked about the delay caused by the defective foundation for the tank. The architect testified: "Mr. Reese specifically inquired if it would be necessary for him to make a formal written application for an extension of time to complete construction of the elevated storage tank, and, under Paragraph 35 of the Contract, I advised Mr. Reese that no formal written application would be necessary, that I would take care of the matter." Mr. Reese, the President of Universal, testified: "I specifically inquired of Mr. Smith if it would be necessary for me to make a formal written application for extension of time to complete the construction of the elevated tank and Mr. Smith advised me that this would not be necessary, that he (Mr. Smith) would take care of the matter. I relied on Mr. Smith's advice and took no further action to secure an extension of time; as far as I was concerned the extension had been secured from Mr. Smith." On the other hand, the Mayor of Bono testified that he never received any formal written notice of or any application from Universal for any extension of time for the completion of the work; and it was also shown that Universal received $1200.00 extra money from Hedger Brothers because of the defective work, and tendered no part of that to Bono.

In Paragraph 19 of the contract it was provided, *inter alia.*

"If the said Contractor shall neglect, fail or refuse to complete the work within the time herein specified, *or any proper extensions thereof granted by the Owner,*

then the contractor does hereby agree, as a part consideration for the awrading of this contract, to pay to the Owner the amount specified in the Contract, ..." (Emphasis supplied.)

Paragraph 35 of the contract between Bono and Universal contained this provision:

"ARCHITECT'S/ENGINEER'S AUTHORITY. The Architect/Engineer shall give all orders and directions contemplated under this contract and specifications relative to the execution of the work. The Architect/ Engineer shall determine the amount, quality, acceptability, and fitness of the several kinds of work and materials which are to be paid for under this contract and shall decide all questions which may arise in relation to said work and the construction thereof. The Architect/Engineer's estimates and decisions shall be final and conclusive, except as herein otherwise expressly provided. In case any question shall arise between the parties hereto relative to said contract or specifications, the determination or decision of the Architect/Engineer shall be a condition precedent to the right of the Contractor to receive any money or payment for work under this contract affected in any manner or to any extent by such question. "The Architect/Engineer shall decide the meaning and intent of any portion of the specifications and of any plans or drawings where the same may be found obscure or be in dispute. Any differences or conflicts in regard to their work which may arise between the Contractor under this contract and other Contractors performing work for the Owner shall be adjusted and determined by the Architect/Engineer."

The question here is whether, under Paragraphs 19 and 35, as above copied, the architect/engineer had the power and authority to waive, on behalf of Bono, the time specified for performance. Certainly there was no express provision in the contract that gave the architect/ engineer any such power; and we conclude that the architect/engineer possessed neither the express nor implied power to bind the Town of Bono to such waiver. In 6 C. J. S. p. 301, "Architects" § 7, in discussing the au-

thority and powers of an architect generally, cases are cited from various jurisdictions to sustain this statement: "An architect is generally held to be an agent with limited authority and not a general agent. . . . . Hence the powers and authority of an architect are limited by the general rules of agency. . . . Accordingly, in the absence of express authority, he cannot bind his employer by contracts for any work upon or materials furnished the structure for which he is employed. . . . Likewise, in the absence of express authority, an architect is not authorized to. . . . accept notice. . . ." In 5 Am. Jur. 2d, p. 668, "Architects" § 6, cases are cited to sustain this statement: "When engaged in supervising the construction of a building as an agent of an owner, an architect's ordinary authority is a limited one. He has no authority, ... to bind his principal by a contract respecting the erection of the building or the performance of work upon it, or to modify the existing contract between the owner and the builder. . ." The following cases support the quoted statements in Corpus Juris Secundum and American Jurisprudence 2d: *Adlard* v. *Muldoon,* 45 Ill. 193; *Starkweather v. Goodman,* 48 Conn. 101; *McIntosh* v. *Hastings* (Mass.), 31 N. E. 288; *Mallard* v. *Moody* (Ga.), 31 S. E. 45; *McNulty* v. *Keyser* (Md.), 76 A. 1113; *Guarantee Title v. Willis* (Ariz.), 297 P. 445; *Jungclaus* v. *Ratti* (Ind.), 118 N. E. 966.

In *Sanitary District* v. *McMahon,* 110 Ill. App. 510, the Illinois Court of Appeals specifically held that a provision in a contract, giving an engineer power to direct and superintend the execution of the contract, did not give him a general power to change the terms of the contract, or to extend the time for completing the work beyond the time fixed by the contract. In *Volquardsen* v. *Davenport,* 141 N. W. 432, the Supreme Court of Iowa used this language:

"The architect's authority is limited. He may not direct the work to be done otherwise than is provided by the plans and sepcifications, except as he has been given authority to do so therein or by the contract. Unless so authorized, he is powerless to relieve the contractor from

complying with his undertaking in order to make it easier for him or for any other purpose, if this be detrimental to the owner."

Under the record before us, there was no provision in the contract that gave the architect the power to accept notice of delay and bind Bono to the architect's agreement for extension; and the Trial Court was in error in so holding. For that reason, the judgment must be reversed and the cause remanded for a new trial on the other issues presented in the case.

We forego any holding: (a) as to whether the contract provision for liquidated damages was reasonable, or was a penalty; (b) as to whether the weather conditions excused some delay; or (e) as to whether the $1200.00 which Universal received from its sub-contractor Hedger should, at all events, be the amount to which Bono is entitled. These questions were not decided by the Trial Court and the cause must be remanded for a new trial on these and all other issues, except as to the points decided in this Opinion.

Reversed and remanded for a new trial.

PARKER *v.* ROWAN, CHANCELLOR.

5-3763 395 S. W. 2d 338

Opinion delivered November 8, 1965.

Arnold & Hamilton, for appellant.

N. L. Schoenfeld, for appellee.

ED. F. MCFADDIN, Associate Justice. The present petition for a writ of prohibition is another step in the legal battle between the "Wet" and the "Dry" forces in Ouachita County. To get the proper perspective it is well to list the various proceedings that have reached this Court in such battle in the past few years:

(a) Prior to November 6, 1962 Ouachita County was "wet." At the General Election on November 6, 1962 there was a local option election in Ouachita County, and the result of that election was certified in favor of the "Drys."

(b) The "Wets" filed an election contest, which had the effect of keeping the County wet until the final determination of the contest. (Ark. Stat. Ann. § 48-827 *et seq.* [Repl. 1964].) This interpretation of the law was explained in our Opinion in *Hendrick* v. *Hickman,* 225 Ark. 273, 280 S. W. 2d 406.

(c) The Wets delayed the "final determination" of the election contest as long as possible. On October 12, 1964, in Case No. 3420 styled *Hendriks* v. *Parker,* we issued a *per curiam* order dismissing the appeal of the Wets. The petition for rehearing was denied on November 10 ,1964; and that was the "final determination" of the contest, as those words are used in Ark. Stat. Ann. § 48-827 *et seq.* (Repl. 1964). So really the liquor dealers in Ouachita County had only 60 days from and after November 10, 1964 in which to dispose of their liquor stocks; and then the further sale of liquor would have been illegal in Ouachita County by virtue of the 1962 local option election.[1]

(d) However, on November 3, 1964 there was another local option election[2] in Ouachita County, and

[1] But see Paragraph (e) *infra,* wherein the date allowed liquor dealers to dispose of their stocks was fixed at August 6, 1965.

[2] Under Act No. 15 of 1955 (Ark. Stat. Ann. § 48-824 [Repl. 1964]) such local option election must be on the date of the General Election and therefore cannot be oftener than every two years; so the 1964 election was the first opportunity the Wets had to again test the vote of the electors.

the result of that election was certified in favor of the Wets. The Drys duly filed an election contest in the County Court; and the legal effect of that contest was to postpone the results of the November 3, 1964 election until the "final determination"[3] of the contest. The County Court dismissed the Drys' contest on August 6, 1965; but under Ark. Stat. Ann. § 48-821 (Repl. 1964) and Ark. Stat. Ann. § 27-2001 (Repl. 1962) the Drys have six months from that date to appeal to the Circuit Court in the matter of the 1964 election contest.

(e) After the 1964 local option election the Wets filed a "petition for declaratory judgment" in the Ouachita Chancery Court, naming the Prosecuting Attorney as a defendant. The Drys intervened. The Wets claimed that the effect of the 1964 local option election in favor of the Wets wiped out all the results of the 1962 election in favor of the Drys, and that the sale of liquor was legal in Ouachita County because of the 1964 election, regardless of the case involving the 1962 election. The Chancery Court agreed with the Wets, and the Drys appealed to this Court in Case No. 3571, styled *Parker* v. *Hendriks,* on June 7, 1965. We decided that case: reversing the Chancery Court and ordering an immediate mandate. Since the liquor stores had continued in business in Ouachita County under the Chancery Court decree, we ordered that an immediate mandate would issue from this Court so that the liquor dealers would have only 60 days from June 7, 1965 to dispose of their stocks; and thereafter there could be no more legal sales of liquor in Ouachita County until the "final determination" of the contest on the 1964 local option election.

(f) It seems that our Opinion and holding in said Case No. 3571 should have settled all questions until the "final determination" of the contest of the 1964 election; but the Wets then filed, on August 11, 1965, another suit in the Ouachita Chancery Court, asking the Court to answer this question: "The question is: what is the effect of the ruling of the Arkansas Supreme Court in *Parker* v. *Hendriks* June 6, 1965 with the 'contest' hav-

[3] This contest has not been finally determined, as will be discussed subsequently.

ing been dismised August 6. 1965 in Case No. 178 in the Ouachita County Court—there now being no contest or other legal proceeding pending in any court challenging the effect of and the 713 margin vote *for* the sale of licensed beverages in Ouachita County November 3, 1964." The basis of the Wets claim in the Chancery Court case filed on August 11, 1965 was: that the County Court on August 6, 1965 had dismissed the Drys' contest of the 1964 election; that no appeal had been filed in the Circuit Court from that order; so there was nothing to prevent the County Court order of August 6, 1965 from being a "final determination," even though the Drys had and have six months from August 6, 1965 within which to appeal to the Circuit Court.

(g) When the Chancery Court entertained jurisdiction of the Wets' petition, as filed on August 11, 1965, the Drys filed in this Court their present petition for a writ of prohibition to prohibit the Chancery Court from hearing the Wets' petition for a declaratory judgment. This petition for writ of prohibition is the present Case No. 3763 in this Court. We granted a temporary writ of prohibition September 7, 1965, and now the matter is before us for final determination. In the meantime, sale of liquor in Ouachita County has been illegal since August 6, 1965 and this, because of our holding and judgment in Case No. 3571, decieded by us on June 7, 1965.

The foregoing and rather lengthy detailing of the legal battles between the Wets and Drys in Ouachita County brings us to our decision in the present controversy; and we now make permanent the temporary writ of prohibition issued by us in this case on September 7, 1965. There are several reasons for our decision, but one is sufficient.

CHANCERY COURTS HAVE NO POWER TO INTERFERE WITH ELECTION CONTESTS. Beginning with *Willeford* v. *State,* 43 Ark. 62, and continuing to date, we have an unbroken line of cases, all holding that equity has no power to interfere with election contests. In *Walls* v. *Brundidge,* 109 Ark. 250, 160 S. W. 230, Ann. Cas. 1915C 980, Mr. Justice Kirby reviewed many cases and summarized the holdings:

"From these authorities it is conclusive that the trial of election contests and the adjudication of political rights and the protection of persons in their enjoyment were not matters of cognizance by courts of equity when our Constitution was adopted, and the Legislature had power only to vest the chancery court with jurisdiction in matters of equity, and was without power to enlarge such jurisdiction beyond such matters as courts of equity at the common law exercised jurisdiction in, and such courts having no jurisdiction of election contests and the adjudication of political rights were given none by our said Constitution."

In *Sheffield* v. *Heslep,* 206 Ark. 605, 177 S. W. 2d 412, we quoted from *Rhodes* v. *Driver,* 69 Ark. 606, 65 S. W. 106, 86 A. S. R. 215:

" 'A court of equity will not permit itself to be made the forum of determining the disputed questions of title to public offices, or for the trial of contested elections, but will in all such cases leave the claimant of the office to pursue the statutory remedy, if there be such, or the common law remedy by proceedings in the nature of a *quo warranto.*' "

Thus, as long as an election contest is pending, the Chancery Court has no jurisdiction to interfere in such controversy. Regardless of whether the proceeding filed by the Wets in the Ouachita Chancery Court on August 11, 1965 be called a "petition for declaratory judgment" "petition for injunction" or some other pleading, the net effect is the same: the Chancery Court was being asked to declare that during the time allowed by law for the Drys to appeal to the Circuit Court there was no election contest pending.

In many cases when a judgment is rendered it is considered as final until reversed; but our statute on local option liquor elections establishes an entirely different rule in such cases, Act No. 212 of 1957, as found in Ark. Stat. Ann. § 48-827 (Repl. 1964) says of local option liquor election contests that if the election is contested there is no *final determination* until "the date of the issuance of the mandate by the court finally determining

an election contest." This Act No. 212, when fitted into our local option election law in liquor cases, applies to contests by Drys as well as to contests by Wets. The effect of our said statute is that the *status quo ante* in liquor matters will not be changed until the "final determination" of the election contest.

The contest of the 1964 local option election in Ouachita County has not been finally determined. As we have previously pointed out (and because of Ark. Stat. An. § 48-821 [Repl. 1964] and Ark. Stat. Ann. § 27-2001 [Repl. 1962]), the Drys have six months from August 6, 1965 to prosecute their appeal in the Circuit Court; and under the plain wording of Ark. Stat. Ann. § 48-827 (Repl. 1964) there has been no "final determination" because there has been no "issuance of the mandate by the court finally determining an election contest." The fact that the Drys have not yet filed their appeal in the Circuit Court only shows that they are taking all the possible time allowed in contesting the 1964 election, just as the Wets took all possible time allowed in contesting the 1962 election. It is a case of "sauce for the goose is sauce for the gander." Until the 1964 election contest is finally determined, the *status quo ante* remains; and the Chancery Court has no jurisdiction to determine the effects of an election, the contest of which is still undetermined.

The Wets say that the result of such a holding, as we are now making, is to delay, if not to thwart, the will of the electors as expressed in the 1964 election. But the answer to that question is simple: it is for the Legislature of Arkansas to fix the time for filing a local election contest, and to shorten the time for appeals in such cases, provided the Legislature sees fit to enact such legislation. The Wets cannot accomplish such result by going into the Chancery Court under the guise of a declaratory judgment proceeding. We reaffirm our holdings in *Hedrick* v. *Hickman,* 225 Ark. 273, 280 S. W. 2d 406; and *Parker* v. *Hendriks,* 239 Ark. 667, 393 S. W. 2d 251.

The temporary writ of prohibition issued in this case is now made permanent.

JOHNSON, J. dissents in Part.

WILLIAMS *v.* GILBERT.

5-3652 395 S. W. 2d 333

Opinion Delivered November 8, 1965.

Howell, Price & Worsham, for appellant.

Cockrill, Laser, McGehee & Sharp, for appellee.

GEORGE ROSE SMITH, J. Larry Williams, a seven-year-old boy, was injured when the bicycle that he was riding was struck by a pick-up truck being driven by the appellee, John Gilbert. In this action for personal injuries, brought by Larry's father as next friend, the jury returned a verdict for the defendant. Here the appellant contends that the court erred in instructing the jury that Larry was to be held to the same standard of care as an adult.

The accident happened at 38th and Crutcher in North Little Rock. Thirty-eighth is a through street, protected by stop signs. As Gilbert, driving east on 38th, approached the intersection he observed a car to his

right, traveling north on Crutcher, slow down and stop for the intersection. According to Gilbert's testimony, which of course cannot be regarded as undisputed, Larry Williams, also going north, suddenly appeared on the far side of the other car and rode his bicycle into the intersection when it was too late for Gilbert to avoid hitting him. (Larry was too young to be allowed to testify. Ark. Stat. Ann. § 28-601 [Repl. 1962].)

There is no contention here that Gilbert was entitled to a directed verdict. To the contrary, there is an abundance of proof from which the jury might have found Gilbert to have been negligent. Gilbert testified that he first saw the bicycle when he was even with the west curbing on Crutcher Street. This version is contradicted by the testimony of a police officer, who fixed the impact at a point 12 feet 8 inches east of that curbing. Thus Gilbert's skid marks, which were 32 feet long, began about 19 feet west of the point where Gilbert says he was when he first saw the child. Gilbert admitted that he knew he was driving near a school where children were usually present. He admitted that the sun was almost directly in his eyes as he approached the intersection. On cross examination he had no satisfactory explanation for his failure to avoid the child by swerving either to the right or to the left. In view of all the testimony it is plain that we should have to weigh the evidence in order to hold that the plaintiff did not make a *prima facie* case. This is not our province.

The plaintiff offered an instruction, substantially in the language of AMI 304, which would have told the jury that ordinary care, with respect to a minor, means that degree of care which a reasonably careful minor of his age and intelligence would use in similar circumstances. This is ordinarily the correct rule. *Garrison* v. *St. Louis, I.M. & S. Ry.*, 92 Ark. 437, 123 S. W. 657 (1909). Needless to say, this instruction has nothing whatever to do with *Gilbert's* duty to use ordinary care. The trial court, in instructions that are not questioned, charged the jury with respect to Gilbert's duty to keep a lookout, to keep his vehicle under control, and to drive

at a reasonable speed. What counsel for Larry Williams sought, in requesting that he be held to the standard of care appropriate to a minor of his age and intelligence, was to supply the jury with a guide for determining whether *Larry* was negligent in disobeying a stop sign. Compare *Smith* v. *Wittman,* 227 Ark. 502, 300 S. W. 2d 600 (1957).

The court refused the requested instruction and instead told the jury in effect that Larry was to be held to the same standard of care as an adult. Doubtless the court relied upon *Harrelson* v. *Whitehead,* 236 Ark. 325, 365 S. W. 2d 868 (1963), where we held that a minor operator of a motor vehicle (there a motorcycle) is required to exercise an adult standard of care. But that situation is unlike the present one. To operate a motor vehicle by himself a minor must be at least sixteen years old and must have a driver's license. Ark. Stat.Ann. §§ 75-302 and -309 (Repl. 1957). An automobile carelessly driven is of great potential danger to motorists and pedestrians upon the public streets. As we quoted in the Harrelson case; "To give legal sanction to the operation of automobiles by teen-agers with less than ordinary care for the safety of others is impractical today, to say the least. We may take judicial notice of the hazards of automobile traffic, the frequency of accidents, the often catastrophic results of accidents, and the fact that immature individuals are no less prone to accidents than adults."

There can be no serious comparison of a sixteen-year-old youth driving an automobile with a seven-year-old child riding a bicycle—as much a plaything as a means of transportation. The automobile poses all the threats to human life that led to our decision in the *Harrelson* case, but the bicycle poses no threat of serious injury to anyone except the child himself.

Counsel for the appellee stress the fact that our motor vehicle statutes apply to persons riding bicycles, Ark. Stat. Ann. § 75-424, and that therefore Larry should have obeyed the stop sign at the intersection. *Ibid.,* § 75-645 (Supp. 1963). Even so, it does not follow that a violation of the statute must be treated in the same way

whether the offender is an adult or a child. To the contrary, on the criminal side an adult who runs a stop sign is guilty of a misdemeanor, Ark. Stat. Ann. § 75-421, but not so in the case of a child under twelve. *Ibid.*, § 41-112 (Repl. 1964).

There is a similar distinction on the civil side. An adult who violates a common law duty to another's injury is negligent if his conduct involves a want of ordinary care. A minor violating the same duty may also be negligent, but his conduct is to be tested by the standard set by reasonably careful minors of his own age and intelligence. We can think of no reason for a different rationale when a statute is involved. An adult who disregards a stop sign is not negligent *per se*; his conduct is merely evidence of negligence, to be considered with the other proof in the case. *Bridgforth* v. *Vandiver*, 225 Ark. 702, 284 S. W. 2d 623 (1955). In like manner Larry Williams's violation of the stop law was evidence of negligence; but there is not even a plausible reason, much less a sound reason, for refusing to test his conduct by the standard that applies in other cases—that degree of care to be expected of other minors of his own age and intelligence.

Reversed.

WARD, J., dissents.

PAUL WARD, Associate Justice (dissenting). For two reasons, explained hereafter, I would affirm the trial court.

1. The majority say "there is an abundance of proof from which the jury might have found Gilbert to have been negligent", yet the fact is the jury did not do so. If there was an *abundance* of proof it would have been immaterial whether Larry was seven or seventy-seven years old.

I think there is *no substantial* proof, but merely conjecture of appellee's negligence. The majority appear to think the skid marks are evidence of negligenc while I think they show positively Gilbert was keeping a lookout and that he responded alertly. I wonder what the major-

ity would think had there been no skidmarks. If driving on the streets with the sun in one's face is evidence of negligence, then none can escape. Contrary to what the majority say, I think Gilbert gave a convincing explanation for not "swerving either to the right or the left". He explained that if he turned right he would have hit the car stopped on Crutcher Street and he couldn't turn left because the bicycle was going at an angle. There is no evidence Gilbert was speeding as he drove east on a non-stop street. By conjecture alone could I conclude Gilbert was negligent, but conjecture is not proof. In the case of *Russell* v. *St. Louis Southwestern Railway Company,* 113 Ark. 353 (p. 359), 168 S. W. 135, 136, the Court said:

"But conjecture and speculation, however plausible, cannot be permitted to supply the place of proof."

Also, in my opinion the physical facts present in this case are indicative of a high degree of care on the part of Gilbert rather than of negligence. This Court has often recognized the high probative value of physical facts. In *St. Louis Southwestern Railway Company* v. *Ellenwood,* 123 Ark. 428 (p. 436) we said:

"Appellate courts take notice of the unquestioned laws of nature, of mathematics, of mechanics and of physics. So where ther are undisputed facts shown in the evidence, and by applying to them the well known laws of nature, of mathematics and the like, it is demonstrated beyond controversy that the verdict is based upon what is untrue and what cannot be true, this court will declare as a matter of law that the testimony is not legally sufficient to warrant the verdict."

As previously stated, this case should also be affirmed because of our decision in the *Harrelson* case. Any material distinction between that case and this case is not apparent to me.

In affirming the trial court in the *Harrelson* case we relied upon certain sections of Ark. Stat. Ann., (all of these sections being a part of Act No. 300 of 1937) to conclude there is no distinction between a minor and an

adult as to the degree of care to be exercised while riding a *motorcycle* on the public highway. However, the majority say the case now under consideration is different because the minor was riding a *bicycle* and because he was only seven years old. Yet the same Act (No. 300 of 1937) which applies to a minor on a *motorcycle* also, by virtue of § 24 of said Act (Ark. Stat. Ann. § 75-424 [Repl. 1957], applies to a minor on a *bicycle*. It reads, in pertinent parts:

"Every person riding a bicycle . . . upon a roadway shall be subject to the provisions of this act. . . ."

There is nothing in Act No. 300 that makes any distinction between a minor seven years old and one fifteen years old. The important thing is ,the Act recognizes that a minor (regardless of age) presents a threat to his own welfare and to the welfare of the public when he undertakes to ride a bicycle or a motorcycle on a street or highway.

UNITED-BILT HOMES *v.* KNAPP.

5-3589 396 S. W. 2d 40

Opinion delivered November 8, 1965.

[Rehearing denied December 13, 1965.]

Patton & Brown, Smith, Williams, Friday & Bowen, By: *John T. Williams & Frank Warden, Jr.,* for appellant.

Murphy & Arnold, Ivan Williamson, for appellee.

PAUL WARD, Associate Justice. The principal issue on appeal involves the question of usury, but another issue is also raised. The statement of facts set out below will suffice to show how these issues arose.

Mr. and Mrs. O. H. Knapp (two of the appellees, hereafter sometimes referred to as purchasers) contracted with United-Bilt Homes, Inc. (appellant, sometimes referred to as builder) to erect a home on their land in Stone County. The printed building contract (dated March 27, 1962) obligated the builder to construct an "Alexander house expanded" according to "plans and specifications attached hereto" [but none are attached in the record], and it obligated the purchasers to pay the sum of $10 in cash and the balance of $..... in "90 monthly installments of $48.69 each." The purchasers, on March 27, 1962, signed a note for the principal sum of $4382.10, payable $48.69 per month (beginning June 1, 1962) "until total indebtedness is paid."

Pursuant to the above, a house was constructed. The Knapps moved in and made only two monthly paymants when a dispute and litigation ensued as set out below.

Litigation began in circuit court (later transferred to chancery court) when Hugh Younger and H. R. Bauerlein sued the Knapps and appellant to collect $560 due them for labor and to perfect a lien therefor on the property. They also asked for an attorneys' fee. This claim was controverted by all the defendants. Appellant filed a cross-complaint against the Knapps alleging a default in payments and asking for judgment and a sale of the property. In answer to the cross-complaint the Knapps, among other things, alleged the note given by them to appellant was usurious.

A trial on the issues resulted in the following decree: that Younger and Bauerlein have judgment against

appellant for $420 and a $75 attorneys' fee, with a lien on the property to secure the same; that the said note is void for usury and all indebtedness evidenced thereby is cancelled and set aside.

Appellant here contends: *One,* the judgment and lien in favor of the laborers is not supported by the evidence; *Two,* the note is not usurious, and; *Three,* the Knapps are not entitled to retain the house even if the note is held to be usurious.

One. We cannot say the weight of the evidence does not support the chancellor in finding Younger and Bauerlein were entitled to receive $420 (less $194 placed in the registry of the court by appellant) for their labor in helping erect the house. There was some dispute over the quality and extent of their work but it is not disputed that they are entitled to some amount. Bauerlein testified they worked 280 hours and that their services were worth $2.00 an hour—the court allowed only $1.50 per hour. It is admitted there was no written contract specifying the hourly wage. The court was right in holding the judgment to be a lien on the property, if it is not paid by appellant who is primarily liable.

Two. The principal dispute is over the question of whether the note is usurious. The question is presented to us in a somewhat novel way. Usually the note itself contains the questionable items constituting what is often referred to as "closing costs." Here, the note contains no such items, so they must be gleaned from the record. As the question comes to us it could be exceedingly complicated were it not for the frank and able manner in which it was handled by the attorneys, for which they are to be congratulated.

Since we have reached the conclusion the trial court must be affirmed on this point, we will take the figures relied on by appellant, as set out below:

(a)	Selling price of the home (being the basic cost of the home plus three extra items, and minus the $10 paid by the Knapps)	$2,770.00

(b)	Title Insurance	40.00
(c)	Recording of Mortgage	2.25
(d)	Attorneys Fee	5.00
(e)	Appraisal Fee	24.00
(f)	Fire Insurance	146.26
(g)	Credit Life Insurance	131.46
		$3,118.97

It is further conceded by appellant, with commendable candor, that if item (g) above is not a proper charge then the interest charged is over 10% and the note is therefore usurious, it also being conceded that the rate charged in the note amounts to 9.93%.

In our opinion the inclusion of said item (g) was erroneous. The undisputed proof shows that appellant did *not* pay for this item as it did for all the other items listed, and in fact such is conceded by appellant. The effect of the improper inclusion of item (g) was to allow appellant to collect interest on money which it did not pay out, i.e., did not advance to the Knapps.

The court is also of the opinion that item (e) was improperly charged as closing costs. The undisputed evidence shows that the house was never inspected, and that no attempt to inspect it was made until the buliding was completed. Under these circumstances it can hardly be said appellant paid the $24 for the benefit of Knapps.

So that this opinion will not be misconstrued, and so that appellant may not be unduly restricted in its operations hereafter, we wish to explain: (a) Appellant has a right to add to the price charged for the construction of a house proper "closing costs" items; (b) Appellant has the right to pay for these items, and treat them as a part of the principal debt on the total amount; (c) We do not mean to hold that appraisal fees and premiums for life insurance can not, under any circumstances, be charged as proper "closing costs."

Three. Finally, we find no merit in appellants' contention that, even if the note is found to be usurious, the Knapps should *not* be allowed to keep the house. This

Court has held contrary to that contention in *Universal C. I. T. Credit Corp.* v. *Avery,* 225 Ark. 190, 280 S. W. 2d 229; *Universal C. I. T. Credit Corp.* v. *Stanley,* 225 Ark. 96, 279 S. W. 2d 556, and; *Sloan* v. *Sears, Roebuck & Co.,* 228 Ark. 464, 408 S. W. 2d 802. Appellant is aware of what our holdings in this respect have been heretofore, but asks us to now re-examine the same. For several reasons we do not feel inclined to do so. In the first place we think that for this Court to make the change suggested by appellant would be to violate the spirit, if not the letter, of Ark. Stat. Ann. § 68-609 (Repl. 1957). In the second place it would render the Constitutional provision against usury practically ineffective. If the seller of an article on a usurious contract knew he could, if caught, repossess the same, he obviously would be more inclined to take a chance.

Finding no error the decree of the trial court is affirmed.

Affirmed.

LITTLE ROCK ABSTRACT CO. *v.* KEATON

5-3641 395 S. W. 2d 327

Opinion delivered November 8, 1965.

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

H. B. Stubblefield, for appellee.

SAM ROBINSON, Associate Justice. The appellees herein, Martha Louise Keaton, et al, filed suit in the Pulaski Circuit Court against appellant, Little Rock Abstract Company, alleging that the defendant company negligently, and in violation of its contractual obligation, failed to show in an abstract of title prepared for plaintiffs an easement over a street adjoining the property purchased by plaintiffs, and that as a result of the failure to show the easement plaintiffs were damaged in the sum of $1,638.21. There was a judgment for the plaintiffs for the alleged amount. The abstract company has appealed.

In the year 1946, the Arkansas Louisiana Gas Company was granted an easement over a certain 40 acre tract in Pulaski County. Later, Industrial Development Company of Little Rock, Inc., hereinafter called Industrial, obtained title to the 40 acres. On October 18, 1962, Industrial conveyed to the gas company a right-of-way easement within 65th Street, which adjoins the land here involved. The authority to grant the easement has not been put in issue. This easement in favor of the gas company is recorded in Deed Book 817, page 517, of the records of Pulaski County. Later, in February, 1963, the gas company and Industrial entered into an agreement whereby the gas company released the original easement over the 40 acres. Embodied in the release was a clarification of the easement which had been granted by Industrial to the gas company on October 18, 1962. The language in the February, 1963 release clarifying the October, 1962 easement is as follows:

"WHEREAS, The parties hereto have heretofore entered into a certain right-of-way agreement dated October 18, 1962, recorded December 6, 1962, in Deed Book 817, page 517, of the records of Pulaski County, Arkansas; reference thereto being hereby made, the terms thereof are incorporated herein by reference.

. . .

"2. By way of clarification of the description of the right-of-way granted in the aforesaid agreement dated October 18, 1962, insofar as the same pertains to that

certain area along the north side of that area designated as West 65th Street on the plat attached to the aforesaid agreement, it is understood and agreed that the right-of-way therein granted is a strip of land 20 feet in width running from the West right-of-way line of Interstate highway 30 to the East right-of-way line of Scott Hamilton Drive, the north line of said 20 foot strip of land being the north line of that certain strip of land 110 feet in width designated as West 65th on the plat attached to the aforesaid right-of-way agreement and as more particularly shown on that certain plat of Little Rock Industrial District filed in Plat Book 11, at page 49, of the Records of Pulaski County, Arkansas, reference thereto being hereby made.

"3. Industrial, for itself and its successors and assigns, does hereby covenant, the same to run with the land, that it will not cause to be erected or constructed any buildings, fences, walls, pavement, permanent structures or similar improvements within the area of said right-of-way, and will not cause to be planted any shrubbery or trees within such area."

Later, appellees bought from Industrial about 1 acre of the aforesaid 40 acres and purchased an abstract of title from appellant, Little Rock Abstract Company. The abstract failed to show the release of the easement over the 40 acres, which contained the language clarifying the October, 1962 easement granted to the gas company by Industrial. Appellees' attorney, who examined the abstract of title, called attention to the fact that the record showed an easement in favor of the gas company across the 40 acres, but that it did not show whether the easement was across the particular part bought by appellees. The appellees made inquiry about the easement of an officer of Industrial, and he informed them that the easement across the 40 acres had been released. Nothing was said about the granting of an easement over a portion of 65th Street in October, 1962.

Under an agreement to lease to the Texaco Company, appellees built a service station on their newly acquired property. When they attempted to pave a portion of

65th Street which would extend from the then paved part of the 65th Street right-of-way over the north portion of that street onto the service station property, the gas company called their attention to the easement the company had along the north 20 feet of 65th Street. The gas company insisted on doing certain work in order to properly protect its pipeline in that part of the 65th Street right-of-way on which Industrial had given an easement. The gas company did do the paving and charged appellees $1,638.21 for the work.

The appellees then filed this suit against the abstract company for the amount charged by the gas company for the work done in protecting the pipeline. The plaintiffs alleged that it was the duty of the abstract company to show in the abstract the release by the gas company of the old easement across the 40 acres, and to show the new easement granted to the gas company by Industrial in the north 20 feet of 65th Street.

The real issue is whether it was the duty of the abstract company to show the condition of the title to property other than the property within the call of the particular land the abstract company was engaged to prepare an abstract of title. If it was the duty of the appellant abstract company to show in the abstract the easement granted to the gas company in 65th Street, then it breached its contract and was also negligent in not showing the easement in the abstract.

No case has been called to our attention, nor have we found any, where the courts have held that it is the duty of an abstract company to furnish information concerning the title to property other than the specific property under examination. On the other hand, *American Trust Investment Co.* v. *Nashville Abstract Company,* 39 S. W. 877, holds that it is not the duty of the abstract company to make such a showing. But appellees contend that it is the custom and practice of abstract companies in Pulaski County to show matters of record concerning adjoining property that might affect the property under consideration. We feel that the evidence falls far short of showing such custom and practice.

Two witnesses familiar with the abstract business testified for appellees. First, Mr. E. A. Bowen, Jr. in his testimony does not mention the October, 1962 easement (in fact, no witness mentions it), and does not state he would have shown it in an abstract, although he does state that he would have shown the February, 1963 release which contained a clarification of the October, 1962 easement. He further testified that portions of records that do not apply to the particular property under consideration are frequently omitted. Bowen further testified that in the normal course of preparing an abstract, the release of an easement might be shown and another easement not located on the property under consideration would not be shown. Apparently, Mr. Bowen's abstract company has subsequently brought the abstract in question up-to-date and showed the February, 1963 release of the easement over the 40 acres. But, Mr. Bowen did not testify, and it is not shown by any of the evidence, that the October, 1962 easement from Industrial to the gas company over a portion of 65th Street was shown in the abstract, and Mr. Bowen did not testify that in the normal course of the abstract business it would be shown.

Mr. Burton Dougan, another abstract man and a witness for appellees, testified to the same effect.

It cannot be said that there is any substantial evidence in this case going to show that according to the local custom and practice it is the duty of an abstract company to show in an abstract an easement which has been granted in an adjoining street.

The judgment is reversed and the cause dismissed.

McFaddin, J., concurs; Ward & Johnson, J.J., dissent.

Ed. F. McFaddin, Associate Justice (concurring). I concur in the result reached by the Majority. The showing of the original easement as unreleased was sufficient to put the appellees on notice of an easement. Their attorney in examining the abstract advised them in detail about the necessity of inquiry. I believe that such inquiry, if pursued to its logical conclusion, would have given them all the information that the record now con-

tains. The appellees failed to make a full inquiry, and cannot hold the appellant liable for their own failure.

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

It is admitted appellant did not place in the abstract the notation on the margin of the instrument creating the original easement in favor of the gas company. This notation reads:

"*Partial* RELEASE Filed for record February 18, 1963, Recorded in Mtg. record 929, page 515. Roger McNair, Circuit Clerk & Recorder. By C. Eggleston, D.E. 2-18-63" (Emphasis added.)

The word "partial" is the key to this case. Had appellee known of the notation, it certainly would have made inquiry as to the meaning of that word and, consequently could have avoided paying out the sum of $1,638.21.

It is important therefore to determine whether appellant was under an obligation to show this marginal notation. I think it was.

The abstract showed the original easement—that means appellant saw or should have seen the marginal notation. It is the duty of an abstractor to use skill and care. In the *American Trust Investment Co.* v. *Nashville Abstract Co.,* (cited by the majority) there appears this statement at page 879:

"To furnish abstracts of title is a business. Parties undertaking it assume the responsibility of discharging its duties in a skillful and careful manner. Patience in the investigation of records is the main capacity required." It is the duty of an abstractor to show every record (if he can reasonably find it) which might affect the title, and it is then up to the purchaser or his attorney to determine to what extent or degree it is affected. In 1 Am. Jur. 2nd, Abstracts of Title, page 230, § 5 it is stated ". . . the abstract should disclose everything material concerning the sources and conditions of the title to the property in question."

Also, in § 6 there appears this statement:

"What is required is that the abstract disclose to an intended purchaser everything pertaining to the names and to the property in question, so far as appears from the record, that reasonably might affect such title, and thus put the purchaser on inquiry, in order that such purchaser may himself make the proper investigations as to the outside facts."

NELSON *v.* PARON CONSOLIDATED SCHOOL DIST. NO. 17 OF SALINE COUNTY.

5-3663 395 S. W. 2d 337

Opinion delivered November 8, 1965.

L. A. Hardin, for appellant.

Leslie Evitts, for appellee.

JIM JOHNSON, Associate Justice. This is a suit in ejectment. Appellants William H. Nelson and Kathleen Marie Nelson, his wife, filed a complaint in Saline Circuit Court on May 11, 1964, against Paron Consolidated School District No. 17 of Saline County. The complaint and its amendment allege in essence that in 1960 Joe R. Wilburn and Jessie, his wife, conveyed to appellants a tract of

land "containing 160 acres, more or less, . . . except six acres to Paron School District No. 17 of Saline County, Arkansas, . . ."; that as a result of a survey on January 18, 1964, appellants determined that appellee school district was claiming an extra one acre of land, and prayed that appellee be ejected from the one acre or, alternatively, that appellants be given judgment for damages against their predecessors in title. After trial on October 14, 1964, the court found for appellee school district. From judgment dismissing their complaint, appellants have prosecuted this appeal.

Appellants raise some interesting points for reversal, but we do not reach the points on appeal for its clear from a careful reading of the record that appellants wholly failed to prove the first requirement in ejectment, *i.e.*, title to the property in dispute.

"One seeking to eject another must bring himself within the rule that, *prima facie,* a legal right to possession of the realty must be shown." *Moss* v. *Chandler,* 209 Ark. 130, 189 S. W. 2d 715. Further, the complaint must describe the premises sought to be recovered. *Flanagan* v. *Ray,* 149 Ark. 411, 232 S. W. 600; 28 C. J. S., Ejectment, § 62. Appellants made no effort to particularly describe the so-called extra one acre in their complaint. The nearest we have to a description of the land in dispute is contained in appellant's testimony (as abstracted by appellants) as follows:

"At the time I bought this tract of land the only knowledge I had that the Paron School District No. 17 owned any land was the six acres described in the deed as having been conveyed to the School District by the Hollands, as was shown in my deed from the Hollands. At the time I bought the land from the Wilburns I did not know whether or not the six acre tract conveyed to the School District was in a square or oblong or what. The deed I got from the Wilburns describes the land as a square. Evidently the School District is claiming more for they have some buildings on it. This particular piece of land in dispute adjoins the front and South part of the Paron School. It is a narrow strip of land taken off the

front of my tract of land and is no longer than it is wide. This particular land that the appellees are claiming is a long strip of land and is not a part of the six acre tract described in the deed."

This court has previously allowed premises sought to be recovered in ejectment to be described "with reasonable certainty," *Carden* v. *Montgomery,* 171 Ark. 1000, 287 S. W. 183, instead of the great accuracy traditionally required. However, appellants' testimony is not a sufficient description to meet even this relaxed rule. Certainly it is not such description as would enable a sheriff to know what land should be placed in a plaintiff's possession in the event of his recovery. It should also be noted here that, apart from appellants' one statement, there is no showing that the disputed property is not a part of the acreage which admittedly had been deeded to appellee by appellants' predecessor in title long prior to appellants' purchase.

Having reached the same result, although on different grounds, the judgment of the trial court is affirmed.

SULLIVANT *v.* SULLIVANT

5-3662 396 S. W. 2d 279

Opinion delivered November 15, 1965.

[Rehearing denied December 20, 1965.]

John Harris Jones, for appellant.

Bridges, Young, Matthews & Davis and *Cole & Scott,* for appellee.

ED. F. MCFADDIN, Associate Justice. This appeal stems from an unsuccessful effort by appellant (Myrtle Hill Sullivant White) to set aside the divorce decree which she obtained in 1927 and the property settlement she made with her husband, Bud Sullivant, in the said divorce suit. The Chancery Court denied the prayed relief, and appellant prosecutes this appeal.

On January 1, 1915 Myrtle Hill and F. D. (Bud) Sullivant were married. For convenient identification we will hereafter refer to them as "Myrtle" and "Bud." On April 30, 1927 they were divorced by decree of the Jefferson Chancery Court. A property settlement was made by Myrtle and Bud in the 1927 divorce suit whereby Myrtle received $1200.00 cash in full settlement of all claim for dower, homestead, alimony, etc. Myrtle went her way and Bud went his. She moved to Oklahoma, married Mr. White, lived with him for 22 years, was divorced by him in Arizona in 1955, and received

$11,000.00 as a property settlement in that divorce proceeding. Bud continued to live in or near Grant County, Arkansas, and by penurious living amassed property in excess of $100,000.00. Bud died September 14, 1961, leaving a will which made his brother, Birt Sullivant (present appellee), executor and chief beneficiary.[1]

After the death of Bud, Myrtle filed the present proceeding on December 26, 1961, seeking to set aside the 1927 divorce decree and property settlement, and seeking to receive the share of the estate of Bud to which she would have been entitled as widow.[2] She alleged that the 1927 property settlement was void because at all times she was under duress from Bud Sullivant, and that such duress continued unabated until his death in 1961.[3] The defendant, Birt Sullivant,[4] denied all the claimed duress, and pleaded limitations, laches, estoppel, and unjust enrichment. With the issues thus joined the cause proceeded to trial.

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[1] The will was contested by other brothers and sisters but was sustained by this Court in the case of *Sullivant* v. *Sullivant*, 236 Ark. 95, 364 S. W. 2d 665.

[2] Myrtle Hill Sullivant White (present appellant) filed two pleadings: (a) she filed a petition in the original 1927 divorce case, which was Chancery Court Case No. 12,000; and when objection was made to that procedure she (b) filed a separate and independent suit (Chancery Court No. 13381), naming as defendants in the separate suit not only Birt Sullivant as executor and individually, but also several other parties. The two pleadings filed by Myrtle were consolidated, so no procedural problems, from such duplicate filing, are now presented on this appeal. In each of the pleadings she sought relief against Birt Sullivant, as executor of the estate of Bud Sullivant individually, since he was the principal beneficiary under the will of Bud Sullivant. In both pleadings filed by her Myrtle prayed alternately that: (a) the divorce decree be vacated and she take as a widow; or (b) that the divorce decree be reopened to allow her to receive the just portion to which she was entitled by way of dower, homestead, alimony, etc.; or (c) that Bud Sullivant and his executor be held as fiduciaries as to that part of the Bud Sullivant estate to which Myrtle Sullivant claims she was entitled.

[3] There were also allegations as to fraud practiced by Bud Sullivant in the procurement of the divorce and the property settlement. We find it unnecessary to detail the allegations and evidence as to fraud, since any such fraud was known by her and would have been long since barred unless she continued under duress. Thus our holding regarding duress disposes of the issues of fraud.

[4] As previously mentioned, other persons were joined as defendants, but they are immaterial to the issues herein.

The appellant testified—and was corroborated to some extent by some of her witnesses—that she was married to Bud for 12 years; that Bud beat her and otherwise mistreated her; that she was afraid of Bud from the day after she married him continuously until his death; that she agreed to the $1200.00 property settlement in the 1927 divorce decree because Bud threatened to kill her if she did not so agree; that he told her that if she ever tried to get anything more he would kill her; and that her fear of Bud continued at all times until his death. Thus, she testified that she was under duress until Bud died.

The Chancellor delivered a written Opinion which is in the record before us. He found that Myrtle was under duress when she made the 1927 property settlement, but that such duress ended long before Bud's death in 1961, and that Myrtle was barred from recovery in the present suit. Conceding, without deciding, that the Chancery Court was correct as to duress[5] in the 1927 property settlement, we nevertheless are thoroughly convinced that any such duress, as existed in 1927, ceased to exist long before this present suit was filed, and that Myrtle is barred from any relief in the present suit.

Myrtle admitted that after the 1927 decree she lived in Pine Bluff for two years; moved to New Orleans and lived there two years; then moved to Oklahoma and married J. A. White on April 28, 1933; that she and Mr. White moved to Texas; then to Arizona, where they lived together as husband and wife until 1955; that Mr. White obtained a divorce from her in Arizona in 1955; and that she received $11,000.00 property settlement in the Arizona divorce proceedings. The record shows this:

"Q. During the time you were in Kilgore, Texas, during the time you were living in New Orleans, and during the time you were living in Oklahoma City and living in Kilgore, Texas, you didn't come in contact with Bud Sullivant or any of the Sullivants did you?

[5] It is hard for us to see how Myrtle was under duress in 1927 because she was represented by most able counsel in the entire proceeding.

"A. I did not."

Thus for a long period of time she never came in contact with Bud or any of his people, and yet she claims she was under duress even though she was married to another man for 22 years and was living in Arizona for most of those years. We refuse to believe in such "long distance" duress. Certainly the finding of the Chancellor, on the absence of continued duress, is not against the preponderance of the evidence.

The appellee herein pleaded limitation and laches. Appellant insists there could be no laches, because laches is delay with change of position; and appellant claims there was no change of position. The death of Bud and the absence of his testimony would be a change adverse to the interests of his estate. But at all events in equity stale demand is *a species of laches.* In *Skelly Oil Co.* v. *Johnson,* 209 *Ark.* 1107, 194 S. W. 2d 425, we had occasion to consider the matter of stale demand; and we there said:

"In 21 C. J. 211 it is stated: 'A stale demand or claim in its proper sense is one that has for a long time remained unasserted; one that is first asserted after an unexplained delay of such great length . . . as to create a presumption . . . that it has been abandoned. . . . It is an inherent doctrine of jurisprudence that nothing less than conscience, good faith, or reasonable diligence can call courts of equity into activity, and they will not grant aid to a litigant who has negligently slept on his rights and suffered his demand to become stale, where injustice would be done by granting the relief asked.' See *Davis* v. *Harrell,* 101 Ark. 230, 142 S. W. 156; and *Hill* v. *Wade,* 155 Ark. 490, 224 S. W. 743. See, also 30 C. J. S. 521."

We are firmly of the opinion that even if there was any duress, it ceased to exist long before 1961 and that appellant is barred by stale demand from prosecuting the present claim.

Affirmed.

HARRIS, C. J., not participating.

SLAUGHTER *v.* BARRETT.

5-3627 395 S. W. 2d 552

Opinion delivered November 15, 1965.

Bob Scott, for appellant.

No brief filed for Appellee.

GEORGE ROSE SMITH, *J.* The appellant and the appellee were involved in a traffic collision on College Avenue in Fayetteville. Slaughter, alleging that the damage to his car amounted to $157.33, brought this action for double damages and an attorney's fee under Act 283 of 1957. Ark. Stat. Ann. § 75-918 (Repl. 1957). The trial court directed a verdict for the defendant on the ground that the plaintiff's proof failed to show the difference in the value of his car before and after the collision, that being the correct measure of damages. Whether the court was right in directing a verdict is the only issue before us.

In the collision Slaughter's car was struck from the rear while he was waiting for a traffic light to change. He testified that the frame was bent, that a new rear bumper had to be installed, and that two panels were damaged. Without objection a repair order was introduced in evidence, the total cost of the repairs being $157.33. Slaughter testified that that amount had been paid by him and his insurance carrier to the garage that repaired the car.

We have frequently held that the difference in the market value of a vehicle before and after an accident

may be established by proof of the amount paid in good faith for repairs made necessary by the collision. *Southern Bus Co.* v. *Simpson,* 214 Ark. 323, 215 S. W. 2d 699 (1948); *Golenternek* v. *Kurth,* 213 Ark. 643, 212 S. W. 2d 14, 3 A. L. R. 2d 593 (1948); *Payne* v. *Mosley,* 204 Ark. 510, 162 S. W. 2d 889 (1942). "The effect of our holdings . . . is that proof of repairs is sufficient if, when considered with the other evidence adduced, it is shown to fairly represent the difference in market value before and after the injury." *Watson* v. *White,* 217 Ark. 853, 233 S. W. 2d 544 (1950).

In the case at bar Slaughter, who is himself an automobile mechanic, described the specific replacements and repair work that were necessitated by the collision. The repair bill reflects the labor and materials that went into the job. Under the rule approved by our cases Slaughter's testimony and the repair bill itself were sufficient to justify the trial court in submitting the question of damages to the jury. Needless to say, the defendant was at liberty to go forward with rebutting proof if he thought that the cost of the repairs exceeded the difference in market value. We hold, however, that the plaintiff's evidence made a *prima facie* case for the jury.

Reversed.

DONALDSON *v.* HOLCOMB.

5-3667 396 S. W. 2d 281

Opinion delivered November 15, 1965.

[Rehearing denied December 20, 1965.]

Ulys A. Lovell, for appellant.

Bass Trumbo, for appellee.

PAUL WARD, Associate Justice. Mrs. Rosalie Donaldson, the wife of J. Earl Donaldson, died on June 27, 1962 in Tulsa, Oklahoma and was buried on June 30, 1962 in Washington County, Arkansas. On August 7, 1964 Janelle Holcomb, a daughter of the deceased by a prior marriage, filed a verified petition in the Circuit Court of Washington County asking to have the body of the deceased exhumed and to have an autopsy performed thereon. The petition was granted on the same day, without notice to anyone.

Following the above, several motions and orders were entered regarding the matter, but finally on December 15, 1964 the court directed the coroner of Washington County (Dr. Donald Baker) to proceed with the exhumation of the body, and to provide for an autopsy thereon and also to report the pertinent finding into court. This order was objected to by the husband of the deceased and he accordingly prosecutes this appeal, relying on three separate grounds for a reversal.

One. It is first contended that:

"The Circuit Court's orders were void since they were without notice; without proof, without jurisdictions, and on petitions filed by improper persons."

Even if it be conceded, for the purpose of this opinion, that the order made on August 7, 1964 was defective for the reasons mentioned, we think all such defects were later cured by the order dated December 15, 1964. This last order was made following a hearing at which appellant and the deputy prosecuting attorney (repre-

senting the state) were present and participated. At this hearing, by agreement of the parties, certain exhibits and affidavits were examined and considered by the court. Then it was that the trial court directed the coroner of Washington County (Dr. Donald Baker) to proceed with the exhumation of the body of Rosalie Donaldson located in Washington County, and to secure an autopsy on said body by the office of the State Medical Examiner, and to report back to the court all pertinent facts obtained. Then the trial court directed the coroner to withhold action for ten days in order that appellant might decide if he desired to appeal.

The above procedure was in substantial compliance with the procedure set forth in Ark. Stat. Ann. § 42-604 (Repl. 1964). In all parts material here that section reads:

"Upon the death of any person . . . in apparent good health, or when unattended by a physician . . . or in any suspicious . . . manner, the coroner . . . shall be notified . . . by any law enforcement officer having knowledge of such death. . . ."

The following section (42-605) in all parts pertinent here reads:

"In any case of sudden, violent or suspicious death and the body being buried without any autopsy being performed, it shall be the duty of the Coroner upon being advised of such facts to notify the Prosecuting Attorney of his District who shall communicate the same to any Circuit Judge of said District and said Judge may, by appropriate order, require the body to be exhumed and an autopsy be performed thereon by the Director of the Office of State Medical Examiner or by a pathologist or toxicologist designated by the Director and the pertinent facts disclosed by the autopsy shall be communicated to the Judge who ordered it, for such action thereon as he deems proper."

It is not denied that the affidavits presented at the hearing concerning the death of Mrs. Donaldson fully

justified the action taken by the trial court. There was evidence that she was not attended by any doctor during her final sickness; that she was in good health a week before her death; that she expressed fear "they are trying to kill me"; that she thought she should get a divorce from her husband, and; that appellant (the deceased's husband) had expressed a strong desire not to have the body exhumed.

Two. Next, appellant says the court erred in granting only ten days for notice of appeal. As previously set out the court directed the coroner to withhold any action for ten days. While it is not clear just what the court had in mind by this part of the order, we are unable to say it constituted reversible error. We agree that appellant had thirty days in which to file notice of appeal under the provisions of Ark. Stat. Ann. 27-2106.1 (Repl. 1962), but we do not think the court meant to, or actually did, deny him that right. Rather it appears the court may have intended to do appellant a favor by staying all action for ten days. Moreover, the record discloses that appellant did give notice of appeal on December 29, 1964 (14 days after the date of the order appealed from), and there is no contention that he has been prejudiced in any way.

Three. On March 26, 1965 a judge (on exchange) made an order extending the time until July 21, 1965 for appellant to perfect his appeal to this Court. Four days later the regular judge modified the order to allow appellant until May 1, 1965. It is now contended this constituted reversible error, but we do not agree. In the first place the trial court had a right, on its own motion, to cancel or modify any order before the term expired. Also, the appeal has been filed and accepted within the time allowed by the last mentioned order, and there is no showing by appellant that he has in any way been prejudiced because of lack of time.

Affirmed.

COOK GRAINS *v.* FALLIS.

5-3668 395 S. W. 2d 555

Opinion delivered November 15, 1965.

[redacted]

Rieves & Rieves, for appellant.

Spears & Sloan, for appellee.

SAM ROBINSON, Associate Justice. Appellant, Cook Grains, Inc., filed this suit alleging that it entered into a valid contract with appellee, Paul Fallis, whereby Fallis sold and agreed to deliver to Cook 5,000 bushels of soybeans at $2.54 per bushel. It is alleged that Fallis breached the alleged contract by failing to deliver the beans, and that as a result thereof Cook has been damaged in the sum of $1,287.50. There was a judgment for Fallis. The grain company has appealed.

Appellant introduced evidence to the effect that its agent, Lester Horton, entered into a verbal agreement with appellee whereby appellee sold and agreed to deliver to appellant grain company 5,000 bushels of beans; that delivery was to be made in September, October, and November, 1963. Fallis denied entering into such a contract. He contends that although a sale was discussed, no agreement was reached. He also contends that the alleged contract is barred by the statute of frauds.

Following the discussion or sale, whichever it was, between Horton and Fallis, appellant grain company

prepared and mailed to Fallis a proposed contract in writing which provided that Fallis sold to the grain company 5,000 bushels of beans. The instrument was signed by the grain company and it would have been bound thereby if Fallis had signed the paper, but Fallis did not sign the instrument and did not return it to the grain company. Later, Fallis refused to deliver the beans and the grain company filed suit.

The appellant grain company concedes that ordinarily the alleged cause of action would be barred by the statute of frauds, but contends that here the alleged sale is taken out of the statute of frauds by the Uniform Commercial Code. Ark. Stat. Ann. § 85-2-201 (1961 Addendum) is relied on. It is as follows:

"Formal requirements—Statute of frauds.— (1) Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

"(2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten [10] days after it is received. . . ."

Thus, it will be seen that under the statute, if appellee is a merchant he would be liable on the alleged contract because he did not, within ten days, give written notice that he rejected it.

The solution of the case turns on the point of whether the appellee Fallis is a "merchant" within the meaning

of the statute. Ark. Stat. Ann. § 85-2-104 (1961 Addendum) provides:

" 'Merchant' means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill. . . ."

There is not a scintilla of evidence in the record, or proffered as evidence, that appellee is a dealer in goods of the kind or by his occupation holds himself out as having knowledge or a skill peculiar to the practices or goods involved in the transaction, and no such knowledge or skill can be attributed to him.

The evidence in this case is that appellee is a farmer and nothing else. He farms about 550 acres and there is no showing that he has any other occupation. In Words and Phrases, Vol. 16, beginning at page 401 there are many cases cited giving the definition of a farmer, such as:

"A 'farmer' is one devoted to the tillage of the soil, such as an agriculturalist. *Sohner* v. *Mason,* 288 P. 2d 616, 617, 136 C. A. 2d 449. . . .

"The term 'farmer' means a man who cultivates a considerable tract of land in some one of the usual recognized ways of farming. *O'Neil* v. *Pleasant Prarie Mut. Fire Ins. Co.,* 38 N. W. 345, 346, 71 Wis. 621."

Our attention has been called to no case, and we have found none holding that the word farmer may be construed to mean merchant.

If the General Assembly had intended that in the circumstances of this case a farmer should be considered a merchant and therefore liable on an alleged contract to sell his commodities, which he did not sign, no doubt clear and explicit language would have been used in the

statute to that effect. There is nothing whatever in the statute indicating that the word "merchant" should apply to a farmer when he is acting in the capacity of a farmer, and he comes within that category when he is merely trying to sell the commodities he has raised.

Notes 1 and 2 under Ark. Stat. Ann. § 85-2-104 (1961 Addendum), (Uniform Commercial Code) defining merchant indicate that this provision of the statute is meant to apply to professional traders. In Note 1 it is stated: "This section lays the foundation of this policy defining those who are to be regarded as professionals or 'merchants' . . ." It is said in Note 2: "The term 'merchant' as defined here roots in the 'law merchant' concept of a professional in business. . . ."

The following are some definitions of the word merchant taken from Words and Phrases, Vol. 27:

"A merchant is defined to be, in one sense, a trader, by Webster, and by Burrill and Bouvier in their Law Dictionaries, and a person who is engaged in farming and stock raising is not a merchant. In re Ragsdale, 20 Fed. Cas. 175. . . .

" 'The term "merchants" includes those only who traffic, in the way of commerce, by importation or exportation, who carry on business by way of emption, vendition, barter, permutation, or exchange and who make it their living to buy and sell by a continued vivacity or frequent negotiations in the mystery of merchandise, and does not include a farmer who sells what he makes.' *Dyott* v. *Letcher,* 29 Ky. (6 J. J. Marsh) 541, 543."

In construing a statute its words must be given their plain and ordinary meaning. *Hancock* v. *State,* 97 Ark. 38, 133 S. W. 181; *Fort* v. *City of Brinkley,* 87 Ark. 400, 112 S. W. 1084.

The judgment is affirmed.

McGehee Planting Co. *v.* Jones.

5-3680 395 S. W. 2d 553

Opinion delivered November 15, 1965.

[redacted]

D. A. Clarke, for appellant.

Smith & Smith, J. F. Wallace, Clifton Bond, for appellee.

Jim Johnson, Associate Justice. This suit involves enforcement of a landlord's lien.

Mrs. George Heathcock, now deceased, leased about 100 acres of farm land to Otis Lunsford in 1958 for $1500, payable November 15, 1958. Appellant McGehee Planting Company furnished Lunsford with the money to raise cotton and soy beans. Lunsford harvested and sold his cotton crop to Bell Brothers Cotton Company (appellees) and the soy beans to appellee Dreyfus Company. Lunsford delivered the checks from these sales to appellant in partial payment of his furnishing account for 1958. The $1500 rent was not paid. Mrs. Heathcock died in November, 1958. On May 14, 1959, appellee heirs of Mrs. Heathcock filed suit against Lunsford, appellant McGehee, appellees Bell and appellee Dreyfus in Desha Circuit Court, McGehee District, to enforce the landlord's lien against crops grown by Lunsford. Writs of attachment issued, all parties answered separately. On November 1, 1960, on motion of the Heathcock heirs, the cause was transferred to Desha Chancery Court. The complaint was amended January 14, 1961, answered, amended again. Bell cross-complained for damages occasioned by the writ of attachment which forced Bell to repurchase nine bales of cotton in storage at the Federal

Warehouse and Compress Company. In time the case was heard; the court issued detailed interim findings while the matter was under submission prior to its decree of November 16, 1964. The court gave appellee heirs judgment against Lunsford for $1500; dismissed their action against appellee Bell; gave Bell judgment against appellee heirs for $295.20; denied Dreyfus' plea for damages from appellee heirs; dismissed their action against Dreyfus; granted appellee heirs judgment against McGehee if Lunsford failed to pay the $1500 judgment or any part of it.

McGehee Planting Company has appealed, urging three points for reversal. Appellee heirs cross-appealed.

Appellant first urges that the trial court erred in overruling the plea of McGehee Planting Company based upon a defect of parties plaintiff. In its findings the court stated that it assumed that the pleading which appellant considers as raising the issue of defect of parties is a pleading designated "Motion to Dismiss" filed in 1959 when the action was pending in circuit court, that the pleading was called to the attention of the chancery court for the first time in 1963 when appellant filed its brief, a year after the cause had been heard and taken under submission. (The pleading alleged in part that the court did not have jurisdiction of the cause or the defendants, and that the complaint failed to state a cause of action.) The chancellor found that the plea should be denied because, among other reasons, it came too late and the plea of defect of the parties was not properly raised.

The second point is that the trial court's findings of fact do not support a judgment against appellant. The court found that appellant has in its possession the proceeds of the crops grown on the Heathcock place by Lunsford; that the proceeds were received by appellant with knowledge of the landlord's lien (it is undisputed that appellant knew of the landlord's lien and had advanced Lunsford money in 1956 and 1957 to pay the landlord); that appellant was not a bona fide holder of

the proceeds; that courts of equity have jurisdiction to enforce the lien; appellee heirs have not waived the lien nor are they estopped to assert it; an equitable lien should be impressed on the proceeds in appellant's hands, and a judgment granted appellee heirs against appellant so that if Lunsford does not pay the $1500 or the judgment not satisfied by execution, then execution may issue against appellant for any deficiency.

Appellant's third point is in effect the same as that urged by appellee heirs on cross-appeal. Appellant argues, in the alternative, if judgment is sustained against appellant, judgment should be rendered against Bell and Dreyfus for two-thirds of the amount adjudged to be due appellee heirs. The trial court found that Bell and Dreyfus were innocent purchasers; that the attachment of the cotton was unlawful, the attachment should be dissolved, appellee heirs should be liable to Bell for such damages as Bell sustained by reason of the unlawful attachment, and both Bell and Dreyfus should be protected as innocent purchasers of the cotton and soybean crops.

"The testimony was not designated," to quote apellant's brief, "nor transcribed for the reason that the trial court's findings of fact detail the evidence in a most comprehensive manner and appellant takes no appeal therefrom."

Appeals from chancery are tried de novo on the record in this court. From the limited record in the case at bar we cannot say with confidence that the testimony fails to support the findings of the chancellor either as to the law or the facts—the testimony is not before us. It follows, therefore, that the decree must be affirmed on both direct and cross-appeal.

Opinion delivered November 15, 1965.

C. E. Blackburn, for appellant.

Bruce Bennett, Atty. General, By: *Clyde Calliotte,* Asst. Atty. General, for appellee.

FRANK HOLT, Associate Justice. Appellant was charged by information with violating the liquor laws. The jury acquitted the appellant of the charge of possessing liquor for sale in a dry county (second offense) in violation of Ark. Stat. Ann. § 48-811.1 (Repl. 1964). He was found guilty of possessing more than one gallon of

intoxicating liquor in a dry county in violation of Ark. Stat. Ann. § 48-918. The court fixed appellant's punishment at a fine of $200.00, plus costs. For reversal of the judgment upon this verdict the appellant contends that the "court erred in failing to suppress the evidence obtained in the search and seizure either under an admittedly void search warrant, or the search of an automobile without a warrant." This motion to suppress was seasonably made.

The local police secured a search warrant to search appellant's combination residence and business for contraband liquor. The appellant was present when the officers arrived at his premises. The search warrant was exhibited to him and an unsuccessful search was made. It is admitted that the search warrant was invalidly issued as being in conflict with Ark. Stat. Ann. § 22-753 (Repl. 1962). Immediately following this fruitless search of his premises, the appellant gave the officers the keys to his car in compliance with their request. The car was parked in the street in front of his premises. Appellant accompanied the officers to his parked car where he assisted in opening the trunk compartment. There a case containing 48 half-pints of illegal liquor was discovered.

It is ably urged by the state that appellant's action in surrendering the keys and participating in the opening of the trunk was a consent to the search and thus constituted a waiver of any constitutional requirements of a search warrant. In support of this contention we are cited to numerous cases including our recent decision in *Williams* v. *State,* 237 Ark. 569, 375 S. W. 2d 375. In this case the information that stolen property was stored in a trailer was volunteered by the accused following which the exact location of the trailer was "pointed out" to the officers and assistance rendered in removing the stolen articles. We cannot agree that this case or others cited are controlling under the facts in the case at bar. In our view there was no knowledgeable consent to the search of appellant's parked automobile at his premises. This exploration was merely a continuation of and con-

temporaneous with a search made under an admittedly invalid warrant. This invalidity was unknown to appellant at the time of the search. In 79 C. J. S. Searches and Seizures § 62 (b) p. 820-21 it is said: "* * * Voluntary consent requires sufficient intelligence to appreciate the act as well as the consequence of the act agreed to. Since the consititutional guaranty is not dependent on any affirmative act of the citizen the courts do not place the citizen in the position of either contesting an officer's authority by force or waiving his constitutional rights, but instead they hold that a peaceful submission to a search or seizure is not a consent or an invitation, thereto, but is merely a demonstration of regard for the supremacy of the law."

The state further contends that the search of appellant's automobile was reasonable and, therefore, not in violation of constitutional restrictions. It is true that not all searches and seizures without a warrant are prohibited. Only those searches and seizures which are unreasonable are prohibited by the Fourth Amendment to the United States Constitution and Art. 2, § 15, Arkansas Constitution. We recognize the rule that an automobile may be searched without a warrant where there is reasonable or probable cause for the belief of the officers that contents of the automobile offend against the law. *Burke* v. *State*, 235 Ark. 882, 362 S. W. 2d 695. There we said that the total circumstances "all add up to probable cause for the search." These circumstances consisted of the reputation of the defendant as a bootlegger, his vehicle moving upon the road with the appearance of being heavily loaded, and a strong odor of "wildcat whiskey in the car" thus noticeable to the senses of the officers.

In the case at bar the only evidence in support of the existence of reasonable or probable cause to search appellant's automobile was appellant's reputation as being a bootlegger, a "tip" from a filling station operator to an officer earlier in the day that appellant had purchased gasoline for his car, and that appellant's parked car looked like it was "a little heavy loaded in

the back." It cannot be said that the appearance of the automobile was any different when the officers entered and searched appellant's premises than afterwards. It is undisputed that it was just as practical to secure a search warrant for the stationary vehicle as it was for appellant's house.

As was said in *United States* v. *Roberts,* 223 F. Supp. 49: "* * * In the last analysis the question of the validity of a given search and seizure must be determined by reference to whether that particular search and seizure were reasonable or unreasonable, and that determination must be made on a case to case basis in the light of all the surrounding facts and circumstances." In the case at bar there was testimony that the car was searched by the officers because "we didn't find any whiskey inside the building." It can fairly be said from the evidence that the failure to discover contraband whiskey in appellant's dwelling was the compelling basis for extending the exploratory search to appellant's parked automobile.

We hold that it was error to refuse appellant's motion to suppress the evidence. Reversed and remanded.

HARRIS, C. J. dissents.

JOHNSON, J., concurs.

JIM JOHNSON, Associate Justice, (concurring). I agree with the majority view. This concurrence is written for the purpose of emphasizing the fact that the protection of the constitutional rights of the least deserving of us is in reality the protection of the constitutional rights of all of us.

Bitter experience through the ages has taught men desirous of freedom that there could be no freedom without the recognition that free men must possess certain inherent and indefeasible rights, amongest which is the right to be secure in their persons, houses, papers and effects.

The authors of our Bill of Rights attested to this great truth when they wrote in the fourth amendment to the Constitution of the United States:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The framers of the constitutions of all of the states have incorporated similar language with the same import in the constitutions of their respective states. The provision in our constitution is Article 2, Sec. 15, and is almost identical to that contained in the Constitution of the United States.

For a number of years this court, while frowning upon unlawful searches and seizures, effectively encouraged the practice by permitting the introduction of evidence illegally obtained in cases being tried by persons who had sworn to uphold the very constitution which specifically prohibited the practice. (For example, see *Venable* v. *State,* 156 Ark. 564, 246 S. W. 860; and *Woolem* v. *State,* 179 Ark. 1119, 20 S. W. 2d 185.)

I was proud on May 25, 1959, when the majority of this court concluded in the case of *Clubb* v. *State,* 230 Ark. 688, 326 S. W. 2d 816, that the blindfolds of impartiality should be placed back on the Goddess of Justice. There we said:

"The right to be secure against unreasonable searches is guaranteed by Art. 2, Sec. 15 of our Constitution and also, in essentially the same language, by the 4th Amendment to the United States Constitution, yet our Court has followed a rule at variance with the Federal rule regarding the admissibility of evidence obtained by search without a warrant. After careful consideration we have concluded that we will re-examine our former decisions in this connection with a view to

changing our announced rule when the question is properly presented to us again."

This conclusion was reached not in anticipation of nor to conform with some radical decision of the United States Supreme Court but because it was right, and just and proper and the only way to insure the protection of the constitutional rights of all the people to be secure in their persons, houses, papers and effects.

Following the *Clubb* decision but prior to a proper presentation of the question for our further determination, the United States Supreme Court in the case of *Mapp* v. *Ohio,* 367 U. S. 643, held that the fourth amendment to the Constitution of the United Staes through the agency of the due process clause of the fourteenth amendment governs the subject of searches and seizures in state proceedings.

Admittedly these two opinions have imposed the responsibility upon all law enforcement officers of this state to comply with the simple rules requisite of a lawful search and seizure. It should not be discouraging to our dedicated officials to require of them that they obey the very law they are sworn to uphold. Under our constitutional system the general public has the right to expect no less and demand no more.

In the case at bar, obviously appellant committed the crime with which he is charged. This would seem to place him in the category of those least deserving. This is not an unusual situation. It frequently becomes our unpopular duty and responsibility as an appellate court when error is demonstrated to reverse cases in which we are convinced beyond doubt of the guilt of the accused. If our function was merely that of an appellate jury we would quickly affirm these cases and who could say that the accused would not deserve the punishment. I am sure that this simple system prevails in some countries in the world but not in the United States. Ours is a government of laws and not of men. The least of us are clothed with every constitutional protection afforded the mighty. The precedent set today by the denial of those

rights to the guilty could well be the vehicles through which the innocent are convicted tomorrow.

For these reasons and those stated in the majority opinion, I concur.

CARLETON HARRIS, Chief Justice, (dissenting). I am unable to agree with the manner in which this case is disposed of by the majority, for it is extremely difficult for me to distinguish this case from *Williams* v. *State,* 237 Ark. 569, 375 S. W. 2d 375, mentioned by the majority in their opinion. There, one of the defendants was arrested, and the officers attempted to search his home; however, the defendant's wife would not permit the officers to enter until they had obtained a search warrant. Thereafter, the officers obtained a search warrant, but the warrant was clearly void, and of no effect, and this court so found. In the instant case, it is likewise conceded that the search warrant was void. With the search warrant in *Williams,* the officers proceeded to make a search of the house, but found nothing. Again, we have the same situation present in the instant case. Defendant's house was searched, but nothing was found. In *Williams,* this court then said:

"* * * so such search, though illegal, obtained no evidence; and thus the search of the Holeman house passes out of the case. If any evidence had been obtained in the Holeman house we would promptly hold that such was illegally obtained."

Likewise, I feel that the search warrant passes out of the picture in the present case, though the majority is holding that the search of appellant's automobile was based on the warrant, being "merely a continuation of and contemporaneous with a search made under an admittedly invalid warrant."

Again, referring back to *Williams,* the state's evidence disclosed that the defendants were arrested and charged with burglary and grand larceny. Some of the defendants told the officers that stolen property was stored in a trailer in Faulkner County. Two accom-

panied the officers, and pointed out the house trailer; one of the defendants unlocked the door to the trailer, and nearly all of the stolen property was found therein. On trial, appellants moved to suppress the evidence obtained from the search, contending that the search was unlawful, and in violation of their constitutional rights. This court said:

"* * * Were the appellant's constitutional protections against unreasonable search and seizure violated by the officers thus obtaining the articles from the trailer and detailing the evidence concerning same? Here, there was evidence, not only of waiver and consent, but also of active participation in the search; so there is no merit to the contention of the defendants that their rights against unreasonable search and seizure were violated insofar as concerns the articles in the trailer. In 79 C. J. S. p. 816 *et seq.*, 'Searches and Seizures' § 62, there is a discussion of waiver and consent; and the holdings from the various jurisdictions—including the United States Supreme Court—are summarized:

"The constitutional immunity from unreasonable searches and seizures may be waived, as by a voluntary invitation or consent to a search or seizure. Thus individuals may waive their immunity to illegal searches of their persons, possessions, or dwelling houses, as well as to the illegal search of their premises, places of business, and searches and seizures of books, papers, or records. Hence, one who has thus consented to a search cannot thereafter complain of irregularities in the search warrant, or question its sufficiency or the manner of its issuance, since an invitation or consent to the search dispenses with the necessity of a search warrant altogether."

It is thus clearly established that this court, as well as the Federal courts, has said that consent to a search dispenses with the necessity of a search warrant.

Let it be remembered that the Constitution does not protect from all searches (without a warrant), but only those that can be considered unreasonable. There are

then only two simple questions in this case. First, did appellant consent to the search? Second, was the search reasonable, or was there a proper cause to make same? If either of these questions can be answered "Yes"—then, in my view, this case should be affirmed. Actually, I think both questions can be answered in the affirmative. Here, Melvin Mann, the appellant, *unlocked the trunk of the car himself,* and there is no evidence that he objected, in any manner, to the search. As in *Williams,* the defendant not only consented, but even participated in the search. Likewise, I am of the opinion that the evidence reflects the search to be reasonable, and based upon probable cause, *i.e.,* the officers had sufficient reason to believe that the car contained whiskey.

Let us first remember that, clearly, appellant had the reputation of being a bootlegger. This is even competent evidence in the trial of a defendant for engaging in the illicit trade of intoxicating liquors. Ark. Stat. Ann. § 48-940 (Repl. 1964) provides that the general reputation of a defendant for moonshining or bootlegging shall be admissible in evidence in prosecuting violations of the liquor control act. Chief Bolin testified that he had been informed that appellant was in possession of illegal whiskey, and also testified that he had information that Mann was bringing a load of whiskey into Cleburne County. It develops that Bolin received this information from other officers, and these officers, in turn, received information from a filling station operator, which information, the majority state, only amounted to the fact that Mann had filled his automobile with gasoline, and had gone out of town. I do not know the language used by the filling station operator in giving the officers the tip, but it is certainly definite that, whatever the language used, the officers gained the impression that Mann had left town to obtain a load of whiskey.[1] The information was explicit enough that they, shortly thereafter, reported to the chief that they had learned

[1] One thing is obvious—irrespective of how he expressed it to the officers, the information given to the police by the filling station operator was accurate, as evidenced by the fact that forty-eight half-pints of "Medley Brothers" whiskey was found in the trunk.

that appellant was bringing a load of whiskey into the county. The police chief testified that Mann's automobile seemed to be a little "heavily loaded" in the back, and this testimony was corroborated by Patrolman Beach, who testified, "Well, it was sitting down a little bit low, like a little extra weight was in the trunk. * * *" In *Burke* v. *State,* 235 Ark. 882, 362 S. W. 2d 695, cited by the majority, this court held that an automobile was properly searched for illegal whiskey because the officers had reasonable or probable cause to suspect that the car contained same. There, the defendant bore the reputation of a bootlegger; the vehicle had the appearance of being heavily loaded, and a strong odor of "wild-cat" whiskey seemed to come from the car. Thus, we have only the additional circumstance in the *Burke* case of the smell of whiskey, and I cannot agree that that circumstance made the *Burke* search legal, while the search in the instance case was illegal. This is a very fine distinction—too fine, I think.

The Heber Springs officers testified that the reason they did not search the automobile first was because they thought appellant had had sufficient time to take the whiskey into the house, and they apparently paid little attention to the car until after ascertaining that no whiskey was in the home.

I commend my brethren of the court for being zealous in protecting one's constitutional rights, but I feel that they have gone further, in suppressing this evidence, than the court has gone in prior cases. Under recent United States Supreme Court decisions, the task of the officer in obtaining competent evidence in divers types of prosecutions has been made much more difficult; restrictions have been placed upon him; evidence that was once held admissible is now held inadmissible, and I am fearful that many of our police officers are becoming discouraged.

I think that I, too, believe in protecting one's constitutional rights, but I am just as interested in protecting the rights of the general public. Here, we have a

defendant, who, beyond question, was violating the provisions of the Arkansas Alcoholic Control Act. Here was a man who, likewise, had previously violated the provisions of this act. Here was irrefutable evidence—(forty-eight half-pints of whiskey)—that appellant held no regard for our statutory requirements. Yet, with the suppression of this evidence, appellant goes "scot free" for, of course, the state is without evidence, if this testimony of the officers, and the forty-eight half-pints, cannot be introduced.

I would affirm the conviction.

WELLS *v.* HILL.

5-3643 396 S. W. 2d 946

Opinion delivered November 15, 1965.

[Rehearing denied January 10, 1966.]

Bruce Bennett, Attorney General and *Russell & Hurley,* for appellant.

Warner, Warner, Ragon & Smith, for appellee.

FRANK HOLT, Associate Justice. This is an action to enforce liability on certain securities posted in lieu of a corporate surety bond.

On December 21, 1960 the Securities Commissioner of the State of Arkansas duly registered Trustworthy Investment Association, Inc. as a broker-dealer and Aubrey L. Andrews as one of its agents. This authorization expired December 21, 1961 and was not renewed by the Securities Commissioner.

On June 19, 1963 appellee was awarded a default judgment against Aubrey L. Andrews based upon his wrongful conduct in the sale of certain stock. Neither the Securities Commissioner nor Trustworthy was made a party to the action against Andrews.

When this default judgment was not paid by Andrews the present action, a writ of garnishment, was instituted by appellee on May 5, 1964 against the appellant Securities Commissioner alleging that he had in his possession certain securities deposited by appellant Wells on behalf of Trustworthy and Andrews in lieu of a corporate surety bond in conformity with Act 254 of 1959. The commissioner resisted the garnishment.

Appellant Wells filed a petition to intervene in the garnishment proceeding alleging ownership of the securities that had been posted with the Securities Commissioner in lieu of bond. Wells also alleged that he had made repeated demands upon the commissioner to release his securities to him and that the bond, in lieu of which the securities were posted, is no longer in effect nor subject to the present garnishment action. The petition to intervene was granted and appellee filed a response controverting the allegations. Upon a hearing the chancery court overruled a motion, based upon a two-year statute of limitation, to quash the garnishment. The chancery court dismissed the intervention holding that the judgment of appellee was a lien upon appellant Wells' securities in the hands of the appellant commissioner.

For reversal appellants rely, *inter alia,* upon the two-year statute of limitation as provided in § 4(e) of Act 254 of 1959. This section requires that broker-dealers and agents post corporate surety bonds or in lieu thereof appropriate cash or securities. It further provides that:

"* * * Every bond shall provide that no suit may be maintained to enforce any liability on the bond unless brought within two (2) years after the sale or other act, upon which it is based."

A civil suit to recover the purchase price of the security or for damages for wrongful conduct, also, is limited to two (2) years after the contract of sale. Ark. Stat. Ann. § 67-1256 (Supp. 1963); *Central Investments, Inc.* v. *Polk,* 239 Ark. 165, 388 S. W. 2d 381. Thus, the statute plainly requires that any action *on the bond* must be brought within two years from the date of the sale or act upon which the suit is based.

The present record does not disclose the date of the sale transaction which resulted in the default judgment. However, the authority of Trustworthy to operate as a broker-dealer, including its authorized agents, ceased to exist on December 21, 1961. According to the commissioner, Andrews' license as an agent would have expired on March 1, 1962 if his authorization as an agent of Trustworthy had not ceased on December 21, 1961. Whether we consider either date as the cessation of Andrews' authority as a licensed agent, it is obvious that the two-year statute of limitation upon the bond is a bar to this action. This is true because it was not until May 5, 1964, the issuance of garnishment, that any action was brought to enforce liability upon the securities posted in lieu of the required bond. The legislature retained this period of limitation in a 1961 amendment to the Securities Act. Act 248 of 1961 [Ark. Stat. Ann. § 67-1238 (Supp. 1963)]. We see no valid distinction between a corporate surety bond and securities posted in lieu thereof in the application of this statute of limitation.

Reversed and remanded with directions to enter a decree not inconsistent with this opinion.

Opinion on denial of rehearing delivered November 15, 1965.

[redacted]

PAUL WARD, Associate Justice. Appellant's petition on rehearing raises two points which merit further comment.

It is again argued that we erred in not applying the law of Texas in construing the policy sued on. Conceding that in many cases this might be true, we do not think it is true under the facts in this case because it appears Mrs. Estes had good reason to think no claim would be made by appellee. Therefore, it became a jury question as to whether or not Mrs. Estes acted as an ordinary prudent person in failing to give prompt notice. According to Appleman (cited in the original opinion) this view has been approved by decisions in more than a dozen states, and (so far as we can ascertain) is has not been disapproved by any Texas decision.

Appellant renews its contention that we erred in approving the judgment assessing the 12% statutory penalty against it and allowing appellee an attorney's fee. This contention is based on the fact that appellee (Syble Stobaugh) was not a "holder" of the policy as provided in Ark. Stat. Ann. § 66-3238 (Supp. 1963). To support that contention appellant relies on the case of *State Farm Auto Insurance Company* v. *Pennington,* 215 F. Supp. 784. That case however refutes rather than

sustains appellant's position. In the cited case "Summerville" (the injured party) is the counterpart of appellee (the injured party) in the instant case, yet the Court there granted a judgment in favor of Summerville for penalty and attorney's fee just as is here granted to appellee—all in accord (in both instances) with the provisions of the above mentioned statute.

Original opinion P. 746.

SMITH *v.* U. S. F. & G. Co.

5-3661 395 S. W. 2d 749

Opinion delivered November 22, 1965.

[redacted]

Brown, Compton & Prewett, for appellant.

Shackleford and Shackleford, for appellee.

CARLETON HARRIS, Chief Justice. The issue in this case is whether Wayne Smith, appellant herein, is entitled to statutory penalty and attorneys' fees, after recovering $2,462.10 from appellee, United States Fidelity and Guaranty Company.

Appellant is a building contractor, and, during the construction of a gymnasium for the Smackover School District, carried a policy, together with endorsement, with appellee company, which insured him against certain losses arising from said construction. While the building was in the process of being constructed, a roofing joist, or joists, fell, which caused extensive damage to the building, and resulting loss to appellant. Suit was instituted by Smith, wherein he set out that he had incurred loss in the total amount of $3,229.97, as a result of the afore mentioned casualty, and had made demand upon the company for the payment to him of this amount, less $500.00 deductible, as provided by the terms of the policy It was further asserted that the company had refused payment. The prayer asked for judgment in the amount of $2,729.97, together with interest, statutory penalty and attorneys' fee. Appellee denied that Smith's loss was covered under the policy and endorsement, and

denied that appellant was entitled to recover in any amount. On trial, the jury returned a verdict in the amount of $2,462.10.[1] Appellant filed his motion for attorneys' fee and penalty, alleging:

"That from the time of the loss to the time of the claim, to the time of the filing of the suit and until the trial of this action the defendant refused to pay the plaintiff solely upon the basis of the defendant's denial of coverage under the provisions of the exclusions contained in said builder's risk special extended coverage endorsement. There was no denial of payment by the defendant based upon the amount of loss claimed by the plaintiff and the defendant made it known to the plaintiff that it would not pay any loss under its position of no coverage."

The company responded, asserting that Smith had continually made a demand for payment in an amount which was more than he was entitled to recover, and he had never amended the amount that he was claiming as damages; the company denied that appellant was entitled to a recovery of statutory penalty and attorneys' fees. The trial judge denied the motion, and appellant has appealed that portion of the judgment denying the recovery of these items.

Appellant commences his brief by stating that he is aware of our long line of cases in which we have held that before a plaintiff is entitled to recover the 12% statutory penalty and reasonable attorneys' fees, he must first recover from the insurance company the amount for which he sued. See *Kansas City Fire & Marine Ins. Co.* v. *Baker,* 229 Ark. 130, 313 S. W. 2d 846, and numerous cases cited therein. However, appellant argues that the rule should not be applicable in every case, and points out that the statute on this subject does not require a recovery of the exact amount sued for before the penalty and attorneys' fee attach. Our original statute was passed in March, 1905, and has been amended

[1] It is obvious, in this particular instance, that the jury disallowed the profit sought by appellant, which amounted to $267.86.

four times (Ark. Stat. Ann. § 66-514 [Repl. 1957]), the last amendment being added by the General Assembly of 1955.[2] The statute, as amended, was re-enacted, almost word for word, by the 1959 General Assembly, and is presently found as a part of the law of this state under the chapter heading, "Insurance Contracts."[3] Appellant is correct in his assertion that there is no language which sets out that the exact amount sought must be recovered. However, this court has always held, and we think with logic, that one is not entitled to recover (penalty and attorneys' fee) if he seeks, or makes demand for, more than he recovers. This holding goes as far back as the year 1909, when in *Pacific Mut. Life Ins. Co.* v. *Carter*, 92 Ark. 378, 123 S. W. 384, we said:

"But the act makes the company liable for failure to pay the loss 'after demand made therefor.' The statute thus contemplates that there shall be a demand. A recovery for penalty and attorney's fee cannot be had when complaint makes demand for more than he is entitled to recover. It could never have been the purpose of the Legislature to make the insurance companies pay a penalty and attorney's fee for contesting a claim that they did not owe. Such an act would be unconstitutional. The companies have the right to resist the payment of a demand that they do not owe. When the plaintiff demands an excessive amount, he is in the wrong. The penalty and attorney's fee is for the benefit of the one who is only seeking to recover after demand what is due him under the terms of his contract, and who is compelled to resort to the courts to obtain it."

As previously stated, this holding has been reiterated dozens and dozens of times. Appellant contends that this rule should not apply when the defendant insurance company denies all liability, and he is of the view that the rule should only apply when the company has admitted liability, but is differing with the claimant only as to

[2] The amendments that were added over the years did not relate to the question here involved.

[3] The section dealing with penalty and attorneys' fee is Ark. Stat. Ann. § 66-3238 [Supp. 1963].

the amount to be recovered. He argues that our ruling "results in an insured backing away from various items of his claim in order not to sacrifice his statutory right to be made whole by the assessment of the penalty and the attorney's fee." As pointed out by appellee, this argument by appellant works both ways, for, if the rule were changed in the manner urged by appellant, the insurer might well also back away from a defense of non-coverage, exclusion, or any other ground of defense, except a contention that the amount claimed is excessive. Further, appellant argues that the statute should be governed by the facts and circumstances of each particular case, and the allowance of the penalty and attorneys' fees should be left to the discretion of the trial court. Of course, this could mean an allowance of attorneys' fees and penalty varying from a 50% recovery (or perhaps any recovery) to a 99% recovery, depending somewhat on the views of the particular court before which the case was tried. Such procedure, it would seem, might well lead to confusion, and certainly there would be no uniformity of action throughout the state.

Actually, without knowing exact percentages, we think it is very likely that most disputes that occasion litigation between a claimant and his insurance company are based upon a defense that no coverage is afforded under the particular circumstances at issue. But we see no need to enter into a detailed discussion of the merits, or demerits, of the rule at issue, for we think that, if a change is to be made, it should be made by the General Assembly. As earlier pointed out, this interpretation of the statute was rendered nigh on to sixty years ago, and the General Assembly has had repeated opportunities to change the law during that period of time. In fact, as herein mentioned, four amendments have been added to this section, but the Legislature has not seen fit to make any change relating to the question presented in this litigation. To the contrary, the General Assembly re-enacted this exact statute (as amended) in 1959.

We decline to overrule, or modify, the numerous cases which hold that a plaintiff must recover the amount

demanded before he is entitled to penalty and attorneys' fee.

Affirmed.

PURTLE *v.* WILCOX

5-3673 395 S. W. 2d 758

Opinion delivered November 22, 1965.

Terral, Rawlings & Matthews and *John I. Purtle,* for appellant.

Rolland A. Bradley, for appellee.

CARLETON HARRIS, Chief Justice. The question in this litigation is whether the complaint in question, together with amendments, is sufficient to state a cause of action as against a demurrer.

Billy J. Purtle, appellant herein, instituted suit against Kenneth Wilcox, appellee herein, and Mobil Oil Company, seeking a judgment in the sum of $4,000.00 for his interest in certain property, and the further sum of $1,000.00 because of alleged damages suffered. The complaint sets out that appellant and the Mobil Oil Com-

pany, on September 12, 1962, executed a written contract, wherein appellant became consignee for consignor, Mobil Oil Company, to handle their products in and around Conway, Arkansas. A copy of the contract was attached to the complaint as Exhibit "A", and made a part thereof.[1] The complaint further recites that the relationship of consignee and consignor existed until September 21, 1964, "at which time consignor attempted to end said contract by checking plaintiff out and entering into another contract whereby defendant Kenneth Wilcox was purportedly made the successor consignee." The suit is largely predicated on Section 16 of the contract, which reads as follows:

"Consignee shall not sell, grant options in respect of, nor, except in the ordinary course of conduct of Consignee's business, lease or otherwise dispose of any properties used in connection therewith without giving Consignor a sixty (60) day option within which to purchase or otherwise acquire the same on same terms and conditions, as those on which the Consignee is willing to make such disposition to any other party. Consignee shall give Consignor prompt written notice of said terms and conditions and shall submit a full and accurate copy of any bona fide offer received by Consignee, sworn to by Consignee as being a true copy of such offer. If Consignor exercises its option, it shall do so in writing sixty (60) days after receipt of such notice and the closing shall take place at Consignor's office at the above address thirty (30) days after the exercise of the option, whereupon Consignee shall, in the case of a sale, deliver to Consignor a full covenant and warranty deed, assignment or bill of sale as the case may be, conveying a good, marketable and clear title subject only to the liens and encumbrances which are specifically excepted in the proposed terms and conditions or, in the case of any other disposition, deliver to Consignor an instrument or instruments in form and substance satisfactory to Consignor

[1] In equity, written instruments filed as exhibits to the pleadings are considered a part thereof, and control the averments. *Arkansas Power & Light Company* v. *Kerr*, 204 Ark. 238, 161 S. W. 2d 403.

and sufficient to transfer the interest proposed to be disposed of."

Appellant asserts:

"That in accordance with item #16 'options' in said contract, the plaintiff conveyed to the defendant, Mobil Oil Company, a bona fide offer from E. D. Houston to purchase plaintiff's interest in said business. That said provision gave defendant, Mobil Oil Company, an option to purchase or otherwise acquire the plaintiff's interest on the same terms and conditions as the offer submitted to them by consignee. That consignor refused to accept E. D. Houston as consignee and instead contracted with Kenneth Wilcox to serve as their consignee.

"That the action of consignor amounts to an exercise of the option, and they are bound to pay for said interest the same amount offered by E. D. Houston. That the consignee has turned over all his interest to consignor and Kenneth Wilcox and is willing to execute a bill of sale or deed or other instrument to either or both of the defendants upon their tender of the sum of $4,000.00, but that the defendants have failed and refused to perform their part of the contract.

"That the action of the consignor in refusing to accept E. D. Houston as consignee was arbitrary, capricious and done with the intent to deprive the plaintiff of a fair and reasonable amount of money for his interest in said business. That the said E. D. Houston was a fit and proper person to act as consignee."

Subsequently, the complaint was amended to show the Mobil Oil Company as a division of Socony-Mobil Oil Company, a New York corporation. Thereafter, Wilcox demurred to the complaint, and Purtle amended, alleging:

"That the defendant, Kenneth Wilcox, has conspired with the defendant, Mobil Oil Company, in an attempt to defraud the plaintiff out of his business and property.

"That the defendants are presently jointly engaged in acts depriving the plaintiff of benefits due him under

the contract attached to the original Complaint, and that unless they are enjoined from such acts, the plaintiff will be repeatedly damaged, and in order to avoid a multiplicity of suits, they should be enjoined from so acting."

Both Mobil and Wilcox then filed separate demurrers to the complaint as amended, and thereafter, Purtle filed a third amendment to his complaint. In this amendment, he alleged, *inter alia,* that, after becoming consignee:

"* * * he purchased a 1959 Dodge, two-ton chassis as a replacement for the 1949 Ford, and that the difference in value between the two is $1,000.00; that he transferred the tank from the old truck to the replacement at a cost of $300.00; that he improved four service sites at a cost of $1,450.00 and that the defendants will receive the benefit of these improvements in the future; and that he purchased two air compressors at a cost of $350.00, both of which he still has on hand, but for which he has no use for.

"That he contracted and added one service station and several farm accounts to the consignor's customers; and that he was out for labor and materials and other expenses the sum of $1,000.00 for these items.

"That he greatly increased the volume of business being done by Consignee and openly solicited and recommended their products to the public.

"That the defendants have acted together to unlawfully deprive the plaintiff of his properties under the contract and leave him with personal property on his hands which has little value to him as they have put him out of the oil and gas business. * * *

"That it is impossible for the plaintiff to recover and sell or use the expenses, equipment, and properties for installing underground equipment at service locations. That the defendants have possession and use of these properties and refuse to surrender possession or pay for same."

Again, separate demurrers were filed by both the company and appellee. On January 4, 1965, the court sustained the demurrer filed to the complaint, as amended, by Wilcox, finding that a cause of action had not been stated against appellee. Purtle's complaint, as amended, against Wilcox was thereby dismissed.[2] This appeal is from the decree so entered, Purtle contending that his allegations state a cause of action.

Appellant apparently construes section 16 to mean that if he (Purtle) obtains an offer from a third person to purchase his interest in the business, this offer must be communicated to Mobil Oil Company, which would then be required to purchase appellant's interest under the same terms and conditions as Purtle would receive under the offer from the third party. Also, Purtle is apparently asserting that he has a right to name his successor consignee. Here, he alleges that an offer had been received from one E. D. Houston to purchase his interest, and that Mobil "refused to accept E. D. Houston as consignee and instead contracted with Kenneth Wilcox to serve as their consignee.

"That the action of consignor amounts to an exercise of the option, and they are bound to pay for said interest the same amount offered by E. D. Houston."

Appellant has erroneously construed the contract. As we see it, Section 16 is a section designed solely for the benefit of the oil company, and permits it *at its option* to purchase, or otherwise acquire, under the same terms (as offered by the third party) properties used in connection with the business. The company is not required to meet any offer made, but has the privilege of doing so, if it desires to exercise the option. We find no language at all that could be construed as giving appellant the right to name his successor consignee.

Section 19 provides that either party has the right to terminate the contract at any time. Accordingly, appel-

[2] Mobil Oil Company is not involved in this appeal, but the record reflects that it subsequently filed an answer, and the case proceeded to trial. The court found that there was a mutual termination of the contract after negotiations for termination were initiated by appellant.

lee, under the facts alleged in the complaint, as amended, could not be held responsible for "putting plaintiff out of business."

In addition, the allegations are not legally sufficient to maintain an action. As stated in *Ocala Loan Company* v. *Smith* (Florida), 155 S. 2d 711:

"The complaint must be so framed as to allege the wrong complained of with sufficient certainty to clearly apprise the court and the defendant of the nature of the claim asserted. Mere legal conclusions are fatally defective unless substantiated by sufficient allegations of ultimate fact; and every fact essential to the cause of action must be pleaded distinctly, definitely, and clearly. * * *

"The requirements governing fraud apply to averments charging conspiracy."

In *Bryant* v. *Motors Ins. Corp.* (Ga.), 134 S. E. 2d 905, the court held that, in an action against an automobile dealer based on fraudulent misrepresentation regarding insurance, against insurer on insurance contract, and against finance company based on conspiracy, the finance company's general demurrer was properly sustained for failure to specifically allege facts constituting the fraud and how the finance company was involved therein. Numerous other cases from various jurisdictions are to the same effect. Here, appellant asserts that appellee had conspired with the oil company in an attempt to defraud Purtle out of his business and property, but no specific acts, or details, of the alleged conspiracy are set forth, and the allegation of fraud is a mere legal conclusion, insufficient to support the complaint against a demurrer.

For the reasons enumerated, the decree is affirmed.

It is so ordered.

URBAN RENEWAL AGENCY OF THE CITY OF NORTH LITTLE ROCK *v.* SHAW.

5-3642 395 S. W. 2d 741

Opinion delivered November 22, 1965.

[redacted]

Byron R. Bogard, for appellant.

Fred Newth, Martin, Dodds & Kidd, for appellee.

ED. F. MCFADDIN, Associate Justice. This is an eminent domain proceeding. The appellant, acting under Ark. Stat. Ann. § 19-3056 *et seq.* (Repl. 1956), took the property of the appellees. The Chancery Court awarded the appellees $57,150.00 for the property taken and the appellant prosecutes this appeal urging the two points which we will consider in the order listed:

"1. The award of $57,150.00 as the reasonable market value of the property taken as of March 4, 1964, is excessive and the award is against the preponderance of the evidence.

"2 It was error for the Court to inspect the property without the knowledge and consent of the parties to the suit, at a time when the property had been materially changed by improvement of the property."

I. *Excessive Award.* The appellant filed action in the Pulaski *Circuit* Court on April 29, 1963, seeking to acquire the lands of the appellees, made a deposit of $10,100.00, and sought immediate entry on the lands.

However, before entry, appellant withdrew the deposit with the permission of the Court and obtained cancellation of the right of immediate entry. When the appellees (landowners) by proper proceedings denied any necessity for the appellant to take the lands, the Circuit Court transferred the proceedings to the *Chancery* Court; and in that forum the cause proceeded to trial. On March 4, 1964 the appellant renewed its tendered deposit of $10,100.00 and obtained an order of the Chancery Court permitting immediate entry on the land. Thus the question of the value of the land is the value on March 4, 1964, the day it was actually taken. On that issue the cause was tried on evidence *ore tenus* in the Chancery Court and resulted in a decree finding the value to be $57,150.00.

The appellant claims the said amount is excessive; but we cannot say that the finding of the Chancery Court is against the preponderance of the evidence. Louis C. Cohen, whose qualifications as a real estate appraiser were admitted by the appellant, testified that he had examined the property prior to March 4, 1964, and again a few days before the trial on November 5, 1964. He testified:

"Q. What would the total value of the lots be?

"A. $61,600.00. . . . .

"Q. Mr. Cohen, is this value based on the highest and best use to which the property may be put?

"A. Yes, sir.

"Q. And in your opinion what is the highest and best use for the property?

"A. Either as a medium high rise apartment or medium high density and also small office building, either use.

"Q. Mr. Cohen, this property is just a short distance West of Main Street there, is it not?

"A. Yes, sir."

Bill Hood, whose qualifications as a real estate appraiser were likewise admitted by the appellant, testified that the value of the property on March 4, 1964 was $61,250.00. As to the use of the property, he testified:

"Q. In your opinion what is the highest and best use to which these properties can be put. What was it as of March 4, 1964?

"A. For office, moderately high density apartment or parking. . . . ."

Raymond E. Block, Sr., whose qualifications as a real estate appraiser were likewise admitted by the appellant, testified that he was familiar with this property and that as of March 4, 1964 the value of the property was $75,000.00 as a maximum and $56,250.00 as a minimum. This occurred:

"Q. In your opinion what is the highest and best use for this property?

"A. It would be ideal for offices and light commercial property."

While the appellant by cross examination endeavored to weaken the testimony of the said three real estate appraisers, and produced competent appraisers who gave much smaller values, nevertheless we cannot say that the value as fixed by the Chancery Court is contrary to the preponderance of the evidence.

II. *Inspection By The Chancellor.* The witnesses testified *ore tenus* on November 5, 1964 and the cause was taken under submission. The decree was rendered and entered on January 4, 1965, and in the first paragraph of the decree there is this language: "And this cause is submitted to the Court . . . upon . . . testimony taken ore tenus at the bar of the Court. From the examination of such evidence *and inspection of the property* and other matters and things before the Court, the Court doth find . . ." (emphasis our own). Now on appeal—and for the first time—the appellant says:

"It was error for the Court to inspect the property without the knowledge and consent of the parties to the suit, at a time when the property had been materially changed by improvement of the property."

The appellant approved the decree as to form on January 4, 1965. No objection was made to the language of the decree as heretofore quoted, and no record was made as to when and under what circumstances the Chancellor made any inspection of the property. For all that the record shows the use of the words "inspection of the property" may have been copied from some other form. There is no record whatsoever on this point except the bare words in the decree, and no objection was made in the Chancery Court to those words or to any inspection made by the Court. Under some circumstances it is proper for the Court and/or the Chancellor to inspect the property. *Mitcham* v. *Temple,* 215 Ark. 850, 223 S. W. 2d 817; and *Fayetteville* v. *Stone,* 194 Ark. 218, 106 S. W. 2d 158. For aught shown to the contrary the inspection by the Chancellor in the case at bar may have been under proper circumstances.

We cannot consider a point like this one urged here, and not urged below. The case of *Springfield* v. *Housing Authority of Little Rock,* 227 Ark. 1023, 304 S. W. 2d 938, is directly in point. There we said:

"Appellants also argue that the trial court erred in viewing the properties in question. However, no objection to the court's action in this respect was made at the trial and the question cannot be raised for the first time on appeal. *Koelsch* v. *Arkansas State Highway Commission,* 223 Ark. 529, 267 S. W. 2d 4."

Finding no error, the decree is affirmed.

RHODEN *v.* STEPHENS.
RHODEN *v.* STATE.

5162 and 5163 395 S. W. 2d 754

Opinion delivered November 22, 1965.

Harkness & Friedman, Texarkana, Texas, *Arnold & Arnold,* for appellant.

Bruce Bennett, Atty. General, By: *Joe Bell,* Asst. Atty. General, for appellee.

GEORGE ROSE SMITH, J. David Rhoden was convicted of murder and sentenced to life imprisonment. After the trial his attorneys, appointed by the court, applied for a new trial on the ground that an ineligible juror had served in the case. The court denied the application. By appeal and certiorari the matter has been brought to us for review. Opposing counsel have agreed that Rhoden's appeal on the merits, Case No. 5118, *Rhoden* v. *State,* will be deferred until the decision in the case at bar.

Both Rhoden and Clint Otwell were involved in the homicide. Otwell was tried first, in December of 1963.

At that trial Walter E. McDaniel was one of the veniremen. On voir dire he stated that he lived close to Otwell and that he had heard the case discussed by persons who purported to know the facts of their own knowledge. The record in the Otwell case then continued as follows:

"By the Court: 'Has that made any impression on your thinking in the matter, without stating what that impression is?'

"By Mr. McDaniel: 'Yes, it has.'

"By the Court: 'You may be seated, Mr. McDaniel.'

"(Excused by the Court.)"

Rhoden's trial began three months later, in March of 1964. At the request of Rhoden's counsel the court inquired of the jury panel: "Is there any juror who was excused for cause . . . in the Otwell case—for cause, now. The Court would have excused you." McDaniel made no response to this inquiry and served as a juror in Rhoden's trial.

The trial court, in denying Rhoden's application for a new trial, held, first, that McDaniel was not excused for cause in the Otwell case; second, that the Otwell and Rhoden cases were not identical; and, third, that counsel had not been diligent in seeking to discover McDaniel's disqualification within the time allowed for filing a motion for a new trial.

We are unable to agree with the court's reasoning. A juror who has formed an opinion by talking with witnesses who purport to know the facts is *prima facie* disqualified for cause. *Collins* v. *State,* 102 Ark. 180, 143 S. W. 1075 (1912). McDaniel was, by his own admission, subject to a challenge for cause in the Otwell case.

In holding that McDaniel was not in fact excused for cause in the Otwell case the trial judge stated that his telling McDaniel to be seated was, under the practice in his court, a reservation of the question of the juror's competency, so that McDaniel might have been questioned in more detail if it developed that his services might be

needed. The trouble is, there is nothing to indicate that McDaniel was aware of that practice. As far as McDaniel might be expected to know, he had been excused for cause. That is, as a result of his knowledge about the case he was not submitted to counsel as a qualified juror, and he did not in fact serve in the case.

We think it immaterial that the Rhoden case and the Otwell case were not *identical.* Apparently only on homicide was involved. That homicide gave rise to similar charges against Otwell and Rhoden. Upon the record before us we cannot say that a prospective juror who had formed an opinion about Otwell's guilt would necessarily be free from bias with respect to Rhoden. The juror McDaniel did not testify at the hearing upon the application for a new trial in Rhoden's case. As far as the proof now before us extends, McDaniel was *prima facie* disqualified in the present case. The State has not rebutted that *prima facie* showing by proof that McDaniel was really unbiased.

On the point of diligence we have frequently held that a party cannot complain of a juror's possible prejudice if the complaining party failed to question the juror about the matter on voir dire. *Missouri Pac. R. R.* v. *Fikes,* 211 Ark. 256, 200 S. W. 2d 97 (1947); *Brown* v. *St., L., I. M. & S. Ry.,* 52 Ark. 120, 12 S. W. 203 (1889). Conversely, the party does not waive the juror's disqualification if the party raises the point on voir dire and is misled by the juror's statements or by his silence. *Anderson* v. *State,* 200 Ark. 516, 139 S. W. 2d 396 (1940). In that case we said: "Nothing can destroy the integrity of juries more effectively than to allow prejudiced jurors to sit in a case." We cannot be certain that McDaniel was free from prejudice in the case at hand. In this situation Rhoden is entitled to a new trial.

The judgment in these two cases is reversed and the matter remanded for a new trial. Rhoden's appeal on the merits, Case No. 5118, now becomes moot and will therefore be dismissed.

ARK. LA. GAS CO. *v.* STRACENER.

5-3669 395 S. W. 2d 745

Opinion delivered November 22, 1965.

Howell, Price & Worsham and *Hall, Purcell & Boswell,* for appellant.

Wright, Lindsey & Jennings, for appellee.

GEORGE ROSE SMITH, J. This is an action for personal injuries suffered by Bill and Marjorie Stracener as a result of a gas explosion that occurred in their home in Benton on Saturday, June 15, 1963. There were originally four defendants: (1) Dale Robbins, the plaintiffs' landlord; (2) Cecil McClendon, doing business as McClendon Furniture & Hardware Co., who installed a kitchen stove and turned on the gas about two hours before the explosion; (3) Arkansas Louisiana Gas Company, a public utility; and (4) Frank Shanks, the gas company's local manager at Benton. The jury returned

a verdict against the gas company only, awarding $9,000 to Stracener and $30,000 to his wife. The gas company and its manager Shanks have appealed. They argue twenty-one points for reversal, but we find it necessary to discuss only five.

I. It is first insisted that the gas company and its manager were entitled to a directed verdict in their favor. We are of the opinion that a question of fact was presented upon this point. The facts must be set forth in some detail in our discussion of this issue.

Dale Robbins, the plaintiffs' landlord, formerly occupied the house himself. A year before the explosion he had a gas clothes dryer installed in the kitchen. The plumber, in making this installation, tapped the gas line by inserting a T-joint beneath the kitchen floor in the gas pipe that served the kitchen stove. The plumber drilled a hole in the floor under the dryer and ran a copper pipe from the dryer through the floor and over to the T-joint under the house.

On June 4, eleven days before the explosion, Robbins moved to another house he owned in Benton. He telephoned the gas company to ask that the gas be shut off at the house he was vacating and to say that he would call when wanted the gas to be turned on in his new home. By mistake the clerk who received his requests made the notation, "will call," on the disconnection order, so that the gas company did not in fact turn off the gas. Robbins employed W. L. Davis to move his furniture. Davis shut off the gas with a wrench and removed the kitchen stove and the dryer, leaving the two uncapped gas pipes, called risers, protruding through the kitchen floor.

A few days later Robbins rented the house to Mr. and Mrs. Stracener, the plaintiffs. In making the lease Robbins agreed to replace the linoleum floor covering in the kitchen. Robbins instructed the linoleum dealer who laid the new floor covering to cap the gas pipe that had served the dryer. However, on Saturday morning, the day of the explosion, the workmen laying the linoleum

discovered that the riser for the dryer had been removed. They assumed that the connection for this pipe had been capped underneath the house, and upon that assumption, they put sheet metal over the hole in the floor where the dryer had been and covered it with linoleum. Their assumption was wrong. Some one, without the knowledge of any of the parties to the case, had removed the copper pipe serving the dryer but had neglected to cap the threaded opening in the T-joint under the floor.

The Straceners moved into the house at about ten or eleven o'clock on Saturday morning. At about noon Stracener called the gas company, whose office was closed for the week end, to request that the gas be turned on. Stracener succeeded in reaching the manager, Shanks, who said that he could turn on the gas if there were no uncapped pipes. Stracener assured him that there were none.

Shanks arrived at the house at about two o'clock in the afternoon. In the meantime Stracener had discovered the uncapped riser that was to serve the kitchen stove. Stracener explained this to Shanks, who accordingly made no attempt to restore the gas service. At this point the testimony is in sharp dispute. Stracener says that he told Shanks that a new stove would be installed that afternoon and that Shanks said:

"Well, they will know how to hook it up—know what to do." Shanks denies that he made the statement just quoted. He says instead that he merely asked Stracener to call him back when the stove had been connected. According to Shanks, if he had been recalled he would, in restoring service, have made a routine test that would have disclosed the fact that gas was leaking somewhere. In that event Shanks would have turned the gas off again and instructed Stracener to engage a plumber to find the leak. The gas company itself does not cap pipes on the homeowner's side of the meter.

Stracener had bought a new kitchen stove from McClendon. At about four o'clock McClendon delivered the stove and connected it to the same pipe that had served

Robbins's kitchen stove. Stracener testified that he told McClendon that the gas man had said that McClendon would know what to do and should turn on the gas. At Stracener's direction McClendon turned on the gas with a wrench and lighted the stove's pilot light. It is evident that gas escaped through the open T-joint under the house until the explosion occurred at about six o'clock, seriously injuring both the Straceners.

W. B. Blankenship, a safety engineer employed by the gas company, testified that it is the company's rule not to permit any one except its own employees to turn the gas back on after it has been shut off. Blankenship testified that this regulation is a safety measure based upon the company's belief that its employees are best qualified to restore service. From his testimony: "We have numerous people call and say, 'Can my plumber turn it on?' and we say 'NO.' "

If the jury accepted Stracener's testimony as the truth they might have found that Shanks violated the company's safety regulation in telling Stracener that the workmen who were to install the stove would know how to restore the gas service. A gas company may be found to have been negligent in having restored service without making an inspection for open pipes. *Sawyer* v. *Southern Cal. Gas Co.,* 206 Cal. 366, 274 P. 544 (1929); *Christo* v. *Macon Gas Co.,* 18 Ga. App. 454, 89 S. E. 532 (1916); *Hebert* v. *Baton Rouge Elec. Co.,* 150 La. 957, 91 So. 406, 25 A. L. R. 245 (1922). Similarly, when the company is under a duty to turn on the gas, as in the case of a new building or a building in which the gas has been shut off during a vacancy (the situation now before us), the company may be guilty of negligence in allowing someone other than its own employees to turn on the gas. *Schmeer* v. *Gaslight Co.,* 147 N. Y. 529, 42 N. E. 202, 30 L. R. A. 653 (1895); *Hayes* v. *Cohoes Gaslight Co.,* 183 App. Div. 182, 170 N. Y. S. 312 (1918); *Lynchburg Gas Co.* v. *Sale,* 160 Va. 783, 169 S. E. 577 (1933). Thus Stracener's testimony created a question of fact in the case at bar.

II. The gas company has another rule that requires its employees, upon shutting off the gas at a customer's house, to tag the meter by attaching a piece of wire with a red seal on it. The tag is intended, apparently for billing purposes, to show that the gas company itself disconnected the meter. When Shanks called at the Straceners' home on the afternoon of the explosion he noticed that the gas had been shut off, but he did not attach a wire seal to the meter.

Upon this proof the trial court, at the plaintiffs' request, instructed the jury that if Shanks violated a company rule with respect to locking or tagging the meter, that failure would be evidence of negligence to be considered along with the other evidence in the case. The giving of this instruction was, in view of the proof, error. Such a regulation does not itself establish a standard of care, for the true standard is the conduct of a reasonably careful person. *Davis* v. *Johnson,* 275 P. 2d 563 (Cal. App., 1954). Here there is no indication that the explosion would have been avoided if Shanks had attached a seal to the meter. To the contrary, it is the plaintiffs' theory that Shanks intended for the appliance dealer to turn the gas on; so he would also have meant for the dealer to remove the wire if one had been attached.

III and IV. The trial court directed a verdict in favor of McClendon, the dealer who turned the gas on, and also instructed the jury that there was no negligence on the part of Mrs. Stracener. In response to interrogatories concerning only three defendants the jury apportioned the negligence in the ratio of 90% to the gas company, 10% to Stracener, and none to Robbins, the landlord.

The fact that the jury found Stracener negligent indicates that the court erred in giving the two instructions we are now considering. This is so because Stracener may have been negligent in two particulars, one of which is also applicable to McClendon and the other to Mrs. Stracener.

First, if the jury believed that Shanks was truthful in denying that he gave permission for McClendon to turn on the gas, then Stracener may have been negligent in instructing McClendon to restore service. In that event the explosion could have been attributed to McClendon's carelessness in failing to discover the open T-joint; so McClendon was not entitled to a directed verdict. The error was not harmless, for the gas company could have moved for a judgment for contribution against McClendon. Ark. Stat. Ann. § 34-1007 (Repl. 1962); *Rudolph* v. *Mundy,* 226 Ark. 95, 288 S. W. 2d 602 (1959).

Second, there is testimony that the Straceners smelled gas shortly before the explosion and discussed the matter. If Stracener was negligent in then remaining at the house his wife might be found to have been equally negligent. Hence the court erred in declaring as a matter of law that Mrs. Stracener was free from negligence. The issue was for the jury.

V. The instructions did not submit the question of Shanks's negligence, even though he was a party against whom the plaintiffs sought a judgment. Had the jury found Shanks not negligent that would have exonerated the gas company, for the only liability asserted against it was based upon Shanks's conduct. *Porter-DeWitt Construction Co.* v. *Danley,* 221 Ark. 813, 256 S. W. 2d 540 (1953). All four of the errors in the court's instructions may be corrected upon a new trial.

Reversed.

The Chief Justice is of the opinion that there was no substantial evidence of negligence on the part of the company which could properly be found a proximate cause of the explosion and resulting injuries, and he would therefore reverse and dismiss.

CITY OF NORTH LITTLE ROCK *v.* HABRLE.

5-3664 395 S. W. 2d 751

Opinion delivered November 22, 1965.

Reed W. Thompson, City Attorney and *James R. Wallace* and *Charles L. Carpenter,* Asst. City Attorneys, for appellant.

Moses, McClellan, Arnold, Owen & McDermott and *James R. Howard,* for appellee.

PAUL WARD, Associate Justice. This litigation concerns an attempt to rezone property in North Little Rock. In 1962 a comprehensive Zoning Code was adopted embracing a large part of the City. The portion of the property here involved was zoned for use as R-3, meaning that it could be used only for single family and multi-family residential purposes.

On March 6, 1964 Cecelia Habrle (appellee) purchased a lot described as Lot 1, Counts' Addition to the City of North Little Rock, located in the area zoned R-3. Shortly thereafter she petitioned the Zoning Commission to rezone her property to "C-2" so she could operate a beauty shop thereon. This request was denied by the Commission on April 7 and by the City Council on April 27, 1964.

On June 3, 1964 appellee filed a complaint in chancery court against the City (appellant) alleging: The action of the City was unreasonable and arbitrary in that the limitation on the use of her property bears no definite relationship to the health, safety, morals or

general welfare of the inhabitants of the area zoned R-3, that the existence of a beauty shop on her property would in no wise affect the value of the property in the area; that it would not constitute a traffic hazard, and that there are similar businesses in the area. She asked the court to enjoin and restrain the City from prohibiting her and her successors in title from "using the land . . . for C-2 purposes." Appellant filed a general denial, and a trial was had on the issues thus enjoined.

The trial court made, in essence, these material findings: (a) Appellee became the owner of the subject lot two years after the Zoning Code became effective; (b) Appellee's property is located in an area which consists of single and multiple family residences and there are several quiet businesses such as a grocery store etc., which were there before the property was zoned as class R-3, being non-conforming uses; (c) Using appellee's lot for a beauty shop would not devalue the property in the area; (d) But rezoning the property for other types of business (permissible under the C-2 classification) would result in a devaluation of the other property in the area, and; (e) The action of the Planning Commission and the City in refusing to rezone this one lot was arbitrary, unreasonable, and capricious. The court's order was that the lot be rezoned from an R-3 to a C-2 classification, and that the City be enjoined from preventing appellee from using "the property . . . in any manner provided in the C-2 classification." This appeal by City follows.

For a reversal appellant relies on three separate points. *One,* the court cannot substitute its judgment for that of the Zoning Authorities; Two, there is no proof the City acted arbitrarily, capriciously, or unreasonably, and; Three, there is no proof to justify the trial court in substituting its judgment for that of the City. However, since there is much similarity in the points, we deem it unnecessary to discuss them separately.

The decisive issue before us is whether the testimony justified the trial court in reversing the Zoning Authorities. The fundamental rule by which we must

decide this issue has been frequently announced by this Court, and it is clearly stated in the recent case of *City of Little Rock* v. *McKenzie,* 239 Ark. 9, 386 S. W. 2d 697. In that case the trial court held the City acted arbitrarily in rezoning certain property. In reversing the trial court we used this language:

"In resolving this conflict we cannot substitute our judgment for that of the zoning authorities. We must uphold their decision unless we can say that it is arbitrary and capricious."

Applying the above rule to the testimony in the record here we are unwilling to say the action of the Zoning Authorities was arbitrary or capricious. One definition of the word arbitrary given by Webster is "decisive but unreasoned," and capricious is defined by Webster as "not guided by steady judgment or purpose." It is true that, according to testimony presented by appellee, eight persons said they would not object to appellee using the lot for a beauty shop, but they did not say they would not object if she used it for some other purpose permissible under C-2 classification. It was also shown that there were other operations not permissible under an R-3 classification, but it is admitted they were in existence when the area was originally zoned. It is undisputed that appellee bought her property after the area was zoned. No doubt it will be a financial disadvantage for appellee if she cannot operate a beauty shop on her lot, but we do not understand this is necessarily any indication the Zoning Authorities acted arbitrarily when they refused to let her do so. In the *McKenzie* case, supra, we indicated we were not insensitive to hardships which sometimes result in a case of this kind, but said: "Yet in every case such as this one a similar loss in property value must be suffered by one side or the other."

It is significant in this case that there is no contention by appellee the Zoning Authority acted arbitrarily under the conditions existing when the Code went into effect in 1962, yet there is no contention conditions have changed since 1962.

As pointed out before several neighbors said they had no objection to appellee operating a beauty parlor on her lot, and it was also stated that appellee had no intention to use her lot for any other purpose. The facts are, however, that if appellee's lot is rezoned to C-2 classification she can sell her property at any time and the purchaser would have the right to use the same for any business permissible under such classification. In this connection, as has previously been pointed out, the trial court found as a matter of fact that a rezoning of the lot to C-2 would devalue other property in the area. We find nothing in the record to support a finding that the Zoning Authorities acted arbitrarily.

It is our conclusion therefore that the decree of the trial court must be reversed, and it is so ordered.

Reversed.

ARK. STATE HIGHWAY COMM. *v.* SHEPHERD.

5-3679 395 S. W. 2d 743

Opinion delivered November 22, 1965.

Mark E. Woolsey and *Thomas B. Keys,* for appellant.

Lookadoo, Gooch and *Lookadoo,* for appellee.

SAM ROBINSON, Associate Justice. On May 7, 1963, appellant, Arkansas State Highway Commission, filed its Complaint and Declaration of Taking and deposited the sum of $27,100 as estimated just compensation for the taking of 14.5 acres of land belonging to appellee, Thomas Shepherd. The land taken was a part of a larger tract which appellee owned consisting of approximately 40 acres situated about 1½ miles west of the City of Arkadelphia. The improvements, all of which were located on the land taken, consisted of a six room dwelling, a one car garage, a utility barn, three chicken houses, a two room tenant house, and a business building. The original tract contained 1,289.1 feet of highway frontage, all of which was included in the taking. The trial resulted in a verdict for appellee in the sum of $50,000 as just compensation for the land and improvements condemned. From this judgment the Highway Commission has appealed.

Appellant insists that reversible error was committed when the court below refused to grant a mistrial as a result of the testimony of appellee, Thomas Shepherd. Shepherd testified that, in his opinion, the land and improvements before the taking had a fair market value of $115,000, and that the value of the land remaining after the taking was $20,000. The objectionable parts of this testimony, which included his consideration of a sale to a condemning authority and certain anticipated profits, were stricken and the court admonished the jury not to consider them. Appellant asked for a mistrial based on the fact that the admonition could not remove the prejudicial effect of the testimony. The motion was properly denied. The trial court must be allowed the broadest latitude in determining the action be allowed the broadest latitude in determining the action appropriate to eliminate the prejudicial effect of incompetent testimony. *United Order of Good Samaritans* v.

Lomax, 172 Ark. 330, 288, S. W. 709. We cannot say that the over all effect of Shepherd's testimony was prejudicial to appellant.

Appellant argues that the expert testimony of Mr. Ben Bledsoe should have been stricken insofar as it relates to the value of the improvements of the property in question. He stated that he knew of no other similar transactions in the locality and, therefore, based his opinion of value on the condition of the buildings and what they would cost new; that a new building would cost around $8.00 per square foot, and, figuring the depreciation on the number of years the improvements had been in use, the value would be about $3.00 per square foot. Although this language did not use the exact terms, we think it satisfies the "cost less depeciation" formula which may be considered when a market price is not readily available.

When asked if the chicken business was or was not the highest and best use of the property, Bledsoe stated that it could be, although there were several other uses which would be, in his opinion, more profitable. Based on this testimony, appellant seeks to establish the premise that the value of improvements could not be considered in this case since the land had been appraised according to its best use. This construction is improper. The testimony shows that the improvements tend to adapt the property to an advantageous use.

The appellant's argument that the verdict was not supported by the evidence is not convincing. Mr. Bledsoe was a qualified expert and had for several years made appraisals in Clark County. In his opinion, appellee's damages were $64,345.00. We cannot, therefore, say that there was no substantial evidence upon which the jury could make its decision.

Affirmed.

5-3670 397 S. W. 2d 129

Opinion delivered November 22, 1965.

[Rehearing denied January 17, 1966.]

Jeff Mobley, for appellant.

Williams & Gardner, for appellee.

JIM JOHNSON, Associate Justice. This appeal is from a divorce in which the basic issue is whether the parties were married.

Appellee Brenda Jones (Spicer) filed suit for divorce against appellant Delmas Spicer in Pope Chancery Court on February 22, 1964, alleging that the parties were married on July 20, 1963, in Oklahoma, and lived together until January, 1964. Appellee alleged indignities to the person, stated that she was enceinte, prayed separate maintenance until delivery of the child and payment of medical bills and attorneys' fees.

On March 12, 1964, the court in an interlocutory decree ordered appellant to pay $10 per week support for appellee, $125 medical expenses, $50 attorneys' fee and all other expenses incident to the birth of the child. The child was born June 9, 1964, and appellant paid all expenses as ordered. On September 14, 1964, appellant filed a motion to dismiss appellee's petition for divorce,

denying the existence of a marriage and asking that appellee be ordered to reimburse him for all sums paid pursuant to court order. After trial on December 23, 1964, the chancellor decreed that the marriage was annulled, the child was legitimate, granted appellee custody with visitation rights to appellant and ordered appellant to pay $10 per week child support. From the adverse decree comes this appeal. Appellant urges reversal of the chancellor's finding of the existence of a voidable marriage and for judgment against appellee for the sums paid by appellant under the court orders of March 12 and December 23, 1964.

Here, briefly, are the contested facts. According to appellee's testimony, the parties had been dating for some months when on September 20, 1963, they decided to get married. They drove from Hilltop to Oklahoma, went to a very small town to the home of a justice of the peace who issued them a marriage license and married them about 10:00 o'clock p.m. in the presence of his wife. Appellee was unable to remember the name of the town, the county, or the justice of the peace. They thereafter returned to Arkansas without cohabiting in Oklahoma. Appellant drove appellee to her parents' home and he returned to his mother's home that night. The parties never established a home as man and wife but did copulate thereafter occasionally, including one night at appellee's parents' home when appellant told her family that he and appellee were married, and one night in Little Rock.

It is undisputed for three months during this period appellee lived and worked in Little Rock under the name Brenda Jones, and she does not deny that she dated other young men while there.

Appellant, on the other hand, denies ever taking appellee to Oklahoma, denies marrying her, denies spending a night at her parents' home. In support of his testimony appellant produced authenticated affidavits from the keeper of the marriage records of each of Oklahoma's seventy-seven counties attesting that a search had been

made and no record of any marriage between the parties could be found in any of the seventy-seven counties. It is not contended that the parties married in Arkansas or in any place other than Oklahoma. Of course Arkansas does not recognize common law marriages. The statutes regulating and prescribing the manner and form in which marriages may be solemnized in this state are mandatory and not directory. *Furth* v. *Furth,* 97 Ark. 272, 133 S. W. 1037.

As was pointed out in *Yocum* v. *Holmes,* 222 Ark. 251, 258 S. W. 2d 535, appellee's testimony that she married appellant was sufficient to make it a question of fact as to whether a marriage took place; the burden of proof that the marriage is not valid and regular is upon the party attacking it, appellant. On trial de novo on the record before us, we find that appellant met the burden and proved by a great preponderence of the evidence that there was no valid marriage. It follows, therefore, the decree is reversed and the cause remanded for further proceedings consistent herewith.

RHODEN, ADM'R. *v.* LOVELADY.

5-3681 395 S. W. 2d 756

Opinion delivered November 22, 1965.

Felver A. Rowell, Jr. for appellant.

Gordon & Gordon for appellee.

FRANK HOLT, Associate Justice. The decedent, 82 years of age, was driving his car at a slow rate of speed in a westerly direction as he approached the entrance to his son's [appellant's] driveway. The driveway was on the south side of the highway. Appellee Lovelady, a salesman for appellee Jackson Cookie Company, was driving a truck in an easterly direction at a speed of approximately 40 to 50 miles per hour as he approached decedent's automobile. There was testimony that the decedent had his arm out the window giving a signal. Appellee Lovelady testified that he could see decedent's vehicle, apparently stopped, at a distance of 200 to 250 yards and observed no signal being given until he got closer; that the decedent stayed in the westbound or his proper traffic lane until appellee was 50 to 60 feet from him when decedent turned to his left into the eastbound or appellee's traffic lane where the fatal collision occurred. Appellee swerved to avoid the collision. According to appellee, he never at any time slowed the speed of his vehicle. The issues of negligence, based upon appellant's complaint and appellees' answer and counterclaim, were submitted to the jury which denied damages to both parties. From the judgment on this verdict appellant brings this appeal.

For reversal appellant contends that the trial court erred in giving appellees' requested instruction on unavoidable accident. The appellees argue, however, that since the jury found appellees free of negilgence in

answer to interrogatories that the instruction constituted harmless error.

In the case at bar, the pleadings and the evidence adduced indicated this accident was caused by the negligence of one or both of the parties and that this accident was not inevitable. It could not have happened without someone being negligent. In the very recent case of *Houston* v. *Adams,* 239 Ark. 346, 389 S. W. 2d 872, we re-examined the suitability of an instruction on unavoidable accident in negligence cases and disapproved it. There we said: "* * * when, as here, the question is merely whether one or more of the parties were guilty of negligence we hold that the instruction in question should not be given." Also, we stated that only in exceptional circumstances is such an instruction permissible. Such a situation would be where the alleged injury resulted from some cause other than the negligence of either party. See, also, *Burton* v. *Bingham,* 239 Ark. 436, 389 S. W. 2d 876. In our view the evidence in the case at bar did not make a submissible issue for the jury on the theory of an unavoidable accident and we reaffirm the cited cases.

Appellant further contends that the trial court erred in not permitting the appellant to interrogate appellee Lovelady on cross-examination with reference to a statement made by him in his discovery deposition and, also, in refusing to allow this portion of the deposition to be read in evidence in chief by the appellant. This proffered evidence reads:

"A. I had the right of way. Mister, I can't wait for every guy to make up his mind and to try to out guess them."

Any part or all of a discovery deposition relevant to the issues may be used by an adverse party for any purpose. Ark. Stat. Ann. § 28-348(d) (Repl. 1962); *Superior Forwarding Co.* v. *Sikes,* 233 Ark. 932, 349 S. W. 2d 818; *Mabry* v. *Ross,* 237 Ark. 514, 374 S. W. 2d 361. Appellee Lovelady was an adverse party to the appellant. The statement by Lovelady in his deposition was an admis-

sion against interest and pertinent to the issue of appellees' alleged negligence. The declarations or admissions of a party against his own interest upon a material matter are admissible against him in the trial of an action in which he is a party. *Pacific Mutual Life Ins. Co.* v. *Butler,* 192 Ark. 614, 93 S. W. 2d 329; 20 Am. Jur., Evidence, § 544. We agree with the appellant that this part of the deposition is admissible both as evidence in chief and, also, as proper cross-examination. The appellees, of course, had the right to read to the jury any part or all of the deposition that might be explanatory of this selected portion.

Appellant's final contention is "that the verdict is contrary to the law and the evidence." We are of the view that the evidence presented issues of fact for the jury and it is within the jury's province, and not ours, to resolve factual issues in law cases.

Reversed and remanded.

5-3632 396 S. W. 2d 938

Opinion delivered November 29, 1965.

[Rehearing denied January 10, 1966.]

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

Shaw & Shaw, John B. Hainen, for appellee.

CARLETON HARRIS, Chief Justice. This is a Workmen's Compensation case. Mrs. Anna Marie Colvin was employed by Mountaire Processing Company as a trimmer. Her work was performed in a large room where there were evisceration lines. This worker stood on a platform, about two feet long and two feet wide, facing a trough about three feet wide and six to ten inches deep. Overhead was a moving mechanical line with chickens hung on it. To the right of the worker was a wash basin. Mrs. Colvin's job was trimming bruises from the chickens as they passed by on the line. On February 26, 1963, appellant fainted, while engaged in the work mentioned above, and, while falling, was caught by Ed Slough, an employee of the United States Department of Agriculture, assigned to Mountaire Processing Company, Mr. Slough working alongside of Mrs. Colvin. Other employees assisted in removing her from the work line. Dr. Roger Dickinson was called, gave her an injection

of thorazine, and Mrs. Colvin was taken home by her husband. She continued to work thereafter until March 5, at which time she went to the Dickinson Clinic, complaining of pain in the lumbosacral region of her back. She was subsequently referred to Dr. Paul Hughes, orthopedist at the Southern Clinic of Texarkana, who, in April, 1963, performed a partial laminectomy on the right side at the L4-L5 interspaces, and a large extruded mass of fibrous tissue was removed from the spinal canal. She was discharged five days later to return home, and Dr. Hughes continued to see her from time to time until September, 1963.

Mrs. Colvin signed a "statement of claim" form for benefits from the General American Life Insurance Company, the claim form denoting that her claim was due to sickness which began approximately March 5; as a result of this claim, benefits were paid to her for thirteen weeks. Thereafter, Mrs. Colvin filed a claim for Workmen's Compensation benefits, asserting that the herniated disc was the result of her fall at the plant on February 26. The referee allowed her claim, but this finding was reversed by the full commission, which found that the extruded disc was not the result of an accidental injury arising out of and in the course of her employment with Mountaire on February 26, 1963. The commission finding was appealed to the Sevier County Circuit Court, and that court reversed the commission, holding that there was no substantial evidence to support the findings of fact made by the commission, and the court further found that the injury to claimant arose out of, and in the course of, her employment, and that she was entitled to Workmen's Compensation benefits. From the judgement so entered, Mountaire and its insurance carrier, Fidelity and Casualty Company bring this appeal.

We are only concerned here with whether there was substantial evidence to support the finding of the commission. Claimant testified that while she was working, she felt a "dizzy spell coming on;" that she had previously had the flu, and that she thought, "Well, I'm

going to faint." She said that she was standing on a narrow platform, slipped, and "that throwed me kind of backwards and I hit this wash basin and tried to catch forwards to keep from falling back on the concrete floor." The witness stated that she lost her balance, and fell back, the lower region of her back striking the wash basin. This is the evidence relied upon to establish the compensable injury, but claimant's version is not corroborated by any other witness, including those offered by Mrs. Colvin. Mr. Slough testified, "Well, I just glanced to one side and I noticed that she was just dropping down, just suddenly wilting and I reached over and grabbed her and moved her back away from the trough." He stated that she just fell "straight down," and that he did not see her strike the wash basin. Mr. Henry W. Shook, another government inspector, who was working opposite Mrs. Colvin on the line, likewise testified:

"Well, she sort of wilted right in front of me just over on the trough down beside of that washbasin that was out beside the trough. She just sort of wilted right down the side and over the trough."

Frank Halter, the plant foreman, testified that he looked at claimant while she was being held up by Mr. Slough, and that her feet were still on the platform at the time.

Mrs. Colvin testified that Dr. Roger Dickinson came out to the plant, and gave her a shot, and later gave her some pills; that she went back to work the following day, and worked the balance of the week. Claimant said that she first noticed pain in her back the next day, as she started to take off her boots, and that from that time on, the pain gradually grew worse; that she then consulted Dr. Bill Dickinson. She testified that the doctor asked if she had had any fall, and that she told him about falling on the 26th, and also told him that Dr. Roger Dickinson knew about it.[1] She also testified that, upon being sent to Dr. Hughes in April, she told this doctor

[1] Mrs. Colvin worked about a week after consulting Dr. Bill Dickinson at the clinic.

about the fall, and slipping and striking her back on the basin.

Dr. Bill Dickinson testified that his records did not show, and he had no recollection of Mrs. Colvin's telling him that she received an injury at the plant. He testified that ordinarily, when receiving a complaint like that of Mrs. Colvin, he would have made inquiry (whether she had received an injury). He also stated that normally, if an injury had been reported, he would have notified the plant, but that he had not given the plant any notice in this case.

Dr. Roger Dickinson, brother of Bill, testified that he went down to the plant after receiving a call, around 8:00 or 8:30 in the evening (February 26), and that he gave Mrs. Colvin a shot of thorazine ("to try to settle her down so that she could go home and go to sleep"). He stated that he inquired as to what had happened, and was told that she had gotten sick and fainted. The doctor stated that he did not remember Mrs. Colvin's ever having given a history of being injured, or of having injured her back while at the plant.

Dr. Hughes did not testify, but a disability insurance form, which had been signed by him and Mrs. Colvin was introduced into evidence by the claimant.[2] Near the top of the form is a clause as follows:

"Claim is) ☒ Sickness which commenced on '[typed in] approx Mar. 5, 63'

Due to) ☐ Accident which occurred on .....
At.....

It will be observed that an "x" is placed in the square by "Sickness."

On Page 2 there is a question, "Did this sickness or injury arise out of the patient's employment?" There are then two spaces for the answer, one marked, "Yes," and one marked, "No," and the "No" is checked.

[2] This claim was referred to earlier in the opinion; Mrs. Colvin drew benefits from this group insurance plan for thirteen weeks in the amount of approximately $25.00 per week.

To summarize, claimant testified that she fell against the wash basin, her back striking it. This is not verified by any witness; in fact, both Edwin Slough and Henry Shook, whose testimony was offered by appellee, stated that she "wilted" and "dropped down," and neither saw her strike the wash basin. The Dickinson brothers, though stating that inquiry was normally made as to possible injuries, when examining and interviewing patients with a back ailment such as that complained of by Mrs. Colvin, had no recollection of claimant's relating any injury, and their medical records did not reflect any such information. The claim form, filled in by Dr. Hughes, and signed by Mrs. Colvin, affirmatively shows that her insurance claim was designated as being due to sickness, rather than an accident, and further reflects that the ailment did not arise out of her employment. No doctor testified that her condition was due to her fall or to an injury.

Of course, it is immaterial what this court would find if we were trying the case *de novo,* for the commission is the trier of the facts, and we review the findings of that body in the light most favorable to its findings if same are supported by substantial evidence. *Burrow Construction Co.* v. *Langley,* 238 Ark. 992, 386 S. W. 2d 484. In the light of what has been set out in this opinion, we are unable to agree with the learned Circuit Judge that there was no substantial evidence to support the findings of the Compensation Commission.

The judgement of the Sevier County Circuit Court is therefore reversed, and that court is directed to reinstate the order of the Workmen's Compensation Commission denying compensation.

It is so ordered.

ROBINSON, JOHNSON and HOLT, J. J., dissent.

JIM JOHNSON, Associate Justice. (dissenting). I do not agree with the majority view. The referee who conducted the hearing in this case concluded from the evidence presented that:

"It is not disputed that claimant received an operation for a herniated disc. The difficult question therefore is whether this herniated disc arose out of claimant's employment with respondent. The referee is of the opinion that the evidence reflects that such is the case. Claimant testified that she fainted while trimming poulry in respondent's plant on February 26, and that before she passed out she remembered falling backward and striking her back against the wash basin which was located to her right and slightly to the rear of her work area [about six inches from her]. She further stated that she attempted to pitch forward to prevent herself from falling striking the floor, and that the following evening when removing her work boots, she noticed pain in the lumbo-sacral area [where her back struck the basin]. The evidence reflects that this pain became progressively worse during the next eight or ten days, culminating in the necessity of claimant being placed in traction for a period of eight days. It was not disputed that claimant did faint while working on respondent's poultry line. Mr. Ed Slough testified that when he first noticed claimant she was falling toward the trough, and that he caught her before she struck the floor. While none of the witnesses testified that they had observed claimant striking the wash basin, [none denied it happened], all of them did testify that they did not observe claimant until the line was stopped, at which time she was being held up by Mr. Slough. Thus we have claimant's testimony that she had never been bothered with her back prior to the fainting episode; that she struck her back as she fell; that the following night she noticed soreness and pain in her lumbo-sacral region; that this pain became progressively worse; and approximately ten days subsequent to her fainting episode, she had to be carried to the hospital and placed in traction.

"While the record does not reflect that claimant definitely gave the Drs. Dickinson a history of having injured her back on the job, the record does reflect that claimant testified that she naturally assumed that the doctors would relate her back injury to her fall, and the

record does reflect that the doctors both at a later date connected claimant's trouble up with her fall and fainting episode there at the plant. Dr. Roger Dickinson's notes reflect that 'Dr. Roger was called to the plant the night this lady fell, gave her an injection, and let her go home.' Dr. Roger Dickinson testified that this was in Dr. Bill Dickinson's handwriting. This would tend to reflect that the doctors eventually connected the fainting episode with claimant's herniated disc."

Without the benefit of additional evidence, the full commission almost summarily reversed the award.

On appeal to the circuit court this matter received a through review. The circuit court, obviously aware of the limited scope of its authority in workmen's compensation cases, rendered a most conscientious and comprehensive opinion both as to the law and the facts. The court said, *inter alia*:.....

"The record of the hearing before the Referee shows that the claimant is thirty-six years old and had been employed by the respondent processing company for approvimately three years. That on the night of February 26, 1963, while trimming poultry on the evisceration line in respondent's plant, and after having worked for six and one-half hours that day, she became dizzy, which produced a sensation of faintness, and in her words: 'Well, I had become dizzy and I thought "Well, I'm going to faint," I just felt so bad and I turned to look to see if I could get someone to take my place. You see, when I would leave the line, it would be stopped and I slipped on this thing I was standing on and that threw me back against this wash basin and then I, you know, tried to catch forward and that's the last I knew.' She further testified that she definitely and positively remembered striking that wash basin.

"The undisputed testimony before the Commission shows that she was carried from the processing room of the plant to the plant lunch room; that she was treated in the plant lunch room by Dr. Roger Dickinson, administered a sedative, and sent home.

"The claimant continued to work the remainder of the week, which was three days; that she worked the next week; that the pain and sorness became progressively worse; that on the 5th day of March, 1963, she went to the Dickinson Clinic and Dr. Bill Dickinson prescribed sedatives by reason of the pain and soreness in her back; that Dr. Bill Dickinson, on March 11, 1963, placed her in the DeQueen Clinic where she was confined in traction for a period of eight days; that she did not improve and was subsequently referred by Dr. Dickinson to Dr. Robert Hughes in Texarkana. Dr. Hughes first saw claimant on April 2, 1963, and a diagnosis of herniated nucleus pulposis was made; the claimant was admitted to St. Michael's Hospital in Texarkana on April 9, 1963, at which time a myelogram was done, which showed almost complete occlusion of the spinal canal in the level of the L4-L5 interspace; that on April 10, 1963, a partial laminectomy on the right side was done at the L4-L5 interspace, and a large extrudal mass of fibrous tissue was removed from the spinal canal.

"To substantiate the testimony of the claimant, the Commission heard the testimony of her husband, Joe Colvin, who testified that following her alleged injury and all the next week, his wife complained a little more every day about her back, and it finally reached the point where she couldn't even lift her right leg."

The court set out additional testimony substantiating appellee's claim and concluded that:

"There is no evidence and no opinion to the effect that claimant's injury was not or could not be caused by the fall she unquestionably sustained. None of the three doctors who treated her, including the one who operated on her, was ever asked if the injury could have been caused by the fall she sustained on the job, and none expressed an opinion about the matter one way or the other.

"The record of the hearing before the Commission affirmatively shows that the claimant sustained no

known injury or any other incident prior to or after February 26, 1963, which contributed in any way to her disability. The question before the Court, therefore, is whether the action of the Commission in denying compensation for claimant's disability is supported in the record by substantial evidence."

"After having examined the entire record in this case day after day, this Court can find no substantial evidence to support the findings of fact of the Commission. On the contrary, this Court finds from the record in this case that said findings of fact are speculative and conjectural." *Clark* v. *Ottenheimer Brothers,* 229 Ark. 383, 314 S. W. 2d 497.

From all of which this case in my view falls squarely within the rule announced in *Hall* v. *Pittman Constr. Co.,* 235 Ark. 104, 357 S. W. 2d 263, as follows:

"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."

For the reasons stated, I respectfully dissent. Justices Robinson and Holt join in this dissent.

CUMMINGS *v.* STATE.

5134 396 S. W. 2d 298

Opinion delivered November 29, 1965.

Skillman & Webb, for appellant.

Bruce Bennett, Atty. General, By: *Farrell E. Faubus,* Asst. Atty. General, for appellee.

ED. F. MCFADDIN, Associate Justice. The appellants, Jesse Cummings and John Teal, were jointly charged, tried, and convicted of the possession of burglary tools (Ark. Stat. Ann. § 41-1006 [Repl. 1964]). They bring this appeal assigning nine points for reversal, and we will mention only those which seem to possess any merit.

I. *Habitual Criminal Statute.* In their Point No. II the appellants say:

"The Court erred in denying the motion of the Defendant, John Teal, to withhold reading of that part of the amended information relative to a charge against the said John Teal of being an habitual criminal until after the jury had determined the guilt or innocence of the Defendant, John Teal."

We find merit in this point. The information charged the defendants jointly with possessing a considerable number of burglary tools. In excess of fifteen items were all carefully listed. Then the information said, as regards the previous conviction of John Teal:

"The said John Teal, alias J. M. Billy Teal, an habitual criminal having previously, in cause No. 3162, been convicted in the Osceola District of Mississippi County, Arkansas, Criminal Division of the Circuit Court, of the Crime of Grand Larceny, such conviction having been on March 30, 1950, and said defendant having served such sentence and released upon pardon or parole as reflected in Criminal Judgment Record Book No. 5, Page 74."

The Trial Court, in the exercise of its discretion (Ark. Stat. Ann. § 43-1802 [Repl. 1964]), refused to grant the defendants a severance; and then in advance of the trial each defendant requested the Court to suppress, until guilt or innocence had been established, all reference to the habitual criminal allegation concerning

John Teal. These separate requests of Teal and Cummings were denied *in toto*.[1] In the course of the trial the previous conviction record of Teal was shown; the Court instructed the jury on the habitual criminal statute; and the Prosecuting Attorney in his summation to the jury commented on the previous criminal record of Teal. All of this was done over the objections of the defendants.[2]

On October 18, 1965 we decided the case of *Miller et al.* v. *State of Arkansas* (239 Ark. 836, 394 S. W. 2d 601), in which we discussed at length the habitual criminal statute and how any reference to previous convictions should be handled in jury trials. Under the holding in *Miller* v. *State* it is clear that the Trial Court committed error in the case at bar in allowing the evidence, instructions, and arguments to go to the jury about the previous conviction of Teal. It is only fair to the learned Circuit Judge to point out that this present case was tried on December 2, 1964, which was several months before our holding in *Miller* v. *State* on October 18, 1965. But, even so, the present appellants are entitled to claim the benefits of our holding in the Miller case.

Even though Teal was the only defendant with a previous criminal record alleged, we feel that the proof of Teal's criminal record likewise adversely affected the interest of his co-defendant Cummings. Cummings had been denied a severance, and the jury might have inferred that Cummings' association with a known criminal was some indication of his own status. In *Moore et*

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[1] The Court order regarding Teal reads as follows: "Now on this 1st day of December, 1964, comes on to be heard the motion of the Defendant, John Teal, to suppress Reading of Habitual Criminal Allegation until Guilt or Innocence has been Determined; the Court, after hearing argument of counsel, and other things, matters and proof before the Court, finds the motion to be without merit and the same is hereby denied. The exceptions to the ruling of the Court and the Defendant's reasons therefor have been duly entered on the record of this cause and made a part of the record."
The Court order regarding Cummings is similar to the above.

[2] On Tr. 180, just before the instructions to the jury, this occurred: "MR. SKILLMAN: Your Honor, did His Honor understand, we renewed the motions heretofore made, we made previous to this time that were considered and ruled on by the Court prior to the impanelling of the jury. We are renewing the motions.
"THE COURT: I understood, you are not waiving the motions."

al. v. *State,* 227 Ark. 544, 299 S. W. 2d 838, four defendants were jointly tried, and we held that the introduction of evidence incompetent as to two of the defendants was prejudicial to the other two defendants. So we reverse the convictions both as to Cummings and as to Teal.

II. *Exhibition Of Pistol.* Appellants say in their Point No. V:

"The Court committed error in permitting a .38 caliber pistol to be exhibited to the jury without same being introduced into evidence or identified by the witness, Charles Faulkner."

There is no need for us to recite in detail all of the various matters about this particular pistol and how it was exhibited to the jury. The point is that the pistol was not admitted in evidence; and until it was admitted it should not have been exhibited before the jury. We do not reverse the case because of this point; but in view of the likelihood of a new trial we call attention to what was said by us regarding showing a pistol to the jury in *Rush* v. *State,* 238 Ark. 149, 379 S. W. 2d 29:

"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."

We have examined all the points urged by the appellants, and find none to possess merit except the two mentioned.

Reversed and remanded for a new trial.

GREYHOUND LINES *v.* HARMON.

5-3692 396 S. W. 2d 291

Opinion delivered November 29, 1965.

Smith, Sanderson, Stroud & McClerkin, for appellant.

McKay, Anderson & Crumpler, for appellee.

GEORGE ROSE SMITH, J. This is an action for personal injuries sustained by the appellee while she was riding as a passenger on one of the appellant's buses. The jury's verdict was for the plaintiff in the sum of $4,000. The appellant's only contention is that it was entitled to a directed verdict.

The incident occurred after midnight. The bus driver, H. W. Fielder, was the only eyewitness to testify. He said that he was traveling at 55 or 60 miles an hour, with his bright headlights on. As he crested a slight rise in the highway the beam of his lights came back down on the road and revealed the presence of two mules, one in each traffic lane, about 75 feet ahead. Fielder testified that to avoid the animals he was compelled to swerve sharply to his right and travel partly on the shoulder of the road. According to him, if he hadn't swerved "that mule would have been inside the bus with us." Mrs.

Harmon, who was asleep, was thrown to the floor of the bus and suffered painful injuries.

Fielder's testimony, which cannot be regarded as undisputed, presented an issue of fact. He stated that his headlights shone farther than 75 feet. In fact, the statute requires headlights to be of sufficient intensity to reveal a person at a distance of at least 350 feet ahead. Ark. Stat. Ann. § 75-713 (Repl. 1957). If the rise in the road was not high enough to block Fielder's view of the road beyond the rise, the jury could have found that his failure to see the mules until they were only 75 feet away indicated that he was not keeping a proper lookout. On the other hand, if the rise was high enough to block Fielder's view of the road ahead it was his statutory duty to reduce his speed in approaching the crest of the hill. Act 307 of 1959, § 33 (d). (This section of Act 307 amended Ark. Stat. Ann. § 75-601, but by an oversight the compiler failed to include subsection (d) in the 1965 pocket supplement.)

As a common carrier the appellant was under a duty to use the highest degree of care for the safety of its passengers. *Missouri Pac. Transp. Co.* v. *Shepherd,* 203 Ark. 412, 157 S. W. 2d 501 (1941). There was no negligence whatever on Mrs. Harmon's part. Her injuries unquestionably resulted from the manner in which Fielder drove the bus. It was for the jury to say whether, in view of the circumstances, Fielder was completely free from negligence.

Affirmed.

WILLIAMS *v.* JONES.

5-3678 396 S. W. 2d 286

Opinion delivered November 29, 1965.

J. G. Moore and *Felver A. Rowell, Jr.,* for appellant.

Gordon & Gordon and *George J. Cambiano,* for appellee.

PAUL WARD, Associate Justice. Jeff Williams (appelant) filed a complaint against Susie Jones (appellee) alleging he bought forty acres of land on June 3, 1959 from the State Land Commissioner; that the lands were sold to the State for the taxes of 1945; that he had been in adverse possession for twelve years; that he had placed valuable improvements thereon, and; that appellee claimed some interest in said land. The prayer was to have his title confirmed.

To the above complaint appellee (through her guardian, Frank Jones) denied all allegations therein, and alleged that appellant had rented the land from her; that appellant had acted in bad faith when he made said improvements because he knew she was insane, and; that she had been insane and confined in the State Hospital for Nervous Diseases since December 15, 1945. Her prayer was that she be allowed to redeem the land in her name.

At a hearing held on November 3, 1963 the court found appellee was a co-tenant as an heir of Louisa Payton Stevenson; that at the time of the tax sale in question appellee was incompetent; that the tax deed to appellant be cancelled, and; that appellee's guardian should redeem said lands from the State. The hearing was then continued for an accounting between the parties.

On January 9, 1965 the court entered an order, with all parties present or represented, giving appellant a lien on the land to secure payment of $225 spent for taxes; $9500 spent for improvements, and; $405 paid for the State deed. The court held appellee "is entitled to a rental of $85 per month from the date of the petition to redeem . . . ."

On appeal appellant urges four points for a reversal but we find no merit in any of them for the reasons hereafter mentioned.

1. There is no testimony from which the trial court could have found that appellant or any of his predecessors in title had held adverse possession of the land for seven years before appellee became insane. This point was never raised in the pleadings, and also it was shown that appellant paid rent to appellee.

2. It is not disputed that appellee has a living sister who has never been adjudged incompetent and who was not made a party defendant. It is contended by appellant that appellee could not (in any event) redeem more than her undivided interest. This contention was never raised by the pleadings, nor could it have been successfully maintained under *Mitchell* v. *Chester,* 208 Ark. 781, 187 S. W. 2d 899 and *Hunt* v. *Ellis,* 219 Ark. 353, 242 S. W. 2d 146. While the decisions in these cases dealt with the right of minors to redeem, they were based on Ark. Stat. Ann. § 84-1201 which applies alike to minors and insane persons.

3. We find no merit in the contention the court erred in charging appellant $85 per month rent on the dwelling. There was testimony that a reasonable rent was as high as $95 per month. In allowing rent the court relied on the fact that appellant continued to work on the house and lived in it after this suit was filed and after he had been admonished by the court not to do so, and also on the fact that appellant was given credit for such additional improvement.

4. Finally, we find no testimony which would have justified the trial court in giving appellant a larger amount for improvements. In fixing the amount the court apparently followed the proper rule announced in *Wallis* v. *McGuire,* 234 Ark. 491, 352 S. W. 2d 940, where we approved the following statement:

" 'The measure of the value of betterments is not their actual cost, but the enhanced value they impart to the land, without reference to the fact that they were desired by the true owner, or could not be profitably used by him.' "

It would serve no useful purpose to set out detail all the testimony regarding the many improvements and the cost or value thereof. We have carefully read the same and feel it does not justify a greater allowance than that made by the trial court.

In view of what we have said above it follows that the decree appealed from should be, and it is hereby, affirmed.

Affirmed.

JONESBORO INVESTMENT CORP. *v.* CHERRY.

5-3644 396 S. W. 2d 284

Opinion delivered November 29, 1965.

Edward L. Westbrooke, for appellant.

Gentry & Gentry, Dulaney & Dulaney, Tunica, Mississippi, for appellee.

SAM ROBINSON, Associate Justice. This is a suit for specific performance filed by appellants, Jonesboro Investment Corporation and M. G. Spurlock, against appellees, James C. Cherry and his wife, Frances D. Cherry. The plaintiffs, appellants here, allege in the complaint that appellees offered to sell and convey a 2,400 acre plantation and equipment thereon to appellants for the consideration of $900,000; that appellants closed the contract by accepting the offer; that appellees breached the contract by refusing to convey the property. Appellees, Mr. & Mrs. Cherry, the property owners, demurred to the complaint on the ground that it shows on its face that the alleged contract is barred by the statute of frauds. The demurrer was sustained. The statute of frauds may be invoked by demurrer. *Stanford* v. *Sager,* 141 Ark. 458, 217 S. W. 458; *Moore* v. *Exelby,* 170 Ark. 908, 281 S. W. 671.

The pertinent part of the statute of frauds, Ark. Stat. Ann. § 38-101 (Repl. 1962) provides:

"No action shall be brought . . . to charge any person upon any contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them . . . unless the agreement, promise or contract upon which such action shall be brought, or some memorandum or note thereof, shall be made in writing, and signed by the party to be charged therewith, or signed by some other person by him thereunto properly authorized."

To affirm the chancellor's action in sustaining the demurrer, the appellees contended that the statute of frauds is applicable because the property to be sold is not sufficiently described; that the memorandum or note relied on by appellants is not sufficient to take the contract to sell out of the statute of frauds insofar as appellants' alleged right to purchase is concerned; and that the written memorandum is not sufficient because

it does not show the terms and conditions of the sale and time for payment.

We need to discuss only one of the points involved, and that is the question of whether the alleged contract is barred by the statute of frauds because it does not state the conditions and terms of the sale and the time of payment. At first blush it would appear that there can be no valid objection to the contract on this ground. The sale price is given at $900,000 "to be paid according to the price and terms herein given." The price is stated but not the terms. The listing contract was prepared by filling in spaces on a listing contract form. That part of the contract form designated "terms," to be used in showing encumberances, the down payment, balance owed and how it was to be paid, was left blank.

Appellants argue that in a situation of this kind it is presumed the agreement is for the payment of the entire purchase price in cash and cites *Kempner* v. *Gans,* 87 Ark. 221, 111 S. W. 1123. This case does appear to sustain appellants' view. But there, apparently the court determined that the contract did provide for the terms and conditions of the sale. This court said: "The price was to be $35,500 payable $10,000 cash and the balance to be arranged to the satisfication of the owners."

Appellants also cite *Sturdivant* v. *McCorley,* 83 Ark. 278, 103 S. W. 732, as holding that where no time is "set for payment, the debt was, in law, payable on demand." In that case, ten years after a note was given showing no due date the question arose as to when it was due, and the court held that in the circumstances it was due on demand, and since it was due on demand, it was due immediately after it was signed and delivered. Hence, it was barred by the statute of limitations. The case is somewhat analogous to the situation here, but in view of many other decisions of this court it cannot be said to be controlling. In the Sturdivant case the money had been loaned, the note given, and the only question on this point was the due date. The statute of frauds was not involved.

All of our cases directly in point with the case at bar hold that the terms and conditions of the sale must be stated in the written memorandum in order to take the transaction out of the statute of frauds.

Perrin v. *Price,* 210 Ark. 535, 196 S. W. 2d 766, is in point. There, the memorandum in question provided: "Pocahontas, Arkansas, March 5, 1945. Received from W. F. Perrin $100, payment on town lots, north Pocahontas, at a price of $1,500, known as the J. W. Price pasture lots. (Signed) Clifford Price, Executor." We said: "We think the memorandum or receipt in question here is totally lacking as to the time within which payment was to be made and the method and conditions of payment."

In *Kromray* v. *Stobaugh,* 212 Ark. 377, 206 S. W. 2d 171, the court said: "In our recent case of *Perrin* v. *Price,* 210 Ark. 535, 196 S. W. 2d 766, we had occasion to discuss the essentials required of a memorandum to fulfill the Statute of Frauds. Some of our cases are reviewed therein. It may be true, as counsel state, that we have gone further than most courts, to require that all the essential provisions of the contract be in writing in order to satisfy the Statute of Frauds; but at all events, such is our holding, and to it we will adhere."

In *Wyatt* v. *Yingling,* 213 Ark. 160, 210 S. W. 122, this court quoted from 49 Am. Jur. 354 to the effect that it is not sufficient that the note or memorandum express the terms of a contract; it is essential that it completely evidence the contract which the parties made by giving all of the essential terms, and the court states: "This statement of the law accords with our recent case of *Perrin* v. *Price,* 210 Ark. 535, 196 S. W. 2d 766, and other opinions of this court on the subject there cited. In one of these, that of *Tate* v. *Clark,* 203 Ark. 231, 156 S. W. 2d 218, the headnote reads: 'A contract for the sale of land which fails to show the terms and conditions of the sale, the price to be paid and the time for payment is not sufficient to satisfy the requirements of the statute of frauds.' " To the same effects are the cases of *Schuman* v. *Hughes,* 203

Ark. 395, 156 S. W. 2d 804, and *Lindsey* v. *Hornady,* 215 Ark. 797, 223 S. W. 2d 768.

The listing contract on which appellants rely was made an exhibit to the complaint. As heretofore pointed out, it does not show the terms and conditions of the sale and the time of payment. The chancellor was, therefore, correct in sustaining the demurrer and dismissing the complaint.

Affirmed.

SPENCER *v.* PLAINVIEW LUMBER CO.

5-3675 396 S. W. 2d 943

Opinion delivered November 29, 1965.

[Rehearing denied January 10, 1966.]

John D. Harris, Tulsa, Oklahoma, *Garner & Parker,* for appellant.

Harper, Harper, Young & Durden, for appellee.

JIM JOHNSON, Associate Justice. This workmen's compensation appeal deals with compensability for a heart attack suffered on the job and the resultant disability.

Appellant Mack O. Spencer was employed by appellee Plainview Lumber Company as a millwright. His primary duty was sharpening and changing the saws as needed; secondarily, he would scale logs and see that the mill itself was running properly. On December 10, 1959, J. F. Moss, in charge of the mill in the absence of the owner, requested appellant's assistance in the dry kiln. (The dry kiln is a heated building in which green lumber is placed for 72 hours to dry at a temperature of 160-180° F.) They opened the doors to the kiln and waited one and one-half to two hours for it to cool to about 100° F. This gas kiln had a concrete roof about eighteen feet high and had ten or twelve ceiling fans which hung about three feet below the ceiling. One of the fans had fallen to the ground. Moss and appellant made a platform with some two by sixes and raised the fan up onto the platform. The fan weighed 35 to 40 pounds. Working on the platform, they replaced the fan up on its shaft and lined it up, having to stoop as they worked. One wielded a sledge hammer, the other held a block of wood against the fan to avoid damaging the fan, and alternated using the sledge hammer. Replacing the fan took appellant and Moss fifteen to twenty minutes; the temperature remained about 100 degrees in the kiln. As soon as they were through they left the building, Moss to the office and appellant to the saw mill to return the sledge hammer and wrench. After appellant replaced the tools he felt bad and went to the planer shed and sat down and then laid down on some stacked lumber. He had pain in his chest, then in his left arm and finally had difficulty breathing. Moss came out where appellant was and took him to Ola to see a doctor. Not finding a doctor at Ola, they returned to Plainview where they met a doctor. He was taken to a hospital at Russellville that day and remained there three weeks. Appellant was allowed to return to work on March 22, 1960, for light

work, and worked until February 2, 1961, when he had fluid on his lungs, and has not worked since on doctors' advice.

A hearing was held September 6, 1962, before the workmen's compensation referee, who found for appellant. On appeal to the full commission, the award of the referee was reversed. The commission ruling was affirmed by the Yell Circuit Court, from which comes this appeal.

For reversal appellant contends that the commission erred in holding that appellant failed to prove by a preponderance of the evidence that there is a causal relationship between his employment and his injury and disability.

The general rule on hearing before the commission is that where a claimant establishes by a preponderance of the evidence that he received an accidental injury arising out of and in the course of his employment, he is entitled to the benefits of workmen's compensation. On appeal we are bound by the substantial evidence rule.

The facts here are uncontradicted. The testimony of both appellant and Moss is that appellant had pains within a few minutes (twenty minutes) after they finished their strenuous work in the dry kiln. Moss had immediately sought for him medical attention.

Appellant's principal doctor testified in essence that while such a heart attack might occur anywhere, even while resting or sleeping, the pain appellant experienced following this work was the onset of a coronary thrombosis. Two doctors who examined appellant once each some five years after his injury testified in effect that his usual work would not cause the injury. One of these doctors based his opinion upon a misconception of the facts; whereas the other concedes that such an attack could occur as a result of an unusual exertion.

Review of the record revels that there is no substantial evidence to support the commission's findings. The evidence reflects that appellant's injury arose out of and

in the course of his employment, and that the injury resulted from the unusual exertion or strain in replacing the fan in the dry kiln. Appellant *more* than met his burden of proof. Claimant's burden of proof is discussed in full in the landmark opinion written for this court by the late Justice Minor Millwee in *Bryant Stave & Heading Co.* v. *White,* 227 Ark. 147, 296 S. W. 2d 436. The sole issue in that case was "whether a disabling back strain suffered by a claimant while doing his *usual* work in the customary manner, and without any fortuitous external happening, constitutes a compensable 'accidental injury' within the meaning of the Arkansas Workmen's Compensation Law." (Emphasis ours.) The language and conclusion of the *Bryant* case are clear:

"If we should adopt a requirement that the work or strain be unusual or extraordinary we would . . . read into the law a requirement which greatly increases litigation to determine the elusory difference between usual and unusual strain or exertion. We would also, in effect, recast upon the disabled employee the burden of the old common law defense of assumed risk in specific violation of the statute (Sec. 81-1304). This result is illogical and contrary to the spirit and purpose of the compensation law and the liberal construction we have repeatedly resolved to give it. *Birchett* v. *Tuf-Nut Mfg. Co.,* 205 Ark. 483, 160 S. W. 2d 574; 58 Am. Jur., Workmen's Compensation, Sec. 2.

"Notwithstanding anything we may have said in prior cases, we hold that an accidental injury arises out of the employment when the required exertion producing the injury is too great for the person undertaking the work, whatever the degree of exertion or the condition of his health, provided the exertion is either the sole or a contributing cause of the injury. In short that an injury is accidental when either the cause or result is unexpected or accidental, although the work being done is usual or ordinary."

The cause is accordingly reversed and remanded to the commission for further findings consistent herewith.

OLIVER *v.* MILLER.

5-3683 396 S. W. 2d 288

Opinion delivered November 29, 1965.

Jonh M. Lofton, Jr. and *Jack Yates,* for appellant.

Edgar Woolsey, Jr., Jeff Mobley, William R. Bullock, for appellee.

FRANK HOLT, Associate Justice. This appeal involves a head-on collision between two vehicles killing both drivers, Mrs. Glenda Oliver and Stanley Miller, who were the only occupants of the cars. Appellant first contends that the present action is barred by a previous one.

The accident occurred on December 14, 1963. Six days later, or December 20th, Dow Oliver, husband of Mrs. Oliver on behalf of himself and their four children, filed suit against Leon Hoing, the special administrator of the estate of Mr. Miller, in the Circuit Court of Franklin County, Arkansas seeking damages for the alleged wrongful death of his wife. On that date Mrs. Miller was advised by letter that a special administrator of her husband's estate had been appointed for the specific purpose of securing service of summons upon the administrator in that action. Within the time to answer the special administrator filed a motion to quash the service of summons upon him. No further pleadings were filed in the case and on February 7, 1964 the suit was dismissed "without prejudice." On the previous day an order was entered in the Probate Court of Franklin County appointing Dow Oliver the administrator of the estate of Glenda Oliver, deceased, and permitting him to settle with the special administrator the pending suit in circuit court for the sum of $8,500.00.

On February 26, 1964 Mrs. Miller, as administratrix of the estate of Stanley Miller, decedent, filed the complaint in the instant case against Dow Oliver as administrator of the estate of Glenda Oliver, decedent, in the Circuit Court of Johnson County, Arkansas. Mrs. Miller sought damages for the alleged wrongful death of her husband as a result of the same accident that was involved in the suit of *Oliver* v. *Hoing, supra,* which had been dismissed without prejudice. Upon a trial the jury found the issues in favor of the appellee and awarded her, as administratrix of her husband's estate, the sum of $13,500.00. From the judgment on this verdict appellant brings this appeal.

For reversal it is urged that the court erred in refusing appellant's motion to dismiss appellee's complaint because of appellee's failure to file a counterclaim in the prior action which was between the same parties and involving the same issues of fact in the Franklin County Circuit Court. Appellant insists that the mandatory provisions of Act 54 of 1935 [Ark. Stat. Ann. § 27-1121

(Repl. 1962)] require that the appellee had to assert any of her rights by a counterclaim in the previous action in answer to appellant's complaint. Therefore, by not so doing, the present action is barred by this statute. We cannot agree with the appellant that this statute is applicable or controlling in the case at bar. The dismissal of a cause of action without prejudice permits the bringing of a subsequent action for the same cause. Ark. Stat. Ann. § 37-222 (Repl. 1962); *Campbell* v. *Coldstream Fisheries, Inc.,* 230 Ark. 284, 322 S. W. 2d 79; 27 C. J. S., Dismissal & Nonsuit §§ 72-73, p. 471.

In the case at bar the dismissal without prejudice occurred during the pendency of the motion to quash and before the time had expired for the appellee to answer or counterclaim. There was no adjudication on any issue in the Franklin County Circuit Court action and consequently it cannot be said to be res judicata. Appellee's right of action is not barred in the instant case.

Appellant next contends that the evidence is insufficient to support the verdict. Upon this point the appellant succinctly states that: "The only issue actually in controversy was the question of the direction in which the two drivers were going at the time of the collision." Appellant contends and presented evidence that Miller was driving westward and Mrs. Oliver was driving eastward when the collision occurred in her lane of traffic. Appellant argues there is no substantial evidence to the contrary. On appeal we must view the evidence in the light most favorable to the appellee and affirm if there is any substantial evidence to support the jury verdict. *Menser* v. *Danner,* 219 Ark. 130, 240 S. W. 2d 652; *Jarrett* v. *Matheney,* 236 Ark. 892, 370 S. W. 2d 440.

With this rule in mind we review the evidence. There was no eyewitness to the accident. Mrs. Miller testified as to her husband's customary route and time of arrival in returning from Noel, Missouri, where he was employed, to their home in Clarksville, Arkansas. Darrell Lofton testified that Mr. Miller left Mr. Lofton's office in Springdale, Arkansas at approximately 2:00 P.M. or

route to his home on the date of the accident. Buddy Rogers testified that he personally knew Mr. Miller and observed him proceeding east on highway #64 traveling at a normal rate of speed toward Clarksville at a point approximately 7 miles west of Mulberry at about 3:15 or 3:20 P.M. on the date of the accident. The accident occurred about 1 mile east of Mulberry. State Trooper Williams stated that he was notified of the accident by radio at approximately 3:25 P.M. and that the collision occurred on the south side of the highway in the eastbound lane of traffic.

We cannot say that this evidence was not sufficiently substantial to support the jury's verdict. *Callaway* v. *Perdue,* 238, Ark. 652, 385 S. W. 2d 4; *St. Louis-Southwestern Ry. Co.* v. *Holwerk,* 204 Ark. 587, 163 S. W. 2d 175; *Harmon* v. *Ward,* 202 Ark. 54, 149 S. W. 2d 575. The preponderance or weight of the evidence was a matter solely within the province of the jury. We do not determine the preponderance of the evidence but only its legal sufficiency. In *Missouri Pacific Transp. Co.* v. *Sharp,* 194 Ark. 405, 108 S. W. 2d 579, we said that we have long adhered to the universal application of the rule sustaining a jury verdict "where there is any substantial testimony to support it, although it may appear to the appellate court to be against the preponderance."

Appellant's final contention is that the court erred in refusing to admit a broken vodka bottle into evidence. The trial court was correct. Officer Brown testified that he looked into the Miller automobile at the scene and did not see the broken bottle. He found the broken bottle in the Miller car some five hours later when he again checked it at a salvage yard to which it had been removed by other parties. No testimony was offered that Mr. Miller had been drinking or was intoxicated nor were there such allegations in the pleadings. The introduction of the bottle into evidence in these circumstances would have been prejudicial as being irrelevant and too remote since it was not a part of the res gestae. *Christianson* v. *Muller,* 239 P. 2d 835 (Ore. 1952).

The judgment is affirmed.

WIRGES *v.* ARRINGTON.

5-3685 396 S. W. 2d 292

Opinion delivered December 6, 1965.

G. Thomas Eisele, for appellant.

Gordon & Gordon, for appellee.

CARLETON HARRIS, Chief Justice. This litigation is a sequel to *Wirges* v. *Bean, Judge,* 238 Ark. 104, 378 S. W. 2d 641, decided by this court on May 11, 1964. In that case, Wirges sought a Writ of Mandamus to compel the Circuit Court to order the court reporter to transcribe proceedings occurring on March 19, 1963, when Wirges, in open court, was asked certain questions by the judge of that court, who also made certain remarks to him. Wirges contended that he had asked the reporter, Carl Lee Arrington, to furnish him with the transcript, but had been informed by the reporter that he (Arrington) would not furnish it unless and until the Circuit Court ordered him to do so. According to Wirges, Judge Bean refused, and he then sought the writ from this court. This

court held that the court reporter was a necessary party to the litigation, and that Wirges' remedy was to file a mandamus action against the court reporter. Thereafter, on September 2, 1964, appellant filed a mandamus action in the Conway County Circuit Court for the purpose of obtaining the desired transcript, and it appears that the summons was duly issued for Arrington to both the Sheriff of Conway County, and to the Sheriff of Johnson County, home of Arrington. On September 12, Arrington appeared specially,[1] without entering his general appearance, and also filed a motion to quash service of summons. This motion was based on the contention that a summons could not be legally served on him except in Conway County. The record does not reflect any action by the court on either pleading.[2] Thereafter, on September 23, 1964, Wirges filed a complaint, identical to the Conway County complaint, in Johnson County.[3] The record reflects several letters from counsel for appellant to the Circuit Clerk of Conway County, to the sheriff of Conway County, to Circuit Judge Wiley Bean, and to the sheriff of Johnson County, inquiring if Arrington had been served with summons. These letters dated from the time of the filing of the Conway County action until January 22, 1965, at which time the Conway County Circuit Court entered the following order:

"A petition was filed by Gene Wirges in the Circuit Court of Conway County, Arkansas, asking for a Writ

[1] The special pleading is as follows: "That * * * Carl Lee Arrington has been advised that a petition for a Writ of Mandamus has been filed against him in the Conway County Circuit Court, Conway County, Arkansas. That he is entitled to ten (10) days notice of any hearing and no notice has been served upon him although he has been advised that the matter is to be heard on September 19, 1964. That the petitioner should be required to give him ten days notice and that the cause should be continued until such notice is given."

[2] An exchange agreement was executed between Judge Wiley W. Bean, Judge of the Fifth Judicial Circuit, and Judge Paul X. Williams, Chancellor of the Fourteenth Chancery District on September 11, 1964, for the trial and disposition of the case of *Wirges* v. *Arrington*, but there is a notation on the order, "Cancelled October 14, 1964. Wiley W. Bean."

[3] This complaint does not appear in the transcript, but a subsequent court order refers to it, and appellant and appellee mention it in their briefs. The Johnson County complaint is pertinent to the issue herein.

of Mandamus, requiring the respondent, Carl Lee Arrington, Court Reporter within and for the 5th Judicial District of Arkansas, to furnish a purported transcript of the record in a case wherein no order nor judgment had ever been rendered. Thereafter, Case Number 2323 was filed in the Circuit Court of Johnson County, Arkansas, wherein the same parties and the same subject matter were involved. The Johnson County petition was apparently copied from the Conway County petition in that the paragraphs and verbiage are identical in both petitions.

"Service of Summons has been obtained on Mr. Arrington in the Johnson County case and a Motion by the respondent to Dismiss has been filed.[4] Service of Summons has not been had in the Conway Circuit Court. Be that as it may, the law does not permit two suits by the same parties having the same subject matter to be maintained at the same time, and the Court finds that Case Number 5346-A, now pending in the Circuit Court of Conway County, Arkansas, should be dismissed.

"IT IS, THEREFORE, considered, ordered and adjudged by the Court that the Petition for a Writ of Mandamus, filed by Gene Wirges against Carl Lee Arrington, in Case Number 5346-A, Conway Circuit Court, should be, and the same is hereby, dismissed."

From this order of dismissal, appellant brings this appeal.

It is contended that the court erred in dismissing the petition for a writ of mandamus upon its own intiative, and appellant is right in this contention. This is a transitory cause of action.[5] Ark. Stat. Ann. §§ 27-1115 and 27-1119 (Repl. 1962) set forth the proper procedure to be used where actions are pending in different counties for

[4] The transcript itself does not show that service has been obtained on Arrington in Johnson County.

[5] Ark. Stat. Ann. § 27-602 (Repl. 1962) provides, *inter alia*, that an action against a public officer for an act done under color of office, or for neglect of official duty, must be brought in the county where the cause arose. However, a court reporter is not a public officer, but only an officer of the court. See Ark. Stat. Ann. § 22-351 (Repl. 1962).

the same cause. Section 27-115 provides that a defendant may demur to the complaint where it appears on its face, *inter alia,* "that there is another action pending between the same parties for the same cause; * * *" and Section 27-1119 provides:

"When any of the matters enumerated in Section 111 [§ 27-1115] do not appear upon the face of the complaint, the objection may be taken by answer. * * *"

As long ago as 1905, we passed on this question in *Kastor* v. *Elliott,* 77 Ark. 148, 91 S. W. 8. There we said:

"* * * The statutes of this State[6] provide what shall be done in such cases. They provide that when it appears in the complaint that there is another action pending between the same parties for the same cause, the objection may be taken advantage of by demurrer; and if it does not appear in the complaint, it may be taken by answer, and if the objection is not taken by demurrer or answer the defendant shall be deemed to have waived the same."

Accordingly, the appropriate manner in which to raise this issue is for the adverse party to call it to the attention of the court by an appropriate pleading.

Actually, the court erred twice. In the first place, it had no authority, on its own initiative, to dismiss the complaint.[7] In the next place, even if such authority existed, the wrong complaint was dismissed. The 1961 General Assembly enacted Act 32 (Ark. Stat. Ann. § 27-301 [Repl. 1962]), which reads 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

[6] The statutes referred to in this opinion are 6093 and 6096, Kirby's Digest of the Statutes of Arkansas, which were the same as the present statutes, Sections 27-1115 and 27-1119.

[7] It is pointed out in 12 Ark. L. Rev. 178, 181 (1958) in a comment by H. Clay Robinson, that, though some jurisdictions will take judicial notice of the pendency of more than one suit on the same subject matter, this procedure is not permissible in Arkansas. *Southern Farmers Assn., Inc.* v. *Wyatt,* 234 Ark. 649, 353 S. W. 2d 531, and cases cited therein.

[2] or more actions are commenced in different courts involved 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.*[8] Each clerk of court shall indorse on each complaint the exact date and time of day when the complaint was filed and a summons issued thereon and each sheriff shall indorse on each summons the exact date and time of day when the summons was placed in his hands."

It is thus obvious that, if a summons was issued in the Conway County case and placed in the hands of the sheriff, even though it has not been served, the Conway Circuit Court is the court that has jurisdiction of this matter.

The transcript in this case is far from clear, and nothing is contained therein that definitely shows that summons was placed in the hands of the Conway County Sheriff. However, letters from counsel for appellant indicate that this was done; for instance, on November 25, 1964, a letter from counsel to the Sheriff of Conway County, states, "I am advised by Mr. Millard Richardson's office [Circuit Clerk] that summons was placed in your hands some time ago to be served upon Mr. Carl Lee Arrington. * * *" Of course, if the clerk did not turn the summons over to the sheriff's office, suit has not actually been commenced in that county, and appellant would be entitled to an early hearing in Johnson County on his motion (to obtain transcription of the proceedings on March 19, 1963). We proceed, in this opinion, on the assumption that the clerk did turn the summons over to the office of the Conway County Sheriff.

The record does not reflect the reason why summons has not been served on Arrington in Conway County, and it is possible that there is good and sufficient reason. However, since Arrington is the official court reporter,

[8] Emphasis supplied.

it seems that he would have been in Conway County attending any court sessions held. At any rate, a motion filed on January 30, 1965, appears in the transcript, wherein the Conway Circuit Court is asked to issue its order directing the sheriff to serve summons upon the respondent in Conway County. This motion has apparently not been acted upon as yet, and, the summons having been purportedly issued nearly a year ago, appellant is certainly entitled to a prompt hearing.

The order dismissing the complaint is reversed, set aside, and held for naught, and the Conway Circuit Court is directed to reinstate this complaint.

McFaddin, J., concurs.

Ed. F. McFaddin, Associate Justice (concurring). I agree with the Majority that the judgment of dismissal should be reversed; but my reasons for such reversal are entirely different from those contained in the Majority Opinion; and I now give my reasons for reversal and the procedure which I think the Majority should have ordered in this case:

The transcript before us in this case shows that on September 11, 1964 Judge Wiley W. Bean (Judge of the Conway Circuit Court) entered into an exchange agreement[1] with Judge Paul X. Williams (Chancellor of the 14th Chancery District), which exchange agreement was filed in the records of this case on September 14, 1964, and reads as follows:

"By consent and agreement, Judge Paul X. Williams, Chancellor of the Fourteenth Chancery District, exchanges circuits with Judge Wiley W. Bean, Judge of the Fifth Judicial Circuit, for the trial and disposition of the case of Gene Wirges v. Carl Lee Arrington, pending in the Circuit Court of Conway County, Arkansas. This Exchange Agreement is to remain in full force and effect for such period as is found necessary for the trial and final disposition of the case herein designated.

[1] For statutes on exchange of circuits and districts see Ark. Stat. Ann. § 22-340 *et seq.* (Repl. 1962).

"The Clerk of the Circuit Court is ordered and directed to enter upon the Circuit Court Records this Exchange Agreement, evidencing the exchange of circuits as herein set out."

So far as the transcript before us shows, this exchange agreement is in full force. It is true that there appears to have been endorsed on the exchange agreement on October 14, 1964 these words: "Cancelled October 14, 1964 Wiley W. Bean." An exchange agreement cannot be cancelled by a unilateral action of one of the parties. Judge Bean and Judge Williams had mutually agreed to the exchange agreement; and Judge Bean could not cancel by a unilateral action. So the exchange agreement, dated September 11, 1964 and filed September 14, 1964, is valid and binding,[2] and all further steps in this case should have been taken in the Circuit Court by Judge Paul X. Willams. Yet, without any further pleadings having been filed and without motion having been made or notice given or entered, and order of dismissal was made in this cause on January 22, 1965 by Judge Wiley W. Bean; and from that said order of dismissal Wirges prosecutes this appeal.

I would reverse the order of dismissal. It was not made by the Judge to whom the case had been assigned by the exchange of circuits agreement. The petition for mandamus is still pending in the Conway Circuit Court; and I feel sure that Judge Paul X. Williams, the Judge on Exchange, would (if my views were adopted) take prompt steps to see that summons be duly served on Arrington in Conway County, and that the petition for mandamus be promptly and speedily heard; and exercising our supervisory powers under Art. VII, Sec. 4 of the Constitution, I think this Court should direct that Judge Paul X. Williams, Judge on Exchange, have jurisdiction of this case until it is concluded in the Conway Circuit Court.

[2] Attention is here called to Act No. 496 of 1965, which had not been enacted at the time of the matters here involved.

BABER *v.* WILLIAMS FORD CO.

5-3691 396 S. W. 2d 302

Opinion delivered December 6, 1965.

[redacted]

J. B. Milham, for appellant.

No brief filed for Appellee.

ED. F. MCFADDIN, Associate Justice. Appellee filed action against appellant to recover the deficiency claimed on a sales contract. On August 10, 1964 appellee Williams Ford Company (hereinafter called "Williams") sold to appellant Richard Baber a 1959 model Ford automobile. The written contract[1] recited that Baber owed a balance of $882.90, payable in instalments of $49.05 per month beginning September 12, 1964. When appellant Baber failed to make the monthly payments due, the car

[1] The written contract contained the following "terms and conditions":
"1. Seller shall have a security interest in the property and the proceeds thereof until all amounts due and to become due hereunder are fully paid in cash . . . .
"9. In the event the Buyer defaults in any payment . . . . Seller shall have the right at its election to declare the unpaid portion of the time balance . . . . immediately due and payable. Further, in such event, Seller . . . . may take immediate possession of the property . . . . In event of repossession of the property, and if Buyer has not redeemed the same in accordance with law, Seller may either sell same at public sale . . . . or dispose of same by private sale in such manner and upon such terms as shall appear to the Seller to be reasonable without demand for performance, with such notice to the Buyer, if any, as may be required by law . . . The proceeds of any such sale . . . . shall be applied to the partial . . . . satisfaction of the Buyer's obligations. The deficiency, if any, shall be paid by the Buyer to the Seller forthwith, upon demand . . . ."

was repossessed and sold to a wholesale secondhand car dealer for $210.00. Then, after giving credit for unearned interest, etc., Williams filed this action against Baber for $596.12 as the deficiency on the contract.

In his answer, the defendant Baber, after making a series of defensive claims not here material, specifically pleaded that Williams had failed to give Baber proper notice of the sale of the car. Here is the specific pleading in that regard:

"That defendant had no notice of the date of the sale of said automobile or to whom sold. That plaintiff did not comply with the terms of the Uniform Commercial Code; and that the acts and procedure of the plaintiff in the transactions in the sale to defendant and in the sale of the car after taking possession and all acts were not Commercially reasonable, . ."

In the trial to the jury Williams testified that after selling the car to Baber, Williams transferred the note and contract to Ford Motor Credit Company; that when Baber defaulted in the monthly payments due in October and November the Ford Motor Credit Company repossessed the car and delivered it to Williams and demanded of Williams the repayment of the amount Williams had received from Ford Motor Credit Company. With the matter in that state of affairs, Williams wrote Baber a letter dated November 30, 1964, reading as follows:

"November 30, 1964

"Mr. Richard Baber
507 E. Sevier Street
Benton, Arkansas

"Dear Mr. Baber:

"As you know, on August 10, 1964, you purchased from us a 1959 Ford 4-Door bearing Motor # A9CG136757, and financed the balance with Ford Motor Credit Company of Little Rock, Arkansas. On November 24, 1964, Ford Motor Credit Company repossessed this automobile due to default of the October 12th and November 12th

payments in the amount of $49.05 each, and returned the automobile to us. Under the terms of the Conditional Sales Contract, Ford Motor Credit Company has requested us to pay them the net balance owed which is $796.12. Due to the foregoing, we hereby give you seven days from receipt of this letter to pay off your contract and redeem the automobile, or we will sell it at private sale. Of course, if this action is necessary and the sale price is less than what you owe Ford Motor Credit Company, we will refer the deficiency to our local attorney for collection. If you have any questions pertaining to this matter, please call or contact us."

Mr. Williams testified that Baber did not respond in any way to the letter and that Williams had the car placed on its lot for resale. Here is the Williams' testimony:

"Q. What did you do?

"A. We cleaned the car up and put it on the lot for resale. It sat there several weeks without a legitimate buyer for it. We took it wholesale to a used car dealer here in town.

"Q. Who was that?

"A. Duvall Used Cars.

"Q. On the Bauxite highway?

"A. At the time, it was on Military and Alcoa Road, at the intersection.

"Q. Did you attempt to sell it to him privately?

"A. We tried to sell it to several people. He was the highest bidder.

"Q. What did he pay for it?

"A. $210.

"Q. Was this a wholesale transaction?

"A. Yes, and it took us a long time to get $210. . ."

The only notice that Williams ever gave Baber concerning the resale of the car is the letter of November 30, 1964, as above copied. The question raised by Baber's answer was whether this letter of November 30, 1964 was "reasonable notification of the time" (after which any private sale, etc. could be made), as required by Ark. Stat. Ann. § 85-9-504 (Add. 1961), which is a part of the Uniform Commerical Code.[2]

At the conclusion of the evidence the Court, on its own motion, directed a verdict for the plaintiff for the amount claimed; and on appeal the appellant lists five points, but the only one which gives us any concern is Point No. 2, which reads:

"The Court erred in refusing to submit issues of facts to the jury and in directing the jury to return a verdict for plaintiff."

Under Ark. Stat. Ann. § 85-9-504 (Add. 1961), in order for the secured party (Williams, in this case) to hold the debtor (Baber, in this case) liable for any deficiency, the second party must give the debtor "reasonable notice," as stated in Paragraph 3 of said section.[3] Was the letter that Williams wrote Baber on November 30, 1964 such "reasonable notice"? That is the question.

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[2] Prior to the adoption of the Uniform Commercial Code the Arkansas holdings were that if the seller exercised the right to repossess the car, as by replevin, then he waived the debt and could not recover for any deficiency. The adoption of the Uniform Commercial Code changed these Arkansas decisions. In 16 Ark. Law Review, p. 1 *et seq.*, there is the report of an entire seminar discussion held at the University of Arkansas on the Uniform Commercial Code; and on page 151 of that volume there is the statement by Professor Mooney: "The most significant change in the law of conditional sales contracts is the final and conclusive eradication of the doctrine of election of remedies which has dogged conditional sellers and overjoyed conditional buyers almost since the founding of the State of Arkansas."

[3] The text containing the germane language reads: "Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor." For a case holding that a secondhand automobile does not have a recognized market value, nor is of a type which is the subject of widely distributed standard price quotation, see *Alliance Discount Corporation* v. *Shaw*, 171 A. 2d 548.

Baber specifically pleaded absence of notice. In instructing a verdict for the plaintiff the Court necessarily had to hold that, as a matter of law, Williams had given Baber reasonable notice.

We think, under the situation here existing, the question of whether the letter of November 30, 1964 was reasonable notice was a question for the jury to decide. The letter of November 30th shows that Williams had not then repaid the Ford Motor Credit Company, so was not in full possession of the car with right to sell. Not until Williams reacquired the paper from Ford, would Williams have had the right to sell the car. We have no brief for the appellee in this case, and our search has disclosed only one case decided by us on this matter of reasonable notice. That is the case of *Hudspeth Motors*[4] v. *Wilkinson,* 238 Ark. 410, 382 S. W. 2d 191. We had no hesitancy in saying that the notice in the Hudspeth case was sufficient as a matter of law; but in the case here, the letter that Williams wrote Baber on November 30, 1964 was so vastly different from the notice in the Hudspeth case as to make a question of fact for the jury on the matter of reasonable notice of the sale of the car. Therefore, for the error of the Court in instructing a verdict for the plaintiff the judgment is reversed and the cause is remanded.

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[4] In studying the present case we went back to the original transcript in the cited case; and the kind of notice that Hudspeth gave Wilkinson was entirely different from the kind of notice given in the case at bar. Here is the notice that was contained in the Hudspeth case: "NOTICE IS HEREBY GIVEN: THAT HUDSPETH MOTORS, INC. will, on October 19, 1962, sell at its place of business in Harrison, Arkansas, the 2-ton Ford Truck, Motor # F69L7U38257, which was purchased by O. N. Wilkinson under an agreement executed between said O. N. Wilkinson and Hudspeth Motors, on the 13th day of February, 1962; and that in the event the amount received for said truck is less than the amount yet owing under the aforesaid agreement, Hudspeth Motors, Inc. will file suit to recover from the said O. N. Wilkinson the deficiency."

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD CO. *v.* DAVIS, ADM'R.

5-3696 397 S. W. 2d 360

Opinion delivered December 6, 1965.

[Rehearing denied January 24, 1966.]

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

Jeff Mobley and *William R. Bullock,* for appellee.

GEORGE ROSE SMITH, J. On the night of November 12, 1963, Dewey Moore was killed in a grade crossing collision in the town of Belleville. Moore was survived by six adult children. This action for wrongful death was brought by the administrators of Moore's estate against the railroad company, the locomotive engineer,

D. L. Corley, and the fireman, G. M. Paul. The jury returned a $15,000 verdict against the corporation, but the verdict was in favor of the two individual defendants. The trial court overruled the corporation's motion for judgment notwithstanding the verdict and entered a judgment in conformity with the jury's findings.

Similar inconsistent verdicts were considered in *Porter-DeWitt Const. Co.* v. *Danley,* 221 Ark. 813, 256 S. W. 2d 540 (1953), where we reviewed our earlier cases. The rule is that if the employer's liability is attributable solely to the employee's negligence, a verdict in favor of the employee exonerates the employer as well. But if there is independent actionable negligence on the part of the employer then he may be held liable even though the employee is found to have been free from fault. Thus the question is whether the evidence establishes a cause of action against the railroad company without regard to any negligence of its engineer or fireman.

At the trial the plaintiffs' proof was directed primarily to their contention that the accident was caused by the train's excessive speed or by the train crew's failure to keep a lookout or to sound the whistle or bell, as required by law. This proof cannot support the judgment against the company, for it merely tends to indicate negligence on the part of the individual defendants. Counsel for the appellees, however, suggest three separate grounds upon which the railroad company might be held to have independently negligent.

First, it is argued that the crew's failure to sound the whistle or bell may have been due to the company's negligence in not maintaining a whistle post (a small post bearing the letter "W") at an appropriate point on the railroad right-of-way to indicate to the train crew that the crossing signals should be given. The flaw in this contention is that there was no such issue of fact at the trial. The complaint contained several specific allegations of negligence, but the failure to maintain a whistle post was not among them. There was nothing in the pleadings to warn the railroad company that the absence

of such a post would be a contested question of fact. There was no request that any such issue be submitted to the jury, although the actual allegations of negligence were explained in the court's instructions. All that the record contains on this point is a casual statement by an expert witness, a photographer, that he did not see a whistle post either in making an aerial photograph of the grade crossing or in driving down the highway next to the tracks. This testimony may have been admissible to corroborate the plaintiffs' proof that the statutory signals were not given, but it certainly did not create the issue of fact now being argued for the first time.

Secondly, it is contended that the company was negligent in having constructed its Belleville station so close to the crossing where Moore was killed that his view of the oncoming train was unnecessarily obstructed. Photographs in the record show that Highway 10 and the railroad right-of-way lie parallel as they pass through the community and together provide an almost unobstructed view in both directions from the cross street on which Moore was traveling. The only obstruction is the depot, a small frame building 18 feet wide. As Moore approached the crossing the depot was 87 feet down the tracks to his right (the direction from which the train was coming) and was set back 18 feet from the tracks. Moore had lived in Belleville for 28 years and was thoroughly familiar with the location of the depot, which was built some 50 years ago. The train, with its headlights burning, apparently struck the center of Moore's car as he attempted to drive across the tracks.

The presence of an obstruction near a grade crossing (especially an obstruction that has existed for half a century) is not, in itself alone, a basis for a finding of negligence on the part of the railroad company. *Parrish* v. *Atlantic Coast Line R.R.*, 221 N. C. 292, 20 S. E. 2d 299 (1942); Missouri *K. & T. Ry.* v. *Perino,* 118 Okla. 138, 247 P. 41, 47 A. L. R. 283 (1926). The effect of the obstruction is to impose upon both the motorist and the train crew a duty to use care commensurate with the hazardous situation that has been created. Blashfield,

Cyclopedia of Automobile Law & Practice, § 1795 (Perm. Ed., 1935).

The jury's problem was simply that of weighing Moore's negligence against the negligence of the train crew. This problem involved essentially a single question of fact. Neither the pleadings nor the instructions suggested that any negligence incident to the construction or maintenance of the depot might be separated from the other circumstances in the case and examined all by itself. The proximity of the depot to the grade crossing was merely an element to be considered by the jury in determining the standard of conduct applicable to the train crew and the traveling public. It could not serve as a basis for a finding of independently actionable negligence on the part of the corporate defendant. See *Ben M. Hogan & Co.* v. *Krug,* 234 Ark. 280, 351 S. W. 2d 451 (1961), for a full discussion of a similar question.

Thirdly, the plaintiffs attempted to prove that the railroad company had failed to erect a stop sign at this crossing after having been notified that the town council had declared it to be hazardous. Ark. Stat. Ann. §§ 75-641 and -642 (Repl. 1957). The proof, however, is manifestly deficient. The statute requires that the city council or mayor designate "by proper order or proclamation" the crossing that is deemed to be hazardous. Section 75-641. There is no proof that any action on the part of the mayor or council of Belleville was ever taken as a matter of record. The asserted municipal action could not be established by parol evidence. *Hencke* v. *Standford,* 66 Ark. 535, 52 S. W. 1 (1899). Moreover, the only pertinent communication that is shown to have been made to the railroad company was a letter in which the mayor requested that a stack of pulpwood be removed from the right-of-way. There is no competent evidence indicating that the location of the depot was ever made a basis for complaint by municipal action that complied with the statute.

The car in which Dewey Moore was killed was owned by his son Hershell. In the court below Hershell re-

covered judgment against all three defendants for the value of the car. It is not contended that Dewey was acting as his son's agent. Hence the judgment in favor of Hershell must be affirmed, for even though Dewey's negligence exceeded that of the defendants it would not be imputed to Hershell as the owner and bailor of the vehicle. *Mullally* v. *Carvill,* 234 Ark. 1041, 356 S. W. 2d 238 (1962).

The judgment for the value of the car is affirmed. The judgment for wrongful death is reversed and the cause dismissed.

HUDMON *v.* COONFIELD.

5-3686 396 S. W. 2d 296

Opinion delivered December 6, 1965.

Davis Duty, for appellant.

Eugene Coffelt, for appellee.

PAUL WARD, Associate Justice. The real question involved on this appeal concerns the sale of certain real property under execution to satisfy a $1000 fine. The fine was assessed against Virginia Jewell Miller (called Mrs. Miller) who owned the land involved and who had refused to deliver custody of an infant to its mother, Virginia Ilene Hudman (called Mrs. Hudmon).

The $1000 fine was assessed against Mrs. Miller on July 6, 1964, and she sold the land to Harrison Coonfield (appellee) sometime in December 1964. On March 4, 1965 the land was sold, under execution at public auction, to Edgar Shook (one of the appellants herein).

When appellee filed suit in chancery court to quiet his title Edgar Shook was made a party defendant because he claimed title as purchaser at the execution sale just mentioned. Later the matter was transferred to the circuit court on appellee's motion to set aside the execution sale. In answer Shook alleged "that the order of July 6, 1964 constitutes a valid subsisting judgment at law against Virginia Jewell Miller . . . .", and that the execution sale was valid and should be sustained.

On April 2, 1965, after a hearing, the circuit court quashed the execution sale and quieted title to the land in appellee; hence this appeal.

Ark. Stat. Ann. § 29-130 (Repl. 1962) provides among other things that a judgment in either the Supreme, Chancery, or Circuit Court shall be a lien on land owned by a defendant in the county from the date of its rendition. It must be conceded therefore that, if the assessment of the fine against Mrs. Miller constituted the kind of judgment referred to in the above section, the execution sale was valid and conveyed title to appellant Shook. This is true because the assessment of the fine preceded the sale by Mrs. Miller to appellee.

It is our conclusion that the assessment of the fine in this instance constituted a judgment contemplated by the above mentioned statute, and that it was a lien on Mrs. Miller's land. Although the question presented appears to be a novel one generally and especially to this Court, yet there is respected authority in support of our conclusion.

In 36A C. J. S. (p. 441) FINES, § 9-by Execution against property, we find this:

"As a general rule a fine may be enforced by execution against the defendant's property."

Following the above, the text continues:
"After a fine has been imposed by the sentence of the court, it is regarded as in the nature of a debt of record due the state, and ordinarily it may be enforced by execution against defendant's property both at common law and under many of the statutes."

In the matter of *Application of Fishman,* 241 Pac. 2d 603, the court made this statement:

"A judgment imposing a fine, without any alternative, is equivalent to a civil money judgment, and its collection is subject to the same rules."

It is not contended here, nor does the record show, that Mrs. Miller had any alternative to paying the fine assessed against her.

In addition to what we have already said, we think Ark. Stat. Ann. § 43-2404 (Repl. 1964) also supports the position we take in this case. In material parts this section reads:

"The clerk of the court . . . shall issue executions for all fines imposed . . . in penal actions or *otherwise* . . . remaining unpaid . . . in the same manner as executions in civil cases, and the property of the defendant may be seized and sold . . . ." (Emphasis added.)

It follows therefore that the judgment and decree of the trial court must be reversed and nullified, and it is so ordered.

Reversed.

5149 396 S. W. 2d 306

Opinion delivered December 6, 1965.

[redacted]

George Howard, for appellant.

Bruce Bennett, Attorney General, By: *Farrell Faubus,* Asst. Atty. General, for appellee.

SAM ROBINSON, Associate Justice. The appellant, Eugene Meeks, 19 years of age, pleaded guilty to the charge of burglary and was sentenced to six years in the penitentiary. About six weeks later he filed a motion to set aside the judgment, and that he be allowed to enter a plea of not guilty. The motion was overruled, and he has appealed to this court.

It appears that on July 29, 1964, a felony information was filed by the prosecuting attorney in the circuit court charging appellant with burglary. It further appears that the burglary is alleged to have been committed on July 27; the appellant was arrested on that same day; on August 5 he pleaded guilty and was sentenced.

In his motion to set aside the judgment, appellant alleged that he is not guilty, but that he pleaded guilty because he was told by officials that it would be better for him to do so; that he would get less time than he would by standing trial. The officials deny that any such statement was made to appellant. The learned trial judge found as a fact, that in all probability appellant received a lesser sentence than he would if he had gone to trial on a plea of not guilty.

But be that as it may, we do not find any substantial distinction between this case and the case of *Swagger* v.

State, 227 Ark. 45, 296 S. W. 204. There we said: "In most instances, since the decision in *Johnson* v. *Zerbst,* 304 U. S. 458, 82 L. Ed. 1461, 58 S. Ct. 1019, 146 A. L. R. 357, the courts have held it to be error to permit a young, inexperienced person to plead guilty to a serious charge where he has no attorney." The point is fully developed in Swagger, and that case is controlling here.

Reversed and Remanded.

HARRIS, C. J. & WARD & JOHNSON, J. J., dissent.

CARLETON HARRIS, Chief Justice (dissenting). As I interpret the majority opinion, it holds that the fact that a defendant is a minor (less than twenty-one years of age) is sufficient in itself to require that the trial court appoint an attorney for him before any plea can be entered. I agree that, in some instances, an attorney should be appointed, but I emphatically disagree that it should be done in every instance solely because a defendant is not legally an adult.

This defendant is nineteen years of age. By statute (Ark. Stat. Ann. § 34-2001 [Repl. 1962]), any male person of the age of eighteen years,[1] may have his disabilities (of minority) removed by court order, and he is then authorized to "transact business in general * * * with the same effect as if such act or thing were done by a person who had attained his or her majority; * * * and every act done * * * shall have the same force and effect in law and equity as if done by a person of full age." It is thus apparent that the law contemplates that a boy eighteen years of age is, generally speaking, mentally capable of transacting business to the same degree as an adult.[2]

Arkansas law permits a young man eighteen years of age to enter into a marriage contract if he has the

[1] He must also be a resident of the county in which he files his application.

[2] The Circuit and Chancery Courts are empowered to enter orders removing disabilities, but it is largely within the discretion of the court as to whether particular petitions for removal of disabilities should be granted.

consent of his parents or guardian. Ark. Stat. Ann. § 55-102 (Supp. 1965).

Arkansas law permits a person eighteen years of age to make a will. Ark. Stat. Ann. § 60-401 (Supp. 1965).

A nineteen-year-old boy (and younger) is subject to the military draft, so apparently Congress feels that one of that age is normally sufficiently intelligent to understand military training, and to learn how to defend himself in combat.

I could go on endlessly with this list, but the point is that if a young man is intelligent enough to do the things mentioned, he is likewise intelligent enough to know whether he wants a lawyer. Bear in mind that this is not a case wherein an indigent defendant requested a lawyer as in *Gideon* v. *Wainwright,* 372 U. S. 335, and to me, there is a vast difference in this case and *Swagger* v. *State,* 227 Ark. 45, 296 S. W. 2d 204, relied upon by the majority. In *Swagger, the defendant was not informed by the court that a lawyer would be appointed to represent him if he so desired.* In the present case, *it is admitted that the court did offer to appoint counsel for Meeks,* and he refused the offer,[3] but it is now asserted that appellant did not understand the value, or the significance, of counsel. However, I find nothing in the record to establish that fact. Appellant appears to possess normal intelligence. His father was present in the courtroom on the day that Meeks entered the plea of guilty, and the father had previously visited and talked with his son at the jail. In fact, it appears that the only request made at that time by the elder Meeks was that his son be committed to the State Hospital for observation—which was done.[4]

I reiterate that there may well be instances where, under particular facts and circumstances, an attorney should be appointed for a youthful defendant before any

[3] If the court had not informed Meeks of his right to counsel at the time of the plea, I would also vote to reverse.

[4] The hospital report reflected "without psychosis."

plea is taken[5]—but I certainly do not feel that this case comes within that category.

Summarizing:

1. Meeks had finished Junior High School, and from the record, appears to possess normal intelligence.

2. He was admittedly offered counsel before he entered his plea of guilty, but refused the offer.

3. His father was present in the courtroom at the time the plea was entered, and had previously talked with his son, but raised no objection.

Gideon v. *Wainwright, supra,* holds that an indigent prisoner is entitled to counsel unless he "competently and intelligently" waives same. I am of the view that appellant was capable of waiving the right to counsel, and I deeply regret that this court is holding that one fact alone is sufficient to reverse this case—that fact being that appellant was only nineteen years of age.

I respectfully dissent.

I am authorized to state that Mr. JUSTICE JOHNSON joins in this dissent.

PAUL WARD, Associate Justice, (dissenting). On October 18, 1965, by a *Per Curiam* Order, we promulgated "Criminal Procedure Rule No. 1." In brief, this Order sets up procedure by which a person, who has been finally adjudged guilty of a crime, who is confined in the State Penitentiary, and who claims one or more of his constitutional rights have been violated, can make application for another trial. This is a new (and untried) form of procedure adopted recently by this and numerous other state courts in an effort to stem the flood of such applications resulting from recent decisions by the U. S. Supreme Court.

The case under consideration gives us the first opportunity to interpret this rule and proscribe procedure

[5] For instance, a boy in his early teens; an illiterate; a defendant, not legally insane, but mentally retarded; a youngster far away from family and friends.

for preliminary hearings thereunder. For example; The trial judges should know how much, if any, weight we give to their findings; To what extent, and for what purpose, may testimony be introduced to show the guilt or innocence of the applicant?

The majority have not seen fit to approach the case in the manner mentioned, but have reversed the trial court entirely upon the opinion in *Swagger* case decided nearly ten years ago, and which opinion was largely rested on the *Zerbst* case which was decided in 1938. As the record will show, I did not agree with the *Swagger* opinion at the time however that fact is not the sole basis of my dissent in this case. I will attempt to show briefly that the opinions mentioned are not controlling here, and that both can be distinguished on the facts from this case.

On this appeal, prosecuted under Criminal Procedure Rule No. 1, there are only two questions for this Court to decide: (a) Was appellant pressured by the Bradley County officials into confessing his guilt, and (b) Did appellant intelligently waive counsel?

(a) In answer to this question I wish merely to call attention to portions of the majority opinion. One, the opinion shows that appellant said he *was* so induced, that the officers said he *was not,* and that the trial judge believed the officers. Two, the majority make no attempt to answer the question but take the position it was immaterial to do so.

(b) Did appellant intelligently waive counsel? Again, there are at least two reasons why (under the record before us) the answer should be in the affirmative.

One. Contrary to the position taken by the majority I contend there is a substantial distinction between this case and the case of *Swagger* v. *State.* In the *Swagger* case appellant's mental condition was an issue but was not brought to the attention of the court in view of the fact he was not represented by counsel. In the case under consideration there is no such issue to rely on

for a reversal. The record shows the trial judge sent him to the State Hospital for an examination where he was found to be normal. Since the issue is appellant's capacity to understand what he did, the above distinction is fundamental and decisive.

Two. The majority have failed to recognize any difference between the mental capacity necessary to plead guilty and the mental capacity to properly defend himself on trial. In other words, appellant (if he was innocent) might need a lawyer to defend him in court, yet might not need a lawyer to tell him whether he broke into Lowrey's home. This line of reasoning may seem to be oversimplified, but it is fundamental, and it is exactly the line of reasoning used by the U. S. Supreme Court in the *Zerbst* case is so heavily relied on by the majority. Incidentally, in the *Zerbst* case, the assured pleaded *not guilty* and stood trial without a lawyer.

When, in the judgment of our president and congress, a seventeen year old boy has enough intelligence to serve with the armed forces in foreign lands, my mind must refuse to believe that a normal nineteen year old boy (with ten years schooling) does not have enough intelligence to know when he has stolen a car, robbed a man, accosted a woman, or broken into a house.

WILSON *v.* PRUDENTIAL INS. CO. OF AMERICA.

5-3687 396 S. W. 2d 300

Opinion delivered December 6, 1965.

Ralph E. Wilson, for appellant.

Marcus Evard, Swift & Alexander, for appellee.

JIM JOHNSON, Associate Justice. This case relates to the right of possession of personal property affixed to mortgaged real estate. On July 19, 1961, Winfred C. Mullen and his wife executed a promissory note and deed of trust to appellee Prudential Insurance Company of America on a home they were purchasing in Osceola. The deed of trust was recorded July 29, 1961. Thereafter the Mullens conveyed the property to Robert A. Slentz and Edith, his wife, who assumed the note and deed of trust. The Slentzes later executed second and third deeds of trust, which are not in issue here. The Prudential deed of trust contained an habendum clause usual in FHA mortgages, as follows:

"To have and to hold the aforedescribed land unto the party of the second part forever, together with all the improvements and appurtenances thereunto belonging, and including all heating, plumbing, and lighting fixtures and equipment thereon or hereafter placed thereon, and said party of the first part hereby covenants with the said party of the second part, that the party of the first part will forever warrant and defend the title to the said lands against all lawful claims whatsoever." The mortgage contained no provisions for future advances.

On June 12, 1962, Chicksaw Electric Company sold and delivered to Slentz a central heating and air conditioning system on a retain title contract. (The record does not show whether Chickasaws's security interest attached before or after installation.) On July 19, 1962, Chickasaw filed its financing statement, perfecting its security interest.

Slentz later defaulted on the obligation to Chicksaw. Chickasaw filed a replevin action against Slentz in Mississippi Circuit Court to recover the heating and air

conditioning equipment installed in the Slentz' residence. On January 6, 1964, Chickasaw obtained a judgment for possession of the equipment or, in the alternative, for $444.80. This judgment was thereafter assigned to appellant Lillie M. Wilson.

On May 9, 1964, the Slentzes having also defaulted on the Prudential deed of trust, appellee commenced foreclosure proceedings in Mississippi Chancery Court, Osceola District. The trial court found that the Slentz' equity of redemption, the second and third deeds of trust, and the Chickasaw judgment and its lien on the equipment were junior to Prudential's deed of trust, and ordered the property sold. From the decree adverse to the Chickasaw judgment, appellant has appealed.

For reversal, appellant urges that she is entitled to possession of the personal property as assignee of the circuit court judgment. Appellant argues logically that Ark. Stat. Ann. § 85-9-313 (Addendum 1961), the Uniform Commercial Code section relative to fixtures, clearly applies. This section of the Commercial Code makes marked changes in the law of fixtures and Chickasaw apparently had carefully observed the provisions of the Code in its atempt to establish its priority over Prudential. Unfortunately for appellant's contention, however, the Prudential deed of trust was entered into and recorded prior to the effective date of the Code (*i. e.,* midnight, December 31, 1961). By law appellant was charged with notice of its existence. Prudential's priority under former law was saved by § 10-102 (6) of Act 185 of the Acts of 1961 (the Code), as follows:

"(6) Transactions validly entered into before the effective date specified in Section 10-101 of this Act, and the rights, duties and interests flowing from them, remain valid thereafter and may be terminated, completed, consummated or enforced as required or permitted by any statute or other law amended or repealed by this Act as though such repeal or amendment had not occurred."

Appellant has not demonstrated that appellee is not entitled to priority under the law applicable to this deed of trust. The judgment of the chancellor is therefore affirmed.

KELLEY *v.* SOUTHERN PULPWOOD CO.

5-3689 396 S. W. 2d 305

Opinion delivered December 6, 1965.

R. D. Rouse, for appellant.

Robert Law and *Smith, Williams, Friday & Bowen,* By: *W. A. Eldredge, Jr.,* for appellee.

FRANK HOLT, Associate Justice. The appellants seek partial dependency benefits in excess of those allowed by the Workmen's Compensation Commission.

In affirming the referee the commission found that the employee was earning $30.00 per week when fatally injured and that appellants, his parents and minor brothers and sister, were 23 1/13th percent dependent upon their decedent. The commission awarded $1.73 per week to each of decedent's parents; $1.04 per week to each of his minor brothers and sister until such time as each becomes 18 years of age; making a total allowance

of $7.62 per week. On appeal to the circuit court appellants contended that they were 37½ percent dependent upon their decedent according to the undisputed findings of the commission and, therefore, they were entitled to $11.25 collectively and in no event could the compensation payments to them ever be less than $7.00 per week. The circuit court affirmed the commission and on appeal appellants argue for reversal that "the findings, conclusions and award of the commission are contrary to the law" and that the appellants are entitled to the larger award as contended before the circuit court.

Dependency, full or partial, is a question of fact to be determined by the commission as of the time of the injury. *Sherwin-Williams Co.* v. *Yeager,* 219 Ark. 20, 239 S. W. 2d 1019. The findings of the commission, having the verity and effect of a jury verdict, will not be disturbed on appeal if there is any substantial evidence to support the findings. *Pufahl* v. *Tamak Gas Products Co.,* 238 Ark. 895, 385 S. W. 2d 640.

To understand why the commission found a partial dependency of 23 1/13 perecnt instead of 37½ percent would require each member of the court to review the record of this case consisting of some 129 pages. Appellants' abstract comprises only 2 pages with no abstract of the evidence. We are of the view that this is not sufficient for us to reach the merits of the case on the computation of the award by the commission. Therefore, we must affirm under our Rule 9 (d). *Allen* v. *Overturf,* 236 Ark. 387, 366 S. W. 2d 189; *Vire* v. *Vire,* 236 Ark. 740, 368 S. W. 2d 265; *Weir* v. *Hill,* 237 Ark. 922, 377 S. W. 2d 178; *Dickson* v. *Harpole,* 238 Ark. 775, 384 S. W. 2d 472; *Hurley* v. *Owens,* 238 Ark. 874, 385 S. W. 2d 636.

Affirmed.

5-3690 396 S. W. 2d 842

Opinion delivered December 13, 1965.

Roscopf & Raff, for appellant.

Mike J. Etoch, Jr., for appellee.

CARLETON HARRIS, Chief Justice. The question on this appeal is whether appellee was entitled to the statutory penalty and attorney's fee. Henry Zambie, appellee herein, purchased a 1964 Buick Skylark on February 29, 1964, and insured the automobile for the full purchase price, less a $50.00 deductible clause, with appellant, Universal Security Insurance Company. Thereafter, on July 22, 1964, the aforementioned Buick was struck by another car, and damaged extensively. On September 11,

1964. Zambie filed his complaint against the appellant insurance company, asserting that his Buick Skylark was insured for the sum of $3,734.39 with a $50.00 deductible clause; that the automobile "was struck from the side by another car, caving in the entire right side, and bending the frame of the car inward about a foot." It was further asserted that the Buick was so damaged as to make it a total loss except for salvage, and that salvage value was approximately $1,100.00. Appellee also alleged that numerous demands had been made upon the company to comply with the contract, "by either providing the plaintiff with a car of like kind and quality, or paying the value thereof," but that the company had steadfastly refused to perform the provisions of the contract. Judgment was sought in the amount of $3,734.39, plus the statutory 12% penalty, and attorney fees. On September 22, the company filed its answer, admitting that it had issued a policy of insurance to appellee, but expressly denying every other material allegation. On October 31, appellee amended his complaint, wherein he asserted that his automobile had an actual cash value of $3,285.00, but was a total loss except for salvage; judgment was sought for $3,235.00, or in the alternative, $3,235.00, less the salvage value of the car. On November 4, the company filed a motion to require Zambie to "make demand for the difference between the contended actual cash value of the car immediately prior to the collision, and the contended actual cash value of the car immediately after the collision." The motion set out that appellee's amended complaint was so vague and ambiguous that the company could not reasonably be required to prepare an answer. On the same date, appellant also moved to strike that portion of appellee's prayer which sought judgment for the 12% statutory penalty, and the attorney's fee. The company set out that Zambie had never made demand upon it for the difference between the contended actual cash value of the vehicle just prior to the collision, and the contended actual cash value of the vehicle immediately after the collision; that the company had not been put on notice as to the specific monetary

demand in the case. On November 9, appellee responded to this motion, as follows:

"That at the time of the collision, the actual cash value of the 1964 Buick Skylark covered by the policy was $3,285.00.

"That following the accident the value of the car was $1150.00.

"That the plaintiff has in the past and still does demand that the defendant, pursuant to the policy, pay the plaintiff the sum of $3235.00, which is the actual cash value less the $50.00 deductible. Or in the alternative that the defendant pay the plaintiff the sum of $2085.00, which is the actual cash value less the salvage value and the $50.00 deductible. Both figures are exactly the same, the only difference being that the former figure leaves the salvage with the insurance company and the latter with the insured."

Thereafter, on November 16, the company moved the court to make General Motors Acceptance Corporation a party plaintiff because of the fact that that company held a lien upon the Buick automobile, and on the same date the company filed a pleading entitled, "Answer to Amended Complaint or Answer to Motion to Make More Definite and Certain." This pleading reads as follows:

"Prior to the filing of such amended complaint on November 6, 1964, defendant was not apprised as to the amount of the claim being asserted by the plaintiff for damages to the automobile. That after the filing of such amended complaint it is now apprised that the claim of the plaintiff amounts to the sum of $2,085.00. That the defendant has never denied the claim of the plaintiff nor has it ever refused to pay same for the reason that the amount of such claim was unknown to the defendant.

"WHEREFORE, defendant acknowledges the claim of the plaintiff as set out in such amended complaint in the amount of $2,085.00 and tenders herewith into the Court such sum of money in full payment of the claim

of the plaintiff, and, does specifically deny any responsibility for the payment of the statutory penalty and attorney's fees based upon the above allegations."

On March 5[1] the court entered judgment for appellee against appellant in the amount of $2,085.00, plus 12% penalty, amounting to $241.20, and an attorney's fee in the amount of $500.00, being a total judgment of $2,826.20. From that portion of the judgment awarding the statutory penalty and the attorney's fee, appellant brings this appeal. For reversal, it is first urged that appellee is not entitled to the penalty or attorney's fee for the reason that appellant promptly confessed judgment for the amount sued for in the amended complaint. Further, appellant asserts that there is no substantial evidence to support the finding of the trial court that $500.00 is a reasonable attorney's fee in this case. Under the view that we take, there is no necessity to consider this last point.

We think, under our holdings, that appellant's argument contains merit, and appellee is not due to recover penalty and attorney's fee for the reason that he originally sought more than he finally recovered, and when his claim was reduced to the amount for which he later received judgment, appellant, within a reasonable time, proffered this amount to him. As earlier stated, Zambie originally sought the amount of $3,734.39, less the $50.00 deductible. Salvage value of the wrecked car was alleged to be $1,100.00. In his first amendment to the complaint, appellee sought $3,285.00. Finally, on November 9, appellee asked for the sum of $2,085.00, alleging that the salvage value of the automobile was $1,150.00. As mentioned, this was the amount that the appellant company, on November 16, tendered in full payment of appellee's claim.

Obviously, the amount finally accepted was less than that originally sued for, but appellee argues that he, in

[1] Apparently, no testimony, exhibits, or other evidence was offered to the court by either party, as only pleadings and orders appear in the transcript. The decision was based upon these pleadings and memorandum briefs filed on behalf of the litigants.

the beginning, submitted an alternative, *i.e.,* that he be given "a car of like kind and quality," and he states that the amount offered by the company, and accepted by him, was equivalent to this demand. We do not agree that this type of demand entitles appellee to penalty and attorney's fee. We think the statute contemplates a claim for a specific amount of money. Certainly, "a car of like kind and quality" is a matter wherein reasonable men could differ—and probably would. It would be exceptionally remarkable if an automobile could be found that would be exactly of the value as the damaged car, for mileage would differ, the condition of the tires would vary, the appearance of the car would likely be different, and numerous other items would likewise be divergent. It is evident that an owner and an insurance company could haggle for some period of time on the question of whether the car offered to replace the damaged vehicle was of "like kind and quality."

There is an equally important reason why a demand for another car is not a demand for a definite amount of money. As stated in the Pennsylvania case of *Alliance Discount Corp.* v. *Shaw,* 171 A. 2d 548:

"The observation by the court below, in its opinion, is well put. 'It is indeed questionable whether there is a "recognized market" for used automobiles. No other article of commerce is subject to more erratic vacillation in pricing procedures. The so-called "red book" purporting to fix prices of various makes and models of automobiles in accordance with their year of manufacture is adopted for the convenience and benfit of dealers and is not based on market prices which are arrived at in the open, based on asking prices of sellers and bids of prospective buyers.' "

Appellee, in his brief, states:

"In this case Appellant had numerous opportunities prior to filing of suit to pay an amount less than it later confessed judgment to. This is pointed out in the original complaint and amended complaint wherein Appellee states he offered on numerous occasions to accept a

car of like kind and quality or the cash value of the one he lost."

Appellee also asserts:

"On November 4, 1964, Appellant filed two motions. The first motion was to strike all and each part of Appellee's amended complaint, and the second motion was for appellee to make his amended complaint more definite and certain, particularly as to the salvage value.

"On November 6,[2] 1964, Appellee answered the motion to make more definite and certain by stating that One Thousand One Hundred and Fifty Dollars ($1,-150.00) was the present salvage value.

"On November 9, 1964, the Appellant requested a pre-trial on the case at which time he argued both motions and was ruled against on both motions. Appellee then asked for the court to set a trial date and Appellant moved that it be continued until the next term of court for the reason it hadn't had sufficient time to have the damaged car appraised. The court overruled this motion and set the case for trial on November 18, 1964.

"Following the case being set for trial the attorneys again discussed settlement to no avail and on November 16, 1964, less than two days before trial Appellant filed an amended answer admitting liability for the full Two Thousand Eighty-five Dollars ($2,085.00). * * *"

Further:

"On November 18, 1964, the date set for trial, the Appellant requested that the question of attorney fees and damages be heard on briefs. This request was granted and both parties submitted briefs to the court with statements of facts."

The alleged facts, set out in appellee's brief, would, under proper circumstances, be pertinent matters for consideration, for, if no offer had been made by the company until two days before trial, it is apparent that coun-

[2] The record reflects that this pleading, though dated November 6, was filed on November 9.

sel would have been forced to spend time preparing his case as a matter of being ready on the trial date. However, *these matters do not appear in the transcript.* We have stated repeatedly that, in determining litigation, we can only consider the record, and statements in an attorney's brief "outside" the record cannot be given any weight. The transcript in this case does not reveal anything at all concerning negotiations prior to the filing of the suit; further, there is nothing in the transcript to show that a pre-trial conference was ever held; still further, the record does not reveal that the case was set for trial on November 18, or that the appellant tendered the $2,085.00 "two days before trial." The court entered its judgment on March 5, 1965, finding that appellant company was indebted to appellee in the amount of $2,085.00, and was liable, in addition, to appellee for a 12% penalty and a reasonable attorney's fee.

Appellee asserts that, to avoid penalty and attorney's fee, the company was required to tender into court the amount sued for, *plus interest and costs,* to date of tender, and cites *Broadaway* v. *The Home Insurance Company,* 203 Ark. 126, 155 S. W. 2d 889. In that case, suit was filed by the claimant for an amount less than he had previously demanded. The company tendered this amount into court, together with interest and costs. In holding that the claimant was not entitled to penalty and attorney's fee, this court said:

"If the insured files suit for less than the minimum demand he has theretofore made under his policy, the insurance company has the right to tender into court and confess judgment for the amount sued for and be relieved of liability for the attorney's fees and penalty provided in the above statute. The insured cannot file suit for an amount less than theretofore demanded and collect the statutory penalty and attorney's fee if the insurance company in apt time, as is the case here, offers to confess judgment and tenders into court the amount sued for, plus interest and costs to the date of tender."

The court pointed out that the case was controlled by *National Fire Insurance Company* v. *Kight,* 185 Ark. 386, 47 S. W. 2d 576, where the circumstances were practically the same. However, the *Broadaway* case leaves out a citation that is mentioned in the *Kight* case. On the last page of the latter opinion (390) we said:

"In *Life & Casualty Co.* v. *Sanders,* 173 Ark. 362, 292 S. W. 657, we held that the plaintiff could reduce his demand by amendment to the complaint after the trial had started and still recover the penalty and attorney's fee. We there said: 'If, instead of proceeding with the trial of the case and denying any liability whatever on the grounds here urged, it [the insurance company] had either offered to pay the reduced amount, or had asked to be given the time in which to pay same as provided in the policies, appellee could not have recovered the penalty and attorney's fee, and, in addition, would have been required to pay all costs, for the reason that he demanded a sum greater than he was entitled to under the policy.' "

The United States Court of Appeals for the Eighth Circuit has also construed our holding as allowing the insurer to tender into court the amount sued for, and by confessing judgment, to be relieved of the penalty and attorney fees. *Trinity Universal Insurance Company* v. *Smithwick,* 222 F. 2d 16. There seems to be, to some extent, a conflict in the cases, possibly occasioned by the fact that the *Broadaway* case did not include the quotation taken from *Life and Casualty Company* v. *Sanders,* which was mentioned in the *Kight case.* Our earlier cases make no mention of interest and costs. In *Queen* v. *Ark. Ins. Co.* v. *Milham,* 102 Ark. 675, 145 S. W. 540, in an opinion by Mr. Justice Hart, this court said:

"When appellant filed its amended answer and claimed as a set-off the amount due it by appellee on the premium note, appellee at once conceded that the amount should be deducted from the amount sued for in his original complaint, and only asked judgment for the difference, which was $423.36. If appellant wished to avoid the penalty and attorney's fee provided for in the

statute, it should have offered to confess judgment for that amount, *and thus have ended the suit.*[3] It did not do so but elected to go on and contest the claim of the appellee on other grounds, and thereby became liable for the penalty and attorney's fee provided for in the statute when appellee recovered the amount sued for."

See also *Great So. F. Ins. Co.* v. *Burns & Billington,* 118 Ark. 22, 175 S. W. 1161. In resolving these possible inconsistencies, we think logic dictates that when a demand for the sum (subsequently received by the claimant) is first made, and the company, within a reasonable time, tenders that amount, there can be no valid reason to require the company to pay interest and costs. We have said numerous times that the company is not to be penalized for refusing to pay an excessive demand, and certainly, it would be unjust to require the payment of interest and costs when it has not been at fault. The statute itself mentions only penalty and attorney's fee.

The question in this litigation thus finally narrows to whether appellant company, in tendering the money one week after appellee made his offer, acted with diligence, and within a reasonable time. We are of the view that this question must be answered, "Yes." Of course, in most instances, it is necessary that an attorney contact his client, communicating any offers to the company, and he cannot act until receiving a reply. Frequently, he must get in touch with the home office, which may well be located in another state, and we do not feel that we can say that a delay of one week in denoting acceptance is normally an unreasonable delay; we find nothing in this record to establish that appellant was merely acting dilatorily.

In accordance with the views herein expressed, that portion of the judgment allowing penalty and attorney's fee is reversed, set aside, and held for naught.

It is so ordered.

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[3] Emphasis supplied.

WALKER *v.* COUNTRYSIDE CASUALTY CO.

5-3710 396 S. W. 2d 824

Opinion delivered December 13, 1965.

Batchelor & Batchelor, H. Clay Robinson, for appellant.

Shaw, Jones &Shaw, for appellee.

CARLETON HARRIS, Chief Justice. William J. Koch, one of the appellants herein, a resident of Logan County, owned a dump truck, and was engaged in hauling various materials. Joseph Eugene William Walker, the other appellant, is also a resident of Logan County, and was eighteen years of age at the time of the occurrence hereinafter discussed. On December 24, 1962, Walker, while assisting in greasing the dump truck, was injured when the bed of the truck fell on him, crushing his right leg; the leg was subsequently amputated. Thereafter, Walker, through his mother as next friend, instituted a suit against Koch, alleging negligence on the part of that person, and seeking damages in the sum of $77,586.75. Koch, who held a policy of liability insurance on the truck with Countryside Casualty Company, appellee herein, made demand upon the insurance carrier to defend the action. Countryside took the position that coverage

was not afforded under terms of the policy, because Walker was an employee of Koch, but the company did assume the defense under a reservation of rights; subsequently, Countryside filed an action for declaratory judgment, asserting that a controversy existed between the company and appellants. Appellee asserted that, under the policy of insurance held by Koch, it was not required to defend, nor was it required to pay any possible judgment up to the limits of the policy. The company prayed that the court enter its declaratory judgment, finding that appellee did not owe any obligation under the policy of insurance held by appellant Koch. On trial, the court, sitting as a jury, held that, due to an exclusion clause in the contract, excluding coverage where any employee of the insured was injured while in the course of his employment, the company was not obligated to defend the suit brought against Koch by Walker, and would not be obligated to pay any part of any judgment rendered against Koch. From the judgment entered in accordance with these findings, appellants bring this appeal.

Under the terms of the insurance policy issued by appellee to Koch, coverage is excluded for:
"(e) Bodily injury to any employee of the insured arising out of and in the course of (1) domestic employment by the insured, if benefits therefor are in whole or in part either payable or required to be provided under any workmen's compensation law, or (2) other employment by the insured;"

The Circuit Court held (2) to exclude coverage to appellant Koch. Appellants, in separate briefs, argue several points. Walker urges that the insurance policy in question excludes coverage to employees only if the employees are covered by Workmen's Compensation Insurance, and he (Walker) was not covered by compensation insurance. Both Walker and Koch argue that the clause is ambiguous, and that the trial court accordingly should have resolved the language in favor of the insured, rather than the insurer. It is asserted that the phrase referring to workmen's compensation coverage applies

to Sub-section (2) as well as to Sub-section (1), *i. e.,* the intent of (e) is that an injured employee, of any kind whatsoever, is to be covered by the policy unless the employee is also covered by workmen's compensation insurance. It is further urged by appellants that, to say the least, the clause is ambiguous. We do not agree. First, let it be said that a provision excluding coverage for injuries to employees has been held to be unambiguous, and to be valid and enforceable. 7 Appelman, Insurance Law and Practice, Section 4415. In the South Carolina case of *Rhame* v. *National Grange Mutual Insurance Company,* 121 S. E. 2d 94, the identical exclusion language was passed upon by that court. The entire exclusion clause provided that the policy did not apply:

"(g) under division 1 of coverage C, to bodily injury to or sickness, disease or death of any employee of the named insured or spouse arising out of and in the course of (1) domestic employment by the named insured or spouse, if benefits therefor are in whole or in part either payable or required to be provided under any workmen's compensation law, or (2) other employment by the named insured or spouse."

The court, in an opinion by Mr. Justice Moss, said:

"In the case of *Quinn* v. *State Farm Mutual Automobile Ins. Co.,* S. C., 120 S. E. 2d 15, 16, we said:

'It is a well settled rule that the terms of an insurance policy must be construed most liberally in favor of the insured and where the words of a policy are ambiguous, or where they are capable of two reasonable interpretations, that construction will be adopted which is most favorable to the insured. *Pitts* v. *Glen Falls Indemnity Company,* 222 S. C. 133, 72 S. E. 2d 174. However, in cases where there is no ambiguity, contracts of insurance, like other contracts must be construed according to the terms which the parties have used, to be taken and understood in their plain, ordinary and popular sense. If the intention of the parties is clear, the Courts have no authority to change the contract in any particular. The Court has no power to interpolate into the

agreement between the insurer and the insured a condition or stipulation not contemplated either by the law or by the contract between the parties. *Chastain* v. *United Ins. Co.,* 230 S. C. 465, 96 S. E. 2d 464.'

"Insurers have the right to limit their liabilities and to impose whatever conditions they please on their obligations, provided they are not in contravention of some statutory inhibition or public policy. Accordingly, an insurer need not protect against all liabilities and a clause exempting certain liabilities from coveage is valid. * * *

"* * * There is excluded from coverage, under section (g) (1) of said clause, domestic employees, if benefits for such injury, sickness, death or disease is payable under any workmen's compensation law; there is also excluded from coverage, under section (g) (2) of said clause, other employment by the named insured or his spouse. In our opinion, the provisions of the insurance policy heretofore quoted, are free from ambiguity, doubt or uncertainty as to the risks included and excluded."

In *Clinchfield Railroad Co.* v. *United States Fidelity & Guaranty Co.,* 160 F. Supp. 337, decided by the United States District Court for the Eastern District of Tennessee, Northeastern Division, a similar exclusion provision in an insurance policy was involved. There, the exclusion, and defendant's argument are as follows:

" 'This policy does not apply:

(d) under coverages A and C, to bodily injury to or sickness, disease or death of any employee of the Insured while engaged in the employment, other than domestic, of the Insured or in domestic employment if benefits therefor are either payable or required to be provided under any workmen's compensation law;'

"Defendant says that by deleting the inapplicable language from the foregoing exclusion provision that it would read thus:

" 'This policy does not apply:

(d) under coverages A and C, to bodily injury to * * * any employee of the Insured while engaged in the employment * * * of the insured * * *' "

After reviewing several cases, the court stated:

"The Court concludes that the exclusion provisions of the policy in this suit are not ambiguous or subject to different interpretations but that the plain meaning of them is that employees suffering injuries while in their employment, other than domestic employees unless covered or subject to coverage by the Workmen's Compensation Act, are not within the coverage of the policy."

A clause with some similarity was also involved in the Georgia case of *Aetna Casualty and Surety Co.* v. *Howell, et al,* 108 F. 2d 148, decided by the Circuit Court of Appeals for the Fifth Circuit. There, the exclusion clause provided that the policy did not apply,

" '(e) to bodily injury to or death of any employee of the Insured while engaged in the business of the Insured, other than domestic employment, or in the operation, maintenance or repair of the automobile; or to any obligation for which the Insured may be held liable under any workmen's compensation law: * * *' "

In commenting upon this clause, the court [referring to the District Court] stated:

"The court found that the exclusion clause (e) contained two exceptions, one being 'domestic employment' and the other 'employment in the operation, maintenance and repair of the automobile.' We disagree with that ruling. We do not find the clause ambiguous. The clause 'other than domestic employment' set off by commas, is parenthetical, solely of itself and should not be coupled with what follows. Omitting it, the exclusion clause plainly means the policy does not apply to bodily injury or death of any employee of the insured while engaged in the business of the insured or while engaged in the operation, maintenance or repair of the automobile."

Other cases could be cited, but let it suffice to say that we agree with these rulings. We find no ambiguity in the language, and hold that the phrase, "other employment by the insured," simply means that no coverage under the policy is afforded where an employee of the insured is injured during the course of his employment.[1]

This brings us to the second question, which is, "Was Walker an employee of Koch at the time he received the injury here complained of?" Appellants contend that Walker was not an employee of Koch, but rather, was only a neighborhood boy, who had loafed around the garage since he was twelve or thirteen years of age, and who had run a few errands on widely separated occasions; that although Walker was occasionally given money, there was no agreement for compensation. It is asserted that the relationship between the two was rather like "father and son." Counsel says, referring to Koch, "as is often the case when a person works on his equipment, [he] becomes a glorified baby-sitter for all of the younger neighborhood boys whose parents do not prevent them from standing around and watching." It is pointed out that at the time of the injury, neither Koch nor Walker had discussed payment for the assistance that Walker would render in greasing the truck. As an alternative contention, it is asserted that, at most, Walker was only a casual employee, and that the term "employee," as used in automobile exclusionary clauses, should apply only to regular employees as distinguished from casual or incidental employees. We cannot agree with these assertions, and it appears that the weight of authority is against appellants' contentions. The policy provides that there is no coverage for bodily injury to *any employee* (arising out of employment by the insured). First, let it be said that the fact that Walker was a minor is of no effect. As stated in *State Farm Mutual Automobile Ins. Co.* v. *Brooks* (Mo.), 136 F. 2d 807 (Eighth Circuit):

[1] Of course, coverage is afforded under (1) where domestic employees receive injuries, and workmen's compensation benefits are not provided.

"The minority of the boys at the time of the accident is not material to the inquiry whether they were, as a matter of law, to be deemed members of the public covered by the policy, or employees engaged in the business of the insured. What was done determined their status as employees."

A succinct discussion of the meaning of employment is found in *Pennsylvania Casualty Company* v. *Elkins,* 70 F. Supp. 155 (E. D. Ky.). There, the employment of the injured person, Nave, was certainly incidental, for Nave was regularly employed elsewhere, but on the occasion in question, agreed to accompany Elkins on a trip to Tennessee for the purpose of delivering a load of cattle. While on the return trip, the truck, driven by Elkins, overturned, and Nave was killed. Elkins' automobile liability insurance policy contained the provision that coverage was excluded for "bodily injury to or death of any employee of the insured while engaged in the employment, other than domestic, of the insured." The party contending that coverage was afforded argued:

"That at the time of the accident which resulted in his death Ernest Nave was not an 'employee' of William Elkins, the insured, in any sense of the word but, having other regular employment, he was merely a casual, incidental and temporary helper, voluntarily rendering a particular service as an accommodation to Elkins;

"That the phrase 'any employee' as used in the exclusion provision of the policy is ambiguous and that it is susceptible of being interpreted in a restrictive sense importing regularity and continuity of service for wages or salary rather than in the broader sense including every type of the relationship of employee and hence, under the familiar rule that where a provisions of an insurance policy is open to two or more interpretations the one most favorable to the insured must be adopted, the exclusion clause of the policy here in question should be interpreted to have no application to Ernest Nave whose employment, if such relation existed at all, was only casual and temporary."

The court, in rejecting this argument, stated:

"The exclusion clause in the policy in question is obviously designed to exclude from coverage every type of employer's liability, other than that arising from 'domestic employment,' regardless of whether the employment be regular and continuous or incidental and temporary. The words used make the broad indiscriminate exclusion sufficiently clear. To hold otherwise would be to make a new contract for the parties entirely different from that which they made for themselves."

Numerous other cases involving similar factual situations to the case at bar could be cited,[2] some even holding that the injured person was an employee *as a matter of law*.[3] We, however, are of the view that the question of whether Walker was an employee is a question of fact, rather than a question of law, and we are therefore only concerned with whether there was substantial evidence to support the findings of the trial court, sitting as a jury.

The evidence reflected that Walker was eighteen years of age, and a student in the Eleventh Grade, at the time of the accident. He held an after-school job with the Fox Transfer company. Koch was a neighbor, and Walker, on various occasions over a six-year period had helped Koch maintain his trucks. This had consisted of different tasks; as Walker stated, "I helped him to grease his truck and I changed oil for him and I have driven—I have gone from place to place with him . . .

[2] *Allied Mutual Casualty Company* v. *Dahl*, 122 N. W. 2d 270 (Iowa 1963). In this case, Ernest Goedken, a minor, received a serious personal injury while riding in the back end of a panel truck, owned by one Wolf, driven by one Dahl, and insured by *Allied Mutual Casualty Company*. Just before being injured, Goedken, with other boys, had been engaged in distributing handbills in behalf of congressional canidate Wolf, and the boy was preparing to distribute additional handbills at the time of the injury. Goedken had been given a dollar for his part in the first distribution, but did not know what he would be paid for the second distribution. After the injury, he was paid $2.00. The trial court found that Goedken was an employee of Wolf at the time of the injury, and that the policy of insurance did not protect either Wolf or Dahl. This holding was based on an exclusion clause which had the identical provision of (2) in the instant case, *i. e.*, "other employment by the insured."

[3] *Inter alia, Clinton Cotton Oil Company* v. *Hartford Accident and Indemnity Company*, 186 S. E. 399 (S. C.); *Church* v. *Consolidated Indemnity and Insurance Company*, 174 Atl. 488 (N. J.)

Well, I had known him for about five or six years and I had been helping him off and on and then afterwards he started coming by and wanting me to help him to do this and do that . . . When I helped him, he would give me something when he had the money, and if he didn't have any money I didn't get anything until he got the money." When asked, "Do you know why he came to get you?" Walker replied, "Because I didn't—when I helped him I didn't charge him so much." Walker stated that on occasion Koch would pay his way to the picture show, and also gave him some clothing. However, this appellant testified that before he was given anything, "I would have to earn it first." He stated that at one time Koch gave him a bicycle, "But he took it back a little while after he gave it to me." On the day of the accident (Christmas Eve). according to Walker:

"I had just got off from work from Fox Transfer and I was going home. I stopped in there right after work and he asked me if I would help him that afternoon, and he asked me if I would come back that afternoon and I told him that I guessed I would if I wanted to work and I went back after dinner, so he asked me to go down there and get the dump truck and have it greased. I took it up to the service station. They wouldn't grease it because it was too big to get inside and they said it was too cold to grease it out side, so I brought it back to the shop."

Walker stated that Koch asked him to help grease the vehicle, and he stated that he was holding the grease gun and the fittings at the time the truck bed fell. The young man testified that Koch came by the hospital the next day, and paid him $2.00.[4]

Koch denied that he hired Walker to help him wash and grease the truck, and, in fact, stated that the first he knew of Walker crawling between the bed and the frame was when he heard the boy cry out. However, as previously stated, we are only concerned with whether there

[4] From the evidence: "Q. What were you doing? A. I was holding the grease gun and the fittings. Q. He in fact did pay you for the work? A. He paid me the next day."

was substantial evidence to support the finding of the Circuit Court.

We think the testimony just related constitutes substantial evidence that Walker was an employee as contemplated under the exclusionary clause of the insurance policy. Under the evidence, Walker helped Koch on many different occasions during the six-year period, and was paid some amount of money in most instances, though he did not always receive the money at the time of the completion of the job. Walker stated that Koch would get him (Walker) to help because, "I didn't charge him so much." Walker testified that Koch asked him to help in greasing the vehicle, and according to his testimony, he was engaged in this task when the accident occurred. Further, he received pay.

Judgment affirmed.

JUSTICE WARD and JOHNSON are of the opinion that Paragraph (e) of Section 8, entitled "exclusions", is ambiguous, and they would reverse the judgment.

MORTON *v.* HALL.

5-3694 396 S. W. 2d 830

Opinion delivered December 13, 1965.

N. J. Henley, John B. Driver, for appellant.

Murphy, Arnold & Purtle, Reed & Blackburn, for appellee.

ED. F. MCFADDIN, Associate Justice. This is a boundary line dispute between adjoining landowners. Appellants own north of the boundary (part of the NE NE); and appellees own south of the boundary (part of the SE NE). There were really three issues before the Trial Court. The first was the location of the true (geographic or survey) boundary. Then assuming the surveyors established the true boundary line between the two tracts, the remaining questions were: (a) did appellants acquire title by adverse possession down to a fence about 45 feet south of the true line? or (b) if not, had the said fence become the boundary by acquiescence over a long period of time.

Appellees, Hall and wife, own the land to the south of the boundary; and they filed suit in the Chancery Court to quiet their title. They named as defendants the appellants, their neighbors to the north. The appellants, by answer, admitted the appellees owned some land to the south, but said:

"Defendants further pleading would state that there is now, and has been for more than 21 years last past, a division fence between the lands belonging to defendants and plaintiffs; that said fence has, for the period aforesaid been recognized by the predecessors in title as a common boundary between the lands of plaintiffs and defendants, and has been fully recognized and acquiesced in by said landowners."

At that stage in the proceedings, and by stipulation, the cause was transferred to the Circuit Court, and tried as an action in ejectment. Trial to a jury resulted in a verdict and judgment for appellees; and appellants bring this appeal, urging three listed points, but which we will discuss under two topic headings.

I.

Appellants' first point is: "That the Court erred in refusing appellants' motion to strike the testimony of the County Surveyor, A. O. Flowers."

Appellees deraigned record title to their lands from the Sovereignty of the soil to themselves.[1] To establish the true or geographical north boundary of their line, the appellees called as their witness Mr. A. O. Flowers, former County Surveyor. He testified as to a survey made by him and the present County Surveyor, Hubert Heigel, to establish the true or geographical boundary line between the lands of the litigants. Mr. Flowers testified that the corners stated in the Government field notes had long since been obliterated; but that he started at what was commonly accepted by all in the community as the common corner of Sections 10, 11, 14, and 15, and ran north 3960 feet to get to the west end of the true or geographical boundary line between the litigants. Mr. Flowers testified that then he went east to an iron pin in the road in front of Cherokee Grill, which iron pin had been used in many surveys, and that he ran back west and came to the same boundary line as previously located. He testified that both sides to this litigation were represented at all of this survey; and that the result of such survey was to find that the fence of the appellants was over on the appellees' land some 45 feet at one end an something over 100 feet at the other end of the fence. The following occurred:

"MR. HENLEY: The defendant now moves to strike all that testimony of the witness, Mr. Flowers, relative to the accuracy of his survey, because he has testified he was given hearsay information as to the accuracy of the location of various quarter section corners, and section corners. Therefore, it does not in law constitute a proper and legal survey.

[1] Attorneys for the appellants (defendants) stated: "MR. HENLEY: The defendants have no objection to the evidence adduced on the part of the plaintiff showing muniment and chain of title from the original United States Patent down to Mr. Hall, the present owner of record title . . . ."

"MR. REED: He testified that he started from a corner known and recognized by the public surveys in years past, that those were known as established corners and people have been using them for years.

"THE COURT: The Court thinks that is a matter for the jury to determine. Of course, the jury will take all the testimony into consideration in determining how much weight to give to his testimony. The jury will take all that into consideration, but I think it is a matter for the jury to determine how much weight they will give to his survey, so I believe your objection will be overruled.

"MR. HENLEY: Note our exceptions."

We think the ruling of the Trial Court was correct. Of course, Mr. Flowers' survey was not a "legal" survey in that it was not squared and tested by known corners, but the weight to be given to Mr. Flowers' survey was—as said by the Trial Court—"a matter for the jury to determine." Furthermore, Hubert Heigel, the present County Surveyor, testified that he assisted Mr. Flowers in making the survey and testified to the same effect as Mr. Flowers; and appellant did not offer any motion to exclude Heigel's testimony. We have discussed this survey matter in detail because the same question may arise on retrial, which may be necessitated by our holding on the next point.

II.

Appellants' other points relate to the giving of an instruction by the Court. As we have heretofore mentioned, the appellants claimed the land south of the surveyed boundary and down to the fence by either of two claims: (a) adverse possession, or (b) boundary by acquiescence. At the request of the appellees the Trial Court gave their Instruction No. 1 which related to adverse possession; and at the request of the appellants the Trial Court gave their Instruction No. 1 which related

to boundary by acquiescence.[2] These instructions were given without objection. Then the Court, on its own motion, went further and said:

"I want to go a little further, gentlemen, on the matter of this fence. In order for a fence between two tracts of land to become the established line between those two tracts, or as I mentioned a while ago the presumed, agreed line, both parties on either side of that fence must make some use of the land up to the fence line, all along acknowledging that as the line between the two tracts. Now, if there is such use of the land on either side of this fence line, all along there, all the time acknowledging he does not own the land up to the line, it would not become the established line. It must be recognized, acknowledged and claimed by both parties on either side of the fence, and recognized by them as the boundary line between the two tracts. If there is such use as that for a period of 7 years, or more, it is presumed to be the agreed division line between the two tracts."

The appellants' attorney immediately objected to the instruction by the Court, saying:

"The statement made by the Court, I understand must be some use or overt recognition of the land by the parties on either side of the boundary line, to which action of the Court in giving that, the last, instruction, the defendants object and except for the reason it contradicts the Instruction No. 1 given on behalf of the defendants, relative to silent acquiescense for the statutory period."

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[2] This instruction reads:

"You are instructed that if adjoining land owners, either by themselves or through their tenants and agents, acquiesce in and govern themselves by a division fence for 29 years, there is a presumption of law that such a division fence and line is an agreed division line, though the fence is not on the true line. And in this connection you are further told that if you find from a preponderance of the evidence that the adjoining land owners of the tracts of land involved in this case silently acquiesced for many years in the location of the present fence on said land as the visible evidence of the division line, the fence line becomes the boundary between the parties because of such acquiscence, and your verdict should be for the defendants, Sam D. Morton, Jr. and Allie Morton."

We are compelled to hold that the instruction that the Court gave on its own motion was erroneous. If there was a boundary by acquiescence then there did not have to be an actual adverse holding up to that boundary fence. See *Webb* v. *Miller,* 236 Ark. 245, 365 S. W. 2d 450; *Stewart* v. *Bittle,* 236 Ark. 716, 370 S. W. 2d 132; *Williamson* v. *Rainwater,* 236 Ark. 885, 370 S. W. 2d 443; and *Tull* v. *Ashcraft,* 231 Ark. 928, 333 S. W. 2d 490. In the last cited case we said:

"We have frequently held that when adjoining landowners silently acquiesce for many years in the location of a fence as the visible evidence of the division line and thus apparently consent to that line, the fence line becomes the boundary by acquiescence. *Deidrech* v. *Simmons,* 75 Ark. 400, 87 S. W. 649; Robinson v. Gaylord, 182 Ark. 849, 33 S. W. 2d 710; *Seidenstricker* v. *Holtzendorff,* 214 Ark. 644, 217 S. W. 836. As we said in a very similar case, *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.' "

In the instruction on its own motion, the Circuit Court evidently confused adverse possession up to a fence line, as discussed in *Brown Paper Mill* v. *Warnix,* 222 Ark. 417, 259 S. W. 2d 495, with boundary by acquiescence, as discussed in *Tull* v. *Ashcraft, supra,* and the several cases heretofore cited. There is no requirement of adverse user to the agreed fence in the case of boundary by acquiescence. Therefore, for the error in the Court's instruction, the judgment is reversed and the cause is remanded.

Opinion delivered December 13, 1965.

[redacted]

McMillen, Teague & Bramhall, for appellant.

Hubert E. Graves, for appellee.

GEORGE ROSE SMITH, J. This is a claim for death benefits under the workmen's compensation law. On March 16, 1963, the decedent, Luther D. Bailey, suffered a fatal heart attack in the course of his regular work as an automobile salesman. The only question of fact for the Commission was whether Bailey's work caused or contributed to the attack. The Commission found that a causal connection existed and accordingly awarded benefits to the appellee, Bailey's widow. The award was affirmed by the circuit court.

In 1959 Bailey's personal physician, Dr. Wassell, discovered that Bailey had heart trouble. Dr. Wassell urged Bailey to give up his job and submit to a period of complete bed rest. Bailey refused, saying that he was not financially able to quit work. The same medical advice was offered and refused upon subsequent occasions, the last one being only three days before Bailey's death.

Dr. Wassell testified positively that Bailey's work aggravated his heart condition, that there was a causal connection between his work and his death, and that he would probably have lived much longer if he had taken

his doctor's advice. Dr. O'Neal was of the same opinion. Their testimony is amply sufficient to support the award. Since our decision in *Bryant Stave & Heading Co.* v. *White,* 227 Ark. 147, 296 S. W. 2d 436 (1956), there has been no requirement that a heart attack, to be compensable, be caused by some unusual exertion rather than by the employee's regular work. That case governs this one.

Affirmed.

KINDER *v.* WEBB.

5-3731 396 S. W. 2d 823

Opinion delivered December 13, 1965.

Williams & Gardner, for appellant.

R. M. Priddy, for appellee.

GEORGE ROSE SMITH, J. The appellants, J. C. Kinder and Geno Johnston, are ministers in a Baptist denomination, the Free Will Baptists. Charges of misconduct were brought against them in their own church, the Oak Grove Free Will Baptist Church. After a hearing the congregation acquitted both men by a vote of 14 to 9. The matter was then carried before a higher organization, the Antioch Association of Free Will Baptists. There both

men were found guilty of the charges. At the direction of the Association they surrendered their Certificates of Ordination.

The two ministers then filed this suit in equity to enjoin the officers of the Antioch Association and the county clerk from attempting to cancel their licenses and credentials. See Ark. Stat. Ann. § 55-218 (1947). After a hearing the trial court dismissed the complaint on the ground that the plaintiffs had not proved an equitable cause of action.

The plaintiffs contend that under the controlling rules of the national denomination each local church is completely self-governing and alone possesses the power to discipline its own members. It is argued that a regional association such as Antioch may take action against its own member churches but cannot take disciplinary measures against the individual members of a local church, whether they be ministers or laymen. Hence it is insisted that the Antioch Association exceeded its powers in attempting to revoke the plaintiffs' Certificates of Ordination.

Both sides refer to a booklet containing the rules and regulations adopted by the national denomination. With respect to the question now at issue there is some ambiguity. On the one hand, there is no rule stating that a minister or church member may be disciplined by a regional association. On the other hand, the prescribed form of a Certificate of Ordination recites that it may be recalled by the association (here Antioch) to which the minister belongs. The Certificates issued to the two plaintiffs contained that recital.

We agree with the chancellor's conclusion that this is not properly a controversy for the civil courts. It is firmly settled that the civil courts will not assume jurisdiction of a dispute involving church doctrine or discipline unless property rights are involved. *Sanders* v. *Baggerly,* 96 Ark. 117, 131 S. W. 49 (1910). The plaintiffs have failed to bring themselves within that rule in the case at bar.

The two plaintiffs were formerly employed by one or more local churches to conduct Sunday services and revival meetings for stipends that were mutually agreed upon. Since the action that was taken by the Antioch Association the local churches have no longer been willing to engage the plaintiffs' services. Hence, it is said, the assertedly unauthorized action of the Antioch Association has brought about a pecuniary loss to the plaintiffs.

The proof does not support this argument. It is an undisputed fact that the congregation of each Free Will Baptist church is an autonomous body. The various congregations are not bound by the disciplinary action purportedly taken by the Antioch Association. Any congregation is at liberty to engage the services of the plaintiff ministers whether Antioch's attempted discipline was authorized or unauthorized by church law. Hence any pecuniary loss that the appellants may have suffered is the result of decisions made by the local congregations rather than by the Antioch Association. It is not within the province of a civil court to intervene in a situation such as this one.

Affirmed.

ARK. STATE HIGHWAY COMM. *v.* WADDELL.

5-3697 396 S. W. 2d 840

Opinion delivered December 13, 1965.

Mark E. Woolsey and *Phil Stratton,* for appellant.

William S. Walker, Joe D. Villines, Jim B. Spears, for appellee.

PAUL WARD, Associate Justice. This is an eminent domain case involving a small parcel of land in the town of Bellefonte, Boone County, Arkansas, situated on the north side of U. S. Highway No. 65. For convenience, we will at times refer to the subject parcel of land as "parcel-x."

The Arkansas Highway Commission (appellant) claims a right-of-way easement over parcel-x by virtue of a condemnation order and judgment of the Boone County Court entered of record April 2, 1928. J. E. Waddell and wife (appellees) claim ownership of parcel-x (together with other lands) by virtue of a warranty deed from J. Frank Robinson and wife, dated March 3, 1944 (shown in the abstract of title as appellees' Exhibit No. 1).

When appellant started to improve and broaden U. S. Highway No. 65 where it runs through the town of Bellefonte appellees objected on the ground that appellant was about to appropriate, without remuneration, parcel-x which belonged to them. Accordingly appellees, on January 29, 1965, filed suit in chancery court to enjoin further action on behalf of appellant. Answering, appellant denied that appellees owned parcel-x, and affirmatively stated it had acquired an easement over the land in 1928, in the manner previously stated.

After a somewhat lengthy hearing, and after appellant's demurrer to the evidence had been overruled, the Chancellor made the following factual findings:

The preponderance of the evidence shows that appellees are the owners of the land in question which is adjacent to the highway and which is subject to whatever rights appellant may have by virtue of the said 1928 County Court Order; Thus, the burden shifts to appellant to show notice of the Order has been given to the then owner of the land; This burden has not been met in this

case; "The taking of the road for highway purposes . . . follows an old road or highway and amounted to a widening of the old original highway," consequently appellees are not precluded by the one year limitation on filing a claim for the taking of this property; Appellant is hereby enjoined from entering upon the land here involved unless and until it furnishes surety for payment of such sums as might later be awarded to appellees. It was further ordered that appellant be notified of any claim filed by appellees in the County Court for compensation for taking of the property. Appellant was ordered to execute a bond in the amount of $2500.

The court then entered a decree in accord with the above findings.

Seeking a reversal, appellant relies solely upon the following point:

"The Trial Court Erred in Overruling Defendant's Demurrer to the Evidence Based on Appellees' Failure to Prove Valid Record Title to the Lands in Dispute."

It was appellant's theory in the trial of this case that appellees failed to prove record title for the reason that the description contained in their complaint and deed described no lands that could be located from monuments and calls in the description. After a careful study of the entire record, including several somewhat unintelligible maps of the town of Bellefonte, we are forced to the conclusion that the trial court was correct in overruling appellant's demurrer to the evidence.

The complaint filed by appellees and the deed from Robinson to them contains a description which is very hard to follow or understand, and we think it would serve no useful purpose to set it out in full. The description covers two pages in the abstract and consists largely of angles and measurements evidently determined by a surveyor. Appellant relies heavily, if not exclusively, on the testimony of a surveyor which shows the several measurements and angles do not form a complete enclosure. Therefore, says appellant, the description does

not describe any land that could be located from the county records or by any clue contained in the deed. Thus, appellant contends, appellees' title is defective. However, for reasons hereafter set forth, we cannot agree with the above argument and contention of appellant.

In our opinion the description of the property in this case does form a "complete enclosure." It contains not only numerous distances and angles but it refers to nunmerous markers and monuments such as streets, a branch, a spring, etc. In this kind of a situation we have held that degrees and measurement must yield to courses and monuments in many instances. See: *Garrett* v. *Musgrave,* 215 Ark. 835, 223 S. W. 2d 779, and *Stallcup* v. *Stevens,* 231 Ark. 317, 329 S. W. 2d 184. The last portion of the description reads: ". . . thence south 20 degrees west 205 feet to the place of beginning." It is the contention of appellant that the above distance and angle would not terminate at "the place of beginning." We held otherwise, under an almost identical fact situation, in the case of *Irby* v. *Drusch,* 220 Ark. 250, 247 S. W. 2d 204.

In addition to the above we also have the following factual situation. At the end of the long description above referred to there appears these words: ". . . said tract herein conveyed embraces lots 3, 5, 6 and 7 and a part of lot 4 of block 20, lots 4, 22, 25, 39 and a part of lot 5 of block 24, and lots 3 and 4 in block 31, all in the town of Bellefonte, Arkansas." Appellant's own Exhibit No. 2, which purports to be a plat (or a copy) of the town of Bellefonte, shows that lot 25 of block 24, lies along the north side of Highway No. 26.

In view of the above, we hold that the trial court was correct in overruling the defendants' demurrer to the evidence; and the decree is accordingly affirmed.

Affirmed.

ARK. STATE HIGHWAY COMM. *v.* DEES

5-3698 396 S. W. 2d 933

Opinion delivered December 13, 1965.

[Rehearing denied January 10, 1966.]

Mark E. Woolsey, Phil Stratton, for appellant.

W. S. Walker, Joe D. Vilines, Jim B. Spears, for appellee.

PAUL WARD, Associate Justice. This is a companion case to *Arkansas State Highway Commission* v. *J. E. Waddell, et ux,* delivered this day. The two cases were consolidated and tried together, and only one decree was rendered by the trial court.

Perry L. Dees and his wife (appellees) claim to be the owners of a small parcel of land in Bellefonte, Arkansas, situated on the north side of U. S. Highway No. 65, by virtue of a deed from Hugh Farris excuted in 1938. The Arkansas Highway Commission (appellant), as in the companion case, claimed a right-of-way easement over the land by virtue of the County Court Order entered on April 2, 1928. Again, when appellant started to enter upon the land appellees filed a complaint in chancery court to enjoin entry. At the conclusion of the combined hearing the trial court found, among other things, that appellees were the owners of the land; that they should be remunerated for any land taken, and; that appellant must post a $5,000 bond to secure payment to appellees for said taking. Appellant now prosecutes this appeal contending (a) that appellees did not show they had title to the land in question, and (b) that (even if they had title) they cannot now collect damages

because no claim was filed within the time provided by law.

For the purpose of this opinion it may be conceded that appellees proved they had title to the land, but we have concluded the trial court must be reversed for the other reason.

We take it as conceded by all parties that under the 1928 County Court Order any affected land owner had to file a claim within one year or his claim was barred, and that the above provision has been held to mean the affected land owner had one year from the time he had *notice* of the taking to file his claim.

Under our holding in the case of *Arkansas Highway Department* v. *D. L. Staples,* 239 Ark. 290, 389 S. W. 2d 432 appellees are now barred from filing a claim for damages to their land if one of the predecessors in their line of title owned the land on April 2, 1928 and had notice of the said Order of Condemnation during the time he owned the land. We find such to be the situation in this case.

We have carefully examined the testimony and exhibits in the record and find that appellees' title to the land here involved is traced, through mesne conveyances, back to J. L. McDonald who was the owner of the land from March 13, 1922 until after 1930. The record further shows that J. L. McDonald was paid $300 by the Boone County Court on June 4, 1928, upon a claim filed by him for damage to his land. Whether McDonald collected for this particular land or for other land owned by him is immaterial since, in either event, it shows he had notice of the County Court Order. Therefore the decree of the trial court must be, and it is hereby, reversed.

The result above reached makes it unnecessary to consider appellees' contention the trial court should have increased the amount of the bond.

Reversed.

Opinion delivered December 13, 1965.

[Rehearing denied January 24, 1966.]

Thomas L. Cashion, for appellant.

Bruce Bennett, Attorney General, By: *Clyde Calliotte,* Asst. Attorney General, for appellee.

SAM ROBINSON, Associate Justice. Appellant James Williams was convicted of the crime of murder committed in the perpetration of the crime of rape. The jury fixed the punishment at death by electrocution. On appeal appellant argues several points, all of which we have carefully examined. In addition, we have examined the entire record. There is no error.

The evidence shows that on the morning of September 24, 1964, Mrs. Maudene Deggs, 25 years of age, and the mother of three children, was abducted from her home. The next day her body was found about three and one-half miles south of her house, near a dim, seldom used logging road in the woods, about one-quarter of

a mile from the main highway. She had been raped and murdered. Although the evidence is circumstantial, it proves appellant guilty beyond any reasonable doubt. In most cases of this kind the State must rely on circumstantial evidence. Crimes of this nature are not ordinarily committed in the presence of witnesses other than the victim, and of course her lips are sealed by death. Circumstantial evidence is sufficient to sustain a conviction. *Osburne* v. *State,* 181 Ark. 661, 27 S. W. 2d 783, *Jefferson* v. *State,* 196 Ark. 897, 120 S. W. 2d 327; *Smith* v. *State,* 227 Ark. 332, 299 S. W. 2d 52; *Walker* v. *State,* 239 Ark. 685, 317 S. W. 2d 823.

The evidence, which is uncontradicted, shows that Mrs. Deggs lived with her husband and three children, about five miles south of Crossett, Arkansas. On the morning of September 24, 1964, she drove her two older children to the school bus stop. Later, about 11:30 that morning, Mrs. Emma Lee Miller, who lived about four and one-half miles from the Deggs' home, saw a little boy walking in the road in front of her home. Upon investigation she found that the child was Mrs. Deggs' four year old son. She took the child to the home of Mrs. W. S. Cooty, the child's grandmother. Mrs. Miller, along with Mrs. Cooty and the child, then drove to the Deggs' home. Neither Mrs. Deggs nor anyone else was there. A flat iron was on the ironing board, and it was still connected to the electricity. Garments which Mrs. Deggs was apparently in the process of ironing were there. The bedroom was somewhat disarranged, and one of Mrs. Deggs' shoes was on the floor. There was no trace of Mrs. Deggs.

The peace officers of the county and state were notified, and a general alarm of Mrs. Deggs' disappearance was broadcast. Many people gathered and began a wide-spread search for her. The next day her body was found about three and one-half miles southeast of her home, as heretofore indicated. Pictures were made of the body before it was disturbed and removed from the place where it was found. Upon examination of the body by medical authorities, it was found that death was

caused by a crushing of the skull by a heavy blow with a hard object. Male spermatazoa was found in the vagina.

In the investigation for clues, it developed that at about 8:15 or 8:30 a.m. on the morning Mrs. Deggs disappeared, Mrs. Ed Phillips was driving past the Deggs' home, and that she saw a black and white Buick automobile, 1956 model, coming out of the Deggs driveway. Mrs. Phillips expected the car to stop before entering the road, but it did not do so, but entered the road at a rather high rate of speed, turned south, and passed by Mrs. Phillips. A colored man was driving. Mr. Willie Claude Kelly and Mr. Bobby Stell, who were working on the telephone lines, also saw the black and white Buick on the road which passes by the Deggs' home.

The appellant, who worked nearby, owned a black and white Buick that fitted the description of the car seen coming from the Deggs' home on the day of the murder. An officer questioned him soon after obtaining that information. At that time, a small burn was noticed on the appellant's chest. Appellant stated that he was burned by the muffler of the chain saw he was operating in the woods, where he said he had worked on the day of the murder. About two weeks later, after obtaining additional information to the effect that appellant did not go to work at the time and place he claimed to have worked on the day of the murder, he was again questioned. The burned black skin on his chest had peeled off, and there on his chest was a scar made by a burn from an object the size and shape of the flat iron Mrs. Deggs was using when apparently she was first attacked in her home. Moreover, there was found at the scene of the rape and murder, a shoe which matched the one found in Mrs. Deggs' bedroom, and a wrench which the evidence indicates was the murder weapon. The wrench was identified as belonging to appellant. It was also later shown that it would not have been possible for the scar on appellant's chest to have been caused by a burn from a chain saw muffler.

It is hard to imagine any set of circumstances that would more surely point to guilt than that shown by the evidence in this case. The evidence of appellant's guilt is substantial, and is fully sufficient to sustain the verdict of guilty. In fact, it is hard to see how the jury could have arrived at any other verdict.

Appellant argues that the trial court erred in overruling his motion for a change of venue. The motion alleged that the people of Ashley County are so prejudiced against him that he could not get a fair and impartial trial in that county. This motion was supported only by the affidavits of Prewell G. Wilson and Bessie L. Taylor. There are no other supporting affidavits. Wilson and Taylor are not identified, and there is nothing to show that they are residents of Ashley County or that they were in a position to know how the people in the county felt. In support of the motion, appellant introduced evidence that a local newspaper had published some of the facts regarding the murder. But no witnesses, except the two who gave the aforementioned affidavits, stated that the defendant could not get a fair and impartial trial in the county. "The burden was on appellant to make credible proof to support his motion." *Maxwell* v. *State,* 236 Ark. 694, 370 S. W. 2d 113.

Next, appellant argues that pictures made of the body of the victim of the rape and murder, taken at the scene of the crime before the body was removed, were inadmissible. The appellant was charged with the crime of murder in the first degree, committed in the perpetration of rape. Under this charge, it was not necessary for the State to prove premeditation, deliberation and malice, as would have been necessary if those things had been elements of the offense charged. But to sustain the charge in the felony information, it was necessary to prove the rape. The pictures in question, taken before the body of the victim was disturbed, constituted strong evidence that the murder victim had been raped. There was no error in admitting the pictures in evidence. As stated in Wharton's Criminal Evidence, 12th Ed., Vol.

11, at page 654: "When otherwise admissible, it is no objection that a photograph is gruesome, or likely to inflame or prejudice the jury. A photograph otherwise admissible is therefore not to be excluded even though it shows . . . or the naked or decomposed body of the victim." This court has adopted this view previously in *Nicholas* v. *State,* 182 Ark. 309, 31 S. W. 2d 527; *Higdon* v. *State,* 213 Ark. 881, 213 S. W. 2d 621; *Bailey* v. *State,* 227 Ark. 889, 302 S. W. 2d 796.

The evidence tended to show that at the time the victim was first attacked in her home, she was standing at an ironing board ironing with a hot iron (when the officers first arrived at the house to investigate the disappearance of Mrs. Deggs, the electric iron was still connected and turned on). When the appellant was arrested some two weeks after the commission of the crime, he had a scar on his chest caused by a recent burn. The skin where burned had peeled off leaving a light colored scar, which was the same size and shape of the flat iron Mrs. Deggs was using. The iron fitted the scar exactly. The officers had pictures made of the scar from the burn on the appellant's chest; the pictures were admissible.

The admissibility of such evidence depends upon its classification as either "testimonial" or "non-testimonial." The distinction is clearly set out in McCormick's treatise on the law of evidence, (1954), Sec. 126: "As expounded by Wigmore and widely accepted in recent opinions, only these forms of coerced conduct constitute that 'testimonial compulsion' against which the privilege protects. No other compelled conduct or its products, however unlawful or inadmissible on other grounds, is within the protection of this privilege. In jurisdiction following this view, the accused without breach of this privilege may be fingerprinted and photographed, deprived of his papers and other objects in his possession, may be physically examined, may have his blood and other bodily fluids taken for tests without his consent, may be required to give a specimen of his handwriting, may be compelled to assume positions taken by

the perpetrator of the crime, and many be forced to participate in a police 'line up,' to stand up for identification, put on articles of clothing, or display a scar . . ."

The position that only testimonial evidence is protected as being within the scope of the privilege against self incrimination, guaranteed by the 5th Amendment to the Constitution of the United States, is substantiated by Wigmore on Evidence, Vol. 8, Sec. 2265:

"The limit of the privilege should be plain. From the general principle (§ 2263, *supra*) it results that an inspection of the bodily features by the tribunal or by witnesses does not violate the privilege because it does not call upon the accused as a witness—i.e., upon his testimonial responsibility. That he may in such cases be required sometimes to exercise muscular action as when he is required to take off his shoes or roll up his sleeve—is immaterial, unless all bodily action were synonymous with testimonial utterance; for, as already observed (§ 2263 *supra*), not compulsion alone is the component idea of the privilege, but testimonial compulsion. What is obtained from the accused by such action is not testimony about his body, but his body itself . . . When the person's body, its marks and traits, itself is in issue, there is ordinarily no other or better evidence available for the prosecutor."

In an opinion by Mr. Justice Holmes in the case of *Holt* v. *U. S.*, 218 U. S. 245, involving a similar question of admissibility, he said:

"Another objection is based upon an extravagant extension of the Fifth Amendment. A question arose as to whether a blouse belonged to the prisoner. A witness testified that the prisoner put it on and it fitted him. It is objected that he did this under the same duress that made his statements inadmissible, and that it should be excluded for the same reasons. But the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him.

not an exclusion of his body as evidence when it may be material."

In the Nevada case of *State* v. *Ah Chuey,* 33 Am. Rep. 530, Judge Hawley said: "Marks made by wounds upon the person of an offender given with a weapon in the hands of an assaulted party, corresponding with marks visible upon the person of the prisoner, have always been considered as a strong criminating circumstance tending to establish the identity and guilt of the accused person." This court has followed this position. *Mabry* v. *Kettering,* 89 Ark. 551, 117 S. W. 746.

Affirmed.

SEAY *v.* SEAY.

5-3671 396 S. W. 2d 838

Opinion delivered December 13, 1965.

Guy H. Jones, for appellant.

Felver A. Rowell, Jr., for appellee.

JIM JOHNSON, Associate Justice. This is a contested divorce defended on the ground of a prior valid divorce between the parties.

On February 24, 1964, appellee Sylvia Seay filed a petition for divorce, division of property and support in Conway Chancery Court against appellant George Seay. Appellant on March 6, 1964, filed a motion to dismiss, alleging the parties were divorced in Conway County on December 15, 1948, this divorce is a matter of record, and the parties have not remarried. Appellee amended her complaint alleging that the divorce pleaded by appellant was set aside by a joint petition of the parties, and that the divorce is a nullity and void because the parties had resumed their marriage prior to entry of the decree. Appellant answered, renewing his motion to dismiss, denying the divorce had ever been set aside and generally denying appellee's allegations. After taking appellant's discovery deposition on June 20, 1964, appellee obtained leave to amend her complaint. The unverified amendment alleged that the 1948 decree should be set aside for fraud of appellant in that when the parties were reconciled appellant represented to appellee that the then-pending divorce would be or had been dismissed, that the parties had lived together as husband and wife until February, 1964, and appellee did not learn of the 1948 decree until appellant's motion to dismiss was filed. The amendment further alleged that appellant was guilty of fraud in the procurement of the decree because it was obtained without disclosing the fact of reconciliation, at a time when the parties had resumed marital relations, and the decree was taken without notice to appellee.

The cause was heard by the court on November 3, 1964. In its final decree of January 4, 1965, the court set aside the 1948 decree for fraud of appellant, granted appellee a divorce for cruelty and general indignities, awarded her one-third of appellant's personal property and one-third for life of his real property, provided for sale of the real and personal property by the clerk of court, and ordered appellant to pay costs and attorneys fees.

For reversal of the adverse decree, appellant first urges that the 1948 decree was valid and the trial court therefore erred in overruling his motion to dismiss.

The facts relating to the prior divorce are sharply disputed. The great prepondernaace of the evidence, however, with little to the contrary, is that appellant lived with appellee as husband and wife for about sixteen years after the 1948 divorce decree was obtained by appellant. The trial court made the following findings of fact:

1. Appellant instituted the prior action.

2. Appellee signed a waiver of appearance.

3. Neither party appeared in court and the decree was rendered on ex parte depositions prepared in the office of appellant's then attorney.

4. There is only appellant's testimony that appellee ever received a copy of the decree.

5. Appellant and appellee's reconciliation, prior to the entry of the decree, was on appellant's representation that the divorce pending would be dismissed.

6. The original court file contains an unsigned order setting aside the decree, dated three days after the decree, although there is no docket entry indicating what action was taken.

7. A child and a step-child reared by the parties believed that the parties were married.

8. The parties lived together under the same roof as husband and wife for a number of years and neither remarried.

9. By appellant's own admission, the parties had marital relations as husband and wife during this period.

10. The parties had business transactions as husband and wife. In 1957 the parties mortgaged property and signed the mortgage and note as husband and wife.

From these findings the chancellor concluded that the 1948 decree was secret and based upon fraud. While it is difficult to accept the fact that appellee could remain unaware for sixteen years of a divorce decree rendered

against her, we cannot say on trial de novo on the record as abstracted that the court's decree is against the weight of the evidence.

This case seems to fall squarely within the rule succinctly stated in 17 Am. Jur., Divorce and Separation, § 500, p. 598:

"A fraud which occurs with surprising frequency in the situation where one spouse brings suit for divorce and then becomes or pretends to become reconciled with the defendant and states that he has dismissed or will dismiss the action, so that the defendant is induced to refrain from giving further attention to the matter. Later the plaintiff secretly takes a decree of divorce by default. In such cases the court will vacate the decree because of plaintiff's fraud, if the defendant applies for relief within due time after discovering the fraud."
See also 130 A. L. R. 2d 1332.

Appellant next contends that appellee is barred by laches and estoppel from attacking the prior decree. Appellant's motion to dismiss, asserting the prior decree, was filed March 6, 1964. On April 2, 1964, appellee amended her complaint, attacking the validity of the prior decree. Having upheld the trial court's ruling that the prior decree was unknown to appellee until she learned of the motion to dismiss, it can hardly be said that appellee failed to act promptly in attacking the fraud within due time after discovering it. *Fair* v. *Fair,* 232 Ark. 800, 341 S. W. 2d 22.

Appellant's final point for reversal is that appellee's petition to vacate the decree was not verified, which was a fatal jurisdictional defect. It is undisputed that appellee's pleading was not verified. All of the allegations of the pleading were supported by sworn testimony at trial. Objection to the lack of verification was not made at trial, and under the circumstances cannot be raised for the first time on appeal. *Pinkert* v. *Reagan,* 219 Ark. 822, 244 S. W. 2d 961.

Affirmed.

VANDERGRIFF *v.* STATE.

5-3663 396 S. W. 2d 818

Opinion delivered December 13, 1965.

Harry C. Robinson, James L. Sloan, for appellant.

Bruce Bennett, Attorney General, By: *Richard B. Adkisson,* Chief Asst. Atty. Gen., and *Fletcher Jackson,* Asst. Atty. General, for appellee.

FRANK HOLT, Associate Justice. Appellant brings this appeal from a civil proceeding in circuit court in which he was held in contempt and his premises permanently padlocked pursuant to the provisions of Ark. Stat. Ann. § 34-101 et seq (Repl. 1962).

The appellee, by the prosecuting attorney, filed a verified petition against the appellant on March 2, 1964 in the First Division of Pulaski Circuit Court alleging that appellant was operating an establishment at 110 Main Street, Little Rock, Arkansas where gaming was being carried on and praying for a temporary and permanent injunction to abate the alleged nuisance. On that day the court granted the temporary order. Upon a hearing before the court on March 27, 1964 the court found that the establishment, consisting of three floors

occupied by the appellant, was being operated in violation of Ark. Stat. Ann. § 34-101 in that gaming was being carried on, and that its operation constituted a public nuisance requiring abatement. The court permanently enjoined appellant from operating the establishment contrary to law, removed the temporary padlock, and authorized him to operate any lawful business. See Ark. Stat. Ann. § 34-106-7; *Futrell* v. *State,* 207 Ark. 452, 181 S. W. 2d 680; *B & M Land Co.* v. *State,* 232 Ark. 815, 340 S. W. 2d 395.

On January 12, 1965 the prosecuting attorney again filed a verified petition against appellant in the same court, reciting the foregoing facts and alleging that appellant had violated the order of the court by operating his establishment as a public nuisance in that gaming existed in violation of the law. On that day the court granted the appellee's petition for a temporary injunction and ordered appellant to appear on January 21, 1965 to show cause why he should not be adjudged in contempt for violation of the court's order rendered in March, 1964. On the date scheduled the court conducted a hearing and found appellant had operated his establishment contrary to the provisions of Ark. Stat. Ann. § 34-101, that such operation constituted a public nuisance, and that appellant had violated the court's permanent injunction. The court then ordered that appellant's premises be padlocked for one year, held appellant in contempt, sentenced him to sixty days in jail and fined him $50.00. See Ark. Stat. Ann. § 34-107. From that judgment there is this appeal.

Appellant first contends: "The First Division Circuit Court was devoid of jurisdiction, so the conviction of contempt was and is a nullity." We find no merit in this contention. Ark. Stat. Ann. § 34-102 expressly confers concurrent jurisdiction upon the chancery and circuit courts of this state to abate public nuisances such as alleged in the case at bar. Further, the proceedings, whether in a chancery or circuit court, must be conducted in accordance with chancery court procedure. Ark. Stat. Ann. § 34-105; *Siesta Cafe* v. *State,* 231 Ark. 1004,

333 S. W. 2d 722; *Lawson* v. *State,* 226 Ark. 170, 288 S. W. 2d 585. The procedings in this type of action, therefore, are civil in nature.

The appellant argues that since this is a civil proceeding, the First Division Circuit Court of Pulaski County is without jurisdiction and cites to us Act 3 of 1961 [First Extraordinary Session (Ark. Stat. Ann. §§ 22-326.4—22-326.6)]. This Act relates, *inter alia,* to the assignment of cases in the Pulaski Circuit Courts. Section 3 of the Act [Ark. Stat. Ann. § 22-326.6 (Repl. 1962)] specifically provides that:"* * * It shall not be reversible error that any civil case is tried in a division to which it has not been specially assigned, provided, that all criminal cases shall be tried in the first division." Thus, this statute requires criminal cases to be tried in the first division, but does not restrict the first division from also trying other cases. Also, see *Blackstad Mercantile Co.* v. *Bond,* 104 Ark. 45, 148 S. W. 262.

Appellant next contends: "The statute under which the State proceeded is unconstitutional on its face and as applied" since a temporary injunction was granted in each instance without notice. The statute only requires notice with reference to a permanent injunction. We have recognized that this statute [Act 109 of 1915, Ark. Stat. Ann. § 34-101 et seq], which provides for the abatement of public nuisances by injunction, is constitutional. *Hickey* v. *State,* 123 Ark. 180, 184 S. W. 459; *Marvel* v. *State,* 127 Ark. 595, 193 S. W. 259; *Adams* v. *State,* 153 Ark. 202, 240 S. W. 5. The granting of a temporary injunction without notice addresses itself to judicial discretion in granting or withholding the relief. Thus, the requirement of due process is satisfied in a case of such brief restraint. 28 Am. Jur., Injunctions, § 246 and 152 A. L. R. 168. We are of the view that the question, however, becomes moot in the case at bar since following each temporary injunction there was a full-scale hearing preceding the issuance of the permanent injunctions. 43 C. J. S., Injunctions, § 180(d). An objection for lack of proper notice cannot be raised after a hearing on the merits in which the injunction is made permanent.

The appellant next asserts that the court erred in refusing to suppress the evidence because the affidavit and the search warrant were insufficient as a matter of law and, therefore, invalid. The affidavit reads in part:

"I, G. F. Weeks, do solemnly swear that gaming is being carried on and gaming equipment is concealed in the premises occupied by Bevis Recreational Parlor at 110 and 110½ Main in the State and County aforesaid, and pray a warrant from said Court to search said premises."

Appellant argues that the place to be searched is not sufficiently identified in the affidavit since it describes the premises to be searched as the "Bevis Recreational Parlor at 110 and 110½ Main in the State and County aforesaid." Therefore, it could have referred to some city other than Little Rock. We do not agree with this assertion. The caption of the affidavit reads: "In the Municipal Court of L. R. Arkansas," and "State of Arkansas, County of Pulaski." Certainly this indicated sufficiently where the establishment was located. 79 C. J. S., Searches and Seizures, § 75; see, also, *United States* v. *Romano,* 203 F. Supp. (Conn. 1962).

The search warrant, based upon this affidavit, describes the place to be searched as "110 and 110½ Main in the City of Little Rock, occupied by Bevis Recreational Parlor" and describes the things to be seized as "prohibited gambling devices." The description of the premises to be searched and the things to be seized was sufficient to enable the officer to locate the premises and identify the concealed articles.

The appellant next asserts that the court committed prejudicial error in the admission of certain evidence offered by the appellee. As we have stated, the rules of chancery procedure are applicable in the case at bar whether the proceeding is being conducted in chancery or circuit court. Ark. Stat. Ann. § 34-105; *Siesta Cafe* v. *State, supra; Lawson* v. *State, supra.* Therefore, this appeal is reviewed *de novo* and we consider only the com-

petent testimony regardless of the ruling of the trial court on the challenged evidence. *Walsh* v. *Fairhead,* 215 Ark. 218, 219 S. W. 2d 941. Here we find no incompetent evidence was heard.

In his last point appellant questions the sufficiency of the evidence to convict for contempt, asserting that the "proceedings were in criminal contempt" requiring proof of guilt beyond any reasonable doubt. We do not agree with this contention. The General Assembly is vested with the authority to regulate by law the punishment of contempt for disobedience of process. Article 7, § 26, Arkansas Constitution. Accordingly, our Legislature has regulated the punishment of contempt for disobedience of a temporary or permanent injunction in a proceeding such as the case at bar. Ark. Stat. Ann. § 34-107. Thus, the test is whether the preponderance of the evidence supports the finding of the trial court since the rules of chancery procedure are applicable. *Alston* v. *State,* 216 Ark. 604, 226 S. W. 2d 988; *Brown* v. *State,* 206 Ark. 135, 173 S. W. 2d 1016; *Lawson* v. *State, supra.*

Further, we think the trial court should be sustained even if appellant were adjudged guilty of criminal contempt. We review the evidence in criminal contempt cases as in ordinary criminal cases. Therefore, we affirm if there is any substantial evidence to support the trial court's order. *Blackard* v. *State,* 217 Ark. 661, 232 S. W. 2d 977; *Songer* v. *State,* 236 Ark. 20, 364 S. W. 2d 155.

In the case at bar the appellant was present on his premises when they were searched. The arresting officers found an individual on the otherwise unoccupied second floor of appellant's establishment sitting alone inside a walk-in steel vault. The officers had to have it opened by a locksmith using a drill when appellant denied that he knew the combination or how to get into the vault. After thus opening the vault, the officers used a key in appellant's possession to open a locked compartment within the vault. On the table in front of the individual inside the vault were telephones, scratch sheets,

betting slips, tally sheets, and football cards. Officer Weeks testified that he accepted calls over these telephones from people placing bets on horses running at race tracks in Louisiana and Florida. There was evidence that the telephones found in the vault were listed in the directory in the name of Jo's Liquor Store and Pedigo Cleaners at 110½ Main Street. There was no cleaning establishment on the premises. The telephones were not "normal" installations. There is no need to detail the other evidence. It is clear that the evidence was amply sufficient to sustain the court's findings that appellant was operating his establishment in such a manner as to constitute a public nuisance and in violation of the court's permanent injunction.

Affirmed.

ROBINSON, J., not participating.

GISS *v.* APPLE.

5-3648 396 S. W. 2d 813

Opinion delivered December 13, 1965.

Herschel H. Friday, Jr., Robert S. Lindsey, J. W. Barron, for appellant.

Julius C. Acchione, Leon Catlett, U. A. Gentry, for appellee.

J. L. "Bex" Shaver, Special Associate Justice. This appeal involves the Riverdale Country Club and the efforts of its Board of Governors and Officers and a majority of the quorum of its members, to sell and exchange all of its presently owned land and facilities to Pleasant Valley, Inc., for a new location. Pleasant Valley, Inc., would also make available to Riverdale $1,150,000.00 for a Clubhouse, pro shop, youth center, tennis courts, parking areas, drives and swimming pools; the design and style of architecture to be determined by Riverdale.

Appellees, Apple et al., are stockholders of Riverdale. They filed suit against appellants, Giss et al., as the President and Board of Governors of Riverdale, to prevent the consummation of the proposed exchange, claiming the appellants lacked authority to act for the corporation. The appellants claimed full authority to act for the corporation, but counterclaimed and asked for a declaratory judgment. Trial in the Chancery Court resulted in a permanent injunction against the appellants; and this appeal ensued, in which appellants list four points:

I. The Club, itself has power to make the proposed exchange.

II. The vote taken Oct. 26, 1964, validily authorized the Board to make the exchange.

III. Under the articles of incorporation and bylaws the Board has authority independently to enter into the proposed exchange.

IV. Appellants are entitled to a declaratory judgment as prayed for.

Riverdale Country is a Corporation, having been incorporated by order of Pulaski Circuit Court on August 11, 1947, as a non-profit corporation under 64-1301 et seq., Ark. Stats. 1947.

Section 64-1306 of said Act provides: "Any such Corporation shall have power * * * to sell, lease, mort-

gage, pledge, assign, transfer or otherwise dispose of lands or real property, or any right or title therein, or improvements thereon, personal property of every class and description, for any purpose or use necessary, convenient, useful or incidental to the accomplishment of the purposes of the Corporation.''

The Corporation is authorized to sue and be sued and ''to do any and all things necessary, convenient, useful or incidental to the attainment of its purposes as fully and to the same extent as natural persons might or could do, as principals, agents, contractors, trustees or otherwise.'' (Ark. Stats. 64-1306).

The Corporation is authorized to amend its Constitution or Articles of Association by complying with Ark. Stats. 64-1304.

The Articles of Incorporation and Constitution of Riverdale Country Club stated that the Corporation shall be located in Pulaski County, Arkansas, and that its object shall be ''to provide recreational facilities for its members and their families by means of a country and outdoor sports club.'' That its name shall be ''Riverdale Country Club.'' Its officers shall be a President, Vice President, Secretary, and Treasurer, and a Board of Governors composed of nine members, to be elected as provided in Article III of the Constitution. The Board of Governors were to have control of the property and business of the Corporation. Amendments to the Articles could be made at any time as provided in Article VII of the Constitution.

The Articles provided that a quorum for the election of any and all officers shall consist of not less than a majority of the members in person or by proxy, and Amendments to Articles could be made at any time by a majority vote at any regular or special meeting at which a majority of the active members of the Corporation shall be present in person or by proxy.

By-Laws of the Corporation were adopted consistent with the authority granted in the Articles of Incorporation and Constitution.

On October 1, 1957, Article 6 of the Constitution was amended to provide that the Corporation should have power to borrow money and pledge and mortgage its property, upon the affirmative vote of a majority of the members having voting rights.

At a special meeting of the regular members of the Riverdale Country Club held on October 26, 1964, 260 regular members voted in favor of the motion authorizing the Board to proceed and act on the Pleasant Valley proposal and 256 regular members voted against it. At that time there were 549 regular members. Therefore, a majority of the members present in person or by proxy voted for the Pleasant Valley proposal, but a majority of the members having voting rights did not vote for the Pleasant Valley proposal.

The Constitution and By-Laws of Riverdale Country Club are silent as to the number of votes necessary to approve the Pleasant Valley proposal.

The lower Court held that the defendants had no authority under the Constitution and By-Laws of Riverdale Country Club to effectuate the proposed trade with Pleasant Valley, Inc., without proper authorization from the members of said Club, and that the vote of the members of Riverdale Country Club on October 26, 1964, at which time 47.35% of the members of said Club voted to authorize said exchange with Pleasant Valley, Inc., did not legally authorize and empower the Board of Governors of said Club to enter into an agreement with Pleasant Valley, Inc., whereby all the assets of Riverdale Club would be sold or exchanged. The lower Court, therfore, enjoined the defendants from entering into such agreement with Pleasant Valley, Inc.

It is appellant's position that a majority vote at any meeting legally called, at which a majority of the active members were present in person or by proxy, was sufficient to carry the proposal of Pleasant Valley. That this is true even though the Constitution and the By-Laws are silent as to the number of votes necessary to carry a proposal for exchange of properties. Also, that

under the Statutes, Articles of Incorporation and By-Laws, the Board of Governors has authority independently to enter into the agreement with Pleasant Valley.

It is appellees' position that the general language of the Statute giving power to the Corporation "to sell, transfer, or otherwise dispose of lands or real property," should be construed to mean that the Corporation should have power to sell its real property in the ordinary course of business; that the above power is limited in the act itself which withholds from the Corporation the right to sell, transfer or otherwise dispose of lands or real property except "for any purpose or use necessary, convenient, useful or incidental to the accomplishment of the purposes of the Corporation." That this language necessarily means that the Corporation was limited in the sale, transfer or other disposition of its real property to a purpose convenient and useful or incidental to the accomplishments of the purposes of operating Riverdale Club, where located, and this language should not be extended to permit the sale and transfer of all of the assets of the Corporation, and substitute therefore an entirely different Club, at an entirely different location to be operated under an entirely different title. Also, the rule generally here is, that in the absence of special provisions in the Charter or By-Laws, the Board of Governors may not sell all the corporate property without the unanimous consent of all of its members.

The Board of Governors of Riverdale considered all aspects of the proposed sale and exchange of properties with Pleasant Valley. It found that it would take $155,000.00 to bring Riverdale facilities up to desirable standards. That Pleasant Valley proposed to convey to Riverdale approximately 254 acres of land west of the Rodney Parham Road and near Highway # 10 in exchange for its 250 acres of land and improvements located on same, and would construct to Riverdale's specification an 18 hole golf course and a 9 hole golf course; pay Riverdale $1,150,000.00 to be used by it to design and construct a Clubhouse, swimming pool and tennis court, and would pay Riverdale's present mortgage indebtedness

amounting to not more than $170,000.00. The Board had the benefit of professional appraisers and the reports of its study committees on all aspects of the proposed transaction. It unanimously approved the proposed transaction and a majority of a quorum of the members approved same.

The Constitution of Riverdale requires that the recreational facilities be in Pulaski County. There is nothing in the Constitution or By-Laws freezing the location to any particular location or place in Pulaski County.

The Board proposed to sell and exchange Riverdale's property for the purpose of acquiring other property, which newly acquired property, in the judgment of the Board, would be an improvement over its present facilities as a whole and would be in the best interest of said Club. We do not think that the proposal of Pleasant Valley, if legally accepted by Riverdale, would have the effect of dissolving the Corporation and abandoning the enterprise for which it was created as contended by appellees. On the contrary, we are of the opinion Riverdale's acceptance of said proposal would further the object and purposes of said Corporation; that is, "to provide recreational facilities for its members and their families by means of a country and outdoor sports club." (Constitution Art. 1). We are of the opinion that Riverdale had power to make the proposed sale and exchange with Pleasant Valley.

The next question to be decided is, how can this power be exercised by Riverdale in the absence of any provision in its Articles and Constitution authorizing same?

We are of the opinion that the Board of Governors of Riverdale does not have the power to sell and exchange its entire property to Pleasant Valley.

"The Corporate Directors or trustees have no power to sell or otherwise dispose of the entire corporate property, unless the power to do so is conferred on the Direc-

tors by the charter or governing statute, in express language or by necesary implication; or unless the stockholders authorized them to do so, or consent thereto, or unless the Corporation is in failing circumstances or insolvent and it is necessary to do this in order to raise money to pay the debts of the Corporation." 19 C. J. S. Corporations, page 536.

Section 64-1306, Ark. Stats. 1947, gives the Corporation power "to sell, lease, mortgage, pledge, transfer or otherwise dispose of lands or real property, or any right or title therein, or improvements thereon, * * * * for any purpose of use, necessary, useful, or incidental to the accomplishment of the purposes of the Corporation." This statute gives the corporation power to sell or otherwise dispose of lands or real property, etc., but it does not give the Board of Governors or Directors of any Corporation the express power to sell and otherwise dispose of its entire property.

Ark. Stats. 64-1301, et seq. was repealed by Section 21 of Act 176 of the Acts of the General Assembly for 1963. See Section 64-1901 through 64-1921, Ark. Stats. 1947. Section 64-1903 provides that the Act shall apply to: "(b) All not for profit corporations heretofore organized under any act hereby repealed, for the purpose or purposes for which a corporation might be organized under this Act."

Section 64-1907 of said Act provides that each Corporation shall have power:

"(d) To sell, convey, mortgage, pledge, lease, exchange, transfer and otherwise dispose of all or any part of its property and assets."

The above sections give the Corporation the above powers but do not confer this power expressly on the governing Board of such Corporations.

In the case of Rives v. McGaughey, 210 Ark. 658, 197 S. W. (2d) 49, the Court said at page 663:

"Ordinarily, in the absence of a charter or statutory limitation on its authority (except in case of sale of all

assets), the Board of Directors of the Corporation has the power, when acting in good faith, to authorize the sale and conveyance of the real estate of the Corporation."

The above statutes gave the governing body of said Corporation the authority to sell and convey the real estate of the Corporation in the ordinary course of its business, but it did not give it authority to sell and exchange all of the assets of said Corporation without first obtaining the approval of the members of said Corporation.

We are then confronted with the question, can a majority of a quorum of its members authorize the sale and exchange of its entire property and facilities, as contended by appellant, or must there be a unanimous vote of all of its members, as contended by the appellees, before the Board has the authority to act?

Our research has failed to show us that we have passed on this question, and counsel has not cited us any Arkansas cases directly in point. So, this is a question of first impression.

In resolving this question we give great weight to the actions of Riverdale when it became necessary for the Club to borrow money for its corporate purposes, in 1957. The members acting under Article VII of its charter, wherein it is provided that amendments may be made at any time to its Articles, amended Article VI, to read as follows:

"This Corporation shall have power to raise funds by the issuance of notes, bonds and other evidence of indebtedness, and shall have the power to pledge and mortgage its properties and assets, upon the affirmative vote of a majority of the members having voting rights." Riverdale, by this amendment, expressly gave the Corporation power to pledge and mortgage its properties and assets upon the affirmative vote of a majority of the members having voting rights. If it takes a majority of members to mortgage its properties to secure a debt

we cannot assume that the affirmative vote of a majority of a quorum of its members would have the power to sell and exchange its entire properties and facilities as provided for in the Pleasant Valley proposal. The power to sell and exchange all of its properties and facilities is a greater power than the power to mortgage same.

In 13 Fletcher Cyc. Corps., Perm. Ed. paragraph 797, at page 97, it is said:

"But while the weight of authority denies to the majority stockholders the power to sell all the corporate property where the Corporation is solvent and prosperous, there are decisions authorizing such a sale in any case where the majority deem it expedient so to do, and the trend of the later decisions seems to be in favor of permitting such a sale by the majority against the dissent of minority stockholders, when deemed expedient."

While the above quotation has reference to business Corporations, we think the rule is applicable to this case. The sale and exchange by Riverdale will not have the affect of dissolving the Corporation and abandoning the enterprise, but in the opinion of the Board it will have the opposite effect. The record shows that the Board gave consideration to the purposes of the Club for which it was organized and that the primary interest of most members was in having available, for themselves and their families, more adequate golf, clubhouse, and other facilities in as nice environment as available. The Board also gave consideration to the Club's overall membership, both now and as it will probably be in the future, the prospect for better facilities and their financing at both the proposed location and at the present site, and both Boards, both outgoing and incoming, unanimously recommended the sale and exchange of said property.

Courts should be reluctant to interfere with the internal government of benevolent corporations. There are adequate provisions in our Benevolent Corporation Law to permit Riverdale to establish its own rules and regulations governing the acceptance or rejection of

the Pleasant Valley proposal, but its members have not seen fit to establish such rules and regulations defining the number of votes necessary to approve the Pleasant Valley proposal. Such being the state of the record it our duty to set the standard. We, therefore, approve the modern trend of authorities and state under the facts in this case that the rule should be that the Board of Governors of Riverdale and its officers shall have power to approve the Pleasant Valley proposal when a majority of its members having voting rights have first approved same. They not having done so, the decree of the lower Court is affirmed.

WARD, J., disqualified and not participating.

PEAKER *v.* POWELL.

5-3712 398 S. W. 2d 58

Opinion delivered December 20, 1965.

[Rehearing denied February 7, 1966.]

[redacted]

Keith, Clegg & Eckert, for appellant.

Joe D. Woodward and *Lewis D. Smith,* for appellee.

CARLETON HARRIS, Chief Justice. Appellee, Delbert Powell, instituted suit against appellants, Don H. Peaker and Augusta Peaker, his wife, to recover the sum of $9,313.13, representing an alleged overpayment in the purchase of a certain oil payment, payable from production of oil and gas, and frequently referred to in the pleadings as a "vendor's lien." After the filing of an answer, which in effect denied the pertinent allegations of the complaint, the court, sitting as a jury, held for appellee, and entered judgment against appellants in the amount sought, $9,313.13. From this judgment, appellants bring this appeal.

The background of the litigation is as follows:

Appellants, by letter, on September 12, 1957, and two telegrams bearing the same date, agreed to sell to appellee "all of our right, title and interest in, on and upon and to the real and personal property oil and gas leasehold interest, vendor's lien interest in Sections 27 and

28, Township 15 South, Range 15 West, Ouachita County, Arkansas, less and except the Southwest Quarter of the Southeast Quarter of Section 27, Township 15 South, Range 15 West, Ouachita County, Arkansas." The trial court rendered an opinion, setting out the pertinent facts, from which we quote:

"The consideration for said sale was the sum of $200,000.00 and this sum was paid by * * * $35,000.00 check, together with payments made for the defendants, and which payments are set out in a letter dated December 2, 1957, from N. P. Powell to Don H. Peaker, * * * together with a letter * * * from Don H. Peaker to Delbert Powell, explaining some of the bills that were paid by Powell for Peaker and credited by Peaker on the $200,000.00 owed by Powell to Peaker.

"This law suit arose as a result of a vendor's lien, which the defendant Peaker had retained in some of the properties here involved to secure $38,909.65, together with 6% interest, and which vendor's lien was also assigned to the plaintiff by the defendant as a part of the deal for which the plaintiff would pay the defendant the sum of $200,000.00.

"The vendor's lien was assigned to the plaintiff by the defendants in an instrument dated October 12, 1957, and which instrument states that as of September 1, 1957, there was remaining due the sum of $21,172.94, together with interest at the rate of 6% per annum, on said sum. This remaining balance proved to be incorrect and by an assignment, dated January 30, 1958, the defendants executed a corrective assignment of the vendor's lien and in said corrective assignment it is stated that as of November 1, 1957, there remained due the sum of $11,859.81, together with interest at the rate of 6% per annum on said sum.

"The difference between these two sums, which is $9,313.13, is the amount involved in this law suit."

Powell testified that the Peakers had acknowledged their indebtedness to appellee in this amount, and had

promised to pay it, but had not done so. This testimony was not denied by appellants, and, in fact, neither appellant testified. The only testimony offered by appellants was that of Beverly Johnson, who testified that, while at Mr. Powell's ranch near Waco, Texas, with several other people, just before going on a dove hunt, the Peakers sold all of their interest in certain oil properties to Powell for the sum of $200,000.00.[1]

Appellants contend that any purported claim by appellee is barred by the statute of limitations, and they also argue that, under the agreement of sale, the various properties were not to be considered separately, but rather, *all* interests, held by appellants in the several properties, were being sold to appellee for the lump sum of $200,000.00; that the vendor's lien was included in this total amount.

In arguing that the suit is barred by the statute of limitations, appellants take the position that the cause of action herein is one to recover for money paid by mistake, and is thus barred by the three-year statute of limitations. We agree with the trial court that this contention is unsound, for perhaps several reasons, but one fact is sufficient to enable us to determine that there is no merit in this assertion. The trial court found that it was

"* * * clear from the evidence that the mistake, if that is what is involved, was made on October 12, 1957,

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[1] From the testimony:

"Q. Tell the court briefly the negotiations that led up to this agreement sale, and what the terms of the agreement were, as you remember it?

A. Well, I don't know what led up to it. Every one was just down there, and I believe we were going on a dove hunt, may be, and one, either Mr. Powell, or Mr. Peaker said to the other one something about either selling or buying the Snow Hill properties, and the conversation started from there, and uh—(interrupted)

Q. What was the purchase price agreed upon at that time?

A. $200,000.00.

Q. And what was to be sold to Mr. Powell for the $200,000.00?

A. As I recall it, all of Mr. Peaker's interest in the Snow Hill field, in the Laney, the Reynolds Brothers, and the Reynolds-Berg leases, and a lien he was holding on Mr. Grandbush.

Q. Was that the vendor's lien, that is referred to here as the vendor's lien?

A. Yes, sir."

when Don H. Peaker and wife assigned the vendor's lien involved to the plaintiff and that if the cause of action to recover as a result of such mistake is what is sued on here, then said mistake occurred on October 12, 1957, and the cause of action should date from that date and hence would be within the three year period involved when the suit was filed on September 30, 1960."

The original assignment of the vendor's lien, although the instrument states that it is to be effective from September 1, 1957, was executed on October 12, 1957, and we think this date is controlling. This suit was accordingly filed in time.

As to the second argument, we certainly can see no reason, nor necessity, for the execution of the corrective assignment of January 30, 1958, if appellants are right in their contention. This assignment specifically states:

"It is expressly understood and agreed between the parties hereto that this Assignment is given in lieu of and instead of a certain Assignment of Vendor's Lien by and between the parties hereto dated October 12, 1957."

The trial court found that the amount due,

"* * * which was secured by the vendor's lien, was unquestionably a factor in the minds of the parties when the consideration was agreed upon. The testimony shows that while negotiations were carried on, the various interests owned by the defendants were considered and discussed, and the actions of the parties subsequent to these discussions show that they were aware of the vendor's lien interest and were concerned with the balance due thereon.

"It therefore appears that it was contemplated by the parties that the exact amount remaining due and secured by the vendor's lien would be ascertained and the actions of the parties show that they contemplated that adjustments could be made when the exact amount due was ascertained and that pursuant to that understanding the corrective assignment of the vendor's lien was made.

In fact this appears to be the only interest conveyed which was capable of exact valuation and when it was determined that the indebtedness secured by the vendor's lien was over $9,000.00 less than originally thought, the defendants executed a corrective assignment of said lien and agreed to pay the $9,313.13 to the plaintiff."

Here, we are, of course, only concerned with whether there was substantial evidence to support the judgment of the trial court, and, under the facts herein enumerated, we are unable to say that the evidence offered by appellee was not of a substantial nature.

Judgment affirmed.

NUTT *v.* NUTT.

5-3695 396 S. W. 2d 930

Opinion delivered December 20, 1965.

James R. Howard, for appellant.

Shaver, Tackett and *Jones,* for appellee.

ED. F. MCFADDIN, Associate Justice. By this appeal the appellant, Victor L. Nutt, challenges the order of the Chancery Court which requires him to contribute $230.00 per month for the support of his two minor children. Appellant claims the amount is excessive.

Appellant and appellee are the parents of two children; one boy is now 10 years of age and the other is three years of age. When Mr. and Mrs. Nutt were divorced in November 1963 the Court awarded Mrs. Nutt the care and custody of the children and required Mr. Nutt (*inter alia*) to pay alimony of $125.00 per month

and also $200.00 per month for support of the children. No appeal was perfected from that decree.

In January 1964 Mr. Nutt sought to have the amounts reduced, stating that his total earnings were "the sum of $8045.00 annually, and that out of this sum is withheld the regular deductions for Social Security, taxes, and the sum of $11.26 per month insurance which covers the plaintiff's and defendant's two minor children." The said petition for reduction of payments was heard by the Chancery Court on December 30, 1964 and resulted in an order which, *inter alia,* eliminated all alimony payments to Mrs. Nutt and fixed the amount of support payments for the children at $230.00 per month.

We deem it unnecessary to detail all the financial affairs of these litigants. It is sufficient to say that a careful review of the record shows that the evidence fully supports the findings and order of the Chancery Court. Mrs. Nutt is teaching music to support herself, and has to go to a nearby town two days a week to teach. She, therefore, must have a maid or "baby-sitter" to look after the two children. Mrs. Nutt detailed the expenses of the children; and the amount fixed is fair and reasonable. Mr. Nutt claims he is unable to pay such amount. The record shows that he now has "take-home pay" of $7440.00 per year, with a possible increase in a short time. This father, with a net income of $7440.00 per annum, is certainly able to pay $2760.00 per annum for the support of his only two children.

Affirmed.

GILMORE *v.* GILMORE.

5-3720 396 S. W. 2d 936

Opinion delivered December 20, 1965.

[redacted]

J. B. Milham, for appellant.

No brief filed for appellee.

ED. F. MCFADDIN, Associate Justice. The Saline Chancery Court adjudged James T. Gilmore guilty of contempt and sentenced him to sixty days in jail, and we are asked to review and reverse that order.

James T. Gilmore and Morean Gilmore were the parents of three children, being two girls and one boy. The Gilmores were divorced several years ago and Mrs. Gilmore has the care and custody of the children, with Mr. Gilmore to contribute to their support. He has several times been found guilty of contempt for failure to make the contribution payments which, by the latest order, were fixed at $8.50 a week. On June 10, 1965 he was again cited for contempt for failure to make such payments; and a hearing was held on that citation on June 24, 1965. At the conclusion of the hearing the Chancery Court made the following finding and order:

"That defendant has been cited before this Court seven (7) times for non-payment of child support; that he has been employed since January of 1965 and has made no payments for child support since prior to September 17, 1964, at which time he was sentenced to ten days in jail for contempt of Court for non-payment of child support; . . . . he is now behind in the total of $506.00; and the Court finds that he is in contempt of this Court and that he has shown no excuse for his failure to comply with the prior Orders of this Court to pay child support. "It is therefore, by the Court, CONSIDERED and ORDERED that the defendant be and he is hereby to serve sixty (60) days in jail; provided however, that the defendant may purge himself of contempt of Court by paying the sum of $506.00 to the plaintiff through the registry of this Court; otherwise an immediate commitment is hereby ordered to be made by the Clerk of this Court."

It is the above copied order that James T. Gilmore now asks us to review and reverse; and he argues three points.

I.

Appellant's first point is: "The Chancellor erred in holding appellant in contempt of court for failing to pay support to the two girls after they became 18 years old."

The evidence shows that the Gilmores have three children. One is a daughter, Billie, who is past 18 years of age. The monthly payments had originally been $12.50 per week, but when Billie reached 18 the payments were reduced to $8.50 per week. The other two children are: a boy aged 13, who is in the seventh grade at school; and a daughter, Tena, aged 20, who is crippled and has been crippled since birth. Even with such defect she has completed one year of college and is attempting to qualify herself to be self-supporting and is being aided by the Arkansas Rehabilitation Service. In his first point Gilmore insists that the Court order finding him guilty

of contempt was in error be cause the Court was requiring him to contribute to the partial support of his cirpled daughter. When Mr. Gilmore made this contention in the Lower Court, the Chancellor reminded him that this was a case in which he was being cited for contempt, and not a case in which he was asking that the weekly payments be reduced. Assuming, but certainly not holding, that the father in this case would be held not liable for the support of his crippled daughter because she was over the age of 18 years, nevertheless, he should have filed a motion and sought a hearing on that point. He could not wilfully disobey the order to pay $8.50 a week and then, when cited for contempt, seek to have the order changed. *Casey* v. *Self,* 236 Ark. 496, 367, 367 S. W. 2d 114; *Carnes* v. *Butt,* 215 Ark. 549, 221 S. W. 2d 416. We find no merit in Mr. Gilmore's first point.

II.

Mr. Gilmore's second point reads: "The Chancellor erred in committing appellant to the County Farm in Phillips County, Arkansas, or any other farm." This point was raised for the first time in the appellant's brief in this Court. We have carefully examined the transcript and there is not a line in the testimony or the Court order which makes any reference to Mr. Gilmore being committed to any place except the jail. We have heretofore copied the order and it says that he will be confined sixty days in jail but provided that he can purge himself of contempt by paying $506.00. Mr. Gilmore filed a petition in this Court for bail pending our hearing, and we granted the motion; so he may yet purge himself of contempt. At all events, there is nothing in the record on which Mr. Gilmore can predicate his second point.

III.

Mr. Gilmore's third point reads; "The order and decree of the Chancellor is against the preponderance of the evidence, in that the evidence does not prove that appellant wilfully refused to make the payments, and the evidence failed to show that appellant legally owed the

amount of $323.00 accumulating since September 17, 1964." There is no merit to this point. Mr. Gilmore admitted that he was making $103.07 take home pay every two weeks. Surely a man making that much money can contribute $8.50 a week to the support of his children. With his pay what it is and his continuous refusal to make the support payments, the Chancery Court was thoroughly justified in the contempt order here involved.

Finding no error, the judgment of contempt is in all things affirmed.

FREEMAN *v.* JONES.

5-3723 396 S. W. 2d 931

Opinion delivered December 20, 1965.

Jeff Mobley and *William R. Bullock,* for appellant.

Joe Goodier and *K. M. Parsley,* for appellee.

GEORGE ROSE SMITH, J. In August of 1963 the appellee Cena Belle Jones and her husband George Jones were involved in a collision between a pickup truck in which they were riding and a gasoline truck being driven by the appellant, J. D. Freeman. Two months after the accident

George Jones suffered a fatal heart attack. Mrs. Jones was appointed administratrix of his estate. She brought this action for her own personal injuries and for her husband's wrongful death, alleging that his heart attack was attributable to the injuries he sustained in the collision. The jury awarded Mrs. Jones $7,500 for her own injuries, but the verdict was against Mrs. Jones in her capacity as administratrix. The only question presented by the direct appeal is whether the verdict in favor of Mrs. Jones is excessive.

George Jones was driving the pickup truck. Mrs. Jones testified that she was thrown against the windshield with such force that the glass was shattered. In addition to the ensuing injuries to her head and neck she sustained a cut over her eye, lacerations to her face, and injuries to her shoulder, her arm, her chest, and her leg. Fine particles of glass were embedded in her scalp and face, remaining there for as much as a month. For the first week after the accident she was unable to sleep or even to lie down. She was confined to a hospital for four days and incurred medical expenses that may have been as much as $500. (The exact figure cannot be determined, for some of the medical bills included services rendered to both the husband and the wife.) At the trial, eighteen months after the accident, Mrs. Jones testified that she had not completely recovered, that she still suffered pain in her neck and in her arm.

The responsibility for determining the recoverable damages in an action for personal injuries is primarily and peculiarly a matter for the jury. We are not at liberty to disturb the verdict unless the award is so palpably excessive that it shocks the conscience of the court or indicates that the jurors were motivated by passion or prejudice. *Alexander* v. *Botkins,* 231 Ark. 373, 329 S. W. 2d 530 (1959). We cannot say that the allowance in this case is so excessive as to demand corrective action on our part.

By cross appeal Mrs. Jones contends that the trial court erred in directing a verdict in favor of the other

two defendants, Al Morgan and American Oil Company. We find no merit in either contention.

Mrs. Jones alleged in her complaint that at the time of the collision Freeman was driving a gasoline truck owned by his employer, Al Morgan. She rested her case, however, without having offered any substantial evidence to show that Morgan owned the truck or that he was Freeman's employer. The state police officer who investigated the accident was called as a witness by the plaintiff. She now relies upon this excerpt from the officer's testimony to establish her case against Morgan:

"Q. I'll ask you if on August 19, 1963, you investigated an accident on Highway 27 out here approximately two and a half miles from Dardanelle, between—that occured between one George T. Jones and a truck owned by Al Morgan and driven by one J. D. Freeman?

"A. Yes, sir, I did."

True, the question *assumed* that Morgan owned the truck, but in our opinion the officer's answer cannot be regarded as anything more than a statement that he investigated the accident. He certainly was not being called upon to express an opinion, which could only have been based upon hearsay, that Morgan was in fact the owner of the truck. We may fairly put the question: Could this officer have been convicted of perjury upon proof that Morgan did not own the truck? Obviously not. The court was right in dismissing the action against Morgan when the plaintiff elected to rest her case.

The third defendant was American Oil Company. Mrs. Jones testified that the name of this company (or at least the word "American") was painted on the gasoline truck. There is no proof, however, either that the company owned the truck or that the driver, Freeman, was its employee. Thus the case does not present the fact situation that was involved in cases such as *Mullins* v. *Ritchie Grocer Co.*, 183 Ark. 218, 35 S. W. 2d 1010 (1931). To the contrary, Freeman, testifying for the defendants after the action against Morgan had been dismissed, stated that he was employed by Morgan and that Morgan

owned the gasoline truck. This uncontradicted testimony rebuts any inference that the jury might otherwise have drawn from the fact that American's name was painted on the gasoline truck. Even though Freeman's testimony is not to be considered as undisputed, there is still no affirmative evidence to show that Freeman was acting as the agent or employee of American Oil Company.

Affirmed.

FINKBEINER *v.* THE FIRST PYRAMID LIFE INSURANCE CO. OF AMERICA.

5-3722 397 S. W. 2d 130

Opinion delivered December 20, 1965.

Eichenbaum, Scott & Miller, for appellant.

W. B. Brady, for appellee.

PAUL WARD, Associate Justice. Christian E. Finkbeiner was killed April 1, 1964 when the private aircraft, which he was piloting at the time, crashed. At the time of his death the deceased was insured under Policy No. WG-162-4, issued by The First Pyramid Life Insurance Company of America (hereafter referred to as appellee), with his wife as the beneficiary.

On September 2, 1964 the deceased's wife, Dorothy Mae Finkbeiner (hereafter referred to as appellant),

filed suit against appellee to recover $30,000 under the terms of said policy. The policy provided life insurance coverage in the amount of $15,000 and it also provided accidental death benefits in the same amount.

In answer to the above complaint appellee admitted it owed appellant the sum of $15,000 for the *death* of her husband, but denied it owed her a like amount (or any amount) based on his *accidental death.*

The trial judge, sitting as a jury, found (from the pleadings, the exhibits, and the stipulation of facts) that appellee should pay appellant the sum of $15,000 (under the terms of the policy) for the *death* of her husband, but that nothing was due appellant "by reason of the accidental death provisions in said policy. . . . ."

For a reversal, appellant's sole contention is that the trial court misconstrued the applicable provisions of the insurance contract as applied to the admitted facts. Therefore it is necessary to set out below the pertinent provisions of the insurance contract.

When originally issued that part of the policy relating to accidental death read:

"ACCIDENTAL DEATH, DISMEMBERMENT AND LOSS OF SIGHT BENEFITS

If, during the continuance of this Policy, the Insured shall sustain bodily injury, solely by accidental means, which shall result directly and independently of all other causes in any one of the losses stated below, within 90 days of the date of accident, except for and subject to the date of accident, except for and subject to the exclusions and subject to the limitations provided hereinafter, the Company, upon receipt of due proof, thereof, will pay the sum set opposite the stated loss, but only one, the largest, of the sums, will be paid for losses resulting from one accident:

For Loss of:	Amount Payable
Life	The Principal Sum

"Exclusions.—The insurance with respect to Accidental Death, Dismemberment and Loss of Sight Benefits does

not cover: (1) Accident or loss caused or contributed to by (a) *bodily injury arising out of or in course of employment;* (b) bodily or mental infirmity, or as a result of medical or surgical treatment thereof; (c) ptomaines or bacterial infections, except only septic infections of and through a visible wound accidentally sustained; (d) suicide, or any attempt thereat, while sane or insane; (e) war or any act of war; or (f) *travel or flight in any aircraft, except as a fare-paying passenger on a licensed passenger aircraft provided by an incorporated passenger carrier on a regular flight between established airports . . . .*"; (Emphasis ours.)

Later the policy was modified as follows:

"This Supplementary Contract is Attached to and Forms a Part of Policy No. WG 162-4. Exclusions Under Accidental Death, Dismemberment, and Loss of Sight Benefits shall be amended by Deletion of line (a), 'Bodily Injury Arising out of or in course of Employment;' "

Appellant makes an ingenious argument which, in substance, is hereafter summarized. When the policy was first written it clearly excluded liability for any injury arising out of or in the course of the deceased's *employment;* this fact would have prevented recovery here because the deceased was an employee of the Little Rock Packing Company; when appellee struck out the above exclusion it knew the deceased was an employee; therefore appellee meant to pay for *any* injury to deceased occurring during his employment. At any rate, says appellant, the language used by appellee in its policy is ambiguous and therefore the construction placed on it should be most favorable to the insured.

We agree with appellant that if there is any ambiguity in the policy language here it should be construed as above suggested. We have many times announced this rule. See: *The Traveler Protective Association of America* v. *Sherry,* 192 Ark. 753 (p. 757), 94 S. W. 2d 713, and *St. Paul Fire & Marine Insurance Co.* v. *Kell,* 231 Ark. 193 (p. 195) 328 S. W. 2d 510. However, we are unable to see where any ambiguity exists in the case under con-

sideration here. In the case of *Aetna Life Insurance Company* v. *Spencer,* 182 Ark. 496 (p. 500), 32 S. W. 2d 310, we said:

"Contracts of insurance should receive a reasonable construction so as to effectuate the purposes for which they are made."

The above statement was cited with approval in *Milwaukee Ins. Co.* v. *Wade,* 238 Ark. 565 (p. 567), 383 S. W. 2d 105. Applying the above rule to the pertinent parts of the amended policy (as they apply only to the admitted facts of this case) the meaning, we think, becomes clear and unambiguous. That is: If the deceased "shall sustain bodily injury solely by accidental means . . . . resulting in death . . ." appellee "will pay the sum . . . of $15,000 . . ." HOWEVER "the insurance . . . does not cover" an accident or loss caused or contributed by . . . (f) travel or flight in any aircraft except a fare-paying passenger on a licensed passenger aircraft . . . ." It is conceded the deceased was not on a "passenger aircraft" when he was killed. It is hard to see how appellee could have used plainer language to say it would not be liable if Finkbeiner was killed while riding in a private plane.

In appellant's brief we find this statement:
"What is the purpose of an accident policy issued only to employees if not to protect against accidents in the course of employment? What meaning can an accident policy issued to employees have if it does not cover accidents in the course of employment?"

Our answer to the above question is that the policy did (by its terms) cover *any* kind of an accidental injury (to an employee) EXCEPT the kind in question. Appellant apparently overlooks the fact that there are many kinds of accidents—and that the policy covered all but one.

Affirmed.

JOHNSON, J., dissents.

JIM JOHNSON, Associate Justice (dissenting). I do not agree with the majority view. As I understand the facts, the policy originally excluded accident or loss caused or contributed to by travel or flight in any aircraft, except as a fare paying passenger on a licensed passenger aircraft, but also excluded death due to bodily injury arising out of or in the course of employment.

By supplemental contract or amendment the exclusion of bodily injury arising out of or in the course of employment was removed.

Appellant filed suit claiming that under the circumstances the removel of the exclusion for death in the course of employment extended coverage of the accidental death benefits to any death of the insured caused or contributed to by bodily injury arising out of or in the course of his employment, whether caused or contributed to by travel or flight in a private aircraft.

It is conceded that this death arose out of and in the course of Chris Finkbeiner's employment.

Evidently this is a case of first impression in the United States on the exact question here involved.

In the absence of authority to the contrary it is my view that the specific removal (by separate rider) of the exclusion had the effect of specifically including in the amended policy the reverse of the removed language, thereby effectively making the policy read, "the company will pay for death arising out of or in the course of employment."

Treating the policy as being so worded and following the settled rule that an intent to exclude coverage should be expressed in unmistakable language, *Milwaukee Ins. Co.* v. *Wade,* 238 Ark. 565, 383 S. W. 2d 105, *Riverside Ins. Co.* v. *McGlothin,* 231 Ark. 764, 332 S. W. 2d 486, it is my conclusion that at least the policy in this case was made ambiguous by the amendment.

Having thus concluded, I would apply the universal rule that ambiguity in insurance policies is resolved in favor of the insured.

For the reasons stated I respectfully dissent.

[Rehearing denied January 24, 1966.]

John W. Walker, for appellant.

John T. Jernigan, for appellee.

SAM ROBINSON, Associate Justice. On the 13th day of May, 1965, petitioner, Robert Winters, was convicted in the Little Rock Municipal Court of immorality, a misdemeanor under the provisions of Little Rock Ordinance 25-121. His punishment was fixed at 30 days in jail and a fine of $254.00, which included the costs. He has filed a petition for a writ of Habeas Corpus, or alternatively for a Writ of Error Coram Nobis. He alleges that he is indigent and did not have benefit of counsel at his trial in the Municipal Court. He also states that he has sought conviction relief, to no avail, in both the Little Rock Municipal Court and in the Pulaski Circuit Court.

In his petition here, petitioner alleges that his constitutional rights were violated because no lawyer was appointed to defend him on the misdemeanor charge in Little Rock Municipal Court. When his case was called for trial, he did not indicate that he wanted an attorney and he did not ask that the case be continued. We have held that no duty is imposed upon the trial court to appoint counsel for a defendant charged with a misdemeanor. *Kirkwood* v. *State,* 199 Ark. 879, 136 S. W. 2d 174; *Wimberly* v. *State,* 214 Ark. 930, 218 S. W. 2d 730.

On the strength of Ark. Stat. Ann. § 43-1203 (Repl. 1964), the courts of this State have always appointed attorneys to represent indigent defendants in felony cases. Thousands of misdemeanor cases are tried in the Municipal Courts of Pulaski County annually. In most of these cases the defendants are not represented by counsel. But petitioner contends that on the strength of *Gideon* v. *Wainwright,* 372 U. S. 335, it is now the duty of the courts to appoint attorneys for indigents in misdemeanor cases. We do not so construe *Wainwright.* There, the court was dealing with a felony case where the defendant had been sentenced to five years in the penitentiary. Here, the petitioner, Winters, had 30 days to take an appeal to the Circuit Court. He did not appeal, although the procedure for appealing from the Municipal Court is very simple. The services of an attorney are not required at all.

Petition denied.

HEEKIN CAN CO. *v.* WATSON.

5-3688 396 S. W. 2d 929

Opinion delivered December 20, 1965.

Reid and Burge By: *Donald E. Prevallet,* for appellant.

H. G. Partlow, Jr., for appellee.

SAM ROBINSON, Associate Justice. This is a workmen's compensation case. Claimant contends that he received a back injury while working for appellant in December, 1961. The Workmen's Compensation Commission denied compensation. On appeal to the Circuit Court, the decision of the Commission was reversed. The employer, Heekin Can Company, has appealed to this court.

Appellant contends there is substantial evidence to sustain the finding of the Commission, and that the Circuit Court was, therefore, in error in reversing the decision of the Commission.

In the year 1958, the employee, while working for appellant, Heekin Can Company, received an injury to his back necessitating the removal of one, and a part of another vertebra. At that time he was awarded compensation for 20% permanent partial disability. He continued to work for appellant company until the 26th day of December, 1961. There is substantial evidence that he was discharged at that time because of a reduction in the working force. He did, however, go to see a doctor on the 15th day of December, claiming an ailment to his back. But it appears that he had been bothered with his back for about two weeks at that time.

On the 23rd of January, 1962, about 30 days after he left the employment of the Heekin Can Company, he went to work for the Scott Valve Company and worked for that company continuously until April 22, 1963, at which time he became disabled with the condition of his back and was operated on shortly thereafter. He worked with valves weighing up to 400 pounds, and his foreman testified that during the 15 months he worked for Scott he never made any complaint about his back and did everything that he was told to do.

The facts as outlined would constitute substantial evidence that appellee's back was injured while working at Scott Valve Comapny. In these circumstances we cannot say there is no substantial evidence to sustain the

Commission's finding that appellee's disability, which began April 22, 1963, was not due to any injury he claims to have received while working for appellant, Heekin Can Company, 15 months previously. If the employee's disability is due to the injury he received in 1958, a recovery at this time is barred by the statute of limitations. Ark. Stat. Ann. § 81-1318(b) (Repl. 1960).

We have held many times that if there is any substantial evidence to sustain the findings of the Commission, the decision will not be set aside on appeal.

Reversed.

MARKHAM *v.* EVANS.

5-3699 397 S. W. 2d 365

Opinion delivered December 20, 1965.

[Rehearing denied January 24, 1966.]

Bob Scott, for appellant.

Jeff Duty, for appellee.

JIM JOHNSON, Associate Justice. This appeal involves an action to recover for room and board for three head of cattle and damage to a meadow.

The case originated in the Justice of the Peace Court of War Eagle Township, Benton County.

From the record it appears that the cattle were the next door neighbors of appellees Len Evans and his wife. The cattle were ranging on land owned by appellants Tom E. Markham and wife. In the absence of the owners of the land who were residents of Sebastian County the cattle evidently determined that the grass was greener on the other side of the fence and proceeded to invite themselves in. Upon discovering the strangers on their property appellees took them in. The cows were impounded and given tender (if not loving), expensive care. After a time appellees became weary of their uninvited guests and sought compensation for their hospitality, including damages to the fescue grass in their meadow.

Upon a verbal complaint before the local magistrate appellees asked for a judgment against appellants in the amount of $295.00. The justice issued summons to the constable of Sebastian County for appellants, which was served in Sebastian County. Prior to hearing, appellants filed a motion to quash services of summons. The motion was overruled and judgment against appellants was entered.

Appellants then filed their affidavit for appeal, reserving their objection to the jurisdiction of the court, which appeal was lodged with the Circuit Court of Benton County, and again raised their objection to the jurisdiction of the Court, which was sustained. The circuit court then reversed its order quashing the service of summons and setting aside the judgment of the justice of the peace, ordered the cattle sold at public auction and the proceeds deposited with the clerk of the court. The cattle were sold for humane reasons, without objection, and the money was deposited as ordered.

The Chancellor of Benton County, sitting as circuit judge on exchange, then overruled the motion to quash, holding the record to be insufficient to rule on the matter, since the summons had not been included in the record.

The chancellor further ordered the justice to complete and correct the record by certifying a copy of all process and papers filed in the justice court, including a copy of the summons issued and served, within one week, which was complied with by the justice of the peace.

Appelants then revived their special appearance and motion to quash service of summons, which was sustained by the chancellor, setting aside the judgment of the justice of the peace.

Appellees then filed a petition against the circuit clerk in order to obtain the funds which had been deposited with the circuit clerk, and a demurrer to that petition filed by the circuit clerk was sustained. Appellees then filed another petition asking the court to render judgment in favor of appellees in the amount of $400.00, on in the alternative to have the money held by the circuit clerk delivered to appellees. Judgment was rendered on this petition in favor of appellees. This appeal followed.

For reversal appellants contend here as they have obviously contended every step of these proceedings that neither the justice of the peace of War Eagle Township nor the Benton Circuit Court had jurisdiction of the persons of appellants, or either of them, and the judgment rendered against appellants is void ab initio.

With this contention we agree. The jurisdiction of the justice of the peace is coextensive with the county in which he is elected or appointed, or county wide. Ark. Stat. Ann. § 26-305 (Repl. 1962). A justice of the peace has only jurisdiction within his county and may not issue process to be served upon a defendant in any other county. *Ashby* v. *Milligan,* 126 Ark. 118, 189 S. W. 1059.

The jurisdiction of the circuit court, in any appeal from the justice of the peace, is derived from and is dependent upon the appeal, and the circuit court may not exercise its original jurisdiction. The circuit court, in its appellant jurisdiction, may not render any judgment which the justice of the peace could not have rendered originally. *Whitesides* v. *Kershaw, & Driggs,* 44 Ark. 377.

In the absence of jurisdiction to render an in personam judgment against appellants, it follows that the judgment here is void from the beginning. This being true we are confronted with the question of what to do with the money derived from the sale of the cattle. Appellees contend that appellants are the owners of the cattle. Appellants have yet to contend either way. (Of course their appeal in this case indicates their claim to the cattle.) We view the money as standing in the stead of the cattle. The state of the record being thus, we are impelled to the conclusion that the case must be reversed and the cause remanded to the Benton Circuit Court with directions to impound the money in the registry of the court, there to be held subject to the claims of the owners or the claims of appellees properly pursued under our estray or other laws.

Reversed and remanded with directions.

GEORGE ROSE SMITH J. concurs in the result.

TRIBBLE *v.* LAWRENCE.

5-3706 396 S. W. 2d 934

Opinion delivered December 20, 1965.

Spencer & Spencer, for appellant.

Ben D. Lindsey, for appellee.

JIM JOHNSON, Associate Justice. This is a suit for the purchase price of a washing machine. Appellant Travis Tribble, doing business as Tribble Appliance Company, sold a washer to appellee Jack Lawrence on June 6, 1963. The price after trade-in was $208.00 plus $22.76 time price differential. Appellee signed a conditional sale contract providing for monthly payments. The form used was furnished appellant by B-W Acceptance Corporation, which ordinarily bought appellant's contracts. The sale to appellee was made after 5:00 p.m., and appellant was unable to contact the credit bureau. When appellant called the credit bureau the following day he was advised that appellee had bad credit, and B-W later notified appellant that it would not buy the contract because of appellee's bad credit. Appellee was advised immediately and was asked to pay the purchase price in full, which he agreed to do.

Nothing was ever paid and appellant filed suit on August 8, 1963, in municipal court for only the $208.00 cash balance due, and obtained judgment. This was appealed to circuit court by appellee. On September 29, 1963, the washer was destroyed in a fire at appellee's home. Trial was held in circuit court on February 12, 1965. The jury returned a verdict for appellee. From judgment on the verdict, appellant has appealed to this court.

For reversal appellant urges that the trial court erred in instructing the jury that under the terms of the contract appellant had the duty to see that the property here involved was insured.

The specific instruction objected to (the objection being to the third paragraph) reads as follows:

"Court's Instruction No. 2.

"Now you are instructed that the property involved in this case was sold to the defendant and that the terms and conditions of the sale are set out in the written 'Conditional Sale Contract' which was introduced into evidence.

"Now under the terms of this written 'Conditional Sale Contract' introduced into evidence, it is provided that the buyer elects to pay for insurance to cover the property purchased.

"And you are instructed that under the terms of this written 'Conditional Sale Contract' it was the duty of the plaintiff to see that the property involved here was covered by insurance.

"So, if you find hat the property was destroyed by fire at a time when the written 'Conditional Sale Contract' was still in force and effect, then the plaintiff cannot recover from the defendant and your verdict should be for the defendant."

On the face of the contract, boxed in the center, is the following clause:

"LIFE AND PROPERTY INSURANCE OPTION.

"Buyer elects to include in the time balance hereof, the cost of property protection insurance in accordance with B-W Acceptance Corporation's property protection plan and term life insurance for the stated term of the contract in the amount of the declining unpaid balance. Buyer designates the individual whose signature first appears below as the insured (said person being a natural person).

"NOT APPLICABLE UNLESS SIGNED.

/s/ Mrs. Jack L. Lawrence
/s/ Jack L. Lawrence

On the back of the contract under "Terms and Conditions" is the following:

"Buyer agrees: That no . . . loss, damage, injury or destruction of said property shall release Buyer from his obligations hereunder; to keep the property insured against fire, theft, and other casualty with the proceeds from such insurance payable to and protecting Seller or its assignee for not less than the total amount owing hereunder."

The holding in *Fort Smith Appliance & Service Co.* v. *Smith,* 218 Ark. 411, 236 S. W. 2d 583, is singularly apt here:

"In our opinion the contract is not so clear and free from ambiguity that the court could say what it meant as a matter of law. In a situation of this kind it must be left to a jury to determine what was the intention of the parties. Ordinarily it is the duty of the Court to construe a written contract and declare its meaning to a jury, but, where there is a latent ambiguity, parole evidence is admisible to explain the meaning of the parties, and then it is a question for the jury and should be submitted to a jury. *Walden* v. *Fallis,* 171 Ark. 11, 283 S. W. 17, 45 A. L. R. 1396; *Lutterloh* v. *Patterson,* 211 Ark. 814, 202 S. W. 2d 767; *Ellege* v. *Henderson,* 142 Ark. 421, 218 S. W. 831. Regardless of whether the ambiguity is patent or latent, if the intention of the parties is not clear it is a question for the jury. *Walden* v. *Fallis, supra.*"

The court properly instructed the jury under the facts here obtaining that they must determine whether the contract was in force and effect at the time the propery was destroyed by fire. However, the court should also have submitted to the jury the interpretation of the conflicting insurance clauses in the light of the attending circumstances of this case, if they found that the contract was in fact in effect. For this error it is necessary that the case be reversed and the cause remanded for new trial. It is so ordered.

Reversed and remanded.

GREEN *v.* SHELL.

5-3684 397 S. W. 2d 363.

Opinion delivered December 20, 1965.

[Rehearing denied January 24, 1966.]

J. B. Milham and *Gladys M. Wied,* Benton, for appellant.

Hall, Purcell & Boswell and *Fred Briner,* Benton, for appellee; *Wright, Lindsey & Jennings,* Little Rock, *Amicus Curiae.*

FRANK HOLT, Associate Justice. This is an action by a taxpayer, the appellant, to cancel a written contract for the appraisal of the real and personal property in Saline County and, further, to enjoin the county officials from using the appraisals as an aid in the performance of their duties. The appellant brings this appeal from an adverse decree and contends for reversal that the chancellor erred in holding the contract to be valid.

The appraisal contract in question was entered into pursuant to the provisions of Act 351 of 1949 [Ark. Stat. Ann. § 84-468 et seq (Repl. 1960)]. By the terms of this contract a professional appraiser was employed with the approval of the county judge and others as required by the statute. The Act in question authorizing the employment and payment of professional appraisers to aid

the assessor in the assessment of property is constitutional. *Strawn* v. *Campbell,* 226 Ark. 449, 291 S. W. 2d 508. See, also, *Latham* v. *Hudson,* 226 Ark. 673, 292 S. W. 2d 252. Nor can it be said that the contract is deficient in meeting the formal requirments of the Act.

The most serious contention for reversal advanced by the appellant is that the contract is invalid because no specific appropriation was ever made by the quorum court authorizing the expenditure of any county funds for the appraisal services. We do not agree with this contention. The Act provides, *inter alia, that*: "The county court shall be authorized to allow claims for services * * * to be paid from the general fund of the county." Thus, payment from a specific appropriation by the quorum court is not required. Under the plain provisions of the Act the legislature directed that the county court could allow payment for the appraisal services from the county general fund. To hold otherwise would, in effect, subordinate the authority of the legislature to the action or nonaction of the county quorum court. This would nullify the clear provision of the statute. *Jeffery* v. *Trevathan,* 215 Ark. 311, 220 S. W. 2d 412.

We have carefully considered every assignment of error urged by the appellant and find none with merit.

The decree is affirmed.

MITCHAM *v.* ARK-LA. CONSTRUCTION CO.

5-3776 397 S. W. 2d 789

Opinion delivered December 20, 1965.

[Rehearing denied January 31, 1966.]

McMath, Leatherman, Woods & Youngdahl, for appellant.

William I. Prewett, for appellee.

BERNARD WHETSTONE, Special Associate Justice. This proceeding originated in this court as a Petition for writ of Prohibition. During oral argument it was stipulated that the entire matter be treated as an appeal and considered and decided here on its merits (in view of the time element involved in the facts of the case and also in view of the question involved being one of public interest).

In this converted form, involved is the question of the jurisdiction of the Chancery Court below to entertain a petition on behalf of building construction contractor(s) to enjoin (peaceful) picketing by a labor organization at a building construction project and to issue an injunction forbidding such picketing.

On July 8th, 1965, Mid South Homes of Arkansas, Inc., contracted to construct an apartment project for the

Malibu Corporation of El Dorado, Arkansas. This contract was assigned without consideration by Mid South to Ark-La Construction Company, Inc. The builder contemplates completion in January, 1966.

On August 25th, 1965, Carpenters Local Union No. 1684 began picketing the construction site with signs alleging low wages and improper working conditions. On August 26th, Mid South and Ark-La jointly filed a complaint in the Chancery Court of Union County that the picketing was unlawful and asking that it be enjoined. On the same day a temporary restraining order issued banning all picketing by the Carpenters Local at the site.

On September 1st, 1965, the defendant Local filed motions asking the court to dismiss the complaint and restraining order because the dispute was subject to the exclusive jurisdiction of the National Labor Relations Board under the National Labor Relations Act, 29 U. S. C. A. Sections 141-148. Plaintiff Mid South admitted that *it* was subject to the jurisdiction of the National Labor Relations Board and moved for a nonsuit on September 3rd leaving plaintiff Ark-La Construction Company, Inc., as the sole plaintiff with the contention that Ark-La, due to insufficient volume of interstate inflow and/or outflow value output (to be discussed later in this opinion) was not. Defendant contended that even though plaintiff Mid South took a nonsuit, that the relationship (identity of officers, ownership etc.) of the plaintiffs was so close and interrelated, that the two should be treated as one (thus placing both within the jurisdiction of the National Labor Relations Board). Another contention by the defendant was that, in any event, the value output of the remaining plaintiff (Ark-La) was "arguably" adequate to come within N. L. R. B. standards and thus still pre-empt State Court jurisdiction (since if "arguably" adequate, it remained for the N. L. R. B. to first determine that it had no jurisdiction before any State Court could proceed).

In a final decree, the lower court found that the picketing violated Amendment 34 to the Constitution of

Arkansas (so-called "Freedom To Work" Amendment), that no "labor dispute" existed, and that Ark-La is not subject to N. L. R. B. jurisdiction, and the injunction was made permanent.

On September 8th the defendant below (Carpenters Local) filed a petition for temporary Writ of Prohibition here.

Proceeding to the merits:

Petitioner (whom we will hereinafter refer to as appellant) contends that the conduct in dispute and the parties are subject to the exclusive and primary jurisdiction of the National Labor Relations Board and that the lower (State) Court was thus without jurisdiction relying on such authorities as Taylor v. Bean, 234 Ark. 932, 355 S. W. 2d 602 (1962); International Bro. of Teamsters v. Blassingame, 226 Ark. 614, 293 S. W. 2d 444 (1956) (dissenting opinion); Article VI, cl 2, of the United States Constitution; Garner v. Teamsters Union, 346 U. S. 485 (1953); Weber v. Anheuser-Busch, Inc. 348 U. S. 468 (1955); San Diego Bldg. Trades Council v. Garmon 359 U. S. 236 (1959); Local 438 v. Curry, 371 U. S. 542 (1963); Liner v. Jafco, Inc. 375 U. S. 301 (1964); N. L. R. B. v. Reliance Fuel Oil Corp., 371 U. S. 224 (1963); 12 Arkansas Law Review 354.

Appellant argues that, considered alone and separate from Mid South, that Ark-La is "arguably" within N. L. R. B. standards for jurisdiction ($50,000.00) stating "when an employer's business is newly established and no annual figures are available, the Board customarily projects over a full year whatever figures on business volume are available . . . . It is still established that in less than two months there have been interstate purchases of $2,700.00, interstate wages amounting to at least $1,200.00, and interstate subcontracts totaling over $20,000.00. Two months experience at this rate will project to a $143,400.00 total for 12 months. Or, giving the respondent the benefit of every ambiguity, if the $20,000.00 figure applies to all seven months of the pro-

jects schedule, the projected interstate inflow figure would total $57,684.00."

The respondent (whom we will refer to hereinafter as appellee), on the other hand, contends that the Garmon Case and many authorities relied on by appellant, were decided prior to the effective date of the Labor Management Reporting and Disclosure Act of 1959 (29 U. S. C. A. Sec. 164) and that "in passing the 1959 Act Congress afforded relief for parties whose disputes fell within the so-called "no man's land" created by the preemption doctrine under which the parties could not be heard either by the N. L. R. B. or State Tribunals. The 1959 Act gave the State Courts authority to exercise jurisdiction over employers whose activities did not substantially affect commerce within the jurisdictional standards adopted by the N. L. R. B. In other words, where the N. L. R. B. has adopted a jurisdictional standard establishing certain requirements before it will assert jurisdiction, the State may act in this area"; and appellee relies on such authorities as Marine Engineers Ben. Asso. v. Interlake S. S. Co., 370 U. S. 173, 176; cites Austin v. Painters Dist. Council # 22, 339 Mich. 462, 64 N. W. 2d 550, (Appeal dismissed 348 U. S. 979); Machinists Local No. 924 v. Goff McNair Motor Company, 223 Ark. 30, 264 S. W. 2d 48 (1954); and in a supplemental brief cites such cases as Fair Share Organization, Inc. v. Morris Mitnick, 188 N. E. 2d 840 (Ind. 1963); Cox v. Sup. Ct. of San Berandino County, 346 p. 2d 15 (1959 California).

It was stipulated in the lower court that Mid South had a sufficient inflow and/or outflow of goods or services to put it under the jurisdiction of the National Labor Relations Act. (It is unquestioned that according to the N. L. R. B. standards and the classification involved in the present litigation that this amount is "in excess of $50,000.00.); that prior to the filing of the complaint in the lower court that neither plaintiff made any effort to obtain any relief from the National Labor Relations Board nor attempted to obtain a determination from it as to whether the subject of this action was within the

jurisdiction of the N. L. R. B.; that the incorporators and stockholders of Mid South were Norman Pearah, G. O. Westbrook, V. J. Casamento, Jr. and Larry Cooper and that the incorporators and stockholders of Ark-La are Carolyn Pearah and the same Norman Pearah and V. J. Casamento, Jr. (the common stockholders and the incorporators being Norman Pearah and V. J. Casamento, Jr.); that the same parties are President and Vice-President of both corporations; that the defendant below, Carpenters Local Union No. 1684 is a labor organization in which employees participate, which govern grievances, conditions of work, etc.

V. J. Casamento, Jr. was called by the *defendant* and testified that he was Vice-President of Ark-La as well as Mid South and that he was employed by Ark-La; that Mid South is engaged in the business of building and selling residences in Louisiana and Arkansas; that currently the stockholders is Ark-La are the same stockholders as Mid South i.e. Norman Pearah, Carolyn Pearah and V. J. Casamento, Jr.; there is a different secretary and treasurer of each company; Mid South entered into a contract with Malibu for construction work in El Dorado and there has been a sign at the site of the construction stating "Builders, Mid South Homes of Arkansas, Inc."; Mid South was asked to sign the contract and also Casamento and Pearah signed the contract personally and then the contract was assigned to Ark-La without consideration for performance; Ark-La is qualified to do business in the State of Arkansas with a general contractor's license with the State of Arkansas and Mid South does not have such a license; Malibu wanted substantial assets to protect them in the course of construction and since Ark-La was a new company, Mid South had to sign the contract and also Pearah and Casamento had to personally sign it; Malibu agreed to pay Ark-La $246,000.00; Ark-La is going to get the money to build the job with Malibu; all Mid South owns in the way of construction equipment right now is a pick-up truck; Ark-La owns no construction equipment; Ark-La is handling the job mostly through subcontract; some

subcontractors operate out of Louisiana and others out of Arkansas; this is the first venture for Ark-La which was organized in May of 1965.

It was stipulated that Carpenters Local No. 1684, the defendant, did not represent any employee of Mid South or Ark-La.

Casamento testified further that there was no protest made about low wages on the job in his negotiations with the labor representatives of the defendant but that the only protest was the failure to use union labor exclusively; that Ark-La was paying union scale to the people that worked on the job; the two subcontracts with the Louisiana firms totaled a little less than $21,000.00; Ark-La will not have a purchase inflow of goods and services across the state line of more than $50,000.00 during its current fiscal year nor an outflow of more than $50,000.00; Mid South and Ark-La have the same office address in Crossett; Norman Pearah and Carolyn Pearah are husband and wife; the material for this Malibu job will be purchased in the name of Ark-La and is going to cost more than $50,000.00.

D. R. White testified that he was Vice-President of Malibu and that the estimated cost of the job in the job was $240,000.00; contract was signed with Mid South with personal endorsements because he did not want to sign with Ark-La since it was such a thin corporation.

There was no other testimony.

Since the enactment of the National Labor Relations Act a series of United States Supreme Court decisions have made it abundantly and increasingly clear that the federal government is vigorously jealous of its jurisdiction in the areas involved in the present litigation. Probably the outstanding and landmark case on this subject is that of San Diego Building Trades Council, etc. v. Garmon 79 S. Ct. 773, 359 U. S. 236, 1 L. Edi. 2d 860. The following quotation from that opinion is indicative:

"At times it has not been clear whether the particular activity regulated by the States was governed by Section 7 or Section 8 or was, perhaps, outside both of these sections. *But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relaions Board.* What is outside the scope of this Court's authority cannot remain within a State's power and state jurisdiction too must yield to the exclusive primary competence of the Board, See, e.g., Garner v. Teamsters, etc. Union, 346 U. S. 485, especially at pages 489-491, 74 S. Ct. 161, at pges 165-166, 98 L. Ed. 228; Weber v. Anheuser-Busch, Inc., 348 U. S. 468, 75 S. Ct. 480, 99 L. Ed. 546.'

* * * * *

'*When an activity is arguably subject to Section 7 or Section 8 of the Act, the States as well as the Federal Courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.*

To require the States to yield to the primary jurisdiction of the National Board does not insure Board adjudication of the status of a disputed activity. If the Board decides, subject to appropriate Federal judicial review, that conduct is protected by Section 7, or prohibited by Section 8, then the matter is at an end, and the States are ousted of all jurisdiction. Or, the Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the States. However, the Board may also fail to determine the status of the disputed conduct by declining to assert jurisdiction, or by refusal of the General Counsel to file a charge, or by adopting some other disposition which does not define the nature of the activity with unclouded legal significance. This was the basic problem underlying our decision in Guss v. Utah Labor Relations Board, 353 U. S. 1, 77 S. Ct. 598, 609, 1 L. Ed. 2d 601. In that case we held that the failure of the National Labor Relations Board to assume jurisdic-

tion did not leave the States free to regulate activities they would otherwise be precluded from regulating. *It follows that the failure of the Board to define the legal significance under the Act of a particular activity does not give the States the power to act. In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction. The withdrawal of this narrow area from possible state activity follows from our decisions in Weber and Guss.* The governing consideration is that to allow the States to control activities that are potentially subject to Federal regulation involves too great a danger of conflict with the National Labor policy.'

'In the light of these principles the case before us is clear. Since the National Labor Relations Board has not adjudicated the status of the conduct for which the State of California seeks to give a remedy in damages, and since such activity is arguably within the compass of Section 7 or Section 8 of the Act, the State's jurisdiction is displaced.'' (Emphasis supplied)

As noted previously, appellee in the present instance argues ''it is important to note that the Garmon Case was decided prior to the effective date of the Labor Management Reporting and Disclosure Act of 1959.''

It is also to be remembered that appellant contends that both the issue of (a) interrelation and overlapping of a party admittedly subject to the jurisdiction of the N. L. R. B. with one who may not be so as to cause the Board to treat the two as a whole and thus give it jurisdiction over both and (b) the question of the dollar value inflow and/or outflow of business in interstate commerce, are ''arguably'' within the jurisdiction of the N. L. R. B.

In view of all this we are impressed with the decision of the Supreme Court of the United States handed down March 15, 1965, in the case of Radio and Television

Broadcast Technicians Local Union No. 1264, International Brotherhood of Electrical Workers, AFL-CIO, et al v. Broadcast Service of Mobile, Inc. 380 U. S. 255.

For a clearer understanding of what was involved and decided in that case it is necessary to have additional background information (appearing in the opinion of the State Court (Alabama) from which the appeal came).

The Circuit Court of Mobile County, Alabama, in equity, dissolved a temporary injunction and dismissed the cause on the grounds that the court's jurisdiction was pre-empted by the National Labor Relations Act. A radio station, which was a member of a chain of stations, had obtained the injunction against Local No. 1264, International Brotherhood of Electrical Workers, et al, to restrain picketing when the radio station refused to employ a certain radio engineer and to require the radio station to bargain through the Local. The radio station also contended that the Local was attempting to force it to violate the Alabama Right to Work Act and other complaints. The Supreme Court of Alabama, in an opinion dated December 12, 1963, 276 Ala. 93, 159 So. 2d 452, reversed the lower court holding that the State Court did have jurisdiction. One of the major reasons for the position taken by the Supreme Court of Alabama was reliance upon the 1959 Amendment to the Labor Management Relations Act of 1957 which is so strongly relied upon by the appellee in the present case. We quote from that opinion:

"Appellant, on the other hand, argues that the entire field of labor relations has not been pre-empted by federal legislation; that there remains a substantial area in which the states may act, and that in fact the activity complained of here has been expressly left to the states by Congress through the enactment of an amendment to the Labor Management Relations Act of 1947, as amended in 1959 (29 U. S. Code Ann § 164 (c) (1) and (2), providing:

'Section 164(c) (1):

"The Board, in its discretion, *may,* by *rule of decision* or by published rules adopted pursuant to the Administrative Procedure Act, *decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction*: Provided, that the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959." (Emphasis supplied.)'

'Section 164(c) (2):

"Nothing in this subchapter shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.'' '

"We are constrained to agree with appellant. It seems to us that the National Labor Relations Board has, in the words of the above amendment, "declined to assert jurisdiction over any labor dispute involving" the class or category of employers to which appellant belongs, thus leaving such disputes within the jurisdiction of the state court."

In reversing (the Alabama Court) the Supreme Court of the United States stated:

"It is contended that although the annual gross receipts of WSIM are below the National Labor Relations Board's jurisdictional minimum of $100,000 per year for radio stations, WSIM is an integral part of a group of radio stations owned and operated by Charles W. Holt and the Holt Broadcasting Service and that the annual receipts of the common enterprise are in excess of $100,000, which is determinative under the Board's standards. Stating that every court has judicial power to determine its jurisdiction and that the union failed

to allege "that the appellant's (WSIM) gross business exceeded $100,000 per annum," the Alabama Supreme Court held that the state courts had jurisdiction over WSIM's complaint. We granted certiorari. 379 U. S. 812. The judgment below must be reversed.'

'Although a state court may assume jurisdiction over labor disputes over which the National Labor Relations Board has jurisdiction but declines to assert it, 29 U. S. C. A. §§ 164 (c) (1) and (2) (1958 ed., Supp. V), there must be a proper determination of whether the case is actually one of those which the Board will decline to hear. *Hattiesburg Building Trades Council* v. *Broome,* 377 U. S. 126.'

'The Board will assert jurisdiction over an employer operating a radio station if his gross receipts equal or exceed $100,000 per year, *Raritan Valley Broadcasting Co.,* 122 N. L. R. B. 90, and in determining the relevant employer, the Board considers several nominally separate business entities to be a single employer where they comprise an integrated enterprise, N. L. R. B. Twenty-First Ann. Rep. 14-15 (1956). The controlling criteria, set out and elaborated in Board decisions, are interrelation of operations, common management, centralized control of labor relations and common ownership. *Sakrete of Northern California, Inc.,* 137 N. L. R. B. 1220, aff'd 332 F. 2d 902 (C. A. 9th Cir.), cert. denied, 379 U. S. 961; *Family Laundry, Inc.,* 121 N. L. R. B. 1619; *Canton, Carp's Inc.* 125 N. L. R. B. 483; *V. I. P. Radio, Inc.,* 128 N. L. R. B. 113; *Perfect T. V., Inc.* 134 N. L. R. B. 575; *Overton Markets, Inc.,* 255 142 N. L. R. B. 615. The record made below is more than adequate to show that all of these factors are present in regard to the Holt enterprise and that this is not a case which the Board has announced it would decline to hear. Since the conduct set out in the complaint is regulated by the Labor Management Relations Act, 1947, 29 U. S. C. A. § 141 *et seq.* (1958 ed.), "due regard for the federal enactment requires that state jurisdiction must yield." *San Diego*

Building Trades v. *Garmon,* 359 U. S. 236, 244; *Construction & General Laborers' Union* v. *Curry,* 371 U. S. 542.

Reversed."

There is some question as to whether it would be proper in cases such as this, to wholly decline jurisdiction until the N. L. R. B. has first acted.

We feel that the proper procedure is for the state trial court, upon the filing of a motion to dismiss the proceeding for want of jurisdiction, to conduct a full-scale hearing upon the jurisdictional issue. If, upon consideration of the proof presented at that hearing, the trial court finds that the case is not one of which the N. L. R. B. would take jurisdiction (as, for example, if the proof showed that the value of the inflow and outflow in interstate commerce is less than $50,000), then the trial court should retain jurisdiction and proceed with the determination of the case. On the other hand, if the trial court finds that the case is one that falls within the jurisdiction of the N. L. R. B., or if the court finds that the question of jurisdiction is so close that the case is arguably within the jurisdiction of the N. L. R. B., then the court should dismiss the proceeding, remitting the losing party to its remedy by appeal to this court or by application to the N. L. R. B.

(Counsel for appellant in oral argument stated that a N. L. R. B. ruling could be had and relief obtained within approximately 10 days from the date of its filing with that tribunal.)

We are of the view that the preponderance of the testimony before the trial court below made the question of the interrelation of the two firms "arguably" within the jurisdiction of the N. L. R. B. and that a similar finding should be made on both (jurisdictional) issues.

It follows that the decree is reversed with directions to dissolve the injunction and dismiss the litigation without prejudice pending adjudication of the question of jurisdiction by the N. L. R. B.

ROBINSON, J., dissents.

JOHNSON, J., not participating.

SAM ROBINSON, Associate Justice, (dissenting). The majority turns this case on the question of whether it is arguable that Ark-La is buying supplies shipped in interstate commerce exceeding $50,000 in value, or whether Ark-La and Mid-South, for purposes of the National Labor Relations Act, are one and the same thing. I do not think this is the controlling point. It is my view that even if it were conceded that both of the foregoing propositions should be answered in the affirmative, still, according to the undisputed facts in this case, the state courts have jurisdiction to prohibit appellants from doing the thing the undisputed evidence shows they were doing, and that is they were picketing only for the purpose of preventing the appellees from employing nonunion labor. We have held that picketing for such purposes is unlawful and subject to injunction. *Burgess* v. *Daniel Plumbing & Gas Co.,* 225 Ark. 792, 285 S. W. 2d 517. We said in *Self* v. *Taylor,* 217 Ark. 953, 235 S. W. 2d 45:

"It is equally well settled that even peaceful picketing for an unlawful objective is not protected by the constitutional guarantee of the right of free speech. We recognized this in the *Asimos* case, *supra,* where we said at p. 702: 'On the authority of these Federal cases the injunction in the case at bar could be sustained in some form, if the appellees had shown that the Union was picketing the Jefferson Coffee Shop in an effort to compel the execution of a "closed-shop" contract.' See, also, *Giboney* v. *Empire Storage & Ice Company,* 336 U. S. 490, 69 S. Ct. 684, 93 L. Ed. 834; *Union Local 262* v. *Gazzam,* 339 U. S. 532, 70 S. Ct. 784; *Union Local 309* v. *Hanke,* 339 U. S. 470, 70 S. Ct. 773; *Amalgamated Meat Cutters* v. *Green,* 119 Colo. 92, 200 Pac. 2d 924; *Construction and General Labor Union* v. *Stephenson,* (Tex.) 225 S. W. 2d 958; *Local Union No. 519* v. *Robertson,* (Fla.) 44 So. 2d 899."

The majority relies on *San Diego Buildings Trades Council, etc.* v. *Garmon,* 79 S. Ct. 773, 359 U. S. 236, 1 L. Ed. 2d 860, but the facts in that case are entirely dif-

ferent from the facts in the case at bar, and the law announced in Garmon is favorable to appellee here. The majority points out that here it is stipuated that Carpenters Local No. 1684, the defendant, did not represent any employee of Mid-South or Ark-La and that the evidence shows there was no protest made about low wages on the job by representatives of the defendant, and the only protest was the failure to use union labor exclusively; Ark-La was paying union scale to the people that worked on the job.

Actually, the Garmon case relied on by the majority supports the appellee. In that case the court said: "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield." It is clear from the Garmon case that the state must *yield* jurisdiction in the first instance only where it is clear that the activities which the state purports to regulate are protected by Section 7 or constitute an unfair labor practice under Section 8 of the National Labor Relations Act. The majority has not pointed out where anything said in Sections 7 or 8 is applicable to the facts in the case at bar.

The appellant was, at all times, acting within Amendment 34 to the Constitution of Arkansas, which provides: "No person shall be denied employment because of membership in or affiliation with or resignation from a labor union, or because of refusal to join or affiliate with a labor union; nor shall any corporation or individual or association of any kind enter into any contract, written or oral, to exclude from employment members of a labor union or persons who refuse to join a labor union, or because of resignation from a labor union; nor shall any person against his will be compelled to pay dues to any labor organization as a prerequisite to or condition of employment."

This provision of our Constitution is valid under Section 14(b) of the Taft-Hartley Law, which provides:

"Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

The majority, in effect, says that before the courts of this State can enforce a valid provision of its Constitution—a provision which has been recognized as valid by laws adopted by the Congress of the United States, we must first have the permission of the National Labor Relations Board. I do not subscribe to that view.

Before the National Labor Relations Board makes a final determination of this matter, in all probability, months instead of 10 days will have elapsed. In the meantime a construction project will be closed down; many people will be thrown out of employment. This is a tragic result, especially when it is considered that there can be only one final result, and that is that the appellant has a right to enjoin the unlawful picketing.

For the reasons stated, I respectfully dissent.

[redacted]