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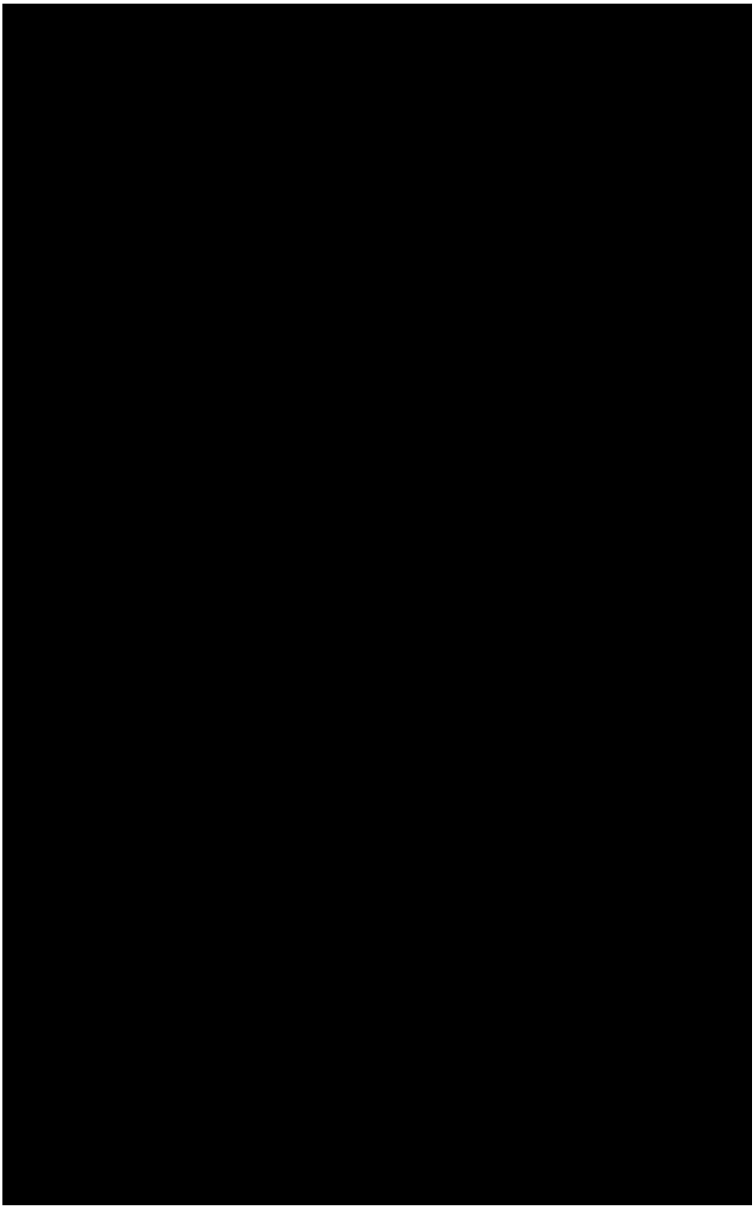

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BURKS *v.* STATE

5203 405 S.W. 2nd 935

Opinion delivered September 12, 1966

Smith & Smith, for appellant.

Bruce Bennett, Attorney General; *Fletcher Jackson,* Asst. Atty. Gen., for appellee.

CARLETON HARRIS, Chief Justice. Robert Lee Burks, an inmate at the State Penitentiary, filed his petition for a writ of habeas corpus[1] on December 29, 1965,

[1]This court, on October 18, 1965, by *per curiam* order, announced the adoption of Criminal Procedure Rule No. 1, such rule setting up the procedure to be followed by prisoners who assert an unlawful conviction or sentence, or a violation of a constitutional right. The instant matter will be disposed of as though it were filed under this rule.

in the Desha County Circuit Court, setting out that on or about April 21, 1958, after entering a plea of guilty, he was sentenced to serve a term of three years in the penitentiary by the Desha County Circuit Court on a charge of grand larceny. The record reflects that this three years was to run consecutively to a term of fifteen years, which Burks was already serving, following a conviction in the Lincoln County Circuit Court in December, 1957, of assault with intent to kill. Burks' petition alleged, *inter alia,* that he was intimidated, forced to sign statements and told to plead guilty by Superintendent Lee Henslee of the Arkansas State Penitentiary; that he was threatened with death by the superintendent, unless he entered such a plea; further, that he had been without counsel, and was not aware of his constitutional rights. Upon the filing of the petition, counsel was appointed to represent Burks, and a hearing was held before the Desha County Circuit Court, at which time Burks testified in his own behalf. This testimony reflects that appellant had escaped from the penitentiary, and it was subsequent to this event that the charge of grand larceny (stealing an automobile) was filed against him. Burks stated that, because of the escape, the superintendent "did have quite a bit of malice in his heart against me. *** I had been terrorized quite a bit by the superintendent." At the conclusion of the hearing, the court entered its order, finding no merit in the contentions raised by petitioner, and dismissing the petition. From the judgment so entered, appellant brings this appeal.

For reversal, appellant relies principally upon our case of *Swagger* v. *State*, 227 Ark. 45, 296 S. W. 2d 204, but there are clearly factual differences in the two cases. For one thing, Swagger was a nineteen-year-old boy, who had never before been convicted of any crime. The record does not reflect appellant's age, but does reflect that Burks was already serving a fifteen year sentence for assault with intent to kill at the time of the events here complained of (his plea of guilty to grand larceny). Furthermore, in *Swagger,* the court did not tell the de-

fendant that an attorney would be appointed for him, if desired.

Appellant's charge of intimidation by the superintendent has a rather hollow ring. Burks, under the statute, could have received a sentence of twenty-one years for grand larceny, and, in addition, could have received as high as five years on the charge of escaping from the penitentiary. However, as previously stated, he was only given a three-year sentence on the larceny count, and the record does not reflect that an escape charge was even filed against him. It does not appear from these circumstances that the superintendent (or any other state official) acted against Burks with animosity or in a spirit of revenge. Appellant says in his brief that his statements of intimidation by Henslee are not contradicted, but it could not be otherwise—since Mr. Henslee is deceased. The Attorney General's office pointedly comments that appellant's account of intimidation is directed at one who is unable to answer.

The judge of the Desha County Circuit Court is also the judge of the Jefferson County Circuit Court, and this jurist was presiding at the time that Swagger entered his plea of guilty in Jefferson County. After briefly discussing the *Swagger* case, the trial judge, in the instant matter, commented that, after the reversal in *Swagger,* before accepting a plea of guilty from any prisoner, the court would first "read the information to him and instruct him that he did not have to plead guilty, that he may get him an attorney and get him a jury trial; that if he does not have funds with which to employ an attorney, the court will appoint him one and then ask him what's his wishes. That was done in this case and he indicated that he did not wish an attorney and wished to plead guilty." This statement is in accord with the docket entry made when appellant entered his plea of guilty in the Lincoln County Circuit Court, "4-21-58 plea of guilty after all his constitutional rights were explained to him and sentenced to three years in the State Penitentiary, same to run consecutively with

what time he has in the penitentiary on previous sentence."

We agree with the trial court that appellant's petition is without merit.

Affirmed.

STEWART *v.* STATE

5197 406 S. W. 2nd 313

Opinion delivered September 12, 1966
[Rehearing denied October 17, 1966.]

Harold B. Anderson, for appellant.

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

ED. F. MCFADDIN, Justice. The first question on this appeal is whether the confession was voluntarily made by the appellant. This case has been before us on previous occasions. See *Stewart* v. *State,* 233 Ark. 458, 354 S. W. 2d 472, Cert. Denied, 368 U. S. 935; *Stewart* v. *State,* 237 Ark. 748, 375 S. W. 2d 804, Cert. Denied, 379 U. S. 935. For angles of this case in other courts,

Stewart v. *Henslee,* 206 F. Supp. 137, 311 F. 2d 691, 373 U. S. 903; and *Stewart* v. *Stephens,* 244 F. Supp. 982.

The voluntariness of Stewart's confession was an issue discussed and decided in the Opinion of this Court in *Stewart* v. *State,* 237 Ark. 748, 375 S. W. 2d 804, Cert. Denied 379 U. S. 935. That decision by us was on March 2, 1964; and at that time the Arkansas practice was to allow the jury to determine the issue of the voluntariness of the confession, in accordance with the holding of the United States Supreme Court in *Stein* v. *New York,* 346 U. S. 156, 97 L. Ed. 1522, 73 S. Ct. 1077. But on June 22, 1964, the United States Supreme Court delivered its Opinion 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, in which case the United Supreme Court held that the trial judge—and not the jury—should make the determination of the voluntariness of the confession before such confession was introduced in evidence to the jury. This is all discussed in our Opinion in the case of *Nelson* v. *State* (decided on September 13, 1965), 239 Ark. 678, 393 S. W. 2d 614.

After the decision in *Jackson* v. *Denno,* (*supra*), Stewart filed a petition in the United States District Court for the Eastern District of Arkansas; and, in keeping with *Jackson* v. *Denno,* that Court, in *Stewart* v. *Stephens,* 244 F. Supp. 982, on June 30, 1965, entered an order reading in part as follows:

> "The State of Arkansas is given seven months from June 30, 1965 to either allow the trial court to conduct a hearing on the issue of voluntariness of Stewart's confession or to retry him. If, for good cause shown, it becomes impossible or inappropriate to try him within that period of time, application may be made to this Court by either Stewart or the State for a reasonable extension of time."[1]

[1]In this hearing before the U. S. District Court for the Eastern District of Arkansas, there is a footnote in the opinion which seeks to summarize all the various instances in which the United

Pursuant to that order, the Pulaski Circuit Court conducted a hearing on November 17, 1965, to determine the issue of the voluntariness of the confession made by the appellant Stewart. The State produced four witnesses, being: Charles W. Tracy, a criminal investigator for the State; Ray D. Vick, Chief of Police of North Little Rock; Paul R. McDonald, Captain of the Arkansas State Police; and Hon. Frank Holt, formerly Prosecuting At-

States District Court reviews State court decisions. For what it may be worth, we copy the said footnote: "Under those decisions, this Court in determining the right of a habeas corpus applicant to personal liberty must keep in mind: 1. That this Court is not concerned with the guilt or innocence of the petitioner, but only with whether he has been deprived of any right guaranteed to him under the Constitution and laws of the United States; 2. That the State Court's adjudication of a federal claim is not conclusive but carries only the weight that federal practice gives to the conclusions of a court of another jurisdiction on federal constitution issues; 3. That jurisdiction of this court to adjudicate the petitioner's federal claims is not affected by procedural defaults incurred by the petitioner during the state court proceedings except in those rare instances when he, after consultation with competent counsel, or otherwise, has understandingly and knowingly bypassed the privilege of seeking to vindicate his federal claims in the state courts; 4. That in any case where the habeas corpus petitioner alleges facts which if proved would entitle him to relief, this Court must grant a full and plenary evidentiary hearing where:

(a) the merits of the factual dispute were not resolved in the state court hearing;
(b) the state factual determination is not fairly supported by the record as a whole;
(c) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing;
(d) there is a substantial allegation of newly discovered evidence;
(e) the material facts were not adequately developed at the state court hearing; and
(f) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

5. And that since controlling weight may not be given to a prior denial of an application for habeas corpus unless the prior determination was made on the merits, the applicant must be urged to present all of his federal claims in one proceeding to prevent the possibility that this Court will be used to thwart, or at least procrastinate the orderly enforcement of the state's criminal laws through the use of successive applications by a state prisoner."

torney and later Justice of the Arkansas Supreme Court. These witnesses testified as to the voluntariness of the confession. The appellant offered no testimony to the contrary. The appellant's attorney stated near the conclusion of the hearing:

> "I think, Your Honor, we are not so much concerned with the physical violence to the defendant as we are with the subtle means of getting him to confess. We think such means were taken.
>
> "THE COURT: Develop it.
>
> "MR. ANDERSON: I think the record develops it within the Federal Rules of the Constitution."

The Circuit Court entered its judgment, finding and holding that the confession was voluntarily made. We have carefully reviewed the testimony and we find that the Trial Court was correct in such finding and holding.

In the Trial Court from whence comes the present appeal, the appellant sought to raise other issues in addition to that of the voluntariness of the confession. And now, on this appeal, appellant argues these other issues. Assuming, without deciding that such issues could be raised, we now dispose of them in an effort to prevent further delays

(a) The appellant insists that he was proceeded against by information instead of by grand jury indictment. This point has long been settled adverse to the appellant. In *Washington* v. *State,* 213 Ark. 218, 210 S. W. 2d 307 (Cert. denied by U. S. S. Ct., 335 U. S. 884, 93 L. Ed. 423, 69 S. Ct. 232), we said:

> "Appellant was tried on an information filed by the prosecuting attorney, rather than on an indictment returned by a grand jury; and appellant claims that prosecuting him by information is violative of his rights under both the State and Federal Constitu-

tions. Amendment 21 of the State Constitution reads: " 'That all offenses heretofore required to be prosecuted by indictment may be prosecuted either by indictment by a grand jury or information filed by the prosecuting attorney.'

"This amendment has been upheld by this court against such attack as is here made, in numerous cases, some of which are: *Penton* v. *State,* 194 Ark. 503, 109 S. W. 2d 131 and *Smith et al* v. *State,* 194 Ark. 1041, 110 S. W. 2d 24. The United States Supreme Court has repeatedly held that a State can —if it so desires—provide for a prosecution by information instead of by indictment. Some of these cases are: *Hurtado* v. *California,* 110 U. S. 516, 28 L. Ed. 232, 4 S. Ct. 111; *Bolln* v. *Nebraska,* 176 U. S. 83, 44 L. Ed. 382, 20 S. Ct. 287; and *Gaines* v. *Washington,* 277 U. S. 81, 72 L. Ed. 793, 48 S. Ct. 468."

(b) The appellant insists that his rights were violated in several respects, and relies heavily on *Escobedo* v. *Ill.*, 378 U. S. 478, 12 L. Ed. 2d 977, 84 S. Ct. 1758; and *Miranda* v. *Ariz.,* 384 U. S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (decided June 13, 1966). We find all such claims of the appellant to be without merit. In *Johnson et al.* v *N. J.,* 384 U. S. 719, 16 L. Ed. 2d 882, 86 S. Ct. 1772, the United States Supreme Court held, on June 20, 1966, that the holding in *Escobedo* v. *Illinois* affected "only those cases in which the trial began after June 22, 1964, the date of that decision." The trial of appellant Stewart (affirmed by this Court in 237 Ark. 748, 375 S. W. 2d 804, and being Case No. 5102 herein) began on August 5, 1963, and the verdict of guilty was returned on August 7, 1963. So the holding in *Escobedo* v. *Illinois* affords no relief to the appellant. Likewise, in *Johnson* v. *New Jersey, supra,* the United States Supreme Court, on June 20, 1966, held that the holding in *Miranda* v. *Arizona* "applies only to cases in which the trial began after the date of our decision one week ago. The convictions assailed here were obtained and trials

completed long before Escobedo and Miranda were rendered, and the rulings in those cases are therefore inapplicable to the present proceeding."

(c) Appellant also urges other points, all of which we have examined and find to be without merit.

Affirmed.

MARTIN *v.* MARTIN

5-3902 405 S. W. 2d 934

Opinion delivered September 12, 1966

Virginia H. Ham and *Q. Byrum Hurst,* for appellant.

No brief filed for appellee.

GEORGE ROSE SMITH, Justice. This is an appeal from the chancellor's refusal to set aside a default judgment against the appellant, in the sum of $1,165, for child support and an attorney's fee. It is insisted that the default was due to such a misunderstanding between counsel as to constitute an unavoidable casualty.

Mrs. Martin obtained a divorce in 1959. On June 7, 1965, her attorney, John L. Sullivan, notified Martin by letter that he had filed a motion for judgment for the arrears then due and that the matter had been set for hearing on June 15. Martin engaged his present counsel, who filed a motion for a continuance on June 14, asserting a meritorious defense. Despite the pendency of this motion a default judgment was entered against Martin on June 22. His attorneys promptly asked that the judgment be set aside, but after a hearing the chancellor denied the relief sought.

Where an attorney's failure to resist an application for a default judgment is attributable not to any fault on his part but to a misunderstanding between counsel, there is such an unavoidable casualty that the judgment should be vacated, even after the expiration of the term. *Kochtitsky & Johnson* v. *Malvern Gravel Co.,* 192 Ark. 523, 92 S. W. 2d 385 (1936). Here, according to the appellant's uncontroverted abstract of the record, his attorney, Virginia Ham, firmly believed that no definite date for the hearing had been fixed. Her office was next door to the courtroom; she could have been notified in a matter of moments. On the other hand, Judge Sullivan thought that the matter had been reset by agreement for June 22, but he conceded that Mrs. Ham might have misunderstood. Neither lawyer questions the other's good faith, nor is the conduct of either of them open to criticism. In the circumstances we think the motion to set aside the judgment should have been granted, to the end that the issues may be tried on the merits.

Reversed.

5-3926 405 S. W. 2d 931

Opinion delivered September 12, 1966

Howell, Price & Worsham and *Ted Mayer; Gordon & Gordon; Moses, McClellan, Arnold, Owen & McDermott,* for appellant.

George O. Green, Don Langston, for appellee.

PAUL WARD, Justice. On June 19, 1964 Charles H. Earl (trustee for John Charles Earl) brought this suit against the Arkansas Highway Commission to enjoin the construction of a portion of Interstate Highway 40 (a controlled-access highway) across the eastern portion of "Earl's Lakeside Subdivision" which adjoins Lake Conway and which lies a few miles south of the City of Conway in Faulkner County. We may hereafter refer to the plaintiff as "Earl," to the defendant as "Commission," and to Earl's Lakeside Subdivision as "Subdivision." For a better understanding of the is-

sues here involved we set out below a brief summary of pertinent and undisputed facts.

The Subdivision was dedicated and the plat filed of record in 1962: In May 1964 the Commission filed a declaration to take several lots in the Subdivision over which the highway was to be constructed: The lots so taken are not involved in this litigation: Originally Earl owned all the lots in the Subdivision—approximately 200—and he still owns them excepting the ones taken by the Commission and excepting about twelve lots which he has sold, or contracted to sell, to certain individuals (hereafter referred to as "purchasers"): On April 8, 1965 said purchasers intervened and joined Earl in asking the Chancery Court to enjoin the Commission from constructing said highway until it compensates them for divers elements of damages to their property.

After a hearing the trial court refused to enjoin the Commission, holding that neither Earl nor any of the purchasers was entitled to compensation. There was one modification of the court's holding which we will mention and discuss later.

After carefully considering the several grounds on which appellants base their claims and the reasons given by the learned Chancellor for denying the same, we have concluded that the trial court must be affirmed. We now discuss separately the several contentions presented by appellants.

One. We find no merit in appellants' contention that they are entitled to recover damages for the loss of "rights in street-easements and the fee . . . taken by the State." None of these appellants owned any lot that abutted on any street at the place where the street was taken by the Commission. In fact it merely blocked off streets which intersected the new highway, acting in conformity with Ark. Stat. Ann. § 76-2207 (Supp. 1965). No land or lot belonging to any appellant was taken by the State, and any inconvenience suffered by appellants

is likewise suffered by the general public. In the case of *Ark. State Highway Comm.* v. *McNeill,* 238 Ark. 244, 381 S. W. 2d 425 we find this statement:

> "It is well settled in Arkansas that a landowner whose land is not being taken is not entitled to compensation for damage of the same kind as that suffered by the public in general, even though the inconvenience and injury to the particular landowner may be greater in degree than that to others."

Two. This point raised by appellants relates to the "one modification" of the decree referred to previously. The court held that "the closing of Charles Street, Lakeside Drive, and Conway Circle make it necessary that other access to Highway 65 be obtained." It appears from the evidence that these streets had been left in such condition that they were unusable, and the court, in effect, ordered the Commission to place these streets "in the same condition as other streets in the addition" within thirty days. The court later found that this order had been fully complied with, and there is no contention here to the contrary. This was all the relief appellants were entitled to receive in this action which was not brought for damages but for injunctive relief.

Three. It is ably and vigorously contended by appellants that they should be compensated for loss of ingress and egress to Lake Conway. It is not denied that appellants may have been inconvenienced or that their lots may be less valuable because they can no longer travel certain streets leading directly to the lake. Likewise it is not denied that they still have access to the lake by traveling a less direct route. However, this inconvenience or loss is something that is also shared by the public in general and is not, under many decisions of this Court, compensable. See: *Risser* v. *City of Little Rock,* 225 Ark. 318, 281 S. W. 2d 949. It is possible that appellants' inconvenience or loss may be of a greater degree than that of others living in the addition or of the public in general, but this fact (if it is a fact) does not

entitle appellants to compensation. See *Wenderoth* v. *Baker,* 238 Ark. 464, 382 S. W. 2d 578, and also the *McNeil* case, supra.

Four. It is here insisted by appellants that their view of the lake has been marred or destroyed. It is admitted by appellants that their claim for compensation in this instance is based on the same reasons advanced in support of point Three above. The trial court was correct in denying compensation for loss of airview for the reasons already set forth in said point Three. In *Holden* v. *Carmean,* 178 Ark. 375, 10 S. W. 2d 865 this Court said:

> "The trial court held that the mere excavation of the Rogoski part of the lot conferred upon appellant no cause of action, and we concur in that view. Rogoski had the right to excavate his property to the grade line of the streets, and if appellant was injured thereby it was, so far as Rogoski was concerned, *damnum absque injuria.*"

By the same token the Commission had the right to raise the grade line on its right-of-way even though, in doing so, it may have obstructed appellants' view of the lake. No property owner has an absolute right to an unobstructed view from his premises so long as his property rights are not involved. To hold otherwise would seriously hamper the development of residential (and industrial) areas in cities and towns.

Five. Finally, appellants contend they suffered a loss because certain streets were blocked by the new highway. The answer to this contention is found in what we have already said in point Three above. Here it is not contended that any part of appellants' lots was taken or that they have been deprived of the right of ingress or egress to and from their property.

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

Affirmed.

McFaddin, Bland & Amsler, JJ., dissent.

Ed. F. McFaddin, Justice, dissenting. I desire to preserve the views expressed in my dissenting opinion in *Arkansas State Highway Comm.* v. *McNeill,* 238 Ark. 244, 381 S. W. 2d 425, so I respectfully dissent in the present case; and I am authorized to state that Justices Amsler and Bland join me in this dissent.

Spears *v.* Rich

5-3943 405 S. W. 2d 929

Opinion delivered September 12, 1966

James R. Hale, for appellant.

Pearson & Pearson, for appellee.

Osro Cobb, Justice. On April 5, 1946, appellee Rich purchased some 14 lots located in the Braley Addition to the City of Lincoln, Washington County, Arkansas from the State of Arkansas, and received a tax deed thereto. This is an appeal from a decree of the trial court quieting title to the 14 lots in appellee.

Appellants claimed title to these lots under a Sheriff's Deed dated November 8, 1946; also, by adverse possession. Appellants further contend that title should be quieted and confirmed in them. After hearing, the Chancellor found for appellee and entered a decree confirming title in appellee.

On appeal, appellants urged two points for our consideration:

(1) That the original suit was in fact a suit in ejectment brought by appellee, who was not then in possession, and that no equity jurisdiction existed as to the cause of action asserted.

(2) That the Chancellor erred in quieting and confirming title in appellee.

Appellants' Point 1—*The question of equity jurisdiction.*

When appellants answered appellee's complaint and prayed for a decree quieting and confirming their title to the subject lands then in their possession, they themselves sought equitable relief and it gave the equity court jurisdiction as to the entire controversy between the parties. This precise question under identical facts was before this court in an early case, *Goodrum* v. *Ayers,* 56 Ark. 88-93, 19 S. W. 97, (1892) in which we said:

> "Conceding that the plaintiff was not in possession of the land, and for that reason could not maintain a suit to quiet title, it cannot avail the appellant; for he filed a cross-bill seeking to quiet his own title, and it gave the court jurisdiction of the entire controversy."

We know of no decision of this court, and certainly appellants have failed to cite any such decision, wherein we have deviated from the rule announced in *Goodrum* v. *Ayers, supra.* Indeed in a considerable number of cases we have followed the rule. For example, see *Not-*

tingham v. *Knight,* 238 Ark. 307, 379 S. W. 2d 260 (1964); *Thomason* v. *Abbott,* 217 Ark. 281, 229 S. W. 2d 660 (1950); *Spikes* v. *Ribbard,* 225 Ark. 939, 286 S. W. 2d 477 (1956).

We therefore find no merit in appellants' contentions as to Point 1.

Appellants' Point 2—The claim of title by adverse possession.

Appellants' claim to title by adverse possession was not predicated upon their own possession, which was limited to a period of approximately four years, but upon the alleged possession of their predecessor in title, Alvin B. Brown, father of Earline Spears, one of the appellants. We test this factual issue in the light of the proof adduced as between the respective claims on behalf of Alvin B. Brown and appellee.

It is undisputed:

(a) that appellee obtained a tax deed from the State of Arkansas on April 5, 1946 conveying subject lots to him and that said deed was recorded by appellee on April 10, 1946, and that thereafter appellee has paid the annual taxes thereon.

(b) That Brown shortly after appellee recorded the deed and acting upon the advice of his attorney, went to see appellee in an effort to come to some settlement with appellee concerning the lots. Brown testified that appellee demanded $800.00 for the lots and no settlement was made.

(c) Brown testified that he tried to assess the lots but that the assessor refused same for the reason that they were already assessed in the name of appellee.

(d) When a sewer district was formed embracing lands in the vicinity of subject lots and including sub-

ject lots, Brown made no effort at any time to pay benefits assessed for the improvement district against the lots.

(e) Brown gave the sewer district contractor an easement across his farm but never undertook to execute any easement crossing the lots in issue.

(f) When Brown traded with appellants in 1960, he conveyed 10 acres by a warranty deed and conveyed his interest in the lots in controversy by a separate quitclaim deed.

(g) Appellant, Alvia Spears, in the course of his testimony stated that Brown had told him about Mr. Rich's (appellee's) land.

(h) That Brown did not get his deed from the sheriff of Washington County until November 8, 1946, some seven months after the execution and delivery of the deed of the State of Arkansas to appellee, and Brown did not record his sheriff's deed until February 26, 1965, which was after the filing of the instant suit.

(i) That Brown had the lots under fence and in use as a pasture for more than ten years prior to the transfer of his interest to appellants.

Appellee testified that shortly after he had acquired the deed from the State and had filed his deed of record in Washington County, that Brown had come to see him and had asked for his permission to pasture livestock on the land, and that he had given Brown such permission and that thereafter no change had been made in that relationship, the use of the land by Brown being at all times a permissive one. Appellee also testified that he made no charge for Brown's use of the land nor did Brown offer to pay him anything for pasture purposes.

After hearing the evidence introduced, the Chancellor found against appellants on the fact question involving the alleged acquisition of title to subject lands by

adverse possession. We have concluded that this finding against appellants on this issue was supported by a clear preponderance of the evidence and, under such circumstances, such finding will not be disturbed here on appeal. *Orrell* v. *E. C. Barton & Co.,* 240 Ark. 211, 398 S. W. 2d 685 (1966); *Williams* v. *Walker,* 148 Ark. 49, 229 S. W. 28 (1921); *Ellis* v. *Blankenship,* 207 Ark. 739, 182 S. W. 2d 756 (1944).

We therefore find no merit in appellants' contentions as to Point 2.

Having found no merit in any of the contentions of appellants, the decree of the trial court is affirmed.

BUSBY *v.* WILLFORM

5-3932 406 S. W. 2d 131

Opinion delivered September 12, 1966

Giles Dearing and *E. J. Butler,* for appellant.

Shaver & Shaver, for appellee.

GUY AMSLER, Justice. During the year 1962, appellant A. G. Busby (referred to as "Busby" in the briefs) farmed some 500 or more acres of land in Cross County, Arkansas. Appellee Ossie Lee Willform, a twenty year old Negro boy, (referred to by the attorneys as "Willform") was employed by Busby as a farm laborer during busy periods.

On September 5, 1964, Willform filed suit in the Cross County Circuit Court against Busby alleging that while in the employ of Busby on September 16, 1962, (it was later shown that the correct date was July 16, 1962) and acting pursuant to his instructions and using his (Busby's) tools a piece of steel penetrated his left eye, resulting in infection and removal of said eye.

There were also allegations to the effect that when appellee removed the plows from a cultivator and undertook to straighten them: "He used an old four pound hammer which was owned by Mr. Busby and which was defective in that it had been used for a long time and the steel would chip off of the hammer head. The appellee did not know of the defective condition of the hammer head and the softness of the steel, nor of the fact that the steel would chip off of the head of the hammer, and as he was using the hammer to straighten the plow a sliver of steel came off of the hammer, flew through the air and hit the appellee in the left eye; that the appellant did not warn him of the defective tool he used, although he knew that said tool was defective." Furnishing defective tools, knowledge of such defects and failure to warn a minor were alleged as acts of negligence on the part of Busby.

Damages in the sum of $35,000.00 were sought for pain and suffering, medical expense and permanent disability.

Appellant's answer was a general denial with no affirmative defenses offered.

Trial to jury resulted in a verdict for $15,000.00. An appeal was perfected in apt time.

The first point relied on by Busby for a reversal is that there was no substantial evidence on the issues of employment and liability. Millbrook, a former employee of Busby and witness for appellee, testified that he usually worked under the direct supervision of Mr. Busby but that Mr. Busby had told him that if he (Busby) was not around he should get his work instructions from Mr. John Shaw, Busby's son-in-law. He had been familiar with Busby's shop tools since 1957, and they were still being used in 1962. He said that he and other employees used the tools in repairing farm machinery under directions from Busby or Shaw. He also stated that when a three pound ball peen hammer is used to beat on hot steel over a period of time it gets hard and starts to flake. On the questions of employment and liability appellee related that on the morning of the accident when he finished plowing about 10:00 o'clock he drove back to the shop and asked Mr. Shaw for further instructions. Shaw told him that Mr. Busby said for him (appellee) to take the shanks off both rear cultivators and set the "cultivator foots." Then appellee was asked:

> "Q. Now, did you do what Mr. Shaw told you to do?
>
> A. Yes sir I straightened—I straightened—I think I straightened two shanks—two shank parts of the plow, and the third I started with the steel and it hit me in the eye. When I got straight to see what happened I looked on the plow and didn't see no place broken off, and looked at the hammer, there was a fresh piece chipped off."

Appellee also testified that he never received any

warning from Busby regarding the hammer. He further stated that when he got out of the hospital he went to Mr. Busby's house with his brother-in-law and that appellant told them that he (Busby) was using the hammer (sometime previously) and that "a piece sounded like it went through his hat or went through his hat again or something."

Theodis Millbrook, John Wesley Willform and Jessie Willform (relatives of appellee) all testified that Mr. Busby in their presence or to them said that he knew that Ossie Lee was hurt because he (Mr. Busby) was using that hammer one day and a piece of steel or a piece flew off that hammer and went through his hat.

The testimony of appellee and his witnesses was controverted in every essential respect by Busby, Busby's son-in-law and daughter. When the applicable yardstick created by this court many years ago, and which we are unwilling to override, is applied to the point under scrutiny it will be readily seen that appellant's contention must fail. The governing rule (from which there has been no deviation) was succinctly stated in *Baldwin* v. *Wingfield,* 191 Ark. 129, 85 S. W. 2d 689:

> "Under our system of jurisprudence it is the province of the jury to pass upon the facts. It is not only their privilege, but their right, to judge of the sufficiency of the evidence introduced, to establish any one or more facts in the case on trial. The credibility of the witnesses, the strength of their testimony, its tendency, and the proper weight to be given it, are matters peculiarly within their province. The law has constituted them the proper tribunal for the determination of such questions. To take from them this right is but usurping a power not given. * * * When there is a total defect of evidence as to any essential fact, or a spark, a 'scintilla,' as it is termed, the case should be withdrawn from the jury." * * * "The settled rule is that, if there is any substantial evidence to support the

> verdict of a jury, this court cannot disturb it, although we might think that it was clearly against the preponderance of the evidence, and, if we had to decide the facts, would decide differently."

The triers of fact elected to accept the evidence of Willform and his witnesses over the proof offered by appellant and we are unwilling to override their conclusion.

Point 2 urged by appellant for reversal is that: "The trial court erred in permitting Willform to introduce into evidence the mortality table on his life expectancy without explaining to the jury that its use would be limited to future medical expenses."

This point is argued rather perfunctorily and without citation of authority by either party. Appellee was a young man, twenty years of age, with a life expectancy of 49 years at the time he was injured. There is no question that he will throughout his life suffer some inconvenience, humiliation and discomfort from his permanent injury and disfigurement. Dr. Lewis, who removed Willform's eye, testified: "It is obvious that he has this false eye." There was no objection to this or any other testimony regarding the nature and degree of appellee's injuries. In view of the elements of probable future damage revealed by the evidence the trial court did not commit error in refusing to restrict use of the mortality table to future medical expense.

A third point relied on by Busby for reversal is that: "The trial court erred in not declaring a mistrial on the injection of the question of insurance into the trial by counsel for Willform."

On *voir dire* counsel for Willform had questioned prospective jurors concerning their connection with liability insurance carriers. Counsel for appellee admits that this interrogation was "within bounds."

In a reasonably short time after he was injured

Willform visited the office of Dr. Thomas Price in Wynne, Arkansas, to obtain treatment for his injured eye. Dr. Price rendered first aid and concluded that Willform's injury was of such a serious nature as to require the attention of a specialist. So he referred appellee to Dr. Phillip Lewis, a noted eye surgeon of Memphis, Tennessee.

On direct examination, Busby testified that around 3:00 p.m. on the day Willform was injured Dr. Price called his home by telephone and talked with Mrs. Busby. Busby was present, heard his wife talking and learned of the accident in this way.

On cross-examination the following transpired:

"Q. Did they ask you for authority to send him?

A. Didn't ask me nothing.

Q. Why did they call you?

A. Just told me.

Q. Did you authorize him to be sent to Memphis?

A. No.

Q. Did you pay his doctor bill?

A. I didn't.

Q. Did you pay part of it?

A. I never wrote my check to anyone for anything in connection with paying the hospital bill.

Q. Did you pay his doctor's bill?

A. I didn't, not with my check.

Q. "Not with my check"?

A. No.

Q. Do you know whose check paid it; authorized by who?

MR. DEARING: I think he is going too far.

MR. SHAVER: I just asked—

MR. DEARING: He has already gone too far in front of the jury.

COURT: As I understand, counsel asked if he knew who paid the bill. He can answer yes or no.

Q. The question is do you know who paid the check?

COURT: If you know you can answer yes or no.

A. Could I ask one question?

COURT: No, sir, answer the question yes or no; do you know who paid it?

A. This sure puts me on the spot.

COURT: He is not asking who. Just asking if you know.

A. I would have to say no, I don't know who paid it.

COURT: That is the answer.

MR. SHAVER: That's all I want to know."

Since appellant referred to the call by Dr. Price in his direct testimony counsel was justified in pursuing the matter further on cross-examination for determining if Busby had, through some act or statement, assumed responsibility for appellee's injury.

During the development of appellee's case in chief it was stipulated that there were unpaid balances on the hospital and doctors bills, amounting to $159.92. The jury could have reasoned that had Busby been protected by insurance the medical bills would have been paid in full.

It is our conclusion that the trial court did not abuse its discretion in denying appellant's timely motion for a mistrial.

Finally appellant contends that the verdict is excessive. Able counsel for both parties have cited numerous cases dealing with our decisions relating to damages in tort cases. It would serve no useful purpose to undertake a comparison of the case at bar with all cited cases. Generally each case must be judged on its own facts and if a verdict is supported by substantial evidence it will not be disturbed.

Counsel for Busby fairly states the test to be "that the ultimate question in determining excessiveness of a verdict is whether it shocks the conscience of the court or demonstrates the jurors were motivated by passion or prejudice."

In *Breitenberg* v. *Parker,* 237 Ark. 261, 372 S. W. 2d 828, this court quoted the applicable rule from *Ark. Amusement Corp.* v. *Ward,* 204 Ark. 130, 161 S. W. 2d 178, with this language:

> "A verdict will be set aside by an appellate court as excessive where there is no evidence on which the amount allowed could properly have been awarded; where the verdict must of necessity be for a smaller sum than that awarded; where the testimony most favorable to the successful party will not sustain the inference of fact on which the damages are estimated; where the amount awarded is so excessive as to lead to the conclusion that the verdict was the result of passion, prejudice * * * or

of some error or mistake of principle, or to warrant conclusion that the jury were not goverened by the evidence * * * ."

Appellee is a young laborer with less than a high school education who has no training for skilled employment. His life expectancy is 49 more years. He will be forced to struggle through life as a "one-eyed" workman. No proof is required to establish the fact that two eyes are better than one in any undertaking or that a person with two reasonably good eyes would be chosen for employment over an applicant with only one eye. Appellee's medical expense, past and future, amounts to some $1,500.00 if all goes well. He lost twelve weeks wages, amounting to approximately $840.00. He was in the hospital eleven days and Dr. Lewis testified that he had a "considerable wound" that was penetrating and "had gone through the cornea and sclera of his eye." The doctor also said "he suffered extreme pain." The doctor stated: "It is obvious he has this false eye. He was given antiseptic drops to put under the lid and was advised not to take it out except occasionally and when absolutely necessary. In most cases you have to clean the eye and secretion gets underneath it. Frequently these patients get an infection from wiping the eye with a soiled handkerchief or their hand." The eye is removed, when necessary for cleaning or other purposes, with a little rubber suction and in addition to applying the drops the eye must be polished and cleaned every four months. In short Willform has a lifetime aggravating and troublesome problem on his hands for which he is entitled to be substantially compensated.

In view of the gravity of the injury sustained by appellee we are unwilling to say that the amount awarded by the jury for all elements of unliquidated damages was so grossly excessive (or even excessive for that matter) as to require that it be pared down by this court. The judgment is therefore affirmed.

FARMERS COOPERATIVE ASSN. *v.* PHILLIPS

5-3933 405 S. W. 2d 939

Opinion delivered September 12, 1966

Bob Scott and *H. Franklin Waters,* for appellant.

Little & Enfield, for appellee.

HUGH M. BLAND, Justice. This is a suit for damages for breach of an alleged contract. The parties will be referred to as "Cooperative," defendant below, and "Grower," plaintiff below. The contract was attached to and made a part of the complaint as though written therein, word for word.

The contract was dated the 25th day of February, 1964, to continue until December 31st, 1964, a period of about 10 months. The pertinent parts of the contract are as follows:

Grower agrees to produce broilers during this peri-

od, and agrees to abide by this contract, but he understands it can be changed or cancelled by the Cooperative if the Grower does not carry out recommendations made regarding proper management of flock, or if changes in poultry industry warrant a change in type of contract. * * *

It is expressly agreed and understood that this agreement does not create nor attempt to create a partnership, either general or limited, between the parties hereto, but is evidence of an independent contract, and an employer-employee relationship does not exist by reason of this agreement and neither party shall have authority to bind nor act on behalf of the other except as herein specifically provided.

The Grower agrees to furnish brooder house and brooder equipment, and to produce broilers for the Cooperative of the kind, weight, and quality necessary for market.

Grower agrees to produce broilers on a guarantee of one and one-half cents per pound on net weight for broilers sold.

The Cooperative demurred to the complaint which was overruled and answer was duly filed, reserving objections to the overruling of the demurrer.

The case came on for trial before a jury on November 17th, 1965. The testimony was that Grower had been a broiler producer for approximately 16 years. On a 12-month contract, Grower would normally plan to produce 4 bunches of broilers. After the contract was signed, Cooperative placed 3 bunches of broilers with Grower; one bunch on February 26th, 1964, which were in the houses until the 8th day of May, 1964. Another bunch was placed in the houses of Grower on May 5th, 1964 and marketed and sold on July 20th, 1964. The last bunch was placed in the houses on July 30th, 1964, and sold on October 2nd, 1964.

On September 26th, 1964, Cooperative wrote Grower as follows:

> "Dear Sir: We regret that we are not putting any chickens in now. The way we see it, it will be the first of the year or more. We recommend that if you want to get chickens somewhere else it will be O. K. We want to thank you for your patronage and if we can be of any service, please feel free to call on us. Sincerely, Jack W. Deason."

The testimony was undisputed that it was almost impossible to obtain chickens in the fall of 1964. Grower admitted that he tried in two places to obtain them but was unable to do so and did not obtain any chickens until mid-December, 1964. The only evidence as to damages was that Grower received $1,866.00 for the last bunch of broilers sold. According to the record, this was the gross amount and there was no testimony as to net profit.

At the conclusion of all of the testimony, the Cooperative moved for a directed verdict as follows:

> "Comes now the defendant and moves the Court to direct a verdict for the defendant for the following reasons: One, that the plaintiff's case rests upon a contract which has been placed in evidence which says it can be changed or cancelled if the conditions in the poultry industry warrant a change. There is testimony that chickens became scarce in September. For the further reason, it does not specify the number of broilers to be grown and the witness testified that he grew broilers and was paid for it so there has been no breach of contract shown. For the further reason, that even assuming there were a breach, there has been no basis or foundation or evidence placed in the record which would sustain award of damages for any amount whatsoever."

This motion was denied and the court, together with

other instructions, gave Instruction No 7 as follows:

> "You are further told that the contract is an instrument which is binding on both parties and is governed by its terms. If it is breached without grounds, then the party breaching the contract is liable in damages to the other. In this case, you are told that the measure of damages would be governed by the terms of the contract at the rate of one and a half cents per pound on any broilers that were denied, if you find that they were denied, to the grower by the defendant. In that connection, you cannot guess or speculate for it must be based on evidence to support it."

Cooperative objected to this instruction on the grounds that the court had interpreted the contract and commented on the evidence.

After instructing the jury, the court submitted to them two interrogatories. Interrogatory No. 1:

> "Do you find by a preponderance of the evidence that defendant breached the written contract with the plaintiff and that said breach damaged the plaintiff?"

Interrogatory No. 2:

> "What do you find by a preponderance of the evidence the damages of the plaintiff to be as a result of a breach of the contract by defendant. $....."

The first was answered "yes" and the second by writing in "$777.50" as damages.

We hold the court was correct in overruling Cooperative's demurrer to the complaint. The law is well settled in Arkansas that in determining the sufficiency of the complaint on demurrer, the allegations contained in the pleadings must be taken as true. *Moore* v. *North College Avenue Improvement Dist. No.* 1 *of Fayetteville,* 161 Ark. 323, 256 S. W. 70. A demurrer should be over-

ruled when facts stated in the complaint, with every reasonable inference deducible therefrom, constitute a cause of action. *U. S. Fidelity & Guaranty Co.* v. *Moore,* 233 Ark. 703, 346 S. W. 2d 524 (1961).

Instruction No. 7 given by the court is clearly erroneous. The court states, "you are told that the measure of damages would be governed by the terms of the contract at the rate of one and a half cents per pound on any broilers that were denied * * * ." The only testimony as to damages was by Grower who testified that he received $1,866.00 for the broilers sold the latter part of August 1964.

We are committed to the rule in *Black* v. *Hogsett,* 145 Ark. 178, 224 S. W. 439 (1920) and subsequent cases, to the effect that where one party to a contract is prevented from performing by the fault of the other party, he is entitled to recover the profits which the evidence makes it reasonably certain he would have made had the other party carried out his contract. As a precedent for this rule the court cites *Streudle* v. *Leroy,* 122 Ark. 189, 182 S. W. 898 (1916) and *Harmon* v. *Frye,* 103 Ark. 584, 148 S. W. 269 (1912).

In *Sumlin* v. *Woodson,* 211 Ark. 214, 199 S. W. 2d 936 (1947) the holdings in *Black* v. *Hogsett* and *Harmon* v. *Frye, supra,* were cited with approval. In this case it was held:

> "When a party embarks on the enterprise of recovering anticipated profits, he must present a reasonably complete set of figures, and not leave the jury to speculate as to whether there would have been any profits."

Grower failed to fulfill his burden in this regard and the verdict for $777.50 is based upon conjecture and speculation and cannot be allowed to stand.

The evidence is likewise uncertain as to breach of

contract. The case was not fully developed. It is, therefore, evident that this case must be reversed. Cooperative requests that we reverse and dismiss. A similar situation was before the court in *Hayes Brothers Flooring Co.* v. *Carter, Admnx.,* 240 Ark. 522, 401 S. W. 2d 6 (1966) and this court held that although the judgment was reversed for insufficiency of the evidence, where it appeared that the evidence might be more completely developed, circumstances were held to justify remanding the case for a new trial. We believe this should be done in the case at bar.

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

UPI *v.* HERNREICH, D/B/A STATION KFPW

5-3889 406 S. W. 2d 322

Opinion delivered September 19, 1966

Daily & *Woods,* for appellant.

Harper, Harper, Young & *Durden,* for appellee.

CARLETON HARRIS, Chief Justice. This appeal is a companion case to No. 3797, United Press International, Inc., v. George T. Hernreich d/b/a Radio Station KZNG, which is also being handed down this date. On October 15, 1957, Tulsa Broadcasting Company, an Oklahoma corporation, entered into a contract with appellant, similar to that in No. 3797, *i. e.,* appellant agreed to furnish news service for broadcasting, and appellee

agreed to pay certain amounts therefor. During the period of the contract, and while same was in full force and effect, Tulsa Broadcasting Company sold Radio Station KFPW to appellee, George T. Hernreich, and on May 9, 1958, the company assigned the aforementioned contract to Hernreich, who accepted same, and assumed all obligations, as well as privileges provided in the agreement. On May 25, 1964, appellant instituted suit against Hernreich for sums alleged to be due under the contract, that instrument being made a part of the complaint. In addition to denying the indebtedness, appellee raised two other defenses, first, that the agreement between the parties had been cancelled by mutual agreement,[1] and second, that appellant, a foreign corporation, was engaged in doing business within this state in intrastate commerce without having first qualified itself to do business in Arkansas, as provided by statute, and was thus not entitled to maintain the action.

Thereafter, appellant filed a motion for summary judgment, supported by the affidavit of Roderick W. Beaton, Vice-President and General Business Manager of United Press International, the motion asserting that appellant was engaged only in interstate commerce, and there was no genuine issue as to any material fact relating to the defenses sought to be raised by Hernreich. Appellee responded to the motion for summary judgment, the response being supported by a counter affidavit, and affirmatively stated that the contract sued upon was not for services to be performed wholly in interstate commerce, but the services to be performed were both interstate and intrastate, and it was maintained that a question of fact existed on that issue. The motion also stated:

"* * * Defendant admits plaintiff's failure to qualify would not make the contract void, but the statute in question does prohibit plaintiff from bringing suit on

[1]The denial of the indebtedness, and cancellation of the agreement, are not mentioned, or argued, by appellee, and are not at issue on this appeal.

any contract if it is doing business in the state, and not qualified therein, so that a question of fact on this point exists."

The court overruled appellant's motion for summary judgment, and thereafter appellee filed his own motion for summary judgment, contending that the deposition of James R. Campbell, Arkansas State Manager for United Press, established that appellant was engaged in doing business in this state in intrastate commerce, and Hernreich contended in his motion that this fact, together with appellant's failure to qualify to do business in this state, entitled him to a summary judgment. Appellant responded to this motion by asserting that the deposition, relied upon by Hernreich, reflected that United Press was not doing any intrastate business in Arkansas during the term of the contract, and further asserted it had executed the contract in the state of New York. Further, the affidavit of James F. Darr, General Manager of Communications for United Press, was offered, the affidavit being to the effect that all news transmitted from the United Press Bureau in Little Rock crosses state lines, and appellant is thus engaged solely in interstate commerce. Upon submission, the court granted appellee's motion for summary judgment, and dismissed appellant's complaint. From the judgment so entered, appellant brings this appeal.

A discussion of the first point at issue in this appeal (whether a fact question exists as to the place where the contract was executed) is unnecessary, since the legal principle involved in this question is thoroughly discussed in Case No. 3797. The contract here involved, as in that case, reflects that it was entered into "at New York, N. Y.," and there is no proof in the record that this is not true. Of course, the mere fact that an agreement sets out that it is executed in a particular state does not establish the authenticity of the fact, but the question of the locale of the execution of the instrument is certainly placed in question; since this fact is disputed, the granting of a summary judgment was erroneous.

Likewise, the question of whether United Press was engaged solely in interstate commerce needs to be developed by the proof. The affidavits of Campbell and Darr assert that this is true, though some statements in Campbell's affidavit might indicate that intrastate commerce is also engaged in. At any rate, we think clearly that these facts were disputed, and a summary judgment should not have been granted. Of course, the question of whether a motion for summary judgment must be countered by a response in opposition, or affidavits controverting the motion, is not at issue on this appeal, since appellant did file a response and counter affidavit to the motion.

Reversed and remanded.

UPI v. HERNREICH, D/B/A STATION KZNG

5-3797 406 S. W. 2d 317

Opinion delivered September 19, 1966

R. Scott Campbell and *Daily & Woods,* for appellant.

Harper, Harper, Young & Durden, for appellee.

ED. F. MCFADDIN, Justice. This appeal challenges the ruling of the Circuit Court in sustaining defendant's motion for summary judgment and dismissing the plaintiff's complaint.

Appellant, United Press International, Inc., was the plaintiff below. It is, and was at all times herein involved, a corporation not domesticated in Arkansas (see Ark. Stat. Ann. § 64-1201 [Repl. 1966]), and engaged in selling information to various news media. Appellee, at all times herein involved, was owning and operating a radio broadcasting station in Hot Springs, Arkansas, originally under the call letters KBLO, and later under the call letters KZNG.

In December 1961 appellant and appellee entered into a contract whereby appellant agreed to furnish news services for broadcasting, and appellee agreed to pay stipulated amounts therefor. In October 1963 appellant filed this action against the appellee, claiming unpaid amounts due on the contract, which contract was made an exhibit to the complaint. Appellee admitted that the contract had been signed, but claimed[1] that plaintiff, as a non-domesticated foreign corporation, was barred from maintaining the action. The appellee then filed the deposition of Mr. James R. Campbell, State Manager of United Press International, Inc.; and, based

[1]The defendant's answer said:

"Further answering defendent states that at the time of the execution of said contract, to-wit: December 15, 1961, and at the time of the filing of plaintiff's complaint and at the present time, plaintiff, a corporation organized and existing under the laws of the State of New York, had not qualified to do business as a foreign corporation within the State of Arkansas as provided by the laws of said state, although at all of said times plaintiff was engaged in doing business within the State of Arkansas, and defendant states that, therefore, under the provisions of Section 64-1202, Arkansas Statutes 1947, Annotated, said contract is unenforceable by plaintiff against defendant, and plaintiff has no right to maintain this action against defendant."

entirely on that deposition, the appellee moved for summary judgment of dismissal of the complaint, saying:

> "In his answer, defendant affirmatively alleged that at the time of the execution of the contract the plaintiff was a corporation organized and existing under the laws of the State of New York, which had not qualified to do business as a foreign corporation within the State of Arkansas, and that at the time of the execution of the contract plaintiff was engaged in doing business within the State of Arkansas, and that therefore under the provisions of Section 64-1202, Arkansas Statutes, 1947, Annotated, the contract sued upon by plaintiff is unenforceable by plaintiff against defendant. Said affirmative allegation in defendant's answer has not been denied by plaintiff and therefore must be taken as admitted to be true by the plaintiff.
>
> "Defendant states that the foregoing constitutes a complete defense to plaintiff's complaint and that on this issue alone defendant is entitled to a summary judgment of dismissal of plaintiff's complaint, and that therefore there is no genuine issue of fact to be determined herein.
>
> "Defendant attaches to this motion the deposition of plaintiff's state regional manager, James R. Campbell, which affirmatively shows that plaintiff was engaged in doing business in the State of Arkansas in intrastate commerce at the time the contract in question was executed, even though it appears from the pleadings that this allegation has been admitted."

The Circuit Court granted the motion for summary judgment, stating: " . . . plaintiff's complaint should be dismissed for the reasons stated in said motion." From such judgment of dismissal, there is this appeal.[2]

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[2]Appellant urges these points:

"I. The Court erred in sustaining the motion for summary

1. *The Summary Judgment Issue.* At the threshold of the appeal, the appellee insists that the appellant filed no pleading to counter the motion for summary judgment, and filed no affidavits controverting the motion; and appellee claims that such failure on the part of the appellant was, in itself, sufficient grounds for the action of the Court in granting the summary judgment. We do not agree with the appellee in such position. In moving for summary judgment the appellee had the burden of establishing that there was no genuine material fact question, and that on the record as made the summary judgment should be granted. By Act No. 123 of 1961, Arkansas adopted Rule 56 of the Federal Rules of Civil Procedure[3] regarding summary judgment. The Act may be found in Ark. Stat. Ann. § 29-211 (Repl. 1962). Sub-section (c) of § 29-211 reads in part: "The judgment sought shall be rendered forthwith, *if the pleadings,* depositions, and admissions *on file,* together with the affidavits, if any, *show that there is no genuine issue as to any material fact,* and that the moving party is entitled to judgment as a matter of law." (Italics our own.)

So the Court examines the *pleadings;* and, under the pleadings in this case, we hold that summary judg-

judgment for the reason that the appellee failed to sustain his burden of demonstrating that there are no genuine issues of material fact.

"II. There are genuine issues of material fact in this case on which appellant is entitled to a trial.

"A. This contract does not come within the prohibition of Section 64-1202 Arkansas Statutes (1947) Annotated because it is a New York contract; or, at the very least, an issue of fact exists on that point;

"B. This contract arose out of interstate commerce and provides for transactions constituting interstate commerce and thus does not fall within Section 64-1202; or, at the very least, an issue of fact exists upon that point."

[3]Some of the federal cases construing the Federal Rule 56, on the point here at issue, are: *Poller* v. *Columbia Broadcasting System;* 363 U. S. 464, 7 L. Ed. 2d 458, 82 S. Ct. 486; *Durastell* v. *Great Lakes Corp.,* 205 F. 2d 438; *Booth* v. *Barber Co.,* 256 F. 2d 927; *Hiern* v. *St. Paul Co.,* 262 F. 2d 526; *McHenry* v. *Ford Motor Co.,* 269 F. 2d 18.

ment should not have been granted because there was a genuine issue as to the material fact of the place in which the contract sued on had been made. In the complaint it was stated that the ". . . plaintiff and defendant entered into a written contract, a copy of which is attached hereto, made a part hereof, and marked 'Exhibit A'; . . ." In the answer, the defendant ". . . admits the execution of the contract described in paragraph III of said complaint." The opening sentence of the contract was this: "Made this 15th day of December, 1961, at New York, New York, between United Press International, Inc., a New York corporation, hereinafter called UPI, and George T. Hernreich, d/b/a Radio Station KBLO, Hot Springs, Arkansas, hereinafter called broadcaster." It will be observed that the contract alleged that it was made "at New York, New York."

Was it made at New York, New York? There is nothing in the deposition of Mr. Campbell (and that is all the defendant offered) to show that the contract was made in any other place except New York, New York. Before the defendant could bring himself within the purview of Ark. Stat. Ann. § 64-1202, he would have to show that intrastate commerce was involved, and that the contract was made in the State of Arkansas. This point will be developed in Topic II of this Opinion. Until the defendant made such proof he was not entitled to claim any benefits under Ark. Stat. Ann. § 64-1202, and the admission of the defendant in his answer, as previously copied, prevented the defendant from being entitled to any summary judgment. The defendant, as the moving party, had the burden to establish that he was entitled to summary judgment. *Wirges* v. *Hawkins,* 238 Ark. 100, 378 S. W. 2d 646; *Russell* v. *Rogers,* 236 Ark. 713, 368 S. W. 2d 89; *Young* v. *Dodson,* 239 Ark. 143, 388 S. W. 2d 94. Such burden required the defendant to establish that there was no genuine issue as to the material fact that the contract was made in Arkansas, since only contracts made in Arkansas are in the prohibitory provision of the Foreign Corporation Statute, as we will now discuss. The defendant failed to discharge such

burden so the summary judgment should not have been granted.

II. *The Foreign Corporation Issue.* The appellee claims that the appellant, as an admitted non-domesticated foreign corporation, is prohibited by Ark. Stat. Ann. § 64-1202 (Repl. 1966) from maintaining this action. To this claim appellant makes two answers: the first is that only interstate commerce is involved; and the second is that, even if intrastate commerce is involved, nevertheless the contract was not made in Arkansas and thus is not within the prohibitory provisions of the statute.

If all the transactions under the contract were in interstate commerce, then, of course, Ark. Stat. Ann. § 64-1202 has no application. Assuming, however, but not deciding, (a) that the deposition of Mr. Campbell established that some of the dealings under the contract were in intrastate commerce, and (b) that if any of the performance was in intrastate commerce, then any action on any part of the contract is within the prohibitory language of § 64-1202, we necessarily come to the question of whether a non-domesticated foreign corporation may use the courts of this State to obtain any relief under a contract *made outside Arkansas.* This brings us to a study of Ark. Stat. Ann. § 64-1202, which has many times been before this Court; but we find no Arkansas case directly in point on the issue here presented.[4]

The statute (§ 64-1202) has two distinct penalty provisions. The first provision is a fine to be collected against any non-domesticated foreign corporation that

[4]In the annotations following Ark. Stat. Ann. § 64-1202 (Repl. 1966), the case of *Graysonia, N. & A. R. Co.* v. *Newberger Cotton Co.*, 170 Ark. 1039, 282 S. W. 2d 975, is cited as authority for this statement: "A foreign corporation may sue in the state to enforce contracts made in other states without complying with the statutory requirements for doing business." But the reported case does not show that the non-domesticated foreign corporation was seeking to enforce an intrastate transaction resulting from a contract made outside Arkansas.

does business in this State. This fine provision applies regardless of where any contract may have been made, but the statute does not state that the assessment of the fine also makes the contract void. The second penalty provision in the statute is the one here in issue, and is contained in this statutory language: ". . . and as an additional penalty, any foreign corporation which shall fail or refuse to file its articles of incorporation or certificate as aforesaid, *cannot make any contract in the state which can be enforced by it either in law or equity. . .*" (Italics our own.) It will be observed that by the quoted language the courts of this State are closed to any non-domesticated foreign corporation only when seeking to enforce any contract *made in this State.* So the place of the making of the contract becomes most material in the case at bar, assuming any intrastate commerce is involved and that any such would taint the entire transaction.

The statute that is now Ark. Stat. Ann. § 64-1202 has been many times before this Court and the original statute has been several times amended. Judge Leflar, in his volume, "Conflict of Laws," published in 1938, in §§ 50, 54 and 57 thereof, discussed the history of the statute and the many cases involving it. In § 54 there is this statement: "It has been said that the Arkansas statute cannot apply to prevent actions on contracts not made in Arkansas, even though interstate commerce be not involved. *Brace* v. *Gauger-Korsmo Const. Co.* (CCA 8th 1926), 36 F. 2d 661." Cert. denied, 74 L. Ed. (U. S.) 1153.

The cited case is directly in point. There, the non-domesticated foreign corporation made a contract in Tennessee, to be performed in Arkansas, and the statute was invoked against the action of such non-domesticated foreign corporation. The Circuit Court of Appeals stated: "The lower court held that this statute could not be invoked in the instant case because the contract was not made in the State of Arkansas. The correctness of this holding of the trial court is challenged by ap-

pellants, and it is urged that as the contract was one to be performed in the State of Arkansas it was within the inhibition of the statute." In affirming the trial court, the Circuit Court of Appeals said: "The ruling of the court finds support in *State, etc. Ins. Assn.* v. *Brinkley,* 61 Ark. 5, 31 S. W. 157, 29 L.R.A. 712, 54 A.S.R. 191, where the court says: 'Though the appellant company failed to comply with the statute by not doing those things required of foreign corporations before doing business in this state, the contracts in this case were not void on that account, as they were Illinois contracts.' "

A case not going quite as far as the *Brace* case, *supra,* but shedding light on the foreign corporation issue, is *Pratt Laboratories* v. *Teague,* 160 F. Supp. 176, in which Judge John E. Miller, for the Western District of Arkansas, in his usual thorough manner, reviewed the various cases on the Arkansas statute concerning non-domesticated foreign corporations, and concluded: "The statute does not concern itself with the place of performance, but merely refers to the place of the making of the contract . . ."

We have repeatedly held that § 64-1202 is a penal statute and must be strictly construed in favor of those against whom the penalty is sought. *Alexander Film Co.* v. *State,* 201 Ark. 1052, 147 S. W. 2d 1011; *Murray Tool Co.* v. *State,* 203 Ark. 874, 159 S. W. 2d 71. In thus strictly construing the statute in favor of the appellant, we must conclude that the statute closes the doors of the State courts to a non-domesticated foreign corporation only on those actions involving contracts *made in this State.* The general rule in other jurisdictions involving similar statutes supports our conclusion. In 23 Am. Jur. 331, "Foreign Corporations," § 357, cases and texts are cited to sustain this statement: "A foreign corporation is ordinarily entitled to maintain an action in a state court on a contract made by it in another state, irrespective of whether it has complied with the state statute."[5]

[5]There is an annotation in 81 A. L. R. 1134 entitled: "Applicability of provisions explicitly invalidating contracts made by

We therefore conclude that the place of the making of the contract in this litigation is a material question and that the determination of that question presents a genuine issue as to a material fact; and therefore the trial court was in error in sustaining the defendant's motion for summary judgment.

Reversed and remanded.

BLAND, J., dissents from that portion of this Opinion which relates to summary judgment.

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foreign corporations not licensed to do business in state, to contracts made outside of the state," and cases from various jurisdictions are cited in the annotation.

FEDERAL FACTORS, INC. v. WELLBANKE

5-3942 406 S. W. 2d 712

Opinion delivered September 19, 1966

[Rehearing denied October 24, 1966.]

Files, Davidson & Plaster and *Paul Henson,* for appellant.

Guy H. Jones, for appellee.

GEORGE ROSE SMITH, Justice. The appellant, claiming to be a holder in due course, brought this action to enforce three instruments, entitled Trade Acceptances, executed by the appellee Wellbanke and by Richard J. Martin. Wellbanke contended that the instruments were not negotiable and that he was therefore entitled to interpose in his defense certain breaches of contract on the part of the drawer, Chemical Products, Inc. The trial court, sitting without a jury, sustained Wellbanke's contentions. Negotiability is now the main issue.

In October 1962 Wellbanke and Martin signed a contract by which they became exclusive local dealers for Chemical Products. In the contract they agreed to purchase a quantity of merchandise, which was to be shipped to them for resale. At the trial Wellbanke testified that Chemical Products violated certain oral assurances that its agent had given, such as a promise to prepay the freight on the shipment and a promise not to transfer or assign the Trade Acceptances to anyone else.

The three instruments, evidencing the unpaid purchase price, were alike except for serial numbers and dates of maturity. Apart from inessential matters such as the drawer's telephone number, the instruments were in this form:

Chemical Products Incorporated
Salt Lake City, Utah

No. 687 *October* 5, 1962.
On *November* 10, 1962 Pay to the order of Chemical Products Inc. *Two Thousand Four Hundred Thirty-two and no/*100 *Dollars* ($2,432.00).
The transaction which gives rise to this instrument is the purchase of goods by the acceptor from the drawer.
Chemical Products Inc.
By *Bob Chron*

Accepted at *Conway, Ark.* on *Oct.* 5, 1962.
Payable at *First National Bank*

Bank Location *Conway, Ark.*
Buyer's Signature *Joe Wellbanke*
& Richard J. Martin

Neither the trial court nor the appellee's attorney has suggested any reason for holding the instruments to be nonnegotiable. To the contrary, they contain all the elements of negotiability specified by the Uniform Commercial Code. Ark. Stat. Ann. § 85-3-104 (Add. 1961). The mere reference to the transaction giving rise to the instruments does not affect negotiability. *Trice* v. *People's Loan & Inv. Co.*, 173 Ark. 1160, 293 S. W. 1037 (1927); Ark. Stat. Ann. § 85-3-119. In view of the undisputed proof that the plaintiff was a holder in due course it took the instruments free from the defenses relied upon by Wellbanke. Section 85-3-305.

Upon remand it is possible, although unlikely, that one other matter may arise. The appellant insists that the appellee's failure to answer requests for admissions of fact within ten days, as requested, had the effect of admitting the truth of the requests. Counsel for the appellee states in his brief that he was given an extension of time for answering the requests. No such extension, however, appears in the record. Unless the asserted extension is proved the requests must be taken to have been admitted. Ark. Stat. Ann. § 28-358; see *White River Limestone Products Co.* v. *Missouri-Pac. R. R.*, 228 Ark. 697, 310 S. W. 2d 3 (1958). In all probability, however, the negotiability of the Trade Acceptances makes this matter immaterial.

Reversed.

Opinion delivered September 19, 1966

Byron R. Bogard and *U. A. Gentry,* for appellant.

Catlett & Henderson, for appellee.

PAUL WARD, Justice. This appeal is a continuation of the litigation involved in the case of *The Housing Authority of the City of North Little Rock* v. *Amsler, Judge*, 239 Ark. 592, 393 S. W. 2d 268 (decided May 31, 1965), to which reference may be made for fuller details. In that case the Housing Authority asked the trial court for permission to withdraw its suit after the jury had returned a verdict favorable to the landowner. The trial court allowed the withdrawal, but held the Housing Authority must pay the landowner all reasonable expenses for defending the litigation. The trial court then set a hearing on November 13, 1964 to determine the "amount, if any, to be awarded to" . . . the owner.

Before the hearing could be held on November 13,

1964, appellant filed a petition in this Court to prohibit the trial court from proceeding further, contending it had no jurisdiction to award appellee said expenses. On May 31, 1965 we denied the petition and held the trial court did have inherent jurisdiction to award expenses under the circumstances.

Following the decision of this Court, the trial court then found that appellee was entitled to the sum of $12,562.92—hence this appeal.

One. We find no merit in appellant's contention that the trial court had no authority to award expenses. Our decision in the prohibition proceeding is now the law in this case, and refutes appellant's contention on this point.

Appellant makes the contention however that our previous decision is not conclusive here because there was evidence to show appellant acted in good faith in dismissing the original suit. Again, we find no merit in this contention. Even though it be conceded for the purpose of this opinion, that a showing of lack of good faith is a prerequisite to jurisdiction, still appellant cannot prevail. The trial court held that appellant failed to show good faith and we think the trial court was correct in so holding. Three witnesses testified for appellant on this point. Their testimony, in substance, was that it did not have enough money to pay the amount of the jury verdict. We cannot be impressed with their reasoning, especially when this acute money situation was not revealed in advance to appellee or the court. Certainly, the situation cannot be attributed to any fault of appellee.

Two. We have concluded the allowance of $12,562.92 made by the trial court is excessive. Testimony on the part of appellee, to justify that amount, was that he had paid two appraisers the sum of $1,400; that he had paid $162.92 for maps, and that his attorney should have $10,000 for his services. The testimony regarding

the last item was far from convincing. It is true that a reputable attorney testified that, in his opinion, a fee of $10,000 was reasonable. However, that testimony appears to have been based on the fact that a verdict of $45,000 was returned in favor of appellee. The fact, however, is that appellee was not allowed to collect anything. Appellee is entitled to be reimbursed only for all reasonable expense incidental to defending the suit.

We refrain from setting out in detail the testimony relative to the claimed expense because we have concluded the judgment is excessive by the amount of $5,000.

Therefore, if appellee will, within seventeen calendar days, enter an acceptance of a judgment in the amount of $7,562.92 such judgment will be affirmed, otherwise the judgment will be reversed and the cause remanded for a new trial.

HARRIS, C. J. & MCFADDIN, J., dissent.

AMSLER, J., not participating.

ED. F. MCFADDIN, Justice, dissenting. In this case I dissent from the affirmance of the Trial Court's judgment for any amount; and here are my reasons:

I.

In the case of *Housing Authority* v. *Amsler, Judge,* 239 Ark. 592, 393 S. W. 2d 268, I stated in considerable detail why I was of the view that the landowner could not recover any damages in this case; and I am still of the view stated in that dissenting opinion.

II.

In the Majority opinion in the said case of *Housing Authority* v. *Amsler, supra,* the Trial Court was empowered to proceed to hear the damage claim; and these are the directions contained in the final paragraph of the said Majority opinion:

> "Accordingly the writ is denied and, at the next hearing, the Trial Court can determine the question of good faith or lack thereof and also the amount of damages, if any, suffered by the condemnee."

Thus, under the directions of the Majority, the first question that the Trial Court was to determine was that of good faith or lack thereof on the part of the Housing Authority in surrendering the property without a taking. I find absolutely nothing in the testimony in the trial from which comes this appeal which indicates any lack of good faith on the part of the Housing Authority in surrendering the property. The uncontradicted testimony shows that the Housing Authority took 102 parcels of land before this parcel, and had paid for the 102 parcels a total of $517,706.65; that the balance of funds left in the hands of the Housing Authority was a total of $20,418.35 with which to acquire this parcel of property; that after the jury returned a verdict of $45,000.00 the Housing Authority did not have sufficient funds to acquire this property; and, therefore, the Housing Authority necessarily had to forego the acquisition of this property. The testimony is detailed, and there is none to contradict it. Where is the bad faith on the part of a person who cannot buy property because he does not have the money? The Trial Court had no evidence on which to predicate a finding of bad faith on the part of the Housing Authority.

Therefore I dissent from any affirmance of the judgment for any amount.

I am authorized to state that the Chief Justice joins in this dissent.

SPA KENNEL CLUB *v.* DUNAWAY

5-3967 406 S. W. 2d 128

Opinion delivered September 19, 1966

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

Bruce Bennett, Attorney General; *Fletcher Jackson,* Asst. Atty. Gen., for appellee.

OSRO COBB, Justice. The General Assembly passed Act 191 in 1957, same being an Act to legalize, under certain conditions, greyhound racing and parimutuel wagering thereon in all political subdivisions of the State and to regulate same. Section 6(A) of Act 191 provides as follows:

> "Except as otherwise hereinafter provided, the (Arkansas Racing) Commission shall not be authorized to grant, nor shall it grant, a franchise to any county in this State unless and until the proposition of Greyhound Racing shall have been approved by a majority of the qualified electors of such county at a special election called for that purpose." (Parenthesis supplied.)

The mechanics for holding such an election are set forth under the provisions of Section 9 of Act 191. Subsection (A) of Section 6 of the Act was amended by Act 56 of 1961. However, that amendment is irrelevant to the issues presented on this appeal.

In 1965 appellant obtained from appellee a temporary franchise under Act 191, applicable solely to Garland County; thereafter, acting pursuant to the provisions of Section 9 of Act 191, appellee notified the County Board of Election Commissioners to call a special election to submit the issue of Greyhound Racing in Garland County to the qualified electors of said County. The Election Commissioners of Garland County called the special election for November 23, 1965. Prior to that date, an Extraordinary Session of the General Assembly was called by Governor Orval E. Faubus, and Act No. 7 of the Extraordinary Session of 1965 was passed, including an emergency clause, and was duly approved by the Governor on November 6, 1965. The declared intent of Act 7 was to abolish local option elections by political subdivisions on the question of legalizing Greyhound Racing and to require approval of any such franchise by a majority of the qualified electors voting in a Statewide Biennial General Election. See Section 1 (A) of said Act.

Appellee thereafter cancelled the temporary franchise of appellant solely because of the provisions of Act 7.

Appellant filed a petition for declaratory judgment

seeking an order of reinstatement of their temporary franchise. The Attorney General, representing the Arkansas Racing Commission, filed a demurrer to appellant's petition, which was sustained by the trial court, appellant's petition being dismissed.

On appeal appellant raises three points, all relating to Act 7 of the Extraordinary Session of 1965. Appellant's points:

No. 1. Act 7 should not be construed to retroactively apply to appellant.

No. 2. The emergency clause in Act 7 is special and local, and is void.

No. 3 Act 7 is void because introduced within the last three days of the session.

Appellant's Point No. 1.

In support of this point appellant calls our attention to *New York R. R. Co.* v. *Pennsylvania,* 153 U. S. 628, and *Houston & T. C. R. Co.* v. *Texas,* 170 U. S. 243. These cases involved statutory and/or constitutional authority for construction of certain railroads, or specified segments thereof and subsequent operation of same. Furthermore, in these cases the construction had long since been completed and the rights of the respective parties were in no way conditioned upon a local or general election. The cases, therefore, are clearly distinguishable from the facts in the instant case. Moreover, appellant has not cited any case authority where the facts are comparable to those of the instant case.

Appellant was specifically prohibited by the provisions of Act 191 of 1957 from any dog racing operations until after the special election on that issue. Whether such racing proposal would have been approved or rejected at the special election called for November 23, 1965, and which was never held, is a matter of complete conjecture. It is, therefore, clear that appellant's rights

at the time of cancellation of its temporary franchise, which occurred prior to the special election on November 23, 1965, were prospective in character. Furthermore, we have held in *Arkansas Racing Commission* v. *Hot Springs Kennel Club, Inc.,* 232 Ark. 504, 399 S. W. 2d 126 (1960):

> "* * * It is well recognized by all authorities that a franchise granted by the State to conduct dog racing, just as a franchise to sell liquor, is a privilege and not a property right. The State gives the privilege and it can take away that privilege by the same token.* * *"

We find no merit in appellant's contentions under Point No. 1.

Appellant's Point No. 2—The validity of the emergency clause as a part of Act 7.

We quote the entire emergency clause of Act 7 of the Extraordinary Session of the General Assembly of 1965:

> "Section 6. The General Assembly has determined that: (1) the approval of pari-mutual wagering on Greyhound Racing in any county in this State is a matter of vital concern to the people of the entire State, (2) improvements already completed and now being made in means and methods of communication and transportation (particularly in the State and Interstate Highway Systems) render it impossible to confine the economic impact of such wagering to a single county, and (3) an election has been called to submit the question of pari-mutuel wagering on Greyhound Racing in Garland County to the electors of that county on November 23, 1965. Therefore, the General Assembly finds and declares that because of the vital concern of the people of the entire State in the matter of pari-mutuel wagering on Greyhound Racing an emergency exists

and that this Act, being necessary for the preservation of the public peace, health and safety shall be in full force and effect on and after its passage and approval."

Appellant invites our attention to *Matthews* v. *Byrd,* 187 Ark. 456, 60 S. W. 2d 909 (1933), wherein we clearly recognized that those portions of statutes found to be invalid could be severed from the remaining valid provisions of such enactments. We do not recede from that view. However, while recognizing that the emergency clause is subject to separate attack as to its validity, we note that appellant has not cited any case authority in support of its contention that the emergency clause above quoted is special and local and thus invalid, and offensive to the provisions of Amendment 14 of our present Constitution. (1874).

We therefore find no merit in the contentions of appellant's Point No. 2.

Appellant's Point No. 3—The alleged invalidity of Act 7 of the Extraordinary Session of the General Assembly, 1965.

Section 34 of Article 5 of our current Constitution (1874) provides as follows:

"No new bill shall be introduced in either House during the last three days of the session."

It is conceded that the bill which became Act 7 of the Extraordinary Session of 1965 was introduced during the last three days of the Extraordinary Session. If Section 34 of Article 5 of our Constitution were the only expression of the framers of that instrument as to sessions of the General Assembly, then this point by appellant could have unquestioned merit. However, the framers of our Constitution divided the powers—Article 5 relating to the legislative department; Article 6 re-

lating to the executive department, and Article 7 relating to the judicial department.

Section 2 of Article 6 reposes the supreme executive power of this State in the Governor, and Section 19 of Article 6 authorizes the Governor to summon the general assembly into extraordinary session when in his judgment an emergency exists requiring same. The extraordinary sessions of the general assembly are not to be confused with the regular 60-day sessions held every two years, as provided under Section 5 of Article 5. Louisiana has constitutional provisions virtually identical with those of Arkansas in relation to regular and extraordinary sessions of its general assembly. In *State ex rel Saint* v. *Dowling,* 167 La. 907, 120 Sou. 593 (1928), it was held that the special or extraordinary sessions are of such exceptional character and are so limited as to duration and to objects of legislation that they are not even included under the heading of "legislative department" in the present Constitution, but are placed under the heading of "executive department," and within the control of the Governor. See *Opinion of the Justices,* 275 Ala. 102, 152 Sou. 2d 427 (1963). See also *Discussion* in Volume 81, C. J. S., Section 37, beginning at page 952.

While the action of the Governor in calling an extraordinary session is not reviewable, laws enacted during such extraordinary sessions are reviewable in the courts when properly challenged as to validity.

The question of the application of the time limitation referred to in Section 34 of Article 5 to bills introduced during extraordinary sessions of the general assembly is one of first impression here. Appellant has cited no case authority from any sister State having constitutional provisions similar to ours which limits or invalidates such emergency legislation because of any stated time element in processing the emergency legislaon. It is conceivable that an emergency could develop which, in the judgment of the Governor and the mem-

bers of the General Assembly, required legislative action in less than three days. While the General Assembly is a deliberative body using 60 days for its regular sessions, it can, in response to the call of the Governor, meet and pass emergency legislation as the conditions may require in the public interest.

We therefore find no merit in appellant's Point No. 3, and having found no merit in any of appellant's contentions, the dismissal of appellant's petition in the trial court is affirmed.

SHARUM v. TERBIETEN

5-3953 406 S. W. 2d 136

Opinion delivered September 19, 1966

Franklin Wilder, for appellant.

Hardin, Barton, Hardin & Jesson, for appellee.

GUY AMSLER, Justice. This unfortunate controversy involves a property line dispute between a brother and sister. It is the type litigation that members of our Christian society should zealously discourage. As best we can

determine from the record the area in dispute is some 30 to 35 feet in width and 210 feet in length.

Appellant Lawrence Sharum is a son of U. G. Sharum and appellee Madalene Terbieten (nee Madalene Sharum) is appellant's sister. In 1940 the father of these litigants owned considerable real property adjacent to the intersection of Massard Road and Highway 22 in the Greenwood District of Sebastian County. On May 13, 1940, Father Sharum and his wife conveyed, as a gift, to his son Lawrence a plot of land described as follows:

> "Beginning at the center line of State Highway 22 where the East Boundary line of said Massard Road crosses Highway 22 and running thence south along the East Boundary line of said Massard Road 210 feet, thence east 210 feet, thence north to center line of Highway 22, thence west along center line of Highway 22 to place of beginning, containing approximately one acre, and being a part of the NW quarter of the SE quarter of Sec. 30, T8N, R31W."

On the same date the parents conveyed that part of the NW¼ SE¼ of Sec. 30, South of Highway 22 as a gift to their daughter Madalene "except approximately one acre in the NW corner of said tract deeded to Lawrence Sharum, containing 28 acres more or less." The grantors retained a life estate in this tract.

U. G. Sharum died in March of 1949 and his widow passed away in August of 1955. Appellee then took possession of her property. Thereafter according to some of the testimony there were efforts on the part of appellee's husband, Leo Terbieten, and appellant Lawrence Sharum to determine the exact location of the line between the property of appellant and appellee. If Mrs. Terbieten had any part in these endeavors the record fails to reveal it. The contention of appellant is that it was intended that he should have a full acre exclusive of Highway 22 right of way. Appellee on the other hand

contends that appellant is entitled to take according to the plain wording of his deed.

Appellant filed suit praying a reformation of the deeds executed to him and his sister by their parents and title to 1 acre exclusive of Highway 22 right of way be quieted in him. The trial judge very properly held that "one dollar and love and affection" conveyances are not subject to reformation under our decisions: *Wells* v. *Smith,* 198 Ark. 476, 129 S. W. 2d 251; *Kaylor* v. *Lewis,* 212 Ark. 785, 208 S. W. 2d 185; *Ketchum* v. *Cook,* 220 Ark. 320, 247 S. W. 2d 1002; and *Lathrop* v. *Sandlin,* 223 Ark. 774, 268 S. W. 2d 606.

The cause was dismissed for want of equity and this appeal was perfected in due course.

Counsel for appellant concedes that he was not entitled to reformation of the deeds but contends that the chancellor erred in not passing on the question of adverse possession and granting appellant title to a full acre outside the right of way of Highway 22 under the 7 years statute. It is true that the trial judge did not mention "adverse possession" in his findings or decree, however under our well established rule we try chancery cases on the record and dispose of them. Whether the chancellor makes a finding or bases his decision on an erroneous conclusion does not preclude our reviewing the case "de novo." *Culberhouse* v. *Hawthorne,* 107 Ark. 462, 156 S. W. 421; *Langley* v. *Reames,* 210 Ark. 624, 197 S. W. 2d 291.

Adverse possession is a fact question and our holding requires a brief review of the evidence. Appellant says he took possession of one acre, exclusive of the Highway 22 right of way following the gift from his father; that he leased an acre for a billboard; executed a pipe line lease to the gas company; paid taxes on an acre (this was described as pt. 30-18-31); set up some corner posts and cut the sprouts and weeds from what he claimed as his one acre.

The descriptions used in the 2 leases executed by appellant were identical with the one contained in the deed from his father; the billboard was erected on land entirely within the description contained in his deed; he made no effort during his father's lifetime to get a correction deed and he never fenced the acre he now contends belongs to him.

A strong indication of the uncertainty in appellant's mind regarding the correct boundary is the fact that in May of 1965 he employed a surveyor to establish the line. If he had through the years been claiming up to a certain line he didn't need an engineer to locate that boundary.

Of more than passing significance is the fact that the engineer employed by appellant first made a survey that conformed with the description contained in appellant's deed from his father. Appellant was dissatisfied with that survey and had the surveyor tear it up and prepare one based on points and boundaries supplied by appellant. The surveyor testified that his survey did not conform with the description contained in the Lawrence Sharum deed.

The wife and son of appellant corroborated his testimony regarding what he claimed to be hostile acts of adverse possession in practically every detail.

Leo Terbieten, husband of appellee, who seems to have kept track of happenings connected with the boundary dispute testified that before Mr. U. G. Sharum (the father of litigants) died he (the father) laid off the acre that was deeded to Lawrence Sharum and "told me to stay off of it, and I did."

Appellants claim that appellee's husband constructed a line fence in 1952 and thereby fixed a boundary between the parties. The husband explains this by saying that he undertook to place the fence on the line pointed out to him by Mr. U. G. Sharum, (which line

was confirmed by a survey made by H. A. Peck, a civil engineer) and that the men he had doing the work were stopped by Lawrence Sharum. He says he then had a temporary fence constructed further to the south and left about 3 acres open on Lawrence Sharum's side of the fence. Terbieten testified "I just built a temporary fence so we could use it and cut the hay—it is going to be there until I find out where to put a permanent fence." He said they continued to cut hay on the north side (Lawrence Sharum's side) of the fence several years after the fence was built.

Worthy of note is the fact that appellant does not claim title to all the land up to this fence nor does he contend that the fence marks the boundary line between the parties. The implication appears to be that the construction of this temporary fence was some sort of an admission adverse to appellee's contention. We accept the happening as a temporary measure designed for use until a troublesome problem could be resolved.

Appellant claims that sometime after his father's death in 1949 he erected posts at the corners of the one acre he claims. However, if these posts were erected (which is disputed) there is no evidence that his sister or anyone else had knowledge that appellant claimed them as marking the line between the adjoining ownerships. Regarding this boundary dispute appellant testified "I have never had any words with him" (referring to his brother-in-law) and as to his sister he said "I have had no words with my sister at no time." In *Lollar* v. *Appleby*, 213 Ark. 424, 210 S. W. 2d 900, we said:

> "While, in such cases, to constitute an adverse possession, there need not be a fence or building, yet there must be such visible and notorious acts of ownership exercised over the premises continuously, for the time limited by the statute, that the owner of the paper title would have knowledge of the fact, or that his knowledge may be presumed as a fact. * * *"

Considering the testimony as a whole we are unwilling to say that the chancellor's ruling on the case is not supported by a preponderance of the evidence. The decree is therefore in all respects affirmed.

BLAND, J., disqualified.

GREEN CHEV. CO. *v.* KEMP

5-3954 406 S. W. 2d 142

Opinion delivered September 19, 1966

Peter G. Estes, for appellant.

Murphy & Burch, for appellee.

HUGH M. BLAND, Justice. On June 25, 1964 appellant, herein called seller, and appellee, herein called buyer, entered into a conditional sales contract whereby seller sold a used 1963 Chevrolet to buyer and took buy-

er's old car in trade leaving a balance due of $2,702.88 to be paid by buyer in monthly payments. Shortly thereafter seller assigned the contract to Motors Finance Company.

After buyer had become in default on his monthly payments Motors Finance Company brought suit against buyer on January 2, 1965 to recover for balance due on the contract. The buyer answered and filed a cross complaint against seller alleging breach of implied warranty and breach of express warranty of all mechanical parts for one year. Buyer alleged damages of $1,000.00 as a result of breach of these warranties.

At a trial before the court sitting as judge and jury, the only evidence of buyer's damages was a bill from Steakly Chevrolet, Dallas, Texas in the amount of $106.21. Over the timely objection of seller, the trial court allowed buyer to show that a Mr. Freeman, seller's agent, had made oral guarantees of the mechanical parts of the car for a period of one year. Both the buyer and his wife testified, over objections, that seller's agent had told them that the car was guaranteed for a year and that if they were not satisfied with the car to bring it back and the seller would make adjustments. The seller admitted signing the conditional sales contract which provided, among other things, that the buyer accepts the car, having first examined and tested same and found it in sound and first-class condition. It further provided that the contract covers all conditions and agreements between the parties. The buyer brought the car back and minor adjustments were made by seller. Buyer kept the car from June 25, 1964 until January 2, 1965, driving it in excess of 3,000 miles, at which time he refused to make any further payments on the car because the seller would not pay a bill he had incurred while attending the Cotton Bowl Game at Dallas, Texas wherein it became necessary to repair the power steering, brakes and fuel pump.

At the conclusion of the evidence the court granted

Motors Finance Company's motion for summary judgment against buyer. The trial court also found that seller had breached both implied and expressed warranties and awarded buyer $1,000.00 damages. Seller has perfected its appeal from this judgment and relies upon five points for reversal:

"I. The court erred in allowing appellee to introduce oral testimony to vary the terms of the 'Conditional Sale Agreement.'

II. The court erred in awarding appellee any damages in excess of $106.21.

III. There was insufficient proof of an expressed warranty, of breach of expressed warranty, and of damages for breach of expressed warranty.

IV. There was no proof of breach of implied warranty.

V. The appellee did not revoke his acceptance of the vehicle, as required by the Uniform Commercial Code, and if he did revoke his acceptance, he continued to exercise ownership over the vehicle contrary to said Code."

The court was in error in admitting the testimony of the buyer and his wife with reference to representations made by seller's agent as to these warranties. This testimony was contradictory and inconsistent with the terms of the conditional sales contract. Under the Uniform Commercial Code as found in Ark. Stat. Ann. § 85-2-202 (Add. 1961), the parol evidence rule is not changed. Under the circumstances of the instant case this evidence was inadmissible under our holdings in *Hambrick* v. *Peoples Mercantile & Implement Co.,* 228 Ark. 1021, 311 S. W. 2d 785 and *Federal Truck & Motors Co.* v. *Tompkins,* 149 Ark. 664, 231 S. W. 553.

Buyer strongly contends that he is entitled to damages for breach of warranty. In this connection the un-

disputed testimony shows that he kept the car for a period of more than five months, put in excess of 3,000 miles on it, and exercised dominion and control over the car at all times during this period. Under the Code, § 85-2-601—602, he had a right to reject the car but this must be done within a reasonable time after delivery. Under § 85-2-606, after failure to make an effective rejection, he was bound by his acceptance of the automobile and unless it was rejected within a reasonable time with notification to the seller of his decision, he waived any warranties of defective condition of the car. *Hudspeth Motors* v. *Wilkinson,* 238 Ark. 410, 382 S. W. 2d 191.

For the reasons above stated the judgment is reversed and the cause remanded with directions to enter judgment for the seller.

SWINDLE *v.* BRADLEY, CHANCELLOR

5-3941 406 S. W. 2d 324

Opinion delivered May 23, 1966

Dissenting opinion filed September 19, 1966

[Rehearing denied June 6, 1966.]

Ray A. Goodwin, Kirsch, Cathey & Brown, for appellant.

No brief filed for Respondent.

PAUL WARD, Justice, dissenting. After much reflec-

tion I am voting to grant the petition for a rehearing.

This mother is trying to regain possession of her four year old daughter who was taken away from her illegally and by force. Assistance is now being denied this mother by this Court, the trial court, and the law enforcement officers because of a legal technicality which does not, in my opinion, apply under the undisputed facts in this case.

Essential facts. It is undisputed that:

(a) On May 28, 1965 the chancery court gave Valerie (the mother) the custody of Sharon—her three year old daughter.

(b) On July 2, 1965 the term of said chancery court expired.

(c) On August 4, 1965 Gerald (the father) by force took Sharon from her mother in England and brought her to his home in Greene County, Arkansas.

(d) On August 9, 1965 the trial court (on application by Gerald), *without notice to Valerie,* gave temporary custody of Sharon to Gerald. *A hearing on the merits was set for November* 1, 1965.

(e) Valerie came from England to be present for the hearing on *November* 1.

(f) On October 30, 1965 Gerald left the state with Sharon. He is still at large, he still has Sharon, and Valerie is still looking for help.

The Only Point at Issue. Did the trial court have jurisdiction, after expiration of the court term, to give Gerald legal custody of Sharon?

In our original opinion we held the trial court had jurisdiction, citing numerous cases in support. The essence of the citations is ". . . that minors are wards of

chancery court." A careful reading of the cited cases reveals that in each of them the interested parties had been given *notice.* This Court has never held (and I trust never will hold) that a chancery court has jurisdiction over all the minor children within its district—even without notice to their parents. In my opinion the Order of August 9 was void.

It is my conclusion therefore that the trial court in this instance had no jurisdiction to change its decree of May 28, 1965 without notice to Valerie. This is because the term of court expired on July 2, 1965 and the temporary order was made on August 9, 1965.

(a) In *Karoley* v. *A. R. & T. Electronics,* 235 Ark. 609, 363 S. W. 2d 120, we held that chancery court has power to set aside its decree *without notice* before the term lapsed, but that *after the term had lapsed* it had no such power. At page 615 (Ark. Reps.) we said:

> "After the lapse of the April term, the Chancery Court did not have the power to set aside the judgment of June 29th, unless the Garnishee complied with § 29-506 et seq. Ark. Stats. . . ."

These sections, of course, require notice.

(b) In 17 A Am. Jur. § 850, *Divorce* and *Separation,* there is this statement:

> "In proceedings for the modification of decrees in divorce relative to the custody of minor children, proper notice to the adverse party and an opportunity to be heard are required, *whether or not provided for by statute.* An order changing custody, entered without notice, is void and cannot be enforced." (Emphasis ours.)

As noted previously, there is a statute in this State which requires notices.

[See original opinion 240 Ark. 903, 403 S. W. 2d 63.]

5-3958 406 S. W. 2d 329

Opinion delivered September 26, 1966

Chambers & Chambers, for appellant.

McKay, Anderson & Crumpler, for appellee.

CARLETON HARRIS, Chief Justice. Joe R. Lewis, a resident of Columbia County, died testate on December 26, 1964. An instrument, purporting to be his last will and testament, dated June 22, 1964, was offered for probate. The will designated Jean Welch Crisp, a friend and neighbor, as sole beneficiary. Appellants[1] objected to the probate of the will, asserting that Joe R. Lewis

[1]Appellants are Mildred Rogers, Lucy Peterson, Florence Edwards, all sisters of the deceased, and the following nieces and nephews: Glen Lewis, Willie Elliott, Gussie Barron, Vera Hendricks, Leslie Dendy, Louise George, Marie Vent, Gertrude Thornton, Emma Sprick, Fred Lewis, Ray Lewis and Fannie (Jo) Demarco; also Dewey Booth, only heir of Phronia McDonald, a sister of Joe R. Lewis.

was not mentally competent to execute the will on June 22, 1964, and further, that he was acting under undue influence at the time of its execution. On trial, the court found that Lewis was mentally capable of executing the will; that he did execute it without undue influence, and the instrument was admitted to probate. From the judgment so entered, appellants bring this appeal.

Ten witnesses, including three of the heirs, and a daughter of one of the heirs, testified on behalf of appellants, and eight witnesses testified on behalf of appellee. As is usual in this type of case, the testimony was "poles apart," appellants' witnesses maintaining that Lewis was mentally incompetent to execute the instrument, and appellee's witnesses just as emphatically testifying to the contrary.

Donald Shocklee, a neighbor, 18 years of age, testified that Lewis could not dial telephone numbers, because he could not remember while dialing . . . he would take a bath, and sometimes walk out of the bathroom unclothed before company . . . while his wife was ill,[2] milk, which had been purchased for her by the witness, was poured down the sink by Lewis . . . he left his wife alone during storms . . . he carried large sums of money in his billfold, but would misplace the billfold, and couldn't find it . . . he would take three or four pills of the same prescription, and forget he had taken them . . . he would subscribe for the paper, have it stopped, and subscribe again.

Mrs. Nina Martin, daughter of Mrs. Peterson, testified that she stayed with Lewis for a period of time after his wife's death; she would leave the house, telling him where she was going, but upon returning, he would ask where she had been; after his wife died, he asked several times if there were any flowers or cards, and when she called off the names and called her own name, he inquired, "Who is that?"

[2]Mrs. Lewis died in November, 1963.

Mrs. Edwards, a sister, testified that her brother would frequently get lost, and would run red lights in the automobile; he had knocked the bumper off her car, but could not remember it.

Missouri Johnson, who was employed as a housekeeper by Lewis and his wife, testified that Lewis liked "to talk about women and, you know, doing things"... she also said that he would take his medicine, and soon thereafter "take it again." The witness testified that, after she had quit working for him, Lewis would come to her house, and ask her to go to the home of Jean Crisp, and get Jean "to start back to talking to him;" that he made this request about twenty-five times, and finally stated that he would get his gun and shoot her unless she complied with the request.

Lucy Peterson testified that he took one of his sisters' dental plates to Waldo, and left it at a grocery store instead of with the dentist . . . that he had several car wrecks.

Leslie Dendy, a nephew, stated that Lewis could not carry on a normal conversation, would ask a question, and while it was being answered, change to another subject.

O. A. Phillips testified that Lewis' mind "would kind of go and come."

Sam Capps testified that for the last several years of his life, Lewis could not answer questions clearly, and Julia Turk testified that, at his wife's funeral, Lewis talked out loud during the service. The testimony of Dr. Joe Rushton, physician of Magnolia will be subsequently discussed.

Wendell Utley, an attorney, who had known Lewis for approximately twenty years, and who prepared the will in question, stated that the testator came into his (Utley's) office by himself, and said that he wanted to

leave his property to Mrs. Hamilton Crisp. Utley testified that the will was typed up at that time, read to Lewis, and was signed in the presence of the witness and Dr. William A. Carter, an optometrist, whose office was near that of Utley. The attorney stated that he had previously prepared two wills for Lewis, the first naming a brother in El Dorado as beneficiary; after that brother's death, a second will was prepared, naming a sister as beneficiary.[3] The witness said that there was no question in his mind but that Lewis knew what he was doing, and that the will was executed voluntarily. Dr. Carter testified that he noticed nothing abnormal about the testator, and that he knew him, having previously fixed glasses for him.

Harry Cobb stated that he sold Lewis an automobile in October of 1964, and the latter thoroughly understood the transaction, and acted no differently from some years before, when Cobb had also sold an automobile to Lewis.

Mrs. Estes McIntyre testified that Lewis would take her to shop for groceries; had taken a few meals at her home, and he knew his brothers, sisters, and his property. Lewis had told her that he had made a will in favor of Jean Crisp:

"A. Well, he just said she had been real good to him and that when he was down, when he didn't have anybody else to turn to, she come to him and told him that he could live with them or just however he wanted to do it, as long as he wanted to."

Four other witnesses, Richard Walters, W. M. Beasley, William Robert Kelly, and Bob Sanders, all of whom had known Lewis from twelve to thirty years, testified that they noticed nothing unusual about his condition in

[3]From the testimony: "Q. Did he know he had already made another will out to his sister? A. Yes, he knew that, he decided to destroy it and make out another will to Mrs. Crisp, seemed like he had fallen out with his sister for some reason, I don't remember just what."

1964. Sanders stated that he was the "same old Joe," except that he was nervous.

Let us bear in mind that, as to mental competency, the question is whether Joe Lewis was competent to make a will on June 22, 1964. His condition, either before, or after, that time, is not the test, and such evidence is only relevant insofar as possibly indicating his condition on the date in question.

The strongest testimony offered by appellants was the testimony of Dr. Rushton. The doctor stated that he sent Lewis to the Veterans' Hospital in Shreveport in December, 1963, because "his mind got so bad," and it was his opinion that Joe Lewis was never normal after that time; however, it is not clear whether Dr. Rushton saw Lewis in June of 1964, or if so, the time of, and circumstances connected with, such a visit. When asked specifically if Lewis would have been able to comprehend the property he had, and his heirs at the time he executed the instrument, the doctor replied "I might say this, I think he could be talked into anything, easily influenced. I don't think his mind was clear enough that he could reason out as to what he would want to do with his property." This, of course, is not an explicit answer to the question interrogated. The doctor also stated that at times "he would seem fairly well," but it was obvious that Dr. Rushton just did not consider Lewis normal. Of course, it is of some significance that the hospital released Lewis, after treating him for a while. In *Thiel, Special Admr.* v. *Mobley*, 223 Ark. 167, 265 S. W. 2d 507, we said:

"The burden was on appellee, the contestant, to prove the lack of mental capacity *at the time the will was executed.*[4] This court has held many times that the burden of proving mental incapacity to make a will rests on the one alleging it."

In that case, several witnesses stated that Mrs. Mob-

[4]Emphasis supplied.

ley was not normal, did not recognize the witnesses at times, and appeared, on occasion, to be in a stupor. Other witnesses contradicted this testimony. We held, however, that the testatrix was competent to execute the instrument. Of course, people frequently commit acts that other persons do not consider normal, but this does not establish incompetency to make a testamentary disposition. It certainly appears from the evidence that Lewis was aware of the fact that he had relatives; that he knew those relatives; that he was aware of the property he owned, and that he was aware of the fact that he had left the property to Mrs. Crisp. Peculiarities and eccentricities, as distinguished from insanity, are thoroughly discussed in *Harwell* v. *Garrett,* 239 Ark. 551, 393 S. W. 2d 256. Quoting from Volume 1, Page on Wills, Section 12.37, the court said:

"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 might be added that "running red lights" and being involved in automobile wrecks, misplacing one's billfold, mistreating members of the family and being unable to use a dial telephone are acts that are many times committed by perfectly normal people.

It is not unusual for some member of a family to feel that he has been mistreated by other members of the family, and, whether right or wrong, it is apparent that Lewis had "fallen out" with his sister. Nor can it

be said to be abnormal or unnatural for a testator, without wife or children, to leave property to a good friend rather than to a collateral relative.

The proof as to undue influence was extremely meager, and, in fact, only two instances are mentioned by appellant. It is asserted that the testimony of Missouri Johnson establishes that "Jean must have been putting some pressure on him or he would not have gone to Missouri's so many times to get her to talk to Jean." Of course, the quoted portion (from the brief) itself makes evident that speculation would have to be utilized to the utmost to consider this fact as any proof of undue influence. The only other act mentioned is that Mrs. Crisp called the attorney some time after the will was made to inquire if Lewis had made a will. Even if it were established that Mrs. Crisp had begged Lewis to execute a will in her favor, this fact would not establish undue influence. In *Langford* v. *Gates*, 238 Ark. 167, 381 S. W. 2d 456, this court, quoting C.J.S., 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."

It is also noticeable that Lewis, *unaccompanied,* went to *his* lawyer's office, and directed the disposition of the property. A similar circumstance is commented upon in *Langford* v. *Gates, Supra.* The will was not executed during a last illness, but rather several months before his death, and Mr. Lewis had every opportunity to revoke it had he desired to do so. To the contrary, he mentioned to friends some time after signing the instrument that Mrs. Crisp had been kind to him, and that he had left her his property.

Of course, whether one is found mentally competent to execute a will depends upon the particular facts and circumstances in each case. In this type of litigation, where the testimony is generally so much at variance, the findings of the Probate Judge, who heard the evidence and saw the witnesses, carry considerable weight.

As stated in *Thiel, Special Admr.* v. *Mobley, supra*:

While we try the case *de novo,* we must affirm unless we can say that such findings are against the preponderance of the testimony, and in this particular kind of a case we have frequently said that the findings of the Chancellor have persuasive authority and are entitled to weight and consideration."

We are unable to say that the court's findings are against the preponderance of the evidence.

Affirmed.

GARDNER *v.* BULLARD

5-3903 406 S. W. 2d 368

Opinion delivered September 26, 1966

James Daugherty and *Cooper Jacoway,* for appellant.

John D. Eldridge and *George P. Eldridge,* for appellee.

ED. F. MCFADDIN, Justice. This appeal necessitates a study of Ark. Stat. Ann. § 21-914 (Repl. 1956) in regard to proceedings in a drainage district case.

In 1959 the Woodruff-Prairie Drainage District was duly organized by the Chancery Court of Woodruff County, pursuant to statute (See Ark. Stat. Ann. § 21-901 *et seq.* [Repl. 1956].) In January 1962 the District filed with the Woodruff Chancery Court a petition seeking, *inter alia,* authority to borrow money from a federal agency under Ark. Stat. Ann. § 21-914. In accordance with the said statute the Chancery Court set March 12, 1962, as the date for the hearing on the said petition, and due notice was given by publication. On March 12, 1962, the Court adjourned to March 20, 1962; and on that date there was presented to the Court the petition of the District for the desired order, and also the petitions of numerous objectors to the granting of the desired order. The Court heard the witnesses for the District (hereinafter called "proponents"), and appointed a Master to hear the testimony offered by the objectors.[1]

[1]The Court order recited:

". . . and from the testimony of the witnesses for the proponents the court finds that the construction of the proposed drainage system would be to the best interest of the landowners of the area described in the petition.

"The opponents to the petition on March 20th presented to the court various counter petitions which the court allowed to be filed over the objection of the petitioners.

"It appears to the court that a determination should be made as to whether or not a majority of the landowners in the district in number and in assessed valuation oppose the granting of the petition as represented by the signers of the counter-petition filed

The Master proceeded to hear the evidence, and it is voluminous. Then on January 20, 1965 the Master filed his report, which shows great study. He answered the questions posed by the appointing order:

1. The objectors' petitions filed on March 20, 1962 were filed too late, and such fact was, in itself, fatal to the objectors.

2. But if the objectors' petitions had been filed in time, they nevertheless would not constitute a majority in number of the owners of the lands located in the District.

3. The said objectors did constitute a majority of the real estate in assessed valuation.

On July 3, 1965 the Chancery Court approved the Master's report and granted the petition of the proponents; and from that decree there is this appeal by the opponents, in which they list three points:

"I. The court erred in holding that the landowners, who objected to the improvements and tax, could not object by petition.

"II. The court erred in refusing to accept petitions and testimony from opponents of the improvements after March 12, 1962.

"III. The court erred in refusing to admit testimony of husbands (who were tenants by the entire-

March 20, 1962 and the court further finds that this determination is of such a nature that it would require the services of a Master to determine the following facts:

"1. Whether the petitions were filed within the time and in the manner as provided by law.

"2. Whether those appearing in the time and manner as provided by law constitute a majority in number of owners of lands located within the district.

"3. Whether those appearing in the time and manner provided by law are owners of a majority of real estate located within the district in assessed valuation."

ty with their wives of land in the district) that their wives opposed the improvements and tax levy."

We find merit in Points I and II urged by the appellants in their brief. However, there is no need to discuss these points because we find no merit in Point III urged by the appellants, and such conclusion necessitates an affirmance of the decree of the Chancery Court. We proceed, therefore, to a discussion of Point III, as listed by appellants.

"The germane portion of the statute here involved (Ark. Stat. Ann. § 21-914) reads:

> "The Board is hereby authorized to cooperate with the United States or any agency . . . thereof . . . and the Board shall have authority to negotiate a contract with the United States . . . . After the terms of the contract . . . have been negotiated with the United States, the Board shall petition the Chancery Court for the ratification and approval of the contract . . . . The Chancery Clerk shall give notice by publication . . . calling upon all persons owning property within said District to appear before the Chancery Court upon some date . . . to be fixed by the Court, to show cause in favor of or against the ratification of the contract . . . . If upon final hearing the Court deems it to the best interest of the owners of real property within said District, the Court shall enter an order ratifying and approving the contract . . . provided, however, *if it is determined by the Court that a majority in number of the holders of title to the lands within the District and the owners of a majority in value of the lands therein . . . oppose the ratification of the contract . . . the Chancery Court shall enter an order disapproving the contract . . .*" (Italics our own.)

It must be borne in mind that before the objectors can prevail against the finding of the Chancery Court in favor of the contract recommended by the Board, the

objectors have to establish (1) that they constitute a majority in number of the holders of title to the lands within the District, and also (2) that they constitute a majority in value of the lands in the District. And this heavy burden we find the opponents have failed to discharge insofar as concerns the *majority in number of the holders of title to the lands within the District.*

The appellants have conceded that there are twenty tracts in each of which the title is held by husband and wife as an entirety estate; and that in each instance the petition in opposition to the proposal was signed only by the husband. For illustration: the petition was signed as "John Smith," whereas the title was in "John Smith and Mary Smith, his wife." The appellants have also impliedly conceded that they do not have a majority of the holders of the title to the lands in the district unless either (a) land held by entirety be counted as one ownership, with John Smith (following the illustration above) having the right to sign for the entire title; or (b) John Smith, having signed as shown in the illustration, could be allowed to testify at the trial that his wife, Mary Smith, agreed with him in opposition to the project.

We consider each of these matters.

(a) As regards ownership: in an estate by the entirety, the wife is certainly a part owner of the title. In *Branch* v. *Polk,* 61 Ark. 388, 33 S. W. 424, we had occasion to consider the matter of an estate by the entirety, and we there said: "The right of the wife to control and convey her interest, we think, is now equal to the right of the husband over his interest. They each are entitled to one-half of the rents and profits during coverture, with power to each dispose of or to charge his or her interest, subject to the right of survivorship existing in the other." This holding has been reaffirmed in many cases, some of which are: *Western Assurance Co.* v. *White,* 171 Ark. 733, 286 S. W. 804; and *Pope* v. *McBride,* 207 Ark. 940, 184 S. W. 2d 259. Thus we consider it as thoroughly established in this State that in

an estate by the entirety the wife is a holder of a portion of the title which the husband, acting alone, cannot convey.

We have several cases involving improvement districts in which the owner of a portion of a title signed the petition. Some of these are: *Ahern* v. *Board*, 69 Ark. 68, 61 S. W. 575; *Earl* v. *Board,* 70 Ark. 211, 67 S. W. 312; *Board* v. *Offenhauser,* 84 Ark. 257, 105 S. W. 265; *Colquitt* v. *Stevens*, 111 Ark. 314, 163 S. W. 1141; *City of Malvern* v. *Nunn,* 127 Ark. 418, 192 S. W. 909; and *Johnson* v. *Norsworthy,* 239 Ark. 545, 390 S. W. 2d 439. In *Ahern* v. *Board, supra,* we held that when lands were owned by two tenants in common and a petition was signed by only one of them, then such signing person was the sole owner of only one-half interest in the property. in *Earl* v. *Board, supra,* we held that where property was owned by a partnership (Orrel Bros.), and the petition was signed by only one partner (W. T. Orrel), then only one-half of the ownership had signed the petition. Under these cases, and under the case of *Branch* v. *Polk, supra,* we think that when John Smith alone signed the petition (as in the illustration), he was only the holder of a part of the title to the property, and the interest of his wife, Mary Smith (as in the illustration), could not be counted as joining in the petition.

The appellants claim that the cited cases are not governing because appellants claim that an estate by the entirety is different from a co-tenancy or a partnership. It is true that there is a difference between the estates; but the governing principle is the same. In an estate by the entirety the wife has an interest even during the lifetime of the husband which he cannot convey away from her; and we think her signature is just as essential to becoming a valid objector to the district as if she had been a co-tenant or a partner.

If in the illustration John Smith had signed the petition "John Smith and Mary Smith, his wife," or even "John Smith and wife," then oral testimony could have

been heard to show that he was authorized to sign the petition on behalf of his wife. Such is the holding in *Board* v. *Offenhauser, supra,* and *City of Malvern* v. *Nunn, supra.* But in the case at bar there was an entire failure on the part of John Smith (as in the illustration) to show in any way by signature that his wife owned any interest in the title or had joined with him.

(b) In the second place, the appellants claim that the husband should have been allowed to testify at the trial that his wife, though not having signed the petition in any way, was in fact in agreement with him in opposition to the project. We find no merit in appellants' position. If the husband had signed his wife's name her *ratification* could have been shown; but in the entire absence of anything in the petition showing the wife either as an owner or as joining with the husband, then her ratification could not be shown. There was nothing to ratify. In *Colquitt* v. *Stevens, supra,* we said: "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." This holding was followed and reaffirmed in our recent case of *Johnson* v. *Norsworthy, supra.* Certainly if the wife could not, by her own testimony, ratify her unsigned name, then clearly her husband could not by oral evidence attempt to show her agreement with him as regards objecting to the project.

The appellants impliedly concede that they do not have a majority of the holders of the title to the lands unless the whole title be counted in the twenty instances of entirety title, and since we have held that such cannot be allowed, it necessarily follows that the appellants have failed to show that they had a majority of the holders of the title in the petitions filed by them on March 20, 1962, the day the Court appointed the Master.

Appellants make one final argument for reversal as a portion of their Point III, and we now consider it.

During the hearing before the Master, and after March 20, 1962, the opponents attempted to file an additional petition in opposition, which additional petition contained the signatures of four other landowners; and the Master refused to permit this new petition to be considered. We hold that the Chancery Court was correct in affirming the Master's ruling on this point, because such additional petition filed after March 20, 1962 was filed too late. What the Court had authorized the Master to decide related to the petitions of opponents filed on March 20, 1962. The Master had no authority to allow an additional petition to be filed. The four late signing landowners could not remain silent for days, months, or years, and then appear only when such appearance became crucial. The Master was limited to consideration of those who had signed the petitions that had been filed on March 20, 1962.

Since the evidence failed to establish that the opponents to the plan of the proponents constituted a majority in number of the holders of title to the lands in the District, the opponents failed to defeat the plan approved by the decree of the Chancery Court.

Affirmed.

LYMAN LAMB CO. *v.* ARK. SHELL HOMES

5-3917 406 S. W. 2d 708

Opinion delivered September 26, 1966

[Rehearing denied October 24, 1966.]

Bruce T. Bullion and *Wayne Foster* and *W. J. Walker,* for appellant.

John F. Park and *Gerald T. Ridgeway* and *Owens, McHaney & McHaney,* for appellee.

GEORGE ROSE SMITH, Justice. For about two years Arkansas Shell Homes, Inc., acting as a contractor, built shell houses for landowners in Pulaski county. The venture ended in Shell's bankruptcy. The appellant, Lyman Lamb Company, was Shell's principal source of material for some 150 houses. When the company became insolvent it owed a number of accounts to Lamb, five of which are now in issue.

Lamb filed five suits to enforce materialman's liens against five of the houses, joining Shell and the various landowners as defendants. The cases were consolidated in the court below. The chancellor dismissed Lamb's complaints, finding that Lamb had perpetrated such a fraud upon Shell that all Lamb's claims were unenforceable. That finding presents the principal issue on appeal.

The asserted fraud involved a boat—a $2,000 party barge—that Lamb bought in March, 1962. According to Lamb, two of Shell's employees persuaded him to buy the boat and resell it to Shell for its employees' recreation. Lyman Lamb, president of the appellant, testified that he was told to collect the purchase price by submitting, for each shell house, a fictitious invoice for $50.00, describing material not actually delivered. (The invoices were in fact made out for $50.02 each.) The Lamb company followed that course and had recouped its entire outlay before the present suits arose. Thereafter no further dummy invoices were submitted.

Lamb's version of the transaction is contradicted by other testimony showing that the boat was originally a gift by Lamb to one or more of Shell's key employees. According to this testimony Lamb secretly recovered the cost of the gift by means of the false invoices, without the knowledge of Shell's top management. The chancellor credited this testimony, finding the transaction to be fraudulent. Upon that issue of credibility we cannot say that the trial court's conclusion is against the weight of the evidence.

Counsel all agree that if a fraudulent charge was consciously included in any of the accounts that account would be invalidated and the lien would fail. It is Lamb's contention that the boat deal was not involved in any of the five accounts now in issue and thus has no bearing upon this liitgation.

Lamb's contention cannot be sustained with respect

to one of the cases, that involving the Mitchell property. Early in the trial Lamb's attorney announced that it was reducing its claim against the Mitchell house by $50.02. Later on Lamb attempted to retract that concession, maintaining that it had been a mistake, that no fraudulent charge had been made against the Mitchells.

We are not convinced by this argument. Shell built a house for the Mitchells in 1962. Lamb admittedly made one of the false $50.02 charges in the course of that construction. A few months later Shell built an addition to the Mitchell house, which gave rise to the present lien claim. It is apparent that Lamb was morally obligated to the Mitchells for the false charge that had been made earlier. Hence we take Lamb's voluntary reduction of its claim to be a confession of wrongdoing having a foundation in fact. That asserted lien must fail.

A different situation exists with respect to the other four cases. Except for a few trivial errors that were made in good faith and so do not vitiate the lien claims, all the materials for which Lamb is now seeking payment went into the construction of those houses. In none of the four projects was a dummy invoice submitted, doubtless because Lamb had already recovered the cost of the boat.

Despite this fact counsel for the landowners insist that Lamb's claims are tainted by the boat transaction and that its lien affidavits were therefore consciously false. The argument is that Lamb, in asserting its liens, should have recognized that Shell had a cause of action against it for the recovery of the secret fictitious charges and that Lamb should somehow have given these four landowners some sort of pro rata credit for their derivative share of Shell's unasserted cause of action against Lamb.

This argument is unsound. These four landowners were not affected in any way whatever by the fictitious invoices. They have no legal or equitable right to be

subrogated to whatever cause of action Shell might have. If there was a fraud those who suffered from it were the landowners whose construction costs were padded by the false charges. Perhaps they or Shell or Shell's trustee in bankruptcy has an enforceable grievance against Lamb, but in no event could the recovery redound to the benefit of the present lienees.

To sustain the appellees' argument would be to establish a precedent that the courts could not live with in the future. Under the doctrine now being urged any materialman or laborer, before filing his lien affidavit, would have to search his conscience to see whether there was some extraneous cause of action that the principal contractor might bring into the case. If so, it would be the lienor's duty to inject such a collateral matter into the litigation, even though it had nothing at all to do with the matter in controversy. We are convinced that the better course is to let the contractor assert his own causes of action if he sees fit to do so.

One of the four claims, that against the Wawak property, presents two issues that we must consider upon trial *de novo*, though they were not reached by the chancellor.

First, it is contended that the Wawaks are entitled to credit for a payment of $1,627.17 that Shell tendered to Lamb on August 15, 1963. At Lamb's suggestion the money was actually credited to other accounts, but counsel for the Wawaks insist that Shell and Lamb did not have the power to apply the payment as they did.

We do not agree with this contention. The Wawaks, like the other landowners, financed their construction by a mortgage to a lending institution. Shell received the proceeds of the mortgage on March 26, 1963. The Wawak house was completed in May. Long before Shell's check was tendered to Lamb the proceeds of the Wawak loan had been spent by Shell in the payment of other debts,

leaving Shell still indebted to Lamb for materials that went into the Wawak house.

Shell was already in financial difficulty. It was from sixty to ninety days behind in its payments to Lamb. To avoid the filing of materialman's liens both Shell and Lamb wanted Shell's payments to be applied to the oldest accounts. To that end Lamb furnished Shell information from time to time about the age of the various accounts, and from that information Shell made notations upon its checks to Lamb of the amount to be applied to each account.

On August 15, long after the Wawak money had been expended, Shell sent Lamb a check with a notation that $1,627.17 of the remittance was to be applied to the Wawak account. Lyman Lamb noted that there were other accounts older than that arising from the Wawak job. Lamb's bookkeeper at once called Shell's bookkeeper, and the two agreed that the proceeds of the check would be applied to older accounts. The Wawaks knew nothing about the matter until the original notation on the check was discovered by an accountant while the parties were preparing for trial.

It is contended, on the authority of *Kelley Bros. Lbr. Co.* v. *Leming,* 220 Ark. 418, 248 S. W. 2d 359 (1952), that Shell and Lamb could not change the application of the payment. That case, however, differs materially from this one. There the payment had actually been applied to the Leming account. Leming had been so informed. The transaction had become final. More than a month later the contractor and the materialman tried to change the application. We held that such a change could not be made, to Leming's prejudice.

The present case differs from that one in essential respects. There was never any application of the payment to the Wawak account. Lamb in good faith suggested a different application from that proposed by Shell. That suggestion was accepted by Shell. The Wa-

waks knew nothing about the matter and of course did not rely upon the original notation on the check. In the circumstances there is no injustice in giving effect to the application agreed upon by Shell and Lamb. *Stephenson* v. *Ketchikan Spruce Mills,* 412 P. 2d 496 (Alaska 1966). Shell's ready acquiescence in Lamb's suggestion had the same effect as if the application had been made by Shell in the first place. *Garey* v. *Rufus Lillard Co.,* 196 Okla. 421, 165 P. 2d 344 (1945).

Second, the Wawaks raised a question of fact about whether all the materials charged to them had really been used in the construction of their home. Their principal witness was Mrs. Wawak. It was her recollection that the last work on the house, the installation of certain iron work, took place on May 2, 1963. On that premise she questioned an invoice indicating that materials priced at $10.28 had been delivered to the job four days later, on May 6. We think the weight of the evidence shows that Mrs. Wawak was mistaken in her recollection. Especially convincing is the testimony of the iron company's foreman, a disinterested witness. He testified that the company's records showed that the order for the Wawak work was received on May 2 but that the work was actually done on May 29. Upon the record as a whole we find the weight of the testimony to be against the Wawaks' contention that they were charged for materials not used in the construction of their house.

In the Mitchell case the decree is affirmed. In the other four cases the decree is reversed and the causes remanded for further proceedings in harmony with this opinion.

5-3956 406 S. W. 2d 316

Opinion delivered September 26, 1966

Terral, Rawlings, Matthews & Purtle, for appellant.

No brief filed for appellee.

GEORGE ROSE SMITH, Justice. In this garnishment proceeding the trial court entered judgment against the appellee, as garnishee, for $30.00. The appellant, the judgment creditor, contends that the garnishee failed to file a true answer to the writ, as the statute requires, and that he thereby became liable for the full amount of the principal judgment. Ark. Stat. Ann. § 31-506 (Repl. 1962).

In January, 1964, Bell obtained a judgment for $954.70 against Ernest Larkin, an employee of the appellee West. A writ of garnishment was served on West on Thursday, February 20, 1964. On the following Tuesday, February 25, West filed an answer stating that he had paid Larkin in advance through February 20 (the date of service) and that he was not indebted to Larkin either on the date that the writ was served or on the date that the answer was filed. Bell promptly countered with a denial of the correctness of the garnishee's answer.

At the trial in November, 1964, Larkin was the only witness. He testified that throughout the year he had been working for West at weekly wages of $45.00, which were paid to him every Saturday night. The trial judge, in awarding the appellant a judgment for $30.00, concluded that West had been indebted to Larkin for two thirds of a week's work (February 21 to February 25) when the answer was filed.

The court's conclusion, under the law applicable to garnishments, was correct. A debt not yet payable but certain to become payable in the future is reached by a writ of garnishment. *Cannaday* v. *First Nat. Bank,* 238 Ark. 474, 382 S. W. 2d 589 (1964). Hence West's answer to the writ was incorrect. The case is therefore controlled by our decision in *Harris* v. *Harris,* 201 Ark. 684, 146 S. W. 2d 539 (1941), where we held that a garnishee filing an untrue answer is liable for sums paid by him to the judgment debtor until a correct answer is filed. Inasmuch as West had paid Larkin more than the full amount of Bell's judgment in the interval between the filing of his incorrect answer and the date of trial, Bell was entitled, under the *Harris* case, to a judgment against the garnishee for $954.70, with interest.

The judgment must be reversed and the cause remanded for the entry of a judgment in Bell's favor.

PHILLIPS *v.* PHILLIPS

5-3925 406 S. W. 2d 325

Opinion delivered September 26, 1966

Gus R. Camp, and *E. L. Holloway,* for appellant.

Dudley & Burris, for appellee.

PAUL WARD, Justice. This is an appeal from a decree changing the custody of a young child from the father to the mother. A summary of the material facts and circumstances leading to this appeal is set forth below.

Background Facts. The parties were married in July 1959. Some three years later a daughter, Lesa Loeta, was born to the union. It appears from the record that the parties were under twenty years of age when they married. When Lesa Loeta was about two years old the parties separated, and were divorced on April 24, 1964. In accord with a written agreement, entered into on April 10, 1964 by the parties (approved by the court), the custody of Lesa Loeta was awarded to appellant—the father.

Petition for change of custody.

On March 29, 1965 appellee (the mother) filed a petition asking the chancery court to award to her the custody of the child. In support of the petition it was alleged that at the time of the divorce decree she had "no employment or income," but that since that time she has completed a course in cosmetology and is licensed as a beautician from the State of Arkansas and from the State of Missouri; that she is steadily and gainfully employed, operating a beauty shop.

In reply to the above petition appellant alleged; (a) there had been no change in circumstances since the divorce decree, and; (b) it would be to the "best interest of the minor child for the custody order to remain as it is . . . ."

For a reversal, appellant urges only two specific grounds: One, "there has been no change in circumstances," and; Two, "the change of custody was not for the best interest of the child." After a careful study of the record and our applicable decisions we are unable to agree with appellant on either ground, and therefore conclude the trial court must be affirmed.

One. The undisputed testimony shows that there has been a material change in circumstances since the original decree. At that time appellee was not able to support the child and had no place to keep her. At this time appellee has completed a course in cosmetology and is now a licensed beautician in Arkansas and Missouri. Now she is steadily and gainfully employed, conducting her own shop in Williamsville, Ark. She has a place for her daughter to live with her. The case of *Hamilton* v. *Anderson,* 176 Ark. 76, 2 S. W. 2d 673 presents a situation similar to the one here presented. There, the court awarded part time custody of two girls (ages 6 & 8) to the father, but refused later to award custody to the mother who had employment and a home in which to keep the children. On appeal this Court reversed the trial court and gave custody to the mother. In doing so it was stated: "We think, however, that the testimony does show such conditions as warrant a change of custody."

In the case before us the trial court found there was such a change in conditions as to support a change in custody, and we are unwilling to say any such finding was contrary to the weight of evidence.

Two. Likewise, we think the trial court must be sustained in finding the change of custody was in the best interest of Lesa Loeta. We have many times followed the well established rule, in cases of this nature, that the chancellor must keep in view primarily the welfare of the child. *Kirby* v. *Kirby,* 189 Ark. 937, 75 S. W. 2d 817. We have also many times recognized that this rule operates favorably to the mother as the custodian

where the child is of tender years. See: *Beene* v. *Beene,* 64 Ark. 518, 43 S. W. 968; *Wann* v. *Wann,* 85 Ark. 471, 108 S. W. 1052; *Meffert* v. *Meffert,* 118 Ark. 582, 177 S. W. 1, and; *Taylor* v. *Taylor,* 163 Ark. 229, 259 S. W. 395. In the *Beene* case we said: "... but the younger of the boys, not yet five years old, it seems to us, is in special need of a mother's control—that care and control which a father is ill suited by nature to exercise." In the *Wann* case it was stated: "They have only one child, a little girl, named Virgie May. She is about six years old, of that age when she needs the care of a mother." In the *Meffert* case there appears this statement: "Considering her tender age [8] and the fact that she needs a mother's care, we do not think the chancellor erred in awarding her custody to the mother." In the *Taylor* case there is the following statement: "The child's age [girl 5] is such that a mother's care is very necessary, and we think the custody should be awarded to the mother." The rule set forth above has been many times reaffirmed in more recent cases.

Finding no reversible error the decree appealed from is accordingly affirmed.

Affirmed.

ARK. STATE HWY. COMM. *v.* DRENNEN

5-3948 406 S. W. 2d 327

Opinion delivered September 26, 1966

George O. Green and *Don Langston,* for appellant.

Floyd G. Rogers, for appellee.

OSRO COBB, Justice. This appeal reaches us from a judgment in favor of appellees entered in the Crawford Circuit Court. It involves the taking by condemnation of 32.9 acres of land for use in construction of Interstate Highway No. 40. Appellees' original land tract contained 170 acres.

We note at the outset of our review of this case that appellant does not contend that the judgment for appellees is excessive in amount, nor does appellant contend that the case was submitted to the jury without proper guidelines to the applicable law, no objections being made to the instructions to the jury as given by the trial court.

All four of appellant's points on appeal relate to motions to strike certain portions of the testimony of appellees and of their three expert witnesses, all of the motions having been denied by the trial court.

Appellant's Point No. 1.

This point relates to appellant's motion to strike all of the value testimony of appellee because he gave no fair and reasonable basis for his opinion.

Most owners of rural lands, like this appellee, are farmers, and also like appellee they are not qualified as land appraisal experts. This does not mean that such owners who have such a close personal relationship to the lands involved have no sense of proper land values in their respective areas. Appellee testified that the actual value of his land had doubled in the last five years, and, when asked on cross examination as to his basis for such testimony, stated that he primarily based the increased valuation on the action of the Federal Land Bank of St. Louis, Missouri, in doubling all of its land values in Western Arkansas in June of the preceding year. No testimony was offered to contradict this evidence. Furthermore, appellee testified that local lands similar to his land would be difficult to acquire at a price of $400.00 per acre. He admitted that this testimony was based largely on what owners were asking for their lands, no recent sales having come to his attention.

We have never held that the value testimony of owners of land being condemned is inadmissible because of limitations of the landowner in experience and background in land transactions. If such restrictions were imposed, few landowners would be permitted to testify as to their own values and as to their own claims for damages. We have therefore repeatedly held that a landowner may testify as to his own opinions concerning values before and after the taking of his land.

In *Arkansas State Highway Commission* v. *Fowler*,

240 Ark. 595, 401 S. W. 2d 1 (1966), we cited with approval from 20 Am. Jur., *Evidence* § 892:

> "It is generally recognized that the opinion testimony of the owner of property, because of his relationship as owner, is competent and admissible on the question of the value of such property, regardless of his knowledge of property values. It is not necessary to show that he was acquainted with the market value of such property or that he is an expert on values. He is deemed qualified by reason of his relationship as owner to give estimates of value of what he owns. The weight of such testimony is, of course, affected by his knowledge of the value."

See also *State Highway Commission* v. *Covert,* 232 Ark. 463, 338 S. W. 2d 196 (1960).

We find no merit in the contention of appellant as to his Point No. 1.

Appellant's Point No. 2.

This point involves motion of appellant to strike the testimony of Jay Neal, professional land appraiser, because he gave no fair and reasonable basis for his opinions as to values. The witness, Mr. Jay Neal, testified that he had been upon the land involved in this case on many occasions during the past fifty or more years; that he had been a land appraiser for many years and that he had been employed in the past in the capacity of a land appraiser by appellant; that he owned land and lived thereon within some two miles of subject lands, and that he specifically examined appellees' property for appraisal purposes and for purposes of giving his testimony as to values and damages, including severance damages, shortly before the trial of this case. He further testified that he was familiar with land transactions and values in that locality. Appellant did not interpose a single objection to any of the testimony of this witness

as it was being given. We find from a review of the testimony of this witness that he provided the court and jury a fair and reasonable basis for the opinions that he expressed. Such testimony was therefore admissible. See *Bridgman* v. *Baxter County,* 202 Ark. 15, 148 S. W. 2d 673 (1941); *Fort Smith & Van Buren Bridge District* v. *Scott,* 103 Ark. 405, 145 S. W. 440 (1912).

We therefore find no merit in appellant's contentions under its Point No. 2.

Appellant's Points Nos. 3 & 4.

Both of these points involve the contention that expert appraisers Mack Bolding and Bob Gelly, who testified for appellees, based certain portions of their opinion testimony as to appellees' damages upon the inconvenience to appellees by reason of having to travel further from their property in order to reach U. S. Highway 64-71 after the construction of Interstate 40, a controlled access highway.

Appellant has not called to our attention any testimony of either witness wherein they did in fact bottom their opinions as to appellees' damages upon any such inconvenience, or other inconvenience in access to highways not suffered by the public generally. We have examined the transcript of all of the evidence of these witnesses and while they were subject to vigorous cross examination seeking an admission from them that such inconvenience was considered as an element of appellees' damages, they stood steadfast and refused to admit that such was the case, and that, on the contrary, their opinions were based upon the market value of appellees' property before the taking and after the taking.

We have therefore concluded that no proper basis existed for the motions to strike the testimony of these two expert witnesses, and that the trial court committed no error in overruling the motions of appellant.

Having found no merit in any of the contentions of

appellant which have been presented to us for review, the judgment of the trial court is affirmed.

TYLER *v.* TYLER

5-3950 406 S. W. 2d 333

Opinion delivered September 26, 1966

Ward & Mooney, for appellant.

Kirsch, Cathey & Brown, for appellee.

GUY AMSLER, Justice. This litigation involves the custody of a six year old boy, (Craig) who is now attending public school in Paragould, Arkansas, where the boy's father resides with his fourth wife and the child.

The learned chancery judge decreed that custody of the child should remain in the father, appellee Leroy J. Tyler. Appellant (Mabel), the mother and former wife of appellee pursues this appeal.

Attorneys for appellant correctly state that the cardinal question is where does a preponderance of the evidence lie or as they say "from another point of view, the decision of the Chancellor is not compatible with the best interests of the minor child." A brief resume of the proof in the case will readily demonstrate the soundness of the Chancellor's conclusions.

Appellant testified that her married life with appellee, from 1957 until their divorce in 1963, was a stormy one; that when she became pregnant in 1959 she was unhappy about it and when she suggested having an abortion (which she did not do), appellee did not object; that appellee changed jobs frequently and they moved constantly; that she also worked throughout the marriage, because appellee did not consistently contribute to household expenses; that when she decided to take further training to increase her earning capacity, appellee reluctantly agreed to keep Craig during her 1½ years of schooling and agreed that there would be no decision made about Craig's custody until that time. A doctor's wife, who had gone through nurse's training with appellant, testified that appellant was a good mother, affectionate with her son, and that during appellant's advanced schooling in Michigan, appellant drove or flew down to see Craig every three months regardless of the weather. Two women, themselves mothers, who had baby-sat for appellant in the past, testified by deposition that appellant had maintained a nice home, was a good mother, affectionate, and a proper person to have Craig's custody. Appellant's former landlord testified that she had a suitable (rented) home (in Illinois) for a child, near schools.

Appellee's witnesses, besides himself and his present wife Dorothy, testified: their minister, "delightful family relationship, a lovely home with a proper spiritual atmosphere"; two neighbors, "nice home, fondness and affection not only between Craig and appellee but also between Craig and Dorothy Tyler"; Craig's kindergarten teacher, "neat, clean, healthy, happy and normal boy"; the wife of a co-worker of appellee, "wholesome atmosphere and relationship in appellee's home; happy, normal well-adjusted child"; a former co-worker, "a home that just seems orderly, and there's harmony there, there's love, and it's just a beautiful home in which to raise a young lad"; appellee's former employer and his wife who came from Independence, Missouri, to testify (the only witnesses for appellee who

know appellant), "appellant inclined to be rather aloof and retiring, except when she was working; appellant seemed detached and withdrawn"; and the minister of Dorothy's mother, with whom Craig frequently stayed for a few hours after kindergarten, "good clean home, healthy woman and well able to look after Craig, nothing about her home that would have an adverse effect on Craig."

The only real demerit against appellee is his numerous unsuccessful marriages and yet the one with his present wife appears to have been most fortunate. According to Mr. Heath, the funeral director by whom Leroy has been employed as an embalmer and director for over two years, "Leroy is one of the best in his line of work. . . there is nothing about appellee or his home that would be harmful to Craig . . . his marriage to Dorothy Tyler had seemed to have a stabilizing influence on him" (appellee), and he felt that their marriage was very fortunate for both of them.

The chancellor having heard the witnesses first hand with an opportunity to observe their demeanor, sincerity and their means of obtaining information which they imparted to the court was in a much better position than are we to evaluate their testimony. We think the evidence clearly supports appellee's position and that the trial court has correctly determined that the child's welfare will best be served by remaining with his father. *Kirby* v. *Kirby,* 189 Ark. 937, 75 S. W. 2d 817; *Blake* v. *Smith,* 209 Ark. 304, 190 S. W. 2d 455; *Stephenson* v. *Stephenson,* 237 Ark. 724, 375 S. W. 2d 659.

Under the final decree in this case appellant is to have custody of the little boy sixty days each summer and one weekend during the remaining months. Appellee does not contest this arrangement. Accordingly the decree is in all respects affirmed.

Opinion delivered September 26, 1966

Shaw, Jones & Shaw, for appellant.

David O. Partain, for appellee.

HUGH M. BLAND, Justice. On December 12th, 1963, the appellant issued its hospital, surgical and medical policy to the appellee. Among other benefits, the policy provided that in the event of sickness or illness requiring appellee to be treated by a licensed physician the appellant would pay the amount of expense incurred for such treatments not to exceed the sum of $3.00 for each treatment at a clinic or physician's office or $5.00 for each treatment at the home of the policyholder. On or about October 30th, 1964, appellee became ill suffering from granular urethritis and from then through May 4th, 1965, was treated at the office of Dr. M. C. Wilson or Dr. J. N. Thicksten a total of 29 times. Under the terms of said policy the first call was excluded.

Appellee filed claim for 28 treatments at $3.00 each or a total of $84.00. Appellant denied the claim, tendered a refund of all premiums paid and attempted a cancellation of the policy, contending that appellee had granular urethritis before applying for the insurance and had failed to disclose this information to appellant.

Appellee filed suit in the Crawford County Chancery Court to restrain and enjoin appellant from cancelling the policy and to recover $84.00 for the 28 office calls.

Appellant filed an answer by way of general denial and amendment to answer claiming the appellee failed to disclose in her application her true condition and did not reveal that she had granular urethritis prior to issuance of the policy. Appellant tendered into court all premiums paid by appellee and prayed cancellation of her policy.

By agreement of the parties, the cause was tried at Fort Smith, Arkansas before the Honorable Paul X. Williams, Chancellor, on exchange of circuits.

At the trial, on October 28, 1965, the court held appellant liable under the terms of the policy for $84.00, plus a 12% penalty and $100.00 attorney's fee and further held that said policy was noncancellable. From this holding appellant has perfected its appeal to this court.

For reversal appellant relies upon three points:

"I. The Chancellor's holding that the appellee made full disclosure of any and all information pertaining to her health and physical condition to the appellant is against the preponderance of the evidence.

II. The Chancellor erred in holding that the appellant's insurance policy was 'Noncancellable' under the circumstances in this case.

III. Even assuming that the appellee disclosed her condition to the agent, the Chancellor erred as a matter of law in holding that said disclosure to the agent was disclosure to the appellant."

The facts are not in dispute and narrow down to the issue of disclosure of appellee as to her physical condition at the time of her application for the insurance. The application was obtained by Fred K. Miller, agent of the company, at appellee's store. The record is silent as to whether he was a soliciting agent or a general agent. The application was filled out by the agent in response to answers given him by appellee. The application was made a part of the policy. Appellee was asked in Question No. 8 on the application whether or not she had ever had any disease of the heart, kidneys, stomach, intestines, urinary or gall bladder, rectum or respiratory system. Appellee's answer was "yes No. 9". Question No. 9 was: "Have you received medical or surgical advice or treatment within last five years?". The answer was "No". Then follows:

"Date	Which Member?	Nature of Disease or Accident	Doctor
1949	App.	Left Kidney removed No complications	Dr. Palmer Phoenix, Ariz."

There was introduced into evidence two letters from Dr. Carl L. Wilson, Urologist, with the Holt-Krock Clinic in Fort Smith, Arkansas. These letters disclose that appellee was first seen by Dr. Wilson on October 5, 1954. At that time she gave the history of having had her left kidney removed in Phoenix, Arizona but from that time to November 14, 1956 there was no finding of serious pathology. In October 1957 she was hospitalized for complete urologic studies. The remaining kidney was in good condition but a diagnosis of granular urethritis was made and she was treated for this condition from November 1, 1957 to December 29, 1958. During 1959 she received treatment to the urethra from February 2, 1959

to November 23, 1959. In 1960 she had urethral treatment from January 13, 1960 to September 19, 1960. She received two treatments in 1962. She received treatments from October 30, 1964 to July 23, 1965.

It is true that appellee did not give all of this information to appellant. But she did provide appellant with the information that she had urinary problems [answer to Question No. 8] and that she had a kidney removed in Phoenix, Arizona in 1949, giving the name of her doctor. Dr. Wilson lives in Fort Smith and Dr. Thicksten in Alma. This information furnished by appellee put appellant on notice as to urinary problems and removal of her left kidney. The chancellor found that she had made a full disclosure of any and all information pertaining to her health and physical condition and we cannot say that this finding was against the preponderance of the evidence.

A similar situation was presented to this court in a recent decision, *Old American Life Ins. Co.* v. *McKenzie*, 240 Ark. 984, 403 S. W. 2d 94 (1966) wherein this court held:

> "It is true that appellee did not give a full and complete medical history to appellant in his applications. It is also true, however, that appellee did provide appellant with informtaion concerning a disc operation upon his back in 1962, involving extended disability. Furthermore, appellee set forth the true name of the surgeon who had attended him at the time of said operation upon his back (Dr. Richard M. Logue). Moreover, Dr. Logue is a Little Rock surgeon with offices in close proximity to the offices of appellant and could have been reached by telephone or by call of a personal representative of the appellant at little or no inconvenience. Obviously the attending surgeon and not the patient (appellee) would be the best qualified to provide to appellant the accurate medical history of the case. Few operations on the spine are more severe in character than the removal of an intervertebral disc. When

> appellee reported this operation he put appellant upon notice as to a serious back operation; and when appellee provided appellant with the name of his surgeon to whom appellant could turn for exact and precise information if so desired, he substantially met all burdens imposed upon him in his relations with appellant under his contracts of insurance and should not be denied the benefits as provided in appellant's policies."

See, also, *Missouri State Life Ins. Co.* v. *Witt,* 161 Ark. 148, 256 S. W. 46 (1923).

We find no merit in appellant's contention number two as the provision in the policy of noncancellability is plain and certain and subject to but one construction.

As to Point No. 3, it is contended by appellant that the chancellor erred as a matter of law in holding that said disclosure to the agent was disclosure to the appellant. We have searched the record and find no such holding by the chancellor. Whether the agent securing this application was a soliciting agent or a general agent was not developed in the testimony. The question is presented here for the first time. A question not raised in the trial court will not be considered on appeal. *Stroud* v. *Crow,* 209 Ark. 820, 192 S. W. 2d 548 (1946); *Kuester* v. *Kuester,* 237 Ark. 298, 372 S. W. 2d 606 (1963), and many other cases found in West's Arkansas Digest under Key Number 169.

Finding no error, the judgment of the chancellor is affirmed.

Appellee's attorney requests an allowance in this court of additional attorney's fees. Under the circumstances of this case, we allow appellee's attorney an additional $100.00 fee.

Affirmed.

McFaddin, J., not participating.

Opinion delivered October 3, 1966

Terral, Rawlings, Matthews & Purtle, for appellant.

W. M. Lee, for appellee and cross-appellant.

Owens, McHaney & McHaney, for appellee.

CARLETON HARRIS, Chief Justice. Aetna Life Insurance Company, on August 1, 1929, issued Policy P648527, in the amount of $5,000.00, and on October 21, 1934, issued Policy P722610, in the amount of $6,000.00, upon the life of William Gustavus Elledge, Helen N. Elledge,

wife, being named as beneficiary. Some time in 1956 Mr. Elledge became disabled; under terms of the policy, premiums were waived, and these policies were in full force and effect on July 12, 1964, when Mr. Elledge died.

Pertinent facts in this litigation are as follows:

On May 30, 1959, Mr. and Mrs. Elledge entered into a property settlement agreement in contemplation of divorce, in which these two policies, along with other policies, not here at issue, are referred to as follows:

"It is mutually agreed and understood that as to the insurance policies described in item No. 6 above, each of same is on the life of Husband and have as beneficiary Wife. It is further agreed and understood that Husband will not change the beneficiary on any of said policies and will not borrow on same nor surrender same for cash value, they being hereby considered and designated as the property of Wife."

The parties were subsequently divorced in Monroe County, Arkansas, the decree incorporating the property settlement agreement, and reciting

"* * * that the property settlement agreement hereinabove set out be, and hereby is, approved and ratified in all respects and is hereby declared by the court to be finally conclusive of any and all property rights between the parties hereto."

Thereafter, in March, 1961, Elledge, who had previously obtained loans from the company on these two policies,[1] made a request that Aetna grant to him the maximum loan on each policy. The company complied with this request, and increased the loan on P722610 by $2,258.91, and also increased the loan on P648527 by $2,048.27.

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[1]Elledge had borrowed $498.88 on Policy P722610, and $435.59 on Policy P648527.

On December 12, 1961, and January 8, 1962, Elledge directed letters to the insurance company, advising that he desired to change the beneficiary of these policies, and the company sent him Chance of Beneficiary forms. He also advised that his wife had the policies. Elledge completed the forms, naming Ruby E. Patton, one of the appellees herein, as the new beneficiary. Aetna declined to make the change until the policies were surrendered for endorsement. This was never done, and the endorsements, changing beneficiaries, were never made.

On December 18, 1963, Mrs. Elledge wrote to Aetna, advising that the policies, here in litigation, had been assigned to her as of July 9, 1959, and Aetna promptly informed appellant that it was necessary that a certified copy of the property settlement be sent to it, if the company was to be governed by the terms of the agreement. On February 10, 1964, Mrs. Elledge mailed a certified copy of the settlement to the insurance company, and receipt was subsequently acknowledged.

On July 6, 1964, appellant instituted suit against Mr. Elledge in the Monroe County Chancery Court, alleging that Elledge had violated the property agreement, *inter alia,*[2] by borrowing upon the policies, and by attempting to change the beneficiary. Mrs. Elledge asked that Mr. Elledge be held in contempt of court, because of his acts, and further, that all property owned by plaintiff and defendant be sold, and she be awarded $24,000.00 out of his portion of the proceeds from the sale to compensate her for her loss due to the acts complained of. Six days after this suit was filed, Mr. Elledge died, and on August 19, appellant instituted an action against appellee, Atena Insurance Company, seeking recovery for the face amount of the policies herein (except for the first loans obtained by Elledge during the time of the marriage), together with penalty, interest, and a reasonable attorneys' fee. Aetna answered, setting out that Ruby Patton was claiming to be beneficiary under

[2]The property settlement included quite a bit of property not involved in this lawsuit.

the policies, and the company offered to pay into the registry of the court the difference between the face value of said policies and the amount of money due the company, because of the loans made to Elledge. It asked that Mrs. Patton be made a cross-defendant. Mrs. Patton then pleaded that Elledge had changed the beneficiary, and she prayed that the proceeds of both policies, less the amount of indebtedness to Aetna, on account of the loans, be paid to her; she also asserted that the purported property settlement between Elledge and appellant was not binding on either Aetna or herself, and the contract was ineffectual as an assignment of deceased's rights. On trial, the court found that Mrs. Elledge was entitled to the proceeds of Policy P722610, less the amount of indebtedness due Aetna on the two loans made by her ex-husband, and further found that Mrs. Patton was due the proceeds from Policy P648527, likewise less the amount of indebtedness due Aetna because of the loans. From the judgment so entered, Mrs. Elledge appeals from that portion finding that Mrs. Patton was due the proceeds under Policy P648527, and also appeals from that portion of the judgment allowing her only $2,835.57 under Policy P722610, instead of the face value of the policy (less the first loan). Mrs. Patton cross-appeals from that portion of the judgment finding that Mrs. Elledge was due the proceeds (after deductions to Aetna) from Policy P722610.

We will first dispose of appellant's contention that Aetna, in tendering the amount due under the policies, was not entitled to deduct the amounts of the second loans made to Mr. Elledge. This contention, of course, is based upon the argument of Mrs. Elledge that the policies had been assigned to her; that Elledge therefore had no right to borrow on these policies, and it is contended that the company made these loans at its own risk, since they were made without the policies being sent in to the company office.

In the "Policy Loan Agreement" executed by Mr. Elledge when applying for the second loans on the poli-

cies, the statement appears, "I hereby certify that I am not involved in any insolvency or bankruptcy proceedings. I further certify that this policy is not now assigned or transferred to any person or party except as follows:" A blank space is then provided. On these particular applications, no words are set out in the blank space. Mrs. Elledge contends that this omission should have raised the suspicion of the company to the extent that it should have made inquiry (as to whether any assignment had been made) before granting the loans.

It is difficult to see how the word, "none," would have added anything to the applications. The blank was only required to be completed *in case an assignment or transfer had been made* (by setting out the assignment or transfer), and it might well be considered that the failure to answer at all had the same effect as to write in the word, "none." It must be remembered that the validity of this argument depends on whether the company owed a duty to Mrs. Elledge. This will be subsequently discussed. It is also argued that the company should have required the policies to be sent in before making the loan. Since this could not have been done, such a requirement, says appellant, would have disclosed the fact (later disclosed when Elledge sought to change beneficiaries) that he did not have the policies, because they had been assigned. However, as earlier mentioned, Elledge had, during his marriage, borrowed on both policies, and as the policies had been endorsed at that time to show a loan indebtedness, there was no need to again require the endorsement. An endorsement, showing that a loan has been made, is solely for the company's benefit, and its purpose is to make sure that the face amount of the policy will not be paid to a claimant who owes an indebtedness to the insurance company. The first endorsement was sufficient to call that fact to Aetna's attention, and enable it to determine the total amount of the loans before settling the policy.

The principal reason why appellant's argument must fail is that she did not comply with Section 15 of

the policies until long after the loans were made. That section provides as follows:

"No assignment of this policy shall be binding upon the Company unless and until the original or a duplicate thereof is filed at its Home Office. The Company does not assume any responsibility for the validity of an assignment."

Of course, there was no way for Aetna to know of the assignment unless it was notified, and the burden of notification was very clearly placed on appellant. Apparently, she eventually discovered this requirement, for she notified the company of the assignment on December 18, 1963, and sent a certified copy of the property settlement on February 10, 1964, but this was nearly two and one-half years after the loans had been made. In *Patten* v. *Mutual Benefit Life Insurance Company,* 6 S. E. 2d 26 (South Carolina), a similar situation arose. There, one William C. Brown, on December 10, 1910, assigned an insurance policy to J. H. Patten, and at the same time delivered possession of the policy to Patten. Notice of the assignment was first given to the company on May 19, 1925, and the loans advanced to the insured were all granted before that date. The court stated the question as follows:

"* * * Could the insurer under the terms of the policy make a valid loan to the insured on the security of the policy, after an assignment of the policy without notice to the insurer and without 'receipt of the policy,' which loan would be binding on the assignee?"

In deciding this issue, the Supreme Court said:

"It is conceded that notice of the assignment was not given to the company until May, 1925. All of the loans made by the company were prior to this date. The validity of the loans is attacked upon the sole ground that the company did not require a production of the original policy at the time of making any of the loans,

except the first. It therefore follows that if the loans were sanctioned by the contract provisions, construed in the light of the general law, the plaintiff is not entitled to recover. Independent of the provisions of the policy, the law of this State, as elsewhere, seems to be clear that the debtor has the right to deal with the creditor until he has actual notice of an assignment, * * *.

" * * * And although such an assignment is good as between assignor and assignee, it has been held that it is necessary to give notice to the company in order to constitute an assignment valid as against a subsequent assignee, and free from acts of an assignor as to surrender of the policy to the office. *And the policy itself may provide that notice must be given to the company and in such a case the provision should be complied with to render the assignment as a valid one.*

"Thus under the general principles of law the company had the unquestionable right to make loans on the policy and to treat with the insured as the sole owner thereof until it received notice of the assignment."

We are of the opinion that appellant's argument in this respect is without merit.

We think the court erred in awarding the proceeds from Policy P648527 to Mrs. Patton, for there had been no change of beneficiary, and Mrs. Patton held no proper claim to the amounts due under this policy. Elledge attempted to change the beneficiary, but in this effort, was unsuccessful, for the company refused to comply with the request until the policies were sent in. Elledge was aware of the fact that the beneficiary had not been changed. However, this circumstance is not controlling. The controlling fact is that Elledge, at the time of making the request, *held no interest in the policies,* for they had been assigned to Mrs. Elledge just prior to the divorce decree. The Patton brief states:

"Here the decree of divorce merely approved the

property settlement entered into between the Elledges—it did not decree the ownership of the policies changed nor did it divest the ownership from William Gustavus Elledge and vest it in Mrs. Helen N. Elledge."

This is to put form before substance. It is true that the agreement does not set out verbatim that Elledge is divested of any interest in the policies, but it is very evident that that is the intent of the language, the final clause, with reference to these policies, heretofore quoted, providing, "*they being hereby considered and designated as the property of wife.*" The Chancery Court also found, in approving and ratifying this agreement that it was "finally *conclusive* of all property rights." Not only that, but the policies *were delivered to Mrs. Elledge*, which act was certainly in furtherance of the agreement. Thereafter, Elledge never again had his hands on the policies, and his letters to Aetna clearly show that he recognized that he could not obtain them. In *Reilly* v. *Henry,* 187 Ark. 420, 60 S. W. 2d 1023, this court, in quoting a California case, in which a similar instance was at issue, said:

" * * * The court disagreed with both contentions, and as to the last, while holding that when the policy was first taken out the beneficiary named had no vested or equitable rights therein which the insured could not have ended at will by change of beneficiary, yet when he agreed for a consideration to keep the policy in being for the beneficiary as long as she remained single, and 'when this offer was accepted by her, the quality of her interest as a beneficiary in said policies became changed from that of mere expectancy to a more fixed and permanent relation. She had thenceforth an equitable interest in said policies of which she could not be divested by the mere act of the insured in changing the name of the beneficiary.' "

We have reached the conclusion that Mrs. Patton had no beneficial interest in either policy, and this holding, of course, also disposes of her cross-appeal.

Appellee Mrs. Patton contends that Mrs. Elledge, by filing a petition in the Chancery Court on July 6, 1964, seeking to recover from Elledge the amounts lost by his violation of the property agreement, exercised an election of remedies. Appellee cannot prevail on this point for two reasons. For one, the complaint filed in the Chancery Court has not been abstracted, and we have said many times that it is not feasible for the justices of this court to be compelled to examine the transcript in order to acquaint themselves with pleadings, exhibits, or testimony. *Vire* v. *Vire,* 236 Ark. 740, 368 S. W. 2d 265. It is true that the appellant is due to abstract the record, but this particular exhibit was relied upon by appellee, and she was privileged, under our rules, to supply the deficiency, and ask that the cost of the additional abstracting be placed on appellant. In fact, one additional item is abstracted. Merely mentioning the exhibit in the statement of the case is insufficient to constitute compliance. Be that as it may, the argument is without merit. In 28 C.J.S., Section 1, Page 1057, "Election of Remedies," we find:

"Election of remedies has been defined to be the right to choose, or the act of choosing between different actions or remedies, where plaintiff has suffered one species of wrong from the act complained of. Broadly speaking, an election of remedies is the choice by a party to an action of one or two or more coexisting remedial rights, where several such rights arise out of the same facts; but the term has been generally limited to a choice by a party between inconsistent remedial rights, the assertion of one being necessarily repugnant to, or a repudiation of, the other. Thus, in its technical and more restricted sense, election of remedies is the adoption of one of two or more *coexisting*[3] remedies, with the effect of precluding a resort to the others.

" * * * It has been said that the doctrine is a harsh rule which is not to be extended, and that it is to be applied by the courts with a wide discretion in order

[3]Emphasis supplied.

that it may not be made an instrument of oppression. Each case involving a question of election of remedies must be governed by its facts."

Our own cases of *Eastburn* v. *Galyen,* 229 Ark. 70, 313 S. W. 2d 794, and *Bigger* v. *Glass,* 226 Ark. 466, 290 S. W. 2d 641, point out that one of the essential conditions relating to election of remedies is that two or more remedies *exist.* That necessary element is not present in the instant litigation, for Mrs. Elledge had no cause of action against Aetna, *i. e.,* she was not due to receive proceeds of the policies, as contemplated in the argument, until *after* Mr. Elledge's death;[4] in other words, at the time the suit was filed, Mrs. Elledge did not have the remedy she is now pursuing. It might be added that, as pointed out in C.J.S., the doctrine, here under discussion, should not be extended, and to apply such a doctrine here, under the circumstances heretofore set out, would indeed be harsh.

In accordance with what has been said, that portion of the judgment finding for appellee, Aetna Life Insurance Company, is, in all things, affirmed; that portion of the judgment finding that Mrs. Elledge is entitled to the proceeds of Policy P722610 is affirmed, and that portion of the judgment finding that Mrs. Ruby Patton is entitled to the proceeds of Policy P648527 is reversed, with directions to enter judgment in favor of Mrs. Elledge to the proceeds due under this policy. Costs are adjudged two-thirds against Mrs. Patton, and one-third against Mrs. Elledge.

COBB, J., dissents in part.

OSRO COBB, Justice, dissenting in part. I fully agree with the decision of the majority awarding all available proceeds of the Aetna Life Insurance policies to appellant, the wife and designated beneficiary in such policies.

[4]Of course, when appellant learned of her ex-husband's violation of the property agreement (by borrowing on the policies), it was too late to seek to prohibit the granting of the loans—because they had already been made.

I respectfully dissent from that part of the majority opinion which permits Aetna to deduct from its settlement certain loans which had not been registered or endorsed upon subject policies, in accordance with the provisions of Section 7 of the policy contracts.

Section 7 contains the following language:

> "A loan agreement satisfactory to the company shall be executed and *sent with the policy* to the Company at its Home Office. The Company will *return the policy after proper endorsement.*" (Emphasis supplied)

I take the view that when Aetna, in the face of the quoted provisions of Section 7, *supra,* made loans without requiring the surrender of the policies and proper endorsement thereon as to the loans, it breached the clearly stated provisions of its own policy contract and waived its right to assert such loans as a deductible indebtedness against the policies. This is not to say that Aetna also waived its right to proceed against the estate of the deceased insured as a general creditor. *See Subd.* 2 *of* § 335 *of Act* 148 *of* 1959.

The proceeds of the policy due the designated beneficiary could not be reached by creditors, same being exempted by statute. *See* § 66-3328, *Ark. Stat. Ann.* (*Repl.* 1966).

Our decisions must necessarily apply equally to all insurance companies, great ethical companies like Aetna and also the nefarious companies who employ sharp practices to defeat legitimate policy claims. The provisions of Section 7 of the Aetna policies, when complied with, benefit all concerned and deviation therefrom may result in much injustice, as in this case.

Appellant knew from looking at the Aetna policies that same were encumbered by old loans, the particular endorsement used by Aetna giving no date and no

amount. Presumably, husbands and their wives work together in paying insurance premiums upon their separate or joint policies and appellant apparently knew the principal amount of the prior loans against the policies. What she did not know was that additional loans were made while she was in complete possession of the policies. Herein lies the evil of the situation.

Under the rule announced in the majority opinion, widows may no longer rely upon what the policy reflects upon its face. Indeed, when asserting her claim for the sum the policy purports to represent as due her, she may be astonished to be advised by the insurance company, whether honestly or fraudulently, that the funds have been absorbed by unendorsed loans to the insured. With the husband dead and unavailable to give testimony to refute false claims of such loans, the stunned beneficiary may become an easy victim. Moreover, an insured, with an eye for a dishonest dollar, could exhibit his policy free of loan endorsements and dupe innocent persons into relying upon his having a substantial cash equity therein, when in fact the equity had been depleted by unendorsed loans.

The General Assembly might well consider amending Section 335 of Act 148 of 1959 so as to specifically limit policy loan deductions in settlement of policy obligations to those loans which have been duly and properly endorsed upon the policy itself, such endorsements setting forth the date and amount of such loans. This would obviate misunderstandings and possible fraudulent evasions in payment of just claims. It would keep all of the pertinent facts out in the open for the information and guidance of all concerned. It certainly would work no hardship upon the insurance companies.

For the reasons stated, I respectfully dissent.

5-3936 406 S. W. 2d 381

Opinion delivered October 3, 1966

Wright, Lindsey & Jennings, for appellant.

Williams & Gardner, for appellee.

ED. F. MCFADDIN, Justice. The only issue which the appellants urge relates to the ruling of the Trial Court in admitting into evidence a statement of account. The appellants state their point: "The lower Court committed prejudicial error in admitting in evidence the statement of Dr. A. C. Linton."

Appellees, Mr. and Mrs. Burris, are an elderly couple. In January 1964 the car in which they were riding was struck by a gravel truck owned by the appellant, Dewey Frances, and being driven by his employee, the appellant, Harvey Lee Wood. Mrs. Burris received serious and painful injuries; this action for damages resulted; and the jury verdict and judgment were for Mrs. Burris for a substantial amount. Dr. Roy Millard testified in detail as to Mrs. Burris' injuries and the treatment she had received from him. Without objection, the appellees introduced: (a) one hospital bill of $674.90; (b) another hospital bill for $133.35; (c) another hospital bill for $297.06; (d) bill paid Walker's Drug Store of $13.96; (e) bill paid Hector Drug Store of $75.00; (f) rent on a hospital bed of $40.00; and (g) an ambulance bill of $31.80. Then the appellees offered in evi-

dence the bill of Dr. A. C. Linton for $120.00; and the only question on this appeal concerns the ruling of the Court in admitting Dr. Linton's bill into evidence. The bill was worded as follows:

> "6/10/65 To Whom This May Concern: A true estimate of the visits to see Mrs. John Burris, the lady who was injured in a car wreck: 10 visits, $10.00 each; 10 office calls, $2.00 each. A. C. Linton, M. D."

When Dr. Linton's bill was first offered in evidence, appellants objected on the basis that there was nothing to show that Dr. Linton's visits and office calls were because of the traffic mishap in which Mrs. Burris was injured; but this objection was answered by the testimony of Mr. Burris, who stated that all of the dealings with Dr. Linton were incurred because of the traffic mishap. The appellants also urged that Dr. Linton's bill was a hearsay statement[1] and could not be introduced in evidence without Dr. Linton being called to testify as a witness.

We find no merit in appellants' contention. Mr. Burris testified that Dr. Linton made ten house calls at $10.00 each; and that on ten other occasions Mr. Burris went to Dr. Linton's office to get prescriptions for Mrs. Burris to relieve her intense pain. Dr. Linton's bill did not constitute hearsay evidence. There was no effort to show by Dr. Linton's bill for $120.00 the nature and extent of Mrs. Burris' injuries. That testimony had been furnished by Dr. Roy Millard. The only purpose of introducing Dr. Linton's bill was to show one of the items of expense incurred because of the injuries Mrs. Burris sustained in the traffic mishap; and the bill of Dr. Linton was just as admissible, supported by the testimony of Mr. Burris, as were the hospital bills and the ambulance bills and the others previously mentioned. Certainly the bill was admissible to show an expenditure by

[1]Appellants call particular attention to the annotation in 10 A.L.R. 2d 1035, entitled, "Written recitals or statements as within rule excluding hearsay."

Mr. Burris. If the appellants had wanted the bill limited to that purpose, they should have requested such limitation. In *Amos* v. *State,* 209 Ark. 55, 189 S. W. 2d 611, we said:

> "If the evidence is admissible for any purpose, then the objecting party must ask the court to limit the evidence to the one admissible purpose, or the objection is wholly unavailing. See *Bodcaw Lbr. Co.* v. *Ford,* 82 Ark. 555, 102 S. W. 896; and cases collected in West's Ark. Digest, 'Trial,' §§ 85, 86."

Finding no error, the judgment is affirmed.

SHIPP *v.* STATE

5158 406 S. W. 2d 361

Opinion delivered October 3, 1966

Jack L. Lessenberry, for appellant.

Bruce Bennett, Attorney General; *H. Clay Robinson,* Asst. Atty. Gen., for appellee.

ED. F. MCFADDIN, Justice. Appellant, Johnny Paul Shipp, was charged, tried and convicted of the offense of robbery [Ark. Stat. Ann. § 41-3601 (Repl. 1964)], and brings this appeal. His motion for new trial contains 25 assignments, which we will group and consider in suitable topic headings.

1. *Motion To Quash The Jury Panel.* This was a two-point motion. The first point was that the jurors were not qualified because they had not complied with the recent Amendment No. 51. That point was completely answered in the cases of *Coger* v. *Fayetteville,* 239 Ark. 688, 393 S. W. 2d 622; and *Harris* v. *State,* 239 Ark. 771, 394 S. W. 2d 135; wherein we held that the Act No. 126 of 1965 was valid and was passed to eliminate just such a motion as was here made. The second point of the motion to quash was that Negroes had been excluded from the petit jury panel; and that even though the appellant was a white man, still he was entitled to have Negroes on the jury panel. We see no need to discuss the merits, if any, of this point, because the record here fails to show that the appellant exhausted his peremptory challenges. In such a situation we have held that the appellant cannot complain of the composition of the jury. One such recent case so holding was *Trotter and Harris* v. *State,* 237 Ark. 820, 377 S. W. 2d 14, cert. denied 379 U. S. 890, in which we said:

> "Throughout the years, no rule of procedure has been more consistently adhered to than the rule that a defendant cannot complain of the composition of the jury if he does not exhaust his challenges. In *Benton* v. *State,* 30 Ark. 32, decided in 1875, Chief Justice English pointed out that this rule had stood as a precept of criminal practice in this state, for a period of over 22 years. In a long line of cases, we have consistently upheld the rule to the present time. A cursory examination of our cases reveals over thirty-five criminal cases in which this rule has been cited and adhered to . . ."

II. *Sufficiency Of The Evidence.* The State of-

fered evidence which showed that the appellant had persuaded Lee Edwin Goolsby to rob the Joiner branch of the First National Bank of Osceola, so that the appellant and Goolsby could use the money in a joint venture; that on Monday morning, February 8, 1965, Goolsby went alone to the bank and at the point of a loaded pistol took in excess of $9,000.00; that Goolsby concealed the money at his home and it was subsequently recovered. Goolsby admitted all of this and said that the appellant had suggested the planned robbery. If the evidence of Goolsby, the accomplice, was corroborated to the extent required by law, then the evidence was sufficient to support the appellant's conviction; and that brings us to the issue of corroboration of the accomplice Goolsby.

III. *Corroboration.* Our statute on corroboration is Ark. Stat. Ann. § 43-2116 (Repl. 1964), which reads:

> "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. . . ."

We have many cases involving the sufficiency of the evidence to corroborate the accomplice. Some of these are: *Knowles* v. *State,* 113 Ark. 257, 168 S. W. 148, Ann. Cas. 1916C 568; *Casteel* v. *State,* 151 Ark. 69, 235 S. W. 368; *Powell* v. *State,* 177 Ark. 938, 9 S. W. 2d 583; and *Underwood* v. *State*, 205 Ark. 864, 171 S. W. 2d 304. In *Underwood* v. *State, supra,* we stated the rule:

> "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 . . . . Evidence which merely raises a suspicion that accused may be guilty, or which is as consistent with defendant's innocence as guilt is not sufficient . . . . The question of the sufficiency of the corroborating evidence justifying submission of the question of defendant's guilt to the jury must, of necessity, be governed by the facts and circumstances of each particular case, having regard for the nature of the crime, the character of the accomplice's testimony and the general requirements with respect to corroboration."

With this rule thus clearly stated, we come to the evidence in the case at bar. The only evidence to corroborate the accomplice Goolsby was that relating to the rain suit and gloves which Goolsby wore at the time of the robbery.[1] Goolsby testified that appellant purchased a rain suit and gave it to Goolsby with instructions that he wear it in making the robbery; and Goolsby testified that after the robbery he threw the rain suit in a ditch along side the highway. The rain suit was found in the ditch and introduced into evidence. Don Rogers testified that he worked at Graber's Department Store and that on Monday morning, February 8, Johnny Paul Shipp came into the store about nine o'clock and purchased a two-piece rain suit; that Shipp tried on the rain suit; and that Shipp wanted to buy a rain suit with a hood. The witness said the rain suit he sold Johnny Shipp was like the one introduced in evidence; but he could not say that it was the identical one sold to Shipp.

The other and far more substantial corroborative evidence was given by Sheriff William Berryman. He testified that Shipp was arrested and placed in jail; and the Sheriff sent for the witness Rogers, who had sold Shipp a rain suit, and the witness Prince, who had sold Shipp some gloves; that he warned the witnesses that

[1]Goolsby testified that the appellant provided the rain suit and gloves and a silk stocking. The rain suit was introduced as an exhibit in the case and is before us on appeal.

they were to say nothing to the appellant; that the next day the appellant sent for the Sheriff, who went to the jail to see the appellant, and here is Sheriff Berryman's testimony:

> "I asked if he wanted to see me. He told me, those people over there looking at him so on, he did buy that rain suit and gloves, but he bought it for the business. I didn't cross-examine or inquire into it any way, just left it at that."

And again the Sheriff testified as to appellant:

> "Q. And he had a note pad in his hand and told you he was the one who bought this rain gear and was the one who bought these gloves?
>
> "A. Yes, sir."

And on cross-examination Sheriff Berryman testified:

> "Q. You are not saying or suggesting to this jury Johnny Shipp said he had bought this particular rain suit?
>
> "A. He said he bought the rain suit and gloves, yes."

Thus the evidence shows that the appellant admitted to Sheriff Berryman that the *particular rain suit in evidence was the one he bought*; but he claimed in his conversation with the Sheriff that he bought the rain suit for use in his business. When the appellant admitted the purchase of the identical rain suit used in the robbery, certainly the appellant admitted enough to corroborate the accomplice. The appellant seeks to leave the impression that Goolsby stole the rain suit from him; but that was a fact question to go to the jury. Without the testimony of Sheriff Berryman the corroboration in this case would be like that in *Scott* v. *State,* 63 Ark. 310, 38 S. W. 339; or *Cook* v. *State,* 75 Ark. 540, 87 S. W. 1176. But with the testimony of Sheriff

Berryman, the evidence of corroboration went to the particular and identical rain suit introduced in evidence, and there was evidence from which the jury could have found—and evidently did find—that appellant bought the particular rain suit which Goolsby wore at the time of the robbery; and this certainly corroborates Goolsby's testimony to the effect that the appellant suggested and planned the robbery.

IV. *Argument Of The Prosecuting Attorney.* The appellant claims that the judgment should be reversed because of the improper argument of the Prosecuting Attorney. In the course of his closing argument the Prosecuting Attorney, in commenting on the matter of corroboration, said:

> ". . . and every fact shows everything Lee Goolsby said about going to Kennett, about drinking coffee, about getting the rain coat, about the stocking; forty-seven different instances I checked, every word he said was corroborated by witnesses the State of Arkansas put on that witness stand."

There was no objection made to that statement at the time it was made; but after the jury had retired[2]

[2]Two pages after the foregoing quoted statement of the Prosecuting Attorney, the transcript shows that the Prosecuting Attorney had concluded his argument and the Court said: "Gentlemen, the reporter will prepare a form of verdict for you to use in this case. If you find the defendant guilty, your foreman, whom you will select, will sign the first form after inserting in the blank space provided the amount of punishment you agree upon not less than three nor more than twenty-one years. If you find him not guilty, your foreman will sign the second form. You may now retire to the jury room to consider your verdict.

"(IN ABSENCE OF THE JURY):

"MR. LESSENBERRY: I want to object to the remark of the prosecuting attorney stating he had personally checked several instances of corroborating Lee Goolsby's statement: that such a statement from the prosecuting attorney becomes so personal and very persuasive with the jury, is highly prejudicial; it cannot be overcome by an admonition of the Court.

"MR. HARRISON: These are points I checked in the case as

the appellant made an objection. The point is now urged that the Prosecuting Attorney was telling the jury that there were forty-seven different instances of corroboration which he knew about. The appellant insists that this is like the case of the Prosecuting Attorney making a remark about evidence which is not in the record. For instance, in *Hughes* v. *State,* 154 Ark. 621, 243 S. W. 2d 70, the Prosecuting Attorney said: "I have examined the testimony and know so much about it and know things that never get to anybody else." We held that such a remark by the Prosecuting Attorney in his argument to the jury was highly improper and reversed the judgment, saying: "Coming from a sworn official the remark was calculated to make a deep impression upon the minds of the jurymen." Some other cases on improper argument are *Todd* v. *State,* 202 Ark. 287, 150 S. W. 2d 46; and *Simmons & Flippo* v. *State,* 233 Ark. 616, 346 S. W. 2d 197.

In the case at bar, if the remark by the Prosecuting Attorney was intended to mean that the Prosecuting Attorney knew of forty-seven different instances of corroboration which might not have been shown in the evidence, then of course the remark was improper and most certainly the Court would have ordered it stricken, if objection had been made at the proper time. But if the remark of the Prosecuting Attorney merely meant that in the evidence as developed before the jury there were forty-seven different items of Goolsby's testimony which various witnesses had corroborated in the evidence, then of course the remark was not improper. If objection had been made at the proper time, clarification could have been ordered; but from the record as we have examined it and copied it, it appears that the appellant waited until after the jury had retired before he even made any objection on the point; and we hold that such objection came too late and the point cannot now be urged.

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the evidence developed, your honor. He had the same opportunity to check them as I did.

"COURT: Overruled. Exception noted."

IV. *Other Points.* Other assignments in the motion for new trial are urged for reversal of the judgment. We have examined all of them and find none to possess merit.

Affirmed.

RENO AND STARK *v.* STATE

5211 406 S. W. 2d 372

Opinion delivered October 3, 1966

Leon Reed & *C. E. Blackburn,* for appellant.

Bruce Bennett, Attorney General; *Lance Hanshaw,* Asst. Atty. Gen., for appellee.

GEORGE ROSE SMITH, Justice. In November, 1962, the appellants, Reno and Stark, and their wives formed a corporation for the purpose of engaging in the business of building houses. The company never prospered and finally filed a petition in bankruptcy on October 21, 1964. Within the next few weeks a number of materialmen's liens were filed against a house that the company had built for Mr. and Mrs. S. G. Banks. In September of 1965

the prosecuting attorney filed an information against Reno and Stark charging them with having failed to discharge the liens, in violation of Ark. Stat. Ann. § 51-640 (Supp. 1965). Upon trial the accused were found guilty and sentenced to a fine and imprisonment.

Reno and Stark attempted to prove, as their defense to the charge, that they had no intent to defraud the Bankses. That intent is now an essential element of the offense. An earlier statute, which lacked that requirement, was declared to be unconstitutional. *Peairs* v. *State,* 227 Ark. 230, 297 S. W. 2d 775 (1957).

In the course of the defendants' testimony they offered to show that the contract price for the Banks house was too low, so that the builders sustained a financial loss in the transaction. The court excluded this evidence, as follows:

> The Court: I don't believe that would be material here, whether or not he made any profit or whether he lost money. The charge here is . . . failure to satisfy and discharge these liens after he had been paid the contract price.
>
> Mr. Blackburn: Yes, sir, with the intent to defraud. I thought it would show the lack of intent to defraud.
>
> The Court: No, sir, I don't think so.
>
> Mr. Blackburn: Note my exceptions.

This was error. The court's ruling would have been right under the earlier statute, had it been constitutional. But the intent to defraud is now a necessary element in the offense. If the jury had believed the defendants' proffered proof that their insolvency and consequent failure to satisfy the liens resulted from inexperience, which led them to make improvident contracts, the jury might have found that there was in fact no intent to defraud. Hence the evidence was relevant and should have been admitted.

One other point, argued in the briefs, may arise upon a new trial. In the present statute the first sentence defines the offense, in substance, as the failure to apply payments under the contract to the discharge of the liens, with the intent thereby to defraud the owner. The second sentence then attempts, in the following language, to declare that proof of certain facts shall be prima facie evidence of the intent to defraud:

> In any prosecution under this act . . . when it shall be shown in evidence that any lien for labor or materials existed in favor of any mechanic, laborer or materialmen and that such lien has been filed within the time provided by law in the office of the circuit clerk . . . and that such contractor . . . has received payment without discharging the said lien to the extent of the funds received by him, the fact of acceptance of such payment without having discharged the same lien within ten days after receipt of such payment or the receipt of notice of the existence of such lien, whichever event shall occur last, shall be prima facie evidence of intent to defraud on the part of the person so receiving payment. Ark. Stat. Ann. § 51-640 (Supp. 1965).

At the first trial the court read the statute to the jury. Counsel now contend that the statute, or at least the sentence just quoted, is unconstitutional for the same reason that the earlier statute was struck down in the *Peairs* case, *supra.*

We need not decide the issue of constitutionality, for the appellants' contention can be sustained upon a narrower ground. We have frequently held, as in *Blankenship* v. *State,* 55 Ark. 244, 18 S. W. 54 (1891), that the court commits reversible error in telling the jury that proof of a certain fact is sufficient to support a conviction. More recently, in *Thiel* v. *Dove,* 229 Ark. 601, 317 S. W. 2d 121 (1958), we pointed out that "it is clearly improper for the court to tell the jury that a specific fact in evidence is sufficient to support an inference of

guilt, negligence, or the like. [Citing cases.] It is for the jury to say whether the particular inference *should* be drawn from all the proof in the case, and consequently the court comments on the weight of the evidence when it declares that a certain inference *may* be drawn from a specific fact." (Original italics.)

Under this principle the second sentence in the act now before us should not in any case be read to the jury, for it involves a comment on the evidence. Inasmuch as the prohibition against comments on the evidence is set forth in our constitution, Article 7, § 23, the legislature cannot by statute empower the trial judge to make such a comment.

We find no other error that is apt to recur upon a new trial.

Reversed.

HARRIS *v.* SCHICKER CONST. CO.

5-3928 407 S. W. 2d 114

Opinion delivered October 3, 1966

[Rehearing denied November 14, 1966.]

Patten & Brown and *Robert O. Levi,* for appellant.

Wright, Lindsey & Jennings, for appellee.

George Rose Smith, Justice. This is an action by the appellant, a subcontractor, against the prime contractor and its bondsman to recover a balance due the plaintiff upon a school construction job at Arkadelphia. The case was submitted to the jury upon general instructions and two specific interrogatories. Owing to some slightly obscure allegations in the pleadings the parties are not in agreement about the judgment that should be entered upon the jury's answers to the interrogatories. The trial court awarded the plaintiff a judgment for $1,500. The plaintiff-appellant contends that the amount should be raised to $2,850, while the defendant-appellee contends on cross appeal that the amount should be reduced to $345.91.

Harris's complaint alleges that he and the Schicker company entered into a subcontract by which Harris agreed to erect the iron framework for the building at a contract price of $6,700, upon which there is an unpaid balance of $1,350. In addition, the complaint alleges that Harris did extra work for which he should receive $6,670.94, making a total claim of $8,020.94. The complaint then goes on with this paragraph, which led to the present dispute:

> The defendant Schicker Construction Company, Inc., has alleged that certain offsets of value of $2,504.09 are due against the charges and contract sum aforesaid, and the plaintiff, although denying that in fact any offset or counter-charges are due to the defendant Schicker Construction Company, Inc., but for the purpose of this lawsuit and in order to give defendant Schicker Construction Company, Inc., the benefit of questionable charges or claims, reduces his claim, after allowance of $2,504.09, to $5,516.85, and further claims the 12 per cent penalty and reasonable attorney's fee against the defendant, United States Fidelity & Guaranty Company.

The defendant filed an answer and a counterclaim, which contained these two paragraphs:

> They admit that Schicker Construction Company, Inc., has a claim against the plaintiff in the sum of $2,504.09, but they deny that the said charges are questionable, deny that plaintiff is entitled to recover any sum whatsoever and deny that plaintiff is entitled to any penalty or attorney's fee.
>
> * * * *
>
> Ray Harris failed and refused to perform the said written contract in its entirety and failed to perform other portions of the contract in accordance with its terms, thereby breaching the said contract and causing damage to Schicker Construction Company, Inc., in the amount of $2,504.09, as set out in the complaint of the plaintiff. Plaintiff has admitted the said claim in the amount of $2,504.09, but contends that the said amount should be used to reduce a claim of the plaintiff. Since the plaintiff does not have any valid claim against Schicker Construction Company, Inc., to offset any part of the said sum of $2,504.09, Schicker Construction Company, Inc., is entitled to recover the said sum of $2,504.09 from the plaintiff.

Harris filed a reply in which he denied all of the defendants' material allegations "and specifically denies that any admission has been made in the pleadings of the plaintiff or by the plaintiff that any sum is due Schicker Construction Company by failure of Ray Harris to perform any and all agreements that may have existed between Schicker Construction Company, Inc., and Ray Harris."

At the trial many witnesses were called. Both Harris's claim to compensation for extra work and Schicker's claim to damages for Harris's errors and omissions were disputed issues of fact. Both issues were submitted to the jury. At Schicker's request the court instructed the jury that Schicker had the burden of proving its

right to recover on the counterclaim and that if Harris had breached the written contract either by a failure to perform or by improper performance the jury should determine the amount of Schicker's damages.

By agreement of counsel the case went to the jury on two interrogatories which we quote, with the answers:

> What amount, if any, do you find that the plaintiff is entitled to recover for extra work not included in the written contract? $1,500.00.
>
> What amount, if any, do you find that Schicker Construction Company has been damaged by reason of the breach of contract, if any, by Harris Erection Service? None.

As we have said, the court awarded Harris a judgment for $1,500—the amount fixed by the jury under the first interrogatory. On the record now before us the contract balance of $1,350, owed by Schicker to Harris, is an undisputed item. That is, this amount is admittedly unpaid, and even though there was conflicting testimony about whether Harris had failed to perform his contract, that issue was not submitted to the jury under either of the two interrogatories. If it should be argued that the question of Harris's breach of contract was submitted to the jury by the instruction that we have mentioned, the answer is that that instruction related only to the counterclaim, and the jury found in Harris's favor upon that branch of the case.

Harris contends that since the contract balance of $1,350 is admittedly unpaid, and since by the language of the first interrogatory the verdict for $1,500 was for "extra work not included in the written contract," he is entitled to recover $2,850. Schicker does not dispute this contention, but it insists that there must be deducted from the $2,850 the item of $2,504.09 mentioned in the pleadings, leaving a net judgment of only $345.91.

We think the plaintiff's position to be correct. We

do not construe Harris's pleadings as containing an unqualified admission that he owed Schicker $2,504.09 no matter what his recovery proved to be under his own complaint. His attorneys evidently knew that they could recover the statutory penalty and attorney's fees from the insurance company only if they recovered the full amount sued for. Hence, as a precautionary measure, they conceded Schicker's claim solely as an offset against the upper $2,504.09 of Harris's own claim. If there is any ambiguity in the complaint the matter is set clearly at rest by the reply, with its specific denial of any admission by Harris of liability to Schicker for nonperformance of the contract.

The jury was not concerned with the state of the pleadings. If the jury had found—and there was nothing in the instructions to preclude such a finding—that Harris was entitled to recover his entire claim of $6,670.94 for extra work and that Schicker was due nothing upon the counterclaim, Harris would have been entitled to a judgment for only $5,516.85 instead of $8,020.94. This is because with respect to that very situation Harris had waived the upper $2,504.09 of his asserted cause of action. But when it turned out that Harris's total recovery was fixed at only $2,850 the waiver was of no effect, for Harris's pleadings cannot fairly or reasonably be construed to mean that he conceded the merits of the counterclaim with respect to such a verdict.

Reversed on direct appeal; affirmed on cross appeal.

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

PAUL WARD, Justice, dissenting. There are several respects in which I am unable to agree with the majority opinion.

One. On page 3 of the opinion it is stated: "Both Harris's claim to compensation for *extra work* and

Schicker's claim to damages for Harris's errors and omissions were *disputed issues* (emphasis mine) of fact. Both issues were submitted to the jury." The rest of the opinion is apparently based on the above quoted statement which is true insofar as it goes—which statement is, however, only part of the truth. It is also true that it was a *disputed issue* whether Schicker owed Harris the balance of $1,350 (or any amount) on the written (or original) contract. This can be verified by reading the testimony of William C. Reynolds, Frank Bowers, G. W. Lashlee, W. T. McNutt, and E. B. Schicker, Jr.—all as abstracted by appellant himself. Not only so, but Instruction No. 3 (Tr. 403) presents that same *disputed issue* to the jury.

Two. In appellant's Motion for a new trial (set out at pages 15 to 19 of his brief) there appears this paragraph:

> "4. That after the jury returned answers to the interrogatories, counsel for both parties appeared before the trial judge on or about July 9, 1965, and presented the understanding of each party as to the agreement under which the cause was submitted upon interrogatories."

Following the above appellant sets out his version of the "agreement"—it being admitted no written record was made. The trial court heard the evidence presented on the Motion and denied the same. In my opinion this settles the issue. In *Sellers* v. *Harvey,* 220 Ark. 541, we said:

> "Another settled rule is that the motion is addressed to the sound discretion of the court and this court will not reverse for failure to grant it unless an abuse of such discretion is shown."

No such abuse is pointed out by the majority.

Therefore, it seems to me that the majority has

usurped the function of the trial court which found that there was no misunderstanding between the parties when the case was presented to the jury.

The case was fully developed, the jury was correctly instructed, the Motion for a new trial was properly overruled, therefore I think the jury verdict should be accepted and the judgment affirmed.

HARRIS, C. J., joins in dissent.

NELSON *v.* STATE

5202 406 S. W. 2d 383

Opinion delivered October 3, 1966

E. V. Trimble, for appellant.

Bruce Bennett, Attorney General; *Lance Hanshaw,* Asst. Atty. Gen., for appellee.

PAUL WARD, Justice. This is an appeal from a finding by the trial judge that the confession [introduced at a former trial] of appellant, James S. Nelson, was voluntary.

On November 15, 1964 appellant was convicted of

robbery and sentenced to serve twelve years. The conviction was appealed to this Court and on September 13, 1965 we remanded the cause to determine the voluntariness of appellant's confession of guilt—in line with the holding of the United States Supreme Court in *Jackson* v. *Denno*, 378 U. S. 368, 12 L. Ed. 2d 908. For further details see *Nelson* v. *State,* 239 Ark. 678, 393 S. W. 2d 614, decided September 13, 1965.

Upon remand to the trial court for the purpose above stated a hearing was held before the trial judge on November 17, 1965. At the conclusion of the hearing [three police officers testified] the trial judge held appellant's confession was voluntary.

From the above holding appellant now prosecutes the present appeal and, for a reversal, urges two points.

One. It is contended that the first confession of appellant does not "meet the legal requirements as to the voluntariness as applied in the *Escobedo* case." The essence of this contention appears to be that it was encumbent on the State to show not only that the confession was voluntary but also to show appellant was not deprived of counsel.

We find no merit in this point. The uncontradicted evidence shows appellant made two written confessions of his own volition; that appellant was not subjected to any kind of duress or pressure; that he was told he didn't have to make a statement if he didn't want to do so, and; that he could have an attorney if he desired one. Under that state of the record the trial judge was correct in holding the confession to be voluntary. See: *Mullins* v. *State,* 240 Ark. 608, 401 S. W. 2d 9, decided April 4, 1966.

Two. Finally appellant says it was reversible error for the trial judge to hold two of the written confessions to be voluntary and at the same time hold a third one to be involuntary. We do not agree. It appears

that the "third" confession may have been made at a time when the investigation had reached the accusatory stage, but the record reveals also that this confession was not introduced in evidence on the original trial.

Affirmed.

BOONE CO. BOARD OF ED. *v.* HARRISON SCHOOL DIST. NO. 1

5-3937 406 S. W. 2d 365

Opinion delivered October 3, 1966

Williams & Gardner, for appellant.

Fitton & Meadows, for appellee.

GUY AMSLER, Justice. This case involves a dispute over some 600 to 700 acres of land that each district involved desires to have within its boundaries. The acreage had a taxable value of approximately $52,000.00 and 8 pupils were residing thereon in 1965.

In January of 1965 the directors of Bergman School District (called Bergman herein) petitioned [Ark. Stat. Ann. § 80-412 (Repl. 1960)] the Boone County Board of Education (hereinafter called County Board) for a boundary line change.

Directors of the Harrison School District (called Harrison) refused to agree and the County Board acting pursuant to authority given it under Ark. Stat. Ann. § 80-412, supra, fixed the boundary line so that the disputed area was transferred to Bergman.

Harrison appealed to the Circuit Court of Boone County and that court reversed the County Board—basing its conclusion on our decision in *School District No.* 10 v. *County Board of Education,* 185 Ark. 328, 47 S. W. 2d 606. Bergman and County Board have appealed.

The only point relied on by appellants for reversal is:

> "That the lower court erred in holding that the area of land involved in the Board of Education's modification of boundary lines was substantial."

The learned trial judge determined that the change in boundary line was of a substantial nature and that therefore the action of County Board was void. In *School District No.* 10 v. *County Board of Education, supra,* we said:

> "No notice was given of the proposed change of the boundaries amounting to annexation of territory, in accordance with said § 44, [Ark. Stat. Ann. § 80-404 (Repl. 1960)] nor any petitions presented or election held for that purpose, and the county board was without jurisdiction or authority to make the order changing the boundary lines, in effect taking a very substantial part of the territory of one district and annexing it to the other under the guise and procedure as for a change of boundary lines only."

Since the General Assembly has not, subsequent to the above decision, provided the courts a yard stick for determining what constitutes boundary changes of a

"substantial nature" we are not disposed to override the trial court's conclusion.

Affirmed.

INTL. HODCARRIERS LOCAL 1282 *v.* CONE-HUDDLESTON

5-3929 406 S. W. 2d 366

Opinion delivered October 3, 1966

H. Clay Robinson, for appellant.

Lightle & Tedder, for appellee.

HUGH M. BLAND, Justice. The question to be determined by this appeal is whether the White County Chancery Court had jurisdiction to enter an injunction against appellant, or was original and exclusive jurisdiction in the National Labor Relations Board.

Appellee was a general contractor and had contracted to construct the White County Hospital at

Searcy, Arkansas. The building of the hospital was to be financed by the sale of bonds in the amount of $600,000.00 by White County and matching Federal funds. After construction was commenced and on or about October 22, 1965 appellants demanded that appellee execute a contract negotiated between the Associated General Contractors, Arkansas Chapter, and appellants and pay the wage scale set out therein. The appellee refused to do this and on or about October 29, 1965 appellants established pickets on the project and construction ceased. The next day appellee obtained a temporary restraining order on the ground that the picketing was in violation of Arkansas' "right-to-work law" [Ark. Stat. Ann. § 81-201-203 (Repl. 1960) and Amendment 34 of the Arkansas' Constitution]. Appellants filed a motion to dissolve the temporary order and the cause was heard on November 7, 1965. Under the evidence adduced at the hearing the chancellor found that the court had jurisdiction to grant an injunction to prevent a violation of the Arkansas "right-to-work law" and against picketing to obtain an unlawful objective. The court further found that the purpose of the picketing was to coerce appellee to sign a union contract and to coerce its employees to join appellant's union. The temporary order was made permanent, however, the chancellor dissolved the restraining order allowing picketing as a means of informing the public that appellee was paying substandard wages. From this holding appellant has appealed.

It was stipulated that appellee had an inflow and/or outflow of materials or services in interstate commerce of $50,000.00, or more than sufficient to put it under the jurisdiction of the National Labor Relations Act. *Guss* v. *Utah Labor Relations Board,* 353 U. S. 1 (1957). Other testimony in the record is immaterial since the only issue is jurisdiction.

Appellants contend 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 White County Chancery Court was thus with-

out jurisdiction, relying on such authorities as *Mitcham* v. *Ark-La Construction Co.,* 239 Ark. 1162, 397 S. W. 2d 789, decided by this court on December 20, 1965; *San Diego Bldg. Trades Council* v. *Garmon,* 359 U. S. 236 (1959); *Local* No. 438, *Construction & General Laborers Union, AFL-CIO* v. *Curry,* 371 U. S. 542 (1963).

In the *Mitcham* v. *Ark-La Construction Co.* case, *supra,* which was decided subsequent to the decree of the White County Chancery Court, we held that where the activity was arguably within the compass of § 7 or § 8 of the Act, the state courts were without jurisdiction to act. Citing *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236 (1959) and *Radio & Television Broadcast Technicians Local Union No.* 1264 v. *Broadcast Service of Mobile, Inc.,* 380 U. S. 255 (1965). In the case of *Local No.* 438 v. *Curry, supra,* the employer brought an action in a Georgia State Court seeking an injunction against the union, alleging that the union was picketing for the purpose of coercing the employer into hiring only union labor in violation of the Georgia "right-to-work" statute. The union argued that the National Labor Relations Board had exclusive jurisdiction. On appeal the Georgia Supreme Court affirmed. On appeal, the U. S. Supreme Court reversed, holding:

> " * * * The allegations of the complaint, as well as the findings of the Georgia Supreme Court, made out at least an arguable violation of § 8 (b) of the National Labor Relations Act, 29 U.S.C. § 158 (b). Consequently, the state court had no jurisdiction to issue an injunction or to adjudicate this controversy, which lay within the exclusive powers of the National Labor Relations Board. * * * Nor is the jurisdiction of the Georgia courts sustainable, as respondents urge, by reason of the Georgia right-to-work law and by § 14 (b) of the National Labor Relations Act, 29 U.S.C. § 164 (b). This precise contention has been previously considered and rejected by this Court. *Local Union* 429 v. *Farnsworth & Chambers Co.* 353 U. S. 969, reversing 201 Tenn.

329, 299 S. W. 2d 8. The Georgia Supreme Court clearly exceeded its power in authorizing the issuance of a temporary injunction." 371 U. S. at pp 546, 547, 548.

In *San Diego Building Trades Council* v. *Garmon, supra*, the U. S. Supreme Court held:

> "The case before us concerns one of the most teasing and frequently litigated areas of industrial relations, the multitude of activities regulated by §§ 7 and 8 of the National Labor Relations Act. 61 Stat. 140, 29 U.S.C. §§ 157, 158. These broad provisions govern both protected 'concerted activities' and unfair labor practices. They regulate the vital, economic instruments of the strike and the picket line, and impinge on the clash of the still unsettled claims between employers and labor unions." 359 U. S. at p. 241.

> " * * * When an activity is arguably subject to § 7 or § 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. * * * 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 national labor policy." 359 U. S. at pp 245-46.

We cannot speculate what action the National Labor Relations Board will take in this dispute, but the Board must first try or reject the case before a state court may act. We, therefore hold that the White County Chancery Court was without jurisdiction to enter the injunction and the decree is reversed and the cause dismissed.

Reversed and dismissed.

BOOTH ET UX *v.* MASON ET UX, ET AL

5-3947 406 S. W. 2d 715

Opinion delivered October 10, 1966

Harold C. Rains Jr., for appellants.

N. D. Edwards and *Gean, Gean & Gean,* for appellees.

CARLETON HARRIS, Chief Justice. Roscoe R. Booth and Nellie Booth, his wife, came to Arkansas in July, 1960, from the state of Oregon for the purpose of locating in this state. The Booths desired to purchase a farm, and contacted Roy Taylor, a real estate dealer, living at Alma, Arkansas. Mr. Booth requested Taylor to find a place, and Taylor contacted Curtis Mason and wife, and a Mr. Jennings (who owned a farm adjoining that of Mason), and these people agreed to sell their farms. Taylor showed Booth over the properties, and the lat-

ter made a $500.00 down payment, the total purchase price to be $30,000.00, of which the Masons would receive $25,000.00, and Jennings would receive the sum of $5,000.00. On August 16, 1960, Booth gave his check in the amount of $29,500.00 to Taylor in full payment, and received deeds to the property. On July 22, 1965, the Booths instituted suit against the Masons,[1] Taylor, and the Trustees of the Chastain Church of Christ, the complaint containing various allegations.

It was first alleged that the Booths purchased the Mason property with the understanding that it contained 136 acres, but they actually received by deed only 125 acres, and it was asserted that they had been damaged, by reason of the fraudulent and false representations, in the sum of $183.80 per acre, or a total of $2,021.80. Next, it was asserted that the Booths had paid an additional $1,425.68 because part of the property was included in the Soil Bank, and they were told that they could not obtain immediate possession unless this payment were made, since Mason had not received the Soil Bank check; appellants contended that, as owners, they were to receive the check, and should not have been required to make the additional payment. It was further asserted that, after accepting the down payment on the land, the Masons had executed a deed to a third person for 7/10 of one acre, which land was supposed to go to the Booths under the agreement. Count Four alleged that taxes in the amount of $120.05 for the year 1960 had not been paid; that appellants were compelled to pay this amount and should recover it from the Masons. Finally, it was contended that the sale included certain land, which was being claimed by the Chastain Church of Christ, and it was prayed that title be confirmed in appellants, as against the trustees of the church; further, that they were entitled to receive the fair rental value of this property from the Masons; in the alternative, if it were held that the property belonged to the church, appellants asked that they be given judgment

[1]Apparently appellants were satisfied as to the land purchased from Jennings, since he was not included in the suit.

against the Masons in the amount of $229.75, the asserted value of this particular part of the land.

The Masons answered with a denial of the allegations, and further contended that every item in the complaint was barred by the statute of limitations and laches. Taylor demurred to the complaint, as not stating a cause of action against him, and the trustees of the church answered, contending that they were the owners of a particular 1¼ acres, wherein the church was located; that the Booths held no interest, and they asked that title be quieted in them.

The court sustained the Taylor demurrer, and, since there has been no appeal from that order, Taylor is no longer involved in this litigation. After hearing only the evidence offered by appellants, the court dismissed all counts of the complaint as to the Masons. Evidence was then offered by the Chastain Church Trustees, and the court dismissed appellants' complaint, and on the cross-complaint, quieted title in the 1¼ acres at issue in them. From the decree so entered, appellants bring this appeal.

We think the court was right in dismissing the first count. For one thing, though the complaint alleges that a written contract was entered into, it does not appear that there was such a writing. Mr. Booth, when asked if he had signed a contract, or "Offer and Acceptance," with Taylor, replied, "He made out a slip. I never did get a copy of the slip." This is the only testimony relating to any sort of writing. It is, of course, evident that no agreement was executed by the parties, and there is never any explanation of what the "slip" contained; for that matter, Taylor might simply have been making a memorandum for his own benefit. At any rate, there is no written contract in evidence, and if the agreement was oral, the cause of action was barred after three years. Ark. Stat. Ann. § 37-206 (Repl. 1962). However, there are additional reasons why appellants' contention on this point is without merit. Admittedly, Mason made no representations to Booth at all about the number of

acres contained in the farm; rather, Booth stated that this representation was made by Taylor,[2] and he asserts that Taylor was Mason's agent. The testimony on this point is rather indecisive. Here again, the evidence shows that Booth contacted Taylor, and asked the latter to locate a suitable farm. The record reflects the following testimony relative to the matter of agency: "Q. Now Mr. Taylor, you did find him a place and he eventually bought the Jennings and the Curtis Mason place? A. That is right. Q. Were you paid a commission for the sale of these places? A. I was. Q. By whom? A. By Mr. Mason and Mr. Jennings. Q. Did you act for him during this sale in preparing all the papers and carrying out the transaction? A. I did."

It is thus not at all clear whom Taylor represented (perhaps both). However, the matter of agency is really immaterial since it does not appear that appellants purchased this place on the basis of acreage, but simply bought it as a unit—in gross. When asked if he purchased the property by the acre, Mr. Booth unequivocally declared, "I did not. I bought it as a place." The deed itself makes no mention of the number of acres, and the Booths accepted the deed. For that matter, there is no competent evidence in the record that the Mason farm did not contain 136 acres. Mr. Booth testified, "That is what I am told." He then stated that he had measured the land himself, but Mr. Booth is not a qualified surveyor, and his answers to the questions relating to the measurements revealed that he worked from an erroneous premise.

Actually, Booth's testimony on this point indicated that, if he had a cause of action against anyone, it was Taylor, but the court sustained Taylor's demurrer, and no appeal was taken.

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[2]Taylor, who also testified on behalf of appellants, emphatically denied that he had made any representations at all about acreage.

At the time of the sale, a portion of the property was in the Soil Bank, and the Soil Bank payment for the preceding year had not been paid. On August 16, 1960, the date of the deed, Booth testified that Mason said he (Mason) would have to "hold up the title on it until he got that Soil Bank check."[3] Booth, desiring immediate possession, paid Mason $1,425.68, which was the amount that Mason was due to receive under the Soil Bank payment program. There are several reasons why this point is without merit; suffice it to say, the payment appears to have been voluntarily made by Booth in order to enable him to get immediate possession.[4]

There is no need to discuss Point Three, which relates to the 7/10 of an acre deeded to a third party, since Mr. Booth stated that he was willing to "leave it like it is."

The fourth allegation was based on the fact that the 1960 taxes on the Mason property in the amount of $120.05 for the year 1960 had not been paid. Appellants, having paid the amount, assert that they are entitled to reimbursement. It will be remembered that the conveyance from the Masons to the Booths was executed on August 16, 1960, and *the* 1960 *taxes were not due to be paid until the third Monday in February,* 1961. The 1959 taxes, due in 1960, had apparently been paid. In the absence of a specific agreement to the contrary, appellants were obligated to pay the 1960 taxes, since these taxes were not due at the time the transaction between the Booths and Masons was completed.

As to Count Five, we think appellees, Trustees of the Chastain Church of Christ, clearly established their right to the property in question by adverse posses-

[3]The complaint alleged that Curtis Gardner, "the government representative of said soil bank," informed Booth that the transaction could not be completed until the soil bank check was received.

[4]Booth, as the owner, would have normally received the Soil Bank payment, which, of course, had been earned while Mason was the owner. The record does not reflect who subsequently received the check.

sion, and it is accordingly unnecessary to discuss other defenses raised by them. The testimony reflected, without dispute, that the property had been used as a church, at least, since October, 1947. It is fenced on the east and south (such fences being clearly evident when Booth first saw the property), with a road on the north and west sides. Though Booth contends that this land was included in his purchase in 1960, he made no complaint, nor questioned the right of the people who were using the church, until 1965. One wonders why the Booths waited nearly five years to institute their complaint (on all counts); for instance, the complaint alleges that they discovered the "shortage" in acreage "some months" after the transaction was concluded.

However, we think the court erred in dismissing the alternative prayer in the complaint relative to the 1¼ acres without hearing further proof. It is admitted that the description used in the warranty deed from the Masons to the Booths included the approximately 1¼ acres, comprising the church property. The Masons assert, in their brief, that a mutual mistake was made, in that the draftsman of the deed, the Commercial Bank of Alma, made an error in describing the lands; that Mr. Booth knew full well that the church property was not to be included in the purchase. It is true that Mr. Taylor testified that he had told Booth he was not buying the "church property," and Taylor also testified that no consideration was paid for that portion of the lands. Still, Booth testified emphatically that he was told that this 1¼ acres was a part of the property appellees were buying. Here, the statute of limitations does not come into play, for actions on writings under seal are not barred until five years after the cause of action accrues. Since the deed included the church property, appellants' count, based upon a breach of warranty is not barred. There is no *evidence* in this record relating to the deed, *i. e.*, who prepared it, if a mistake was made, or if so, why such a mistake was made. The action for breach of warranty, not being barred by limitations, and there being testimony (by Mr. Booth) that he was sup-

posed to receive the 1¼ acres under the sale, it was error for the court to dismiss this phase of the litigation at the conclusion of appellants' testimony. See *Werbe* v. *Holt*, 217 Ark. 198, 229 S. W. 2d 225.

Accordingly, the court's decree dismissing appellants' complaint is reversed insofar as it relates to the alternative prayer in appellants' complaint, *i. e.*, the matter covered in the previous paragraph of this opinion. In all other respects, the decree is affirmed.

It is so ordered.

BLAND, J., disqualified and not participating.

FIRST STATE BANK, GDN. *v.* THESSING ET AL

5-3913 406 S. W. 2d 865

Opinion delivered October 10, 1966

Clark, Clark & Clark, for appellant.

Robert W. Henry, for appellee.

ED. F. MCFADDIN, Justice. This appeal challenges

the judgment of the Probate Court which allowed two claims against the estate of Mrs. Frances Enderlin, a person of unsound mind.

In April 1965 the appellant bank was duly appointed guardian of the estate (but not of the person) of Mrs. Enderlin; and in July 1965 these two claims were filed. The claimants are Miss Thessing and Mrs. Finkbeiner, who are sisters of Mrs. Enderlin; and the claims are amounts paid by the claimants in 1963 and 1964 to doctors, drug stores, hospitals, and nursing homes, for Mrs. Enderlin. The evidence established that Mrs. Enderlin had been separated from her husband for more than twenty years. He continued to live in her home, while she lived in a small rented house a few blocks away. Her husband and son did not care for her as they should have; and her two sisters, the claimants, were continually aiding her. In 1963 Mrs. Enderlin became ill and her two sisters obtained treatment for her. She was first placed in a hospital in Conway, then transferred to a hospital in Little Rock, and then to a nursing home, where she remained until committed to the Arkansas State Hospital where she is still confined. During the time of her illness, and prior to her adjudication, the two claimant sisters paid the following amounts for Mrs. Enderlin; and these are the claims, the allowance of which is here contested:

Paid by Miss Thessing:		
Conway Memorial Hospital	$ 49.90	
Arkansas Baptist Hospital	301.75	
Newman Nursing Home	187.00	
Dr. William Snodgrass	19.00	$ 557.65
Paid by Mrs. Finkbeiner:		
Dr. Drew Agar	$ 36.00	
Dr. William K. Jordan	85.00	
Dr. Alfred Kahn	115.00	
Ellis Ambulance	10.00	
Arkansas Baptist Hospital	60.00	
Our Lady of Nazareth Home	1,572.40	$1,878.40

From the judgment of the Probate Court allowing these claims, the bank, as guardian, and Mr. Enderlin and Raymond Enderlin, as husband and son, respectively, of Mrs. Enderlin, prosecute this appeal and urge three points, which we consider in the order listed. They are:

> "1. The Probate Court erred in denying the motion to require the joinder of Frances Thessing Enderlin as a party to the hearing on the claims of Antoinette Thessing and Mrs. Paul Finkbeiner because Mrs. Enderlin was physically present within the State of Arkansas, no guardian had been appointed for her person, no personal service was had upon her, and the claims were, in essence, in personam claims for money allegedly advanced for her benefit.
>
> "2. The Probate Court erred in allowing any portion of the Thessing and Finkbeiner claims against Mrs. Enderlin's estate.
>
> "3. If any portion of the Thessing and Finkbeiner claims is to be allowed, the allowance should be limited to the costs of maintaining Mrs. Enderlin in the Arkansas State Hospital for the period of time herein involved."

I.

It will be recalled that the bank is guardian of the estate of Mrs. Enderlin: there is no guardian of her person. Nevertheless, it was insisted below, and is insisted here, that Mrs. Enderlin should have been personally served with process on these claims and the claims transferred to the Circuit Court for jury trial; and appellants cite Ark. Stat. Ann. § 27-337 (Repl. 1962) as to necessity of service of process on the insane person. The learned Probate Judge disposed of this point in a very concise Opinion, which we copy:

"As to the claim of intervenors[1] that the probate

[1]That is, Mr. Enderlin and his son.

> court has no jurisdiction, assuming that intervenors have the right to raise the question, it is held that the election, if any, as to the court used for prosecution of this claim is with the claimant and not with the estate of the incompetent or persons contingently interested in the estate. It is true that the claimants could have filed suit in circuit court on these claims, but they did not elect to do so. The following sections of the Arkansas statutes seem conclusive on this subject: § 57-626, § 57-627, § 57-637. Neither the Arkansas nor the Federal Constitution require jury trials of guardianship matters, since the right to trial of these issues to a jury did not exist at common law. *Schuz* v. *Peoples National Bank,* 215 Ark. 796; *Sharum* v. *Meriweather,* 156 Ark. 331, anno. 91 ALR 88; 31 Am. Jur. 'Jury' Section 30."

Ark. Stat. Ann. § 57-637 (b.) (Supp. 1965) is particularly clear on the point urged, and we copy it:

> "b. CLAIMS WHICH MAY BE PRESENTED. Upon the petition of any person having a claim against the estate of a ward for services lawfully rendered to the ward or his estate or necessaries furnished to him or for the payment of a lawful liquidated claim or demand against the estate of the ward, the court may, after notice, upon appropriate hearing, direct the guardian to pay such claim."

The claimants elected to file their claims in the probate court, as they had a right to do; and that court had jurisdiction to hear and allow the claims, as it did; so we find no merit in appellants' first point.

II.

We copy from appellants' brief their main argument on this point:

> "A. *Presumption Arising from Family Relationship.* The presumption is that services rendered by

members of the same family are gratuitous (*Williams* v. *Walden,* 82 Ark. 136, 100 S. W. 898), and the burden is on the claimant to establish otherwise. This holding appears to be extended to advances in *Meers* v. *Potter,* 208 Ark. 965, 188 S. W. 2d 500. Miss Thessing and Mrs. Finkbeiner both testified that strong bonds of affection existed between themselves and Mrs. Enderlin, their sister; that they had in the past advanced Mrs. Enderlin money without expectation of reimbursement; Mrs. Finkbeiner made her expenditures because of a desire to help Mrs. Enderlin; and that any sums spent by them were spent willingly and without fraud, duress, coercion, intimidation or deceit. Nothing in the record herein indicates that at the time of the alleged advances there was any expectation on the part of either party that there would be any reimbursement, thus reinforcing the above presumption."

We find absolutely no merit in this point. The husband and son of Mrs. Enderlin failed, after notice, to do anything substantial for her. The two claimant sisters came to her relief. There was no obligation on the claimants, because of family relationship, to do what they did. There is no presumption that their advances were gifts, and the evidence is to the contrary.

III.

Appellants' third point is likewise without merit. They claim that the expenses of Mrs. Enderlin at the Arkansas State Hospital are only $90.00 per month, which includes board, medical services, and doctor bills; that the amounts paid by the claimants for Mrs. Enderlin before she was committed to the State Hospital are far in excess of $90.00 per month; and that there is no evidence that the amounts so paid by the claimants were fair and reasonable; so the appellants argue that if the claims are to be allowed for any amounts, such allowances should not exceed a total of $90.00 per month.

The equities are all on the side of the claimants.

They paid every bill by check direct to the person or corporation rendering the service to Mrs. Enderlin; and all of the original checks were introduced in evidence and are in the transcript before us. Of course private hospital and medical care is more expensive than is such service at the State Hospital. Certainly the doctors, hospitals, nursing home, and druggist would not have been paid by these claimants unless and until the claimants were satisfied as to the fairness of such charges. It ill becomes the husband and son, who failed to care for this unfortunate lady, to question the amounts paid in good faith for her by her two sisters.

Affirmed.

OLSEN ET AL *v.* CITY OF LITTLE ROCK

5-3938 406 S. W. 2d 706

Opinion delivered October 10, 1966

Wright, Lindsey & Jennings, Philip S. Anderson Jr., for appellant.

Joseph C. Kemp and *Perry V. Whitmore,* for appellee.

GEORGE ROSE SMITH, Justice. This is a suit by the appellants to compel the city of Little Rock to rezone their property at 401 West Eighteenth Street. The lot

is now restricted to "C" Two-Family residential use. The city's administrative bodies denied the landowners' application to have the lot reclassified to "D" Apartment use. This appeal is from a decree upholding the city's decision.

In a case of this kind the chancellor should sustain the city's action unless he finds it to be arbitrary. No matter which way the chancellor decides the question, we reverse his decree only if we find it to be against the preponderance of the evidence. *City of Little Rock* v. *Garner,* 235 Ark. 362, 360 S. W. 2d 116 (1962). In this instance we are of the opinion that the decree is against the preponderance of the evidence.

The lot in question is separated by Spring Street from the grounds surrounding the Governor's Mansion The city's witnesses took the position that the public's investment in the Mansion could and should be protected by restricting all property within half a block of its grounds to "C" Two-Family use. (There are a few exceptions to this plan, owing to nonconforming structures that antedated the construction of the Mansion.)

The city's attempt to shelter the Manion must be weighed against three counterarguments toward which the landowners directed their proof. First, the city's refusal to rezone the lot imposes a financial hardship upon the landowners. This point is comparatively unimportant. We need say only that the testimony indicates that the vacant two-story house now on the lot cannot, in view of the size of the plaintiffs' investment, be profitably reconditioned or remodeled if the present zoning restrictions are continued.

Second, a disinterested study completed in 1963 supports the plaintiffs' contentions. That study was made by professional planning experts representing the city as well as the metropolitan area. It involved a section of the city comprising about a hundred blocks, bounded by Roosevelt, Chester, Fourteenth, and Cumberland.

The conclusion reached was that the section in question, in view of its nearness to downtown Little Rock, should be extensively rezoned to permit a greater density of population in the area. Specifically and significantly, the report that was made recommended that all the property surrounding the Mansion grounds be reclassified to "D" Apartment use. Most of the recommendations appear to have been followed by the city, but for some reason not disclosed by the testimony the ordinance that was eventually adopted provided for the protective two-family residential belt surrounding the Mansion grounds.

Third, both the necessity for that protective belt and its effectiveness are open to serious question. This section of the city is a comparatively old residential district, characterized by large houses built forty or more years ago. The district, owing to its proximity to the commercial center of the city, is no longer attractive to owners having the means to keep such big homes in first-class condition. Consequently boarding houses and similar semi-commercial enterprises are becoming more numerous. It is pretty clear from the testimony that the Governor's Mansion would suffer more from the intrusion of such establishments than from the construction of those relatively small apartments which alone are permitted under the "D" Apartment classification.

That the proposed rezoning will not adversely affect the neighborhood is confirmed by the complete absence of any protest on the part of other landowners in the area. Such apparently universal acquiescence in the proposal is decidedly unusual in zoning cases. Moreover, the Attorney General obtained a continuance in the court below to enable him to decide whether the State, as the owner of the Mansion, should protest the plaintiffs' request. No protest was made. It is fair to conclude that none of the neighboring property owners—the group who would suffer the greatest damage if the reclassification is contrary to the public interest—oppose the plaintiffs' petition. Upon the record as a whole we are

convinced that the weight of the evidence lies on the appellants' side.

Reversed.

WARD, J., dissents.

PAUL WARD, Justice, dissenting. In 1924 the legislature passed Act 6 (Ark. Stat. Ann. § 19-2804) which says: "It is recognized and hereby declared that the beauty of surroundings constitutes a valuable property right which should be protected by law . . . ." To carry out this wholesome mandate the City of Little Rock provides for a Planning Commission composed of trained men in the field of zoning. Anyone aggrieved by this Commission's action can appeal to the City Board of Directors, and then to Chancery Court.

In the case under consideration the Commission twice refused to rezone the subject property, the Board twice refused to overrule the Commission, and the Chancery Court refused relief. On appeal to this Court the rule by which we are to be guided was plainly stated, less than a year ago, in *City of North Little Rock* v. *Habrle*, 239 Ark. 1007, 395 S. W. 2d 751:

> "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."

In that case we also defined the word *arbitrary* as "decisive and unreasoned."

I find nothing in the majority opinion or in the record from which I can conscientiously say the Commission and the Board acted arbitrarily in attempting to protect the "beauty" of the "surroundings" of the Governor's Mansion. Certainly their actions cannot be called unreasoned.

MARSH ET AL *v.* CITY OF HOT SPRINGS

5-3973 406 S. W. 2d 714

Opinion delivered October 10, 1966

H. M. Campbell and *Farrell Faubus* and *Julian Glover* and *Catlett & Henderson,* for appellant.

Curtis L. Ridgway Jr. and *Dan McCraw,* for appellee.

GEORGE ROSE SMITH, Justice. In 1942 the city of Hot Springs acquired by condemnation, for airport purposes, the fee simple title to 134 acres of land owned by the five appellants. In 1950 the appellants brought this suit to recover the land, asserting that the city's failure to use the property for any public purpose had caused the title to revert to the condemnees. This appeal is from a decree dismissing the complaint for want of equity. (The record does not explain the long delay in the trial of the case.)

There are two answers to the appellants' contention that there was a reverter. First, in deciding in the

first instance whether a taking is for a public purpose the court may consider "not only the present demands of the public, but those which may be fairly anticipated in the future." *Woollard* v. *Ark. State Highway Commn.*, 220 Ark. 731, 249 S. W. 2d 564 (1952). The land now in question is not far from the runways at the municipal airport. The preponderance of the testimony shows that it is reasonable to expect that in the course of the city's normal growth this land will be needed to permit the airport to be enlarged. Thus even if the present question had been raised in the original condemnation proceeding, when it would have been timely, the court would have been justified in sustaining the city's position.

Second, there is ordinarily a reverter when the public abandons an easement, as for a street, but the rule is different when the landowner has been paid in full for the fee simple title, as in the case at bar. "When, however, a fee simple free from any easements or conditions is acquired, either by purchase or by the exercise of the power of eminent domain, if the use for which the land was bought or condemned is lawfully discontinued or abandoned, there is no reversion, and the corporation holding the land may leave it idle, or devote it to a different use, or sell it in the same manner and to the same extent as an ordinary private owner." Nichols, Eminent Domain (3d ed., 1965), § 9.36 [4].

Affirmed.

LOVE *v.* STATE FARM MUTUAL AUTO. INS. CO.

5-3968 407 S. W. 2d 118

Opinion delivered October 10, 1966

[Rehearing denied November 14, 1966.]

Ben D. Lindsey, for appellant.

Mahony & Yocum and *Cockrill, Laser, McGehee & Sharp,* for appellee.

PAUL WARD, Justice. This litigation concerns the meaning of certain provisions in an automobile liability insurance policy.

On July 20, 1963 Dan Love (appellant) was injured when his car collided with a 1955 Buick, owned and driven by Kenneth Sweet. Appellant sued Sweet and, on May 20, 1964 recovered a judgment for $8,500—no appeal taken.

On June 16, 1964 appellant, being unable to collect from Sweet, filed this suit against the State Farm Mutual Automobile Insurance Company (appellee herein) contending he was subrogated to the right of Sweet under an insurance policy which had been issued to him by appellee covering the 1955 Buick.

The matter was submitted to the jury, resulting in

a verdict in favor of appellee. Appellant now prosecutes this appeal for a reversal.

First, we are confronted with a motion by appellee to affirm on the ground appellant has not complied with this court's Rule 9 (d). We have concluded the motion must be affirmed.

The above Rule requires appellant to abstract such "material parts of the pleadings, proceedings, facts, documents, and other matters in the record as are necessary to an understanding of all questions presented to this Court for decision." Many times we have called attention to the fact that it is impracticable (if not impossible) for all the justices to read the entire record. We find, in this case, the abstract in appellant's brief does not provide such an understanding. There is no abstract of the complaint which consists of eight pages; of the answer which consists of seven pages; of the exhibits presented to the trial court consisting of eight pages, and there is no abstract of several orders of the court.

The conclusion which we have reached to affirm the judgment of the trial court is in conformity with the following decisions of this Court: *Ellington* v. *Remmel,* 226 Ark. 569, 293 S. W. 2d 452; *Griffin* v. *Mo. Pac. Rd. Co.,* 227 Ark. 312, 298 S. W. 2d 55; *Anderson* v. *Stallings*, 234 Ark. 680, 354 S. W. 2d 21; *Vire* v. *Vire,* 236 Ark. 740, 368 S. W. 2d 265; *Weir* v. *Hill,* 237 Ark. 922, 377 S. W. 2d 178, and; *Hurley* v. *Owens,* 238 Ark. 874, 385 S. W. 2d 636.

Affirmed.

McFaddin, J., concurs.

Ed. F. McFaddin, Justice, concurring. The purpose of this concurrence is to state that I would affirm the judgment on the merits.

From the abstract and briefs I was able to understand that the case was submitted to the jury to answer two interrogatories. These were answered adversely to the appellant, and there was evidence to support the jury's answers.

I found no errors in the instructions; so I would affirm on the merits.

BENTON ET UX *v.* FULTZ ET UX

5-3975 406 S.W. 2d 699

Opinion delivered October 10, 1966

Gaughan & Laney, for appellant.

Streett & Plunkett, for appellee.

Osro Cobb, Justice. This is a case where adjoining owners of residential properties in Camden are in dispute as to the use of a driveway situated between their residences. The record indicates that the dispute has not thus far affected the neighborly relationship of the parties. The record also indicates that the positions urged by the parties have been taken in good faith, the aid of the courts being invoked to set the dispute at rest.

Introductory Facts:

In 1957 Sue Moore Olsen owned all of the properties which were subsequently acquired by the parties to this action. On May 18, 1957 the tract now owned by appellants was conveyed by warranty deed to John G. Malone and Pauline H. Malone, the deed containing the following easement reservation:

> "Grantor and Grantee hereto mutually agree that easements ten feet in width and extending back forty feet in a westerly direction from Harrison Avenue shall exist for the mutual benefit of the property herein conveyed and the property lying North and the property lying South of the parcel herein conveyed; the northerly line of the property herein conveyed to be the center of such easement for the property herein conveyed and the property lying immediately North thereof and the southerly line of the property herein conveyed being the center of the easement for the benefit of the property herein conveyed and the property lying immediately South, such easement being for ingress and egress."

On June 6, 1958 Sue Moore Olsen conveyed by warranty deed to appellees the property joining that previously conveyed to the Malones. The juncture line of the two properties, particularly toward the rear of the resi-

dences, was marked by a rough and irregular terrain with a deep ditch, making the area impassable by vehicle and even difficult to walk upon. Appellees desired to erect a retaining wall some four and one-half feet high on the Malone property and to bulldoze the area to level same in order to control water drainage for the protection of both properties; and also to extend the driveway from the 40 feet in depth, as set forth in the quoted easement, to a point reaching the rear of their house so that their cars could be parked there and to avoid blockage of the driveway between the properties. All of said improvements were made at a substantial expense to appellees, and at a time prior to appellants' entry upon the scene. The following factual affidavit of John G. Malone, predecessor in title to appellants, appears in the record:

"June 22, 1964

"When George Fultz purchased the property adjoining mine, we had a mutual agreement that, if he leveled the property behind his house and built up the drive-way between our houses and made it passable, that the drive-way would be kept open for the use of both families.

"It was also agreed that George would build up to the same level as his property that part of my back yard on the south side of the storm ditch. This was done by building a retaining wall along the south side of the storm ditch. All of this was done at no expense to me.

/s/ John G. Malone"

On the 9th day of May, 1959, the Malone property was acquired by appellants, who immediately moved into the residence thereon. For some five years thereafter the improved and extended driveway was used without complaint. On one occasion the parties jointly contributed to the purchase of fragments of asphalt shingles, which were used in surfacing the driveway.

The driveway was contoured so that the water would move down the center and away from the residences. When the driveway needed some further repairs, appellees decided to cover it with gravel and Mr. Benton, one of the appellants, agreed to the use of gravel, but stated that he did not know whether Mrs. Benton would have any objection. It developed that Mrs. Benton objected to the gravel that was being placed on the driveway and thereafter appellants placed a series of concrete blocks along the portion of the driveway nearest their residence and in such a position as to prevent appellees from driving their vehicles upon said driveway.

Appellees brought suit to enjoin appellants from blocking the driveway and for other equitable relief. After hearing the court entered a decree declaring a permanent servitude of the land upon which the driveway had been constructed for the use and benefit of appellees in vehicular access to their property. From this decree comes this appeal.

Appellants urge three points for our consideration:

POINT I

"The trial court erred in finding that appellants' predecessor entered into a valid and enforceable oral agreement with appellees wherein appellees acquired an easement in perpetuity over a portion of land subsequently acquired by appellants."

Appellants concede that there was some loosely defined oral agreement or arrangement between appellees and the Malones as to the extension of the existing driveway, leveling the back yards, etc. However, appellants insist, and rightly so, that any oral agreement affecting an interest in land must be established by clear and convincing evidence before it can be enforced. *Tedford* v. *Tedford,* 224 Ark. 1035, 277 S. W. 2d 833 (1955); *Jeffries* v. *Meredith,* 219 Ark. 654, 243 S. W. 2d 942 (1951); *Rolfe* v. *Johnson,* 217 Ark. 14, 228 S. W. 2d 482 (1950).

Performance of the alleged oral agreement was completed in a matter of days, thus removing the oral agreement, if any, from the time provision of our statute of frauds. Ark. Stat. Ann. § 38-101, (Repl. 1962).

While appellants did not couch their testimony as to the oral agreement with the Malones in legal terms, such as servitude in perpetuity, they did make it clear that all of the improvements were made as a result of an oral agreement that they could thereafter use the extended driveway in driving their cars to and from the rear of their house. We cannot rationalize such an extensive project of improvements as those actually completed by appellees, including major construction of a retaining wall on the Malone property itself, without an agreement with the Malones. Neither can we rationalize appellees' expenditure of such substantial sums to make the improvements, including the extension of the existing driveway, absent some understanding with the Malones that they could thereafter use the driveway. This is a case where the improvements made by appellees, particularly those as to the driveway, were such as to speak for themselves as to the intent of the adjoining owners. Significantly, the record is silent as to any complaint on the part of the Malones, who were in possession of their property for a considerable length of time after the improvements were made.

We have concluded that the trial court was justified in finding that the oral agreement as alleged by appellees was supported by clear and convincing evidence. We have reached this conclusion without reliance upon the affidavit of facts of Mr. Malone as it appears in the record. The affidavit was not proper evidence but does serve to indicate that he would have corroborated appellees' claim as to the oral agreement, if called as a witness.

The finding of the trial court that an enforceable oral agreement as alleged in appellees' complaint had been established is supported by a clear preponderance

of the evidence in this case and will not be disturbed here. *Spears* v. *Rich,* 241 Ark. 15, 405 S. W. 2d 929 (1966); *Orrell* v. *E. C. Barton & Co.,* 240 Ark. 211, 398 S. W. 2d 685 (1966).

We therefore find no merit in appellants' contentions under their Point I.

POINT II

"The trial court erred in ruling that at the time appellants acquired their property they had actual, or constructive, knowledge of any adverse claim to an easement over a portion thereof by appellees."

Appellants erroneously assume that appellees bottomed some of their claims to unimpaired use of the driveway in controversy upon elements of adverse and hostile possession. On the contrary, appellees have bottomed their claims upon an oral agreement with appellants' predecessor in title.

Appellants challenge the enforcement of the oral agreement, if any, because of lack of actual or constructive notice to appellants. All of the improvements had been made before appellants purchased the property. They, therefore, had complete and actual notice of what had been done. Furthermore, there was unchallenged use of the driveway, benefiting appellees primarily but appellants as well, for some five years. The dispute, when it arose, did not involve a challenge as to the driveway easement but involved whether the driveway should be completely surfaced with gravel. Admittedly, the dispute grew into enlarged claims by appellants thereafter.

We have held 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. *Hannah* v. *Daniel,* 221 Ark. 105, 252 S. W. 2d 548 (1953).

We therefore find no merit in appellants' contentions under their Point II.

POINT III

"The trial court erred in ruling that appellees had acquired a permanent servitude over a 5 foot strip of appellants' land; and in directing appellants to remove their concrete retaining wall; and in enjoining appellants from interfering with appellees' use of such strip."

Appellants here primarily rely upon our decision in *West* v. *Bain,* 184 Ark. 641, 43 S. W. 2d 245 (1931), wherein we held that a purchaser of a lot is not bound by an oral agreement between her grantor and an adjoining property owner for construction of a common driveway, she having no notice of such agreement at the time of the purchase.

In the *West* case, we noted: (a) that the proposed driveway had not been constructed and (b) that the purchaser had been definitely assured that there were no outstanding agreements with the adjoining property owners. These circumstances clearly distinguish the West case from the present case. Furthermore, some inference may be drawn from the West case that had the driveway been completed, putting the purchaser upon full notice of same, she could have been bound thereby. In *Wynn* v. *Garland,* 19 Ark. 23 (1857), certain drainage ditches were constructed by adjacent plantation owners in reliance upon an oral agreement that when completed each party would be allowed continuous use of the ditches to drain their respective properties. Wynn closed the main ditch on his land, making the ditching done by Garland valueless. The court said:

"We regard it as a question of immateriality in this inquiry, whether a part of all the ditches are now, or were, at the time of their construction, on the land of Garland, or whether the license was given to Garland by Wynn to construct them in the first place without consideration, for we have seen that the ditches were made in part by Garland, that the labor bestowed in this way was of value, and that

> they were made under the agreement and to the knowledge of Wynn, whilst they were progressing; and we have held that the expenditure of money under these circumstances, will be regarded in equity as so much consideration paid by the grantee to the grantor of the license, inducing the expenditure, and has the effect of turning such license into an agreement which will be executed in equity."

We also quote a significant headnote from the *Wynn* case:

> "But though the grant of an easement is within the statute of frauds, and must be in writing, yet a parol grant executed, will be upheld under the same circumstances, and on the same principles that a parol contract for the sale of land would be—as where the grantee has made improvements in good faith, under the grant, or expended money or capital in its enjoyment."

In *Chaney* v. *Martin,* 205 Ark. 962, 171 S. W. 2d 961 (1943), we quoted with approval the following:

> "An oral grant (of an easement) will be upheld where it is accompanied by consideration, action in reliance on the grant and by grantees being permitted the granted use."

See also 28 *C.J.S.,* p. 678; *Kellums* v. *Richardson,* 21 Ark. 137 (1860); *Neil* v. *Neil,* 172 Ark. 381, 288 S. W. 890 (1926).

Appellees have called our attention to the following quotation from Thompson on Real Property, Vol. 2, § 225 (Repl. 1961):

> "A license for a valuable consideration is regarded as irrevocable when the licensee has incurred expense under it or there is a mutual agreement to do certain acts and this has been fully performed on

one side. This rule is based on two distinct theories; the first being that when the licensee expends large sums of money making the improvements without objections by the licensor, the license becomes executed, so that what was at its inception a license is ultimately transformed into a grant and, therefore, irrevocable. The second theory is based on the ground of equitable estoppel and follows the rule that a court of equity will not permit the licensor to cloak himself with the statute of frauds, and under its cover, perpetrate a fraud upon the licensee by revoking the license."

We have concluded that there is no merit in appellants' contentions under their Point III.

Having found no merit in any of the contentions of appellants, the decree of the Chancery Court is affirmed.

Affirmed.

JIMMY H. DAVIS *v.* MAUDINE DAVIS

5-3983 406 S. W. 2d 704

Opinion Delivered October 10, 1966

Fletcher Long, for appellant.

John D. Eldridge, for appellee.

Osro Cobb, Justice. The parties to this appeal were divorced by decree filed October 9, 1965, the decree providing that appellant should pay appellee alimony of $100.00 per month. No children had been born of their marriage.

After the decree of October 9, 1965, appellee sought employment and obtained a job at the Arkansas Baptist Hospital in Little Rock. On December 30, 1965, some 80 days after the divorce decree, appellant filed his petition to modify the decree by abating and deleting all provisions as to further alimony payments because of the changed conditions with respect to appellee's earnings.

Following hearing, the Chancellor denied appellant's petition for modification and from that action of the trial court comes this appeal.

Appellee testified in detail as to her monthly living expenses which aggregated $281.73, without any allowance for emergencies that might occur; that she was then earning approximately $200.00 per month in actual take home pay and that she was in dire need of the supplemental income from the alimony payment.

While it is true that appellee may eventually become self sustaining, this was not the case as of the time of the hearing. Furthermore, there was no showing that appellant's capacity to pay the alimony had been diminished; indeed, there was some evidence that appellant's financial situation was being improved.

We, therefore, find no error in the action of the trial court in refusing to modify its former decree as to alimony payments to appellee.

See *Pledger* v. *Pledger,* 199 Ark. 604, 135 S. W. 2d 851 (1940); *McConnell* v. *McConnell,* 98 Ark. 193, 136 S. W. 931 (1911).

An additional attorney's fee to counsel for appellee in the sum of $100.00 is allowed for services rendered in this Court.

Affirmed.

ST. LOUIS S. W. RY. CO. *v.* HARRIST & ENDSLEY

5-4025 406 S. W. 2d 694

Opinion delivered October 10, 1966

Coleman, Gantt, Ramsay & Cox, for appellant.

Robinson & Robinson, and *W. F. Denman, Jr.,* for appellee.

GUY AMSLER, Justice. Appellees' motion to dismiss the appeal in this cause presents a question of such a novel nature as to prompt a written opinion rather than a "per curiam" order. The procedure followed was approved by us in *Norfleet* v. *Norfleet,* 233 Ark. 751, 268 S. W. 2d 387.

Late during the evening of February 3, 1966, following a trial of two days duration, the jury returned verdicts for plaintiffs (appellees here) against G. R. Chambers (appellant Railway's engineer) in the total sum of $24,300. Following its report the jury was excused and shortly thereafter it was discovered that no verdicts were returned against the defendant-Railroad

Company. The trial judge had the bailiff call the jurors (some of whom had left for their homes) back for further instructions on and consideration of their verdicts. In due time new findings against the Railroad and its engineer were returned. These facts are pertinent to an understanding of subsequent pleadings that were filed by the parties.

On February 11, 1966, plaintiffs filed their motion for judgment notwithstanding the verdict. On February 21st the defendants filed a similar motion and a motion for a new trial the prayer of which contained this wording:

> "WHEREFORE, defendants pray that the Court grant a new trial for the reasons stated above, *and in the event this motion is overruled, defendants appeal to the Supreme Court of Arkansas from the verdict and judgment entered herein.*" [emphasis supplied]

On April 2, 1966, the trial judge, having taken the motions under advisement, addressed a letter to Joe T. Rhodes, Circuit Clerk of Lafayette County, which read:

> "Re: In the Lafayette Circuit Court
> Margaret Janiece Endsley Harrist et al
> v. No. 2358
> St. Louis Southwestern Railway
> Company and G. R. Chambers
>
> "Dear Joe:
> "I would appreciate your filing the enclosed Order and judgment. Thank you.
> Yours very truly,
> Harry Crumpler
> Circuit Judge
>
> "enclosures
> cc: Coleman, Gantt, Ramsay and Cox
> Robinson and Robinson
> Mr. William F. Denman
> Mr. Nick Patton"

Copies of the above letter were mailed to and admittedly received by all interested attorneys. However, there is some disagreement regarding the enclosures. Appellants contend that they received only an undated "non-titled" document, which contained the style of the case and the judge's signature, but no copy of the judgment was enclosed. This we deem unimportant because the letter was sufficient to put all parties on notice of the filing of judgment with the clerk.

In the "non-titled" instrument the trial judge lists each of the motions mentioned above and his rulings thereon. The penult sentence of the judge's conclusions reads:

> "Judgment is hereby awarded for the plaintiff and against the defendants, G. R. Chambers and St. Louis Southwestern Railway Company."

The judge's communication apparently reached the circuit clerk on April 4th because on that day he (the clerk) filed the above described order and findings, also a judgment in regular form, dated April 2, 1966, which was signed by the judge. This judgment made no reference to the defendants' motion for a new trial, but did refer to and grant plaintiffs' motion for judgment notwithstanding the verdict.

On May 18, 1966, appellants filed their objection to the above mentioned judgment, entered April 4, 1966, and prayed that it be set aside because they had no prior notice of its entry; were given no opportunity to approve or object to its form; had no opportunity to file a supersedeas bond for stopping the running of interest; or to have the clerk mail notice of appeal "which had previously been given on 2/21/66"—referring to the wording contained in the prayer for a new trial.

On May 18, 1966, the trial court (acting on a motion filed the same day) entered an order giving defendants seven months from April 4, 1966, to lodge their appeal

in the Supreme Court. This order was objected to by plaintiffs (objections filed May 27, 1966) on the grounds that: no formal request was filed for the extension of time; no notice was given plaintiffs of the request for the extension of time; no hearing held; and *defendants had never given any proper notice of appeal.* (Emphasis ours)

On the 31st day of May, 1966, the trial judge ruled on the issues presented by defendants' motion and the objections of plaintiffs thereto. He refused to set the original judgment aside; overruled plaintiffs' objection to his order of May 18th; and concluded that the statutes governing giving of notice of appeal had been "substantially complied" with by defendants' statement of intent to appeal contained in their motion for a new trial filed February 21, 1966.

On June 2, 1966, appellees (plaintiffs below) gave notice of their intention to request a dismissal of the appeal. A partial transcript was filed on June 3, 1966, and this was supplemented on August 23, 1966. Oral arguments were heard and the issue has been thoroughly briefed.

Considering the foregoing facts we are called upon to determine if a prayer for or statement of intention to appeal as set forth in the concluding paragraph of defendants' motion for a new trial meets the requirements of sections 2 and 3 of Act 555 of the General Assembly of 1953. [Now Ark. Stat. Ann. §§ 27-2106.1 and 2106.2 (Repl. 1962).] If the exact point has been passed on by this or any state or federal court, the decision has not been called to our attention.

The statute, supra, provides in part that:

> "any party to the action may appeal from a judgment or decree, by filing with the court in which the case is tried a notice of appeal *within thirty (30) days from the entry of the judgment or decree appealed from.* Any other party to the action may

> cross appeal from a judgment or decree by filing with the court in which the case is tried *a notice of cross appeal within ten* (10) *days after the notice of appeal is served on such party.*" [emphasis supplied]

and further that:

> "Notice of appeal and of cross appeal shall specify the parties taking the appeal or cross appeal, and shall designate the judgment, decree, or part thereof appealed from. Notification of the filing of the notice of appeal and cross appeal shall be given by the clerk of the court in which the cause is pending by mailing copies thereof to all the parties to the suit other than the party or parties taking the appeal or cross appeal, but his failure so to do shall not affect the validity of the appeal or cross appeal."

We have held that the filing of notice of appeal within 30 days from entry of judgment or decree is a jurisdictional prerequisite to the perfection of an appeal. The filing of notice of cross appeal is likewise jurisdictional. *General Box Company* v. *Scurlock,* 223 Ark. 967, 271 S. W. 2d 40; *White* v. *Avery,* 226 Ark. 951, 295 S. W. 2d 365.

In *Cranna* v. *Long,* 225 Ark. 153, 279 S. W. 2d 828, after quoting the 30 day statute we said:

> "The filing of the judgment with the clerk is the decisive date under the above quoted statute. * * *"

Appellants say in effect that plaintiffs (appellees) knew all along that they (defendants) intended to appeal. Plaintiffs probably did speculate that there would be appellate action when the case was finally concluded and probably thought that the appeal would be perfected in accordance with established procedure. The fallacy inherent in appellants' contention is clearly pointed up by a comparison with what we wrote in *Commercial Credit Corp.* v. *Tarver,* 224 Ark. 667, 278 S. W. 2d 822.

Tarver brought suit (in Union County Chancery Court) to cancel a conditional sales contract on the ground of usury. At the conclusion of trial, on September 21, 1954, the chancellor announced his decision and directed that a precedent be prepared and "let this precedent show, at the wind-up, that the defendant excepts to the judgment, order and ruling and decree of the court and prays an appeal to the Supreme Court, which is granted." It was stipulated by the parties that counsel for appellant (Commercial Credit Corp.) then "orally notified the court and the appellee, Billy D. Tarver, and his attorney that this cause would be promptly appealed to the Supreme Court." Commercial Credit was given 180 days to perfect its appeal. A precedent was agreed on by counsel within a few days and the attorney for Commercial Credit assured opposing counsel that the appeal would be prosecuted as expeditiously as possible.

On November 15th the court clerk wrote the attorney for Commercial Credit that the record had not been prepared because no notice of appeal had been filed. Notice (at the request of the clerk) was filed on November 17th. Contention was that there was substantial compliance with statutory requirements regarding notice of appeal. We said:

> "In principle this case is controlled by the opinion delivered July 5, 1954, in *General Box Co.* v. *Scurlock,* 223 Ark. 967, 271 S. W. 2d 40. There the decree recited that a cross-appeal was prayed and granted, and it was contended that this recital satisfied the requirement that a notice of appeal be filed. We rejected that contention, holding that no sufficient notice of appeal had been given. The only perceptible difference between that case and this one is that here the appellant, at the conclusion of the trial, orally announced that an appeal would be taken. It is quite apparent, however, that the legislature did not intend to subject this vital jurisdictional matter to the uncertainties of oral proof. The

appeal is taken by 'filing' with the court in which the case is tried a notice of appeal."

The Commercial Credit case clearly demonstrates that neither defendants' intent nor plaintiffs' information (or speculation) regarding the appeal has any controlling influence on the disposition of appellees' motion to dismiss. The written notice governs.

Appellants rely on *Wilhelm* v. *McLaughlin,* 228 Ark. 582, 309 S. W. 2d 203, to sustain their contention that notice of appeal may be given before the entry of judgment. A cursory comparison of the facts in the Wilhelm case with the one at bar reveals numerous disparities.

When the taking of testimony was concluded at the Wilhelm trial the chancellor "fired from the hip," as we say, and detailed, somewhat at length, his findings on the facts and conclusions of law. In short the trial judge decided the case "on the spot." In a few days the decree was filed with the clerk but during the interval the losing party filed notice of appeal and we held that under the circumstances of that case the notice was good. This language appears:

> "We know that, despite reasonable precautions on the part of counsel, instances do arise in which the precedent for judgment is signed without notice to the losing party or his attorney, or in which an unforseen delay intervenes between the signing of the precedent and its filing in the clerk's office, or in which the clerk fails to make a record of the date on which the signed precedent was received. In any of these situations counsel might, in good faith, lodge the notice of appeal before the judgment was actually entered."

We then quoted, with approval, this declaration by the Supreme Court of the State of Washington:

> "The statutes governing appeals should be liberally

> construed, to the end that parties may have a review by this court of the rulings of the superior courts when they so desire. The appeal statute thus construed will require us to give force to a notice of appeal given after the court had announced its decision, although it was before the signing and entering of the formal judgment. . ."

We find nothing in the Wilhelm opinion that would, in any degree, support appellants' contention in the instant case.

A couple of simple illustrations and queries may aid in demonstrating the untenableness of appellants position. Bear in mind that after verdict there were 3 motions filed, viz: plaintiffs' motion for judgment notwithstanding verdict on February 11th and defendants' motions for judgment notwithstanding verdict and for a new trial on February 21st. All concerned the verdict returned on February 3, 1966. The alleged notice of appeal was contained in defendants' motion for a new trial. The court filed its ruling on all these motions on April 4, 1966. Now let us suppose that all parties were dissatisfied with the court's findings and desired a review. If we accept defendants' contention that their notice of appeal was given on February 21, 1966, have the plaintiffs lost their right of cross-appeal by their failure to give notice "within 10 days after the notice of appeal is served on them," as required by the statute?

Again: on May 31, 1966, (some 100 days after the alleged notice of appeal) the trial court entered an "order" in which it determined that the objections of the plaintiffs to the order of the court extending appeal time to seven months were not well founded and that the statement in the prayer contained in the motion for a new trial filed February 21, 1966, constituted substantial compliance with sections 2 and 3 of Act 555. Unquestionably plaintiffs would be entitled to have this order reviewed on cross-appeal and yet if the plain

letter of the law is followed the 10 days notice requirement of the statute governing cross-appeals would deny them that right—unless of course we rewrite the statute.

§ 27-2106.2, *supra,* is clear regarding the clerk's duty to inform all parties of the filing of notice of appeal and cross-appeal. If the clerk had accepted the statement in defendants' motion for a new trial as the required statutory notice he would then have been confronted with the problem of wording the notice. He couldn't have given positive notice that an appeal was being taken because no one knew at that time. Orderly procedure would hardly be served constructively if the clerk were called upon to give a preliminary notice of intent to appeal in case of an adverse ruling and then some weeks later give a final notice after disaster had struck. Our lawmakers certainly could not have contemplated that any such construction would be placed on the products of their constructive labors.

The General Assembly at the behest of the Organized Bar of Arkansas enacted Act 555 for the purpose of expediting and simplifying appeal procedures in line with rules governing appeals in federal courts. It is a good measure and the courts should be extremely reluctant to emasculate it in efforts to relieve every unfortunate incident that arises. It was clearly the legislative intent that notice of appeal be given at the conclusion of litigation and not at some intermediate point (or points) during the progress thereof.

Naturally appellate courts give liberal construction to acts of this character, as they should, but no litigant should expect such liberality in construction as to render worthy legislation completely impotent. There must come a time when "generous construction" yields to the clear intent of our law making body and the weal of orderly procedure.

The motion to dismiss the appeal is granted.

HARRIS, C. J., dissents.

CARLETON HARRIS, Chief Justice, dissenting. I recognize that there are two sides to the question here presented, but because of the fact that the law favors determination of cases on the merits, rather than on technicalities of procedure, I would affirm the Circuit Court in its holding that the notice of appeal herein is adequate. In *Wilhelm* v. *McLaughlin*, 228 Ark. 582, 309 S. W. 2d 203, decided in 1958, the Chancellor, at the conclusion of the trial, delivered a comprehensive oral opinion, determining the issues which had been presented. Shortly thereafter, Wilhelm filed a notice of appeal, but this notice was given several days before the decree itself was signed. Thereupon, McLaughlin contended that the appeal notice had not been properly given, the contention being that the notice had to be given after the entry of the decree. This court held that the notice was sufficient, stating:

"* * * Many situations may be conceived in which needless hardship would result from an inflexible rule nullifying every notice of appeal filed before the entry of the judgment.* * *

"* * * The decisions of the state courts, construing statutes having some similarity to ours, are not in harmony, but we prefer the view that gives effect to a notice of appeal such as that filed by these appellants.

"In a case like this one the Supreme Court of Washington explained its position with these words: 'The statutes governing appeals should be liberally construed, to the end that parties may have a review by this court of the rulings of the superior courts when they so desire. The appeal statute thus construed will require us to give force to a notice of appeal given after the court had announced its decision, although it was before the signing and entering of the formal judgment. For some purposes the judgment may not be complete until thus signed and entered, but, after such announcement, it was so far complete as to sustain a notice of appeal.' "

Our statute was patterned after Rule 73(b) of the Federal Rules of Civil Procedure, and there are numerous federal cases in which a liberal interpretation is given to the rule under consideration, in order that the right of appeal might be preserved. I see no point, however, in mentioning these cases, since I deem our own case, *Wilhelm* v. *McLaughlin, supra,* to be controlling in the matter at hand.

I therefore respectfully dissent.

MAULDIN ET AL *v.* TANKSLEY ET AL

5-3976 406 S. W. 2d 705

Opinion delivered October 10, 1966

Lookadoo, Gooch & Lookadoo, for appellant.

Jerry Thomasson and *Gilmore & Moore* and *McMillan, McMillan & Turner,* for appellee.

HUGH M. BLAND, Justice. By this appeal, the appellants, Ethel Mauldin, Van Mauldin and Dean Ray, a minor, by his mother and next friend, Beatrice Ray and Beatrice Ray individually, seek to question the action of the circuit court in vacating default judgments in three consolidated cases during the term in which they were rendered.

Default judgments in all three cases were entered on November 15, 1965. The motions to set aside the judgments were filed on December 30, 1965. The order setting aside the judgments was dated January 11, 1966.

The term of circuit court in Clark County begins on the fourth Monday in January and ends the fourth Monday in July. Ark. Stat. Ann. § 22-310 (Repl. 1960).

The order setting aside the default judgments rendered during the same term is not final or appealable. *Dodd* v. *Bonds,* 220 Ark. 951, 251 S. W. 2d 587 (1952).

Since no final judgments have been rendered in circuit court from which to appeal, the appeal is dismissed.

LINDELL MARSHALL *v.* I. E. MCCRAY ET AL

5-3930 406 S. W. 2d 863

Opinion delivered October 17, 1966

J. B. Milham, for appellant.

Ben M. McCray and *Fred E. Briner,* for appellees.

CARLETON HARRIS, Chief Justice. Exie Marshall and Mary Jane Marshall were the owners of certain real estate in Saline County, Arkansas, upon which a building was located, the structure being used both for the operation of a cafe, and for a home. The property was mortgaged for the purpose of making repairs; the mortgagee, Ann Ehrlich, subsequently foreclosed the mortgage, ob-

taining a judgment of $13,137.10, and the property was ordered sold. I. E. McCray purchased same at the sale for the sum of $7,001.00. McCray then entered into an agreement with appellant Lindell Marshall, daughter of Exie and Mary Jane, wherein appellant would purchase the property. The facts thereafter are very much in dispute. Appellant contends that the agreed purchase price was the amount paid by McCray, *i. e.,* $7,001.00 plus interest, and this amount was to be repaid at the rate of $100.00 per month. This contention is supported by her father and mother. They endeavored to testify that appellee had agreed to sell the property back to their daughter for the amount he paid at the sale, except for interest, but the court would not consider this testimony.[1] Appellant also endeavored to testify that she never made any agreement to pay appellee more than $7,001.00, but the court would not permit this testimony.[2]

McCray testified that, after he bought the property, he entered into a contract with appellant to sell it to her for the sum of $10,500.00. A written instrument (contract) for the sale was offered by McCray, showing the purchase price to be $10,500.00, same to be paid monthly at the rate of $100.00 per month, and bearing interest at 7%. Appellant was also to pay taxes and insurance. This contract was signed by appellee, but not by appellant, who testified that she did not sign it because it was not the amount agreed upon; in the meantime, she had been given possession of the property. The testimony is also in complete conflict as to the payment of taxes and insurance, appellant contending that she has paid the taxes and insurance, and appellee asserting that he has

[1]The Marshalls operated a cafe, and McCray had a "juke box" and marble machines therein; the testimony on the part of Exie Marshall was to the effect that he asked McCray to buy the property and sell it to Lindell, in order that the amount of the payments, which had been about $200.00 per month, might be lowered to a figure that the daughter or Marshall could afford to pay. He stated that he was helping and assisting his daughter to buy the property.

[2]From the record: "MR. MILHAM: Did you ever agree to pay Mr. McCray more than $7,001.00 for the property? MR. BRINER: To which we object your honor. COURT: Objections sustained."

made these payments. Admittedly, appellant has paid several thousand dollars on the indebtedness. At the conclusion of the evidence, the court held that I. E. McCray (and wife) were the owners of the property and entitled to possession, and further found that all sums paid by appellant were to be considered as reasonable rent for the use of the property. From the decree so entered, appellant brings this appeal.

Both sides agree that an oral contract was made. It is quite clear that the court was of the opinion that the oral contract was in violation of the Statute of Frauds, and his findings were predicated on that premise.[3] This holding was erroneous, for we have many times held that part performance takes an oral contract for the sale of land out of the Statute of Frauds. See *Harper* v. *Albright,* 228 Ark. 760, 310 S. W. 2d 475, and cases cited therein. As previously stated, though no written contract was entered into, Lindell Marshall went into immediate possession, and thereafter made numerous payments to McCray.

The question therefore, is simply, "What were the terms of the contract?" The court refused to consider the testimony offered by appellant and her witnesses as to the terms of the agreement, and this constituted reversible error. Nor was the question of the payment of taxes and insurance decided by the court, since it held that there was no contract and all payments were to be considered as rent for the use of the property.

[3]The court, several times, rendered rulings in support of this view. From the record: "MR. BRINER: Your Honor, I am going to object again. THE COURT: Objections will be sustained. MR. MILHAM: Does the Court mean you are not going to let me go ahead and show the conversation between Mr. McCray and this party here * * * ? THE COURT: I am not, Mr. Milham. For one reason, it violates the Statute of Frauds." Later "THE COURT: Just a minute gentlemen. As it stands here now there is no contract before this court. Mr. Marshall, or the defendant has not signed any contract. Under the Statute of Frauds it is very clear that the sale of land in a contract has to be in writing. * * * THE COURT: I have sustained the objections to any oral testimony of the contract for the same reason it violates the Statute of Frauds."

In her brief, appellant mentions that she could not be charged more than 6% interest, since the contract was oral, and an interest rate exceeding 6% cannot be enforced unless such agreement is in writing. That contention is correct. See *Temple* v. *Hamilton,* 178 Ark. 355, 11 S. W. 2d 465, and authorities cited therein. This matter, of course, is not before us at the present time, since the court did not find that a contract was entered into, and consequently made no finding as to the terms of the contract, or the amount of indebtedness due. The point, of course, may well arise on remand.

In accordance with what has been said, the decree is reversed, and the cause is remanded to the Saline Chancery Court with directions to determine the provisions of the oral contract, the amount due thereunder, and to proceed as in matters of foreclosure.

It is so ordered.

CITY OF LITTLE ROCK ET AL *v.* FAITH EVANGELICAL LUTHERAN CHURCH ET AL

5-3970 406 S. W. 2d 875

Opinion delivered October 17, 1966

Joseph C. Kemp and *Perry V. Whitmore,* for appellants.

Lester & Shults, for appellees.

CARLETON HARRIS, Chief Justice. This appeal relates to a petition for re-zoning. Appellees own properties on the north side of West Markham Street in Little Rock, lying immediately east of the intersection of Jackson and West Markham Streets. The owners desire to sell their respective properties to the Texaco Oil Company which plans to construct a service station thereon. Under city ordinance, the lands are zoned "B" Residential District, and appellees filed a petition seeking to have the properties re-zoned as "F" Commercial. The Board of Directors of Little Rock denied the petition, thus supporting the view held by the Planning Commission. Appellees appealed to the Pulaski County Chancery Court (First Division), and that court held that the city had acted arbitrarily and capriciously in refusing to re-zone the properties to "F" Commercial; the court enjoined the city from interfering with appellees or their assigns in using the properties in question for purposes permitted under the "F" Commercial zoning classification, and directed the city to issue a building permit to appellees or their assigns authorizing the construction of improvements on these properties that met the requirements of an "F" Commercial classification. From the decree so entered, appellant[1] brings this appeal. For reversal, it is asserted that the Chancery Court erred in finding that the refusal of the City of Little Rock to rezone the property to "F" Commercial was arbitrary.

Faith Evangelical Lutheran Church is located at the intersection of West Markham and Jackson Streets, and this property fronts on West Markham for a distance of 100 feet from the intersection. The testimony reflected that the membership of the church had expanded from 57 members in 1959 to 261 members at the present time, and the membership has simply outgrown the church building. The congregation is building a new

[1]The City of Little Rock, its Mayor, and Board of Directors, are all named defendants, but we shall refer to these parties in the singular.

church at Mississippi and Markham, and desires to sell the present property to Texaco.

The property of Mr. and Mrs. Oliver Henry is immediately east of the church property (a distance of 50 feet), and the remaining appellee, Ivan H. Smith, owns the 50 feet immediately east of the Henry property. The residences of Henry and Smith are located on their respective lots.

Mr. Smith testified on behalf of the appellees, and stated that, when he first purchased his property, West Markham was a two-lane street, with no commercial property in the area except for a small barbecue stand on the northwest corner of Markham and Van Buren Streets. A short time after his purchase, the northeast corner of Van Buren and West Markham was re-zoned for commercial property and an Esso station was built thereon. Sometime later the block between Van Buren and Jackson (north of West Markham) was re-zoned as commercial property, and a D-X service station was placed on the corner of Jackson and West Markham, just across from the Lutheran Church. Smith canvassed the neighborhood, taking a petition to everyone on Monroe Street, the block affected on West Markham, North Jackson and Brickton Place, and he stated that only two people, both in Brickton Place, refused to sign the petition. At the present time, all property bordering West Markham from Jackson Street west to University Avenue is zoned either as "F" Commercial or "E-1" Quiet Business.[2] Mr. Smith testified that the several houses which are located between Jackson and Monroe Streets are all rental property, except the two belonging to the witness and Henry; that after Markham Street was widened, the traffic increased immeasurably, and the noise has increased to a point where he cannot hear tele-

[2]From Jackson Street to Van Buren and about 1/3 of the block from Van Buren to Harrison, the zoning is "F" commercial; for the balance of the block to Harrison, and from Harrison to Tyler, from Tyler to Polk, from Polk to Taylor, from Taylor to Fillmore, from Fillmore to Pierce, and about ¾ of the area from Pierce to University, the zoning is "E-1" Quiet Business.

vision in the front room of his house if the door is open. Mr. Smith further stated that mercury lights have been installed on Markham "so that the light makes it just like day time all the time," and that he had put up heavy draperies throughout the house to keep out this light.

Mr. James H. Larrison, a Little Rock realtor and appraiser, testified that the present zoning classification of the properties here involved is not an appropriate one, due primarily to the continuing build-up of traffic on Markham Street; he stated however that, to determine the highest compatible use which could be made of the church property, a study would have to be made, but he was emphatic that it could not be feasibly converted to a single family residence.

Russell McLean, a professional real estate appraiser, testified that there are many nice homes in the general area. He specifically mentioned Brickton Place, a sub-division about ten years old, which is located just north of the properties here under discussion.[3] In the opinion of Mr. McLean, the use of the properties belonging to appellees as a service station site would adversely affect the use of other properties in the area for residential use. He stated that the service station on the other side of Jackson Street did not have this same adverse effect because the street itself acted as a buffer. It was his opinion that the highest compatible use of the property presently occupied by the church would be office use; for instance, a doctor's office or insurance office. Mr. McLean agreed with Mr. Larrison that it would not be economically feasible to redevelop the property for single family residential use. W. D. Kelly, who lives at No. 7 Brickton Place, voiced his objection to the re-zoning of the properties for use as a service station site.

Henry DeNoble, Director of Planning, and Traffic

[3]Brickton Place is a sub-division of ten or twelve houses, which sell in a price range of $16,000.00 to $20,000.00.

Engineer, for the city, stated that he felt that, since the church group no longer intended to use its building, the property should be rezoned as "E-1" Quiet Business, which fits in with residential type use. Mr. DeNoble agreed with Larrison and McLean that "B" Residential is not the appropriate zoning classification. It was the opinion of the witness that if the properties here involved were re-zoned to "F" Commercial, there would be nothing to prevent this same zoning all the way down West Markham Street; DeNoble felt that commercial zoning had been successfully stopped at Van Buren because of the use of the "E-1" Quiet Business zone classification.

In rebuttal, appellees offered a report of the Federal Housing Administration (which referred to the property owned by Henry) wherein the F.H.A. denied mortgage insurance because "continuing marketability is too adversely affected by commercial encroachment, fast, heavy traffic, and dangerous vehicular entrance and exit from property to warrant mortgage insurance."

We think the court erred in holding that the city acted arbitrarily in refusing to re-zone this property as "F" Commercial. We agree that the West Markham Street location is not ideal, mainly because of the large volume of traffic, for residential property, but, as pointed out by the city's witnesses, the effect of re-zoning upon surrounding property must also be considered. Such re-zoning, according to the evidence, would have an adverse effect upon surrounding residential property, including Brickton Place. Apparently the intersection of Jackson Street and West Markham was considered (by the Planning Commission) a proper boundary for a "break" for the reason that the church building separated the residential property from the commercial property west of Jackson. Of course, the current problem has arisen because of the fact that the present church building is not adequate for the growth of the congregation. Appellant's witnesses recognize that it would be impractical to try and convert the church prop-

erty to residential use, and with this testimony we completely agree. However, that fact does not mean that the answer is to re-zone to "F" Commercial. For that matter, neither of the real estate appraisers testified that "F" Commercial would be the most appropriate use for the properties. Mr. Larrison, who testified on behalf of appellees, would only say that the properties would not be appropriate for single family residence, and he testified that a study would have to be made to determine the highest compatible use that could be made of the church property. Mr. McLean testified that the best and most appropriate use of the church property would be for clinics or offices, and this view was also concurred in by Mr. DeNoble. In other words, the last two witnesses are of the view that "E-1" Quiet Business is the proper classification, since this classification is ideal as a buffer between residential and commercial zones, and will fit in with residential use.

It is not likely, in any re-zoning case, that a solution could be reached which would afford complete equity and satisfaction to all parties. As in other matters, the welfare of all concerned must be taken into consideration. We stated in *Downs* v. *City of Little Rock,* 240 Ark. 623, 401 S. W. 2d 210:

"The composition of the entire area must be taken into consideration, and it is undisputed that both the area to the west of Beechwood for several blocks, and the area north of Markham and Beechwood for a similar distance are completely residential. The benefit to a few individuals cannot be allowed to override the best interests of the residents of the overall area. The Planning Commission has apparently spent long hours in rezoning property in the city of Little Rock with the view of establishing a long-range program, one that will best fit the needs of an expanding city in future years."

Unquestionably, if this property is re-zoned as "F" Commercial, there is no reason why the adjoining owner

would not be entitled to the same classification, and likewise all the way down West Markham Street.

From what has been said, it is evident that we do not consider the refusal of the City of Little Rock to re-zone these properties to "F" Commercial to be an arbitrary decision, and it follows that the court erred in so holding. On the other hand, we are just as convinced that the church property cannot suitably be converted into residential property. In our view, the evidence clearly indicates that a re-zoning to "E-1" Quiet Business would be the proper classification for the properties here involved. Apparently there has been no recommendation from the Planning Commission for this type of re-zoning, nor has there been an application from appellees requesting this particular change in zoning. Nonetheless, in reaching the conclusion that the Chancery Court erred in allowing the "F" Commercial re-zoning, we take into consideration the evidence of Larrison, McLean and DeNoble (heretofore discussed) relating to a proper classification for these properties.

Reversed.

RUBY JEAN LARKIN *v.* JACOB C. PRIDGETT ET UX

5-3964 407 S. W. 2d 374

Opinion delivered October 17, 1966
[Rehearing denied November 21, 1966.]

Reinberger, Eilbott, Smith & Staten, for appellant.

George Howard Jr., for appellee.

ED. F. MCFADDIN, Justice. The custody of a little boy—Wayne Edward Larkin—born March 13, 1961, is the object of this litigation. The appellant, Ruby Jean Larkin, is the mother of the child. He has no legal father; but appellees, Jacob C. Pridgett and wife, are the parents of the putative father. The appellant, Ruby Jean Larkin, filed this habeas corpus suit against the appellees on November 15, 1965, to obtain possession of the child. The record exceeds 300 pages and the trial was extended to several weeks because of court recesses. Finally, the Chancery Court denied the habeas corpus sought by the petitioner-appellant, and entered a decree awarding the legal custody of the child to the defendants, subject to reasonable visitation rights to the plaintiff and other interested relatives. From that decree there is this appeal in which the appellant urges one point with five sub-points, same being:

> "The Court erred in awarding custody of the appellant's minor child to the appellees.
>
> "(1) Any Finding That The Appellant Was Incompetent Or Unfit To Provide For Her Child Would Have Been Against The Preponderance Of The Evidence.
>
> "(2) The Finding By The Chancellor That The Appellant Abandoned Her Child Was Against The Preponderance Of The Evidence.
>
> "(3) The Finding By The Chancellor That The Appellees Have Had The Physical Custody Of The Child Most Of The Time Since October Of 1962 Was Against The Preponderance Of The Evidence.

"(4) The Finding By The Chancellor That The Appellant Orally Agreed That The Appellees Could Adopt The Child Was Against The Preponderance Of The Evidence.

"(5) The Chancellor Erred In Not Applying The Applicable Law To The Facts Of The Instant Case."

If a habeas corpus case were the same as a replevin case, then this decree would have to be reversed because the appellant established—in fact it was admitted—that she was and is the mother of the little boy and appellees are merely the parents of the putative father; and there is no applicable period of limitation fixed by statute in such a case. But a habeas corpus suit like this, involving the custody of a child, is not like a replevin case. No: the best interest of the child is a matter of vital importance in a habeas corpus case like this one. *Tucker* v. *Tucker,* 207 Ark. 359, 180 S. W. 2d 571.

There were many witnesses in this case and it is impossible to reconcile the testimony. In such a situation we must necessarily lean heavily on the ability of the Chancellor, who saw the witnesses and evaluated their testimony, to decide which witnesses to believe in determining the best interest of the child. We therefore copy *in extenso* from the Chancellor's Opinion:

"The sole issue in this case involves the custody of Wayne Edward Larkin, a little boy four years old. Wayne is the illegitimate child of the petitioner, Ruby Jean Larkin. The undisputed proof is that a son of the defendants is the putative father of this child....

"So the issue of who will have custody of the little boy is between his mother and the parents of the man who fathered this child. Even though they are not legally the paternal grandparents, the evidence reflects that their love and affection for the little boy has been manifested to just as great a degree as if they were, in law, the paternal grandparents.

"With some rare exceptions, the evidence is in serious and irreconcilable conflict. The Court can only resolve the issues by first resolving the conflicting testimony. The petitioner admits to giving birth to two illegitimate children and the evidence sustains a finding that she gave birth to a third illegitimate child.

"In September of 1962, petitioner left Wayne Edward in the custody of her mother and went to New York to work. Even though it was denied, the Court is satisfied that petitioner's mother relinquished custody of Wayne Edward to the defendants in October, 1962 and that the defendants have had the physical custody of the child most of the time since then with the child visiting in the home of his maternal grandmother periodically. The defendants appear to have been the main support for the child for the past three years.

"The problem of the conflict between the natural parent and third parties for the custody of minor children has plagued our courts for many years, but from our cases, several rather clear-cut rules or principles of law have been established. In the early case of *Verser* v. *Ford,* 37 Ark. 27, the natural father of a little girl sought the custody. The child's maternal grandparents had cared for and kept the child since the child was just a few days old. The Court in the Verser case stated some principles that are to be used as guides by the courts in custody cases. The Court stated: 'Only a few general principles can be taken as guides, subject to which the Chancellor must exercise his judgment upon the peculiar circumstances of the case, *and act as humanity, respect for the parental affection, and regard for the infant's best interests may prompt. All three should be considered; neither ought to be conclusive.'* (emphasis supplied) Notwithstanding the Court's finding that the petitioner, the natural father, was a moral man with the means of discharging his parental obligations, the Supreme Court affirmed the Chancery Court order that awarded the custody of the little girl to the grandparents. The Court said: 'The father has shown himself to

be a moral man, with the means of discharging his parental obligations. Certainly, under the circumstances, if he had been in possession of the child, no Chancellor could have found warrant in equity for taking her away to be placed under the grandmother's care. But it cannot be ignored that the case does not present that attitude. " 'The child was placed where she is by the father's assent, and has so remained. By his assent ties have been woven between the grandmother and granddaughter, which he is under strong obligation to respect, and which he ought not wantonly and suddenly to tear asunder. He has shown no urgent necessity for present action, and his appeal to the Circuit Court for aid was not such as to enlist in most hearts any very strong sympathy.'

"The case of *Coulter* v. *Sypert,* 78 Ark. 193, involved the custody of a ten year old boy wherein the boy's father was seeking the custody of the child from the grandfather. The Court, in awarding custody to the grandfather, stated: 'The father has no proprietary right or interest in or to the custody of his infant child. As said by Senator Paige in *Mercein* v. *People,* 25 Wend., 64, 103, decided in the Court of Errors of New York in 1840: "There is no parental authority independent of the supreme power of the State, but the former is derived altogether from the latter. * * * The moment a child is born, it owes allegiance to the government of the country of its birth, and is entitled to protection of that government. And such government is obligated, by its duty of protection, to consult the welfare, comfort and interests of such child in regulating its custody during the period of its minority." '

"The case of *Baker* v. *Durham,* 95 Ark. 355, has been cited as authority that a natural parent will not be deprived of the custody of his or her child unless said parent is incompetent or unfit. However, even the Baker case recognized that other factors could be present that would warrant and require a Court to deprive a natural parent of custody even though the parent was compe-

tent, fit, and a moral person. The Court stated: 'There may be other exceptional cases where the father, by reason of indifference to the welfare of his child and the lack of proper affection for it, has voluntarily relinquished these parental obligations, privileges and pleasures to other hands for so long that the court will refuse to disturb the associations and environments which his own conduct has produced, and will leave in *statu quo* those whom he has thus permitted to stand in *loco parentis.*'

"It should be noted in the case before the Court, that even though the petitioner did not relinquish the custody of Wayne Edward to the defendants in the first instance, the preponderance of the evidence reflects that she was aware of the fact that her mother had relinquished custody of the child to the defendants. The Court is of the further opinion that petitioner orally agreed at one time that the defendants could adopt the child involved.

"The case of *Mantooth* v. *Hopkins,* 106 Ark. 197, at page 205 stated the rule: 'While the preferential right of parents as the natural guardians of their children entitling them to their custody, will always be respected and enforced as between them and relatives or strangers to the blood, unless there are some special circumstances calling for a different disposition of them, still whenever these circumstances arise the Court will give force to them and will not treat the right of the parent as proprietary and as absolute and uncontrollable.'

"The case of *Tucker* v. *Tucker,* 207 Ark. 359, 180 S. W. 2d 571, stated the rule: 'Many decisions (rendered both before and after *Loewe* v. *Shook*) are to be found where the court declined to restore the custody of an infant to a parent who was morally fit, and financially able to establish and maintain a suitable home for the child. When the language employed in *Loewe* v. *Shook* is read in the light of these cases it is apparent that the court did not by that decision change the rule announced

in the earlier cases. Moral fitness and financial ability remained, as before, proper, but not the only, nor even paramount, subjects of inquiry. All doubt, if any existed, must necessarily have been removed when in *Massey* v. *Flinn,* 198 Ark. 279, 128 S. W. 2d 1008, a contest between a father and an aunt, it was declared "We do not think that the fitness or competency of the father is the only criterion by which to judge his right to the custody and control of his child."

" 'In the case last cited it was said: "We recognize the general rule that ordinarily the parent of the child is its natural guardian and is entitled to its care and custody, however, this is not always true. There are exceptions. *Of prime concern and the controlling factor is the best interest of the child.*" ' (Emphasis added).

"Other cases that have set forth the rules of law as enumerated in the above cited cases are: *Massey* v. *Flinn,* 198 Ark. 279, 128 S. W. 2d 1008; *Haller* v. *Haller,* 234 Ark. 984, 356 S. W. 2d 9; *Carr* v. *Hall,* 235 Ark. 874, 363 S. W. 2d 223. In the Haller case . . . the opinion for the Court stated: 'It is a well-established rule that the welfare of the child is the polestar.'

"It can be readily seen from the above quoted citations that a natural parent does not have an absolute right to the custody of his or her child. In a general sense, a natural parent is preferred over blood relatives or strangers, but this is not because of any absolute right that the natural parent may have but it is presumed to be for the benefit of the infant. The law presumes that it is better for a minor to be under the care of its natural protector. However, this is not a conclusive presumption. Therefore, when this Court is asked in this case to enter an order putting the custody of the minor child with the natural mother and to withdraw his custody from the parents of the putative father, it has a duty to look into all the circumstances and ascertain whether it will be for the real and permanent interests of the child.

"When this criterion is followed in this case, there can be but one result. Assuming without deciding that the natural mother is a fit and moral individual—and the admitted fact that she has had two illegitimate children would make this statement highly questionable—nevertheless, she left this child in the custody of the maternal grandmother in September, 1962, and went to New York where she has remained continuously since that time with one visit back home between that time and just shortly before the first trial of this case.

"Even though she testified that she has made regular payments for the support of this infant, other than that statement and the statement of her mother, there is nothing in the record to substantiate such a claim. As previously found by the Court, the defendants have had the custody for most of the time since October, 1962.

"The evidence reflects that the defendants are high type people of the Negro race who are providing a good home for this child. The evidence reflects that their own children have obtained a good education for persons with their economic standing. The petitioner is asking this Court to allow her to take this child from a stable and good environment to her room or apartment in New York City, with all of the hidden perils that may lurk in that metropolis, portions of which have sometimes been referred to as a jungle. The petitioner attempted to leave the impression that she did not live in a ghetto, but by her own testimony she went to New York to seek work and apparently was never able to be in a financial position, nor had the desire, to take the child to live with her in New York. . . .

"The Court holds that the legal custody of Wayne Edward Larkin should be awarded to the defendants subject to reasonable visitation rights of the petitioner and other interested relatives. . . ."

The appellant has failed to establish that the opinion of the Chancellor was in error in any respect.

Affirmed.

STATE FARM FIRE & CASUALTY CO. *v.* FORREST E. RICE ET UX

5-3972 406 S. W. 2d 880

Opinion delivered October 17, 1966

Brown, Compton & Prewett, for appellant.

W. P. (Billy) Switzer, for appellee.

ED. F. MCFADDIN, Justice. This is an action by an insured to recover for property alleged to have been lost by theft.

Appellees, husband and wife, were policy holders of a home owners' policy issued by appellant. Among other things the policy covered ". . . personal property . . . owned, worn, or used by an insured while on the premises. . ." One of the perils insured against was "Theft, meaning an act of stealing or attempt thereat. . ." Appellees filed action claiming that Mrs. Rice's cloth coat of the value of $80.00 had been stolen from the Rice home, and that they were entitled to be compensated[1] under the policy provisions above quoted.

[1]The original complaint alleged the value of the cost to be $120.00; but by amendment this was reduced to $80.00; and no point is here made as to any irregularity in such reduction. The Trial Court allowed penalty and attorney's fee, and the correctness of that ruling is not challenged on this appeal.

The appellant insurance company denied any liability; the case was tried to the Court without a jury; and there was a finding and judgment in favor of the plaintiffs for $80.00 and interest, plus costs, penalty, and attorney's fee. From such judgment there is this appeal, and appellant urges only one point, to-wit:

> "Under the facts and under the terms and conditions of the policy there is no substantial evidence to support the judgment."

We have previously copied the germane provisions of the policy. The facts were disclosed by the testimony of Mrs. Rice. She testified that before going to the hospital for surgery she checked all her winter clothing and that the coat was in her bedroom closet. She remembered distinctly checking about the buttons. Some time after she returned from the hospital she discovered that the coat was missing from the closet. She made a thorough search of the premises and the coat was not to be found; and she notified the insurance agent of the loss. Mrs. Rice further testified that the only persons living in the home were her husband, herself, and their 13-year-old daughter; that they also had a maid for housework; that frequently the entire family had been away from the home; and that she could not say that the doors were always locked when the entire family was away.

The burden of proof was on the plaintiffs to prove that the coat was lost by theft. (*National Surety Co.* v. *Fox,* 174 Ark. 827, 296 S. W. 718.) Appellant argues that the proof offered by the appellees was not sufficient to warrant a finding that the loss was due to theft; and appellant claims that a mere disappearance of an article does not, of itself, mean a theft. There are a myriad of cases involving claims on insurance policies for loss of property. Even to attempt to delineate the cases would be a work of supererogation. In addition to the National Surety case previously cited, some of our own cases involving loss of insured property in which the insurance policy covered larceny besides theft, are: *Central Surety*

Fire Corp. v. *Williams,* 213 Ark. 600, 211 S. W. 2d 891; *Mass. Fire & Marine Ins. Co.* v. *Cagle,* 214 Ark. 189, 214 S. W. 2d 909; and *Equity Mutual Ins. Co.* v. *Merrill,* 215 Ark. 483, 221 S. W. 2d 2.

There are interesting annotations in American Law Reports on "Burglary, Larceny, Theft, or Robbery Within Policy of Insurance." These annotations may be found in 41 A.L.R. 846; 44 A.L.R. 471; and 54 A.L.R. 467. In the last cited annotation it is stated: "While mere disappearance of an article covered by the policy is not sufficient, of itself, to warrant a finding that its loss was due to theft, larceny, or burglary, within the terms of the policy, a finding of such a felonious abstraction may, in a proper case, rest upon circumstantial evidence." A case with facts somewhat similar to those here is *Fidelity Cas. Co.* v. *Wathen,* (Ky.) 266 S. W. 4.

It will be observed from the policy provisions previously copied that there was no provision in the policy concerning the nature of proof sufficient to establish a theft. The house did not have to be entered, etc., etc. The word "theft" is a generic word: Black's Law Dictionary says of theft, ". . . it is a wider term than larceny. . . Theft is the fraudulent taking of corporeal personal property belonging to another . . . with the intent to deprive the owner of the value of the same. . ." Funk & Wagnall's New Standard Dictionary says of theft: "Theft sometimes has a wider significance than larceny and . . . may apply to any illegal acquisition of property, whether by removing or withholding it, and includes embezzlement, breach of trust, robbery, cheating, etc."

Mrs. Rice's testimony went farther than to show a mere disappearance of the property. She stated the condition of the house and the absence of the family at times. In short, there were sufficient matters of a circumstantial nature to take the case to the fact finding agency to determine whether there had been a theft of

the coat. So we find no merit in the appellant's argument that the evidence was not sufficient to support the judgment to the effect that the coat was stolen.

While not listed as a separate point, the appellant also argues that the plaintiffs did not comply with the policy provisions as to notification of the loss. The policy says: "Upon knowledge of loss under this peril or of an occurrence which may give rise to a claim for such loss, the insured shall give notice as soon as practicable to this company or any of its authorized agents, and also to the police." Mrs. Rice testified that she promptly notified the agent of the company; but it is claimed by appellant that Mrs. Rice did not notify the police. Mrs. Rice testified, without contradiction, that there was no police force in West Crossett, Arkansas; that the Sheriff's office was located in the court house in Hamburg, a number of miles away, and that she discussed with the insurance company adjuster the matter of notifying the police and was advised that such was not necessary. Under the showing here made the matter of waiver of notice to the police became a fact question.

Finding no error, the judgment is affirmed; and appellees are allowed an additional $100.00 for attorney's fee in this Court.

DONALD H. BRIDGES *v.* YELLOW CAB CO., INC. ET AL

5-3988 406 S. W. 2d 879

Opinion delivered October 17, 1966

Richard W. Hobbs, for appellant.

Ben J. Harrison and *Walter J. Hebert* and *Q. Byrum Hurst,* for appellee.

George Rose Smith, Justice. In 1963 the city of Hot Springs, by a resolution of the city council, approved a five-year franchise that granted to Virgil East an exclusive concession for the operation of a limousine cab service at the municipally owned airport. East later assigned the franchise to the appellant Bridges. Yellow Cab Company, Inc., brought this suit to enjoin the city from interfering with Yellow Cab's asserted right to maintain a cab stand at the airport. Bridges intervened, relying upon his exclusive franchise as a bar to the suit. This appeal is from a decree holding Bridges' franchise to be invalid under our constitutional prohibition of monopolies. Ark. Const., Art. 2, § 19 (1874).

Under the terms of the franchise Bridges pays the city a fixed monthly fee for the limousine concession. He is entitled to the exclusive use of four parking spaces at the airport. Bridges binds himself to provide a limousine cab service, to maintain his vehicles in good condition, and to carry public liability insurance in a specified amount.

Elsewhere, in decisions with which we agree, the courts have sustained exclusive limousine concessions such as this one. *Miami Beach Airline Service* v. *Crandon,* 159 Fla. 504, 32 So. 2d 153, 172 A.L.R. 1425 (1947); *Stone* v. *Police Jury of Parish of Calcasieu,* 226 La. 943, 77 So. 2d 544 (1954); *Ex parte Houston,* 93 Okla. Crim. 26, 224 P. 2d 281 (1950). In the *Stone* case the court used this pertinent language: "A necessary incident to the competent operation of an airport is adequate provision for transportation of passengers throughout the twenty-four hours of the day, and it would be unwarranted to hold that the Police Jury of Calcasieu Parish did not have the power to make contracts to insure the performance of these services. . . Since the Police Jury

was empowered to enter into such a contract, the plaintiff's contention that the purpose of the Ordinance was to protect a monopoly cannot be legally sustained; its object was to protect the right granted by the contract, so as to insure to the person who obligated himself to provide the service an adequate return for his furnishing of transportation facilities, proper equipment, competent drivers, and sufficient insurance to protect the public."

We do not agree with Yellow Cab's contention that this case is controlled by *North Little Rock Transp. Co.* v. *City of North Little Rock,* 207 Ark. 976, 184 S. W. 2d 52, 159 A.L.R. 813 (1944). There the effect of the statute and ordinance was to grant to one company a monopoly upon the taxicab business in the entire city of North Little Rock. We pointed out that the company seeking the monopoly was under no obligation to continue its service for any length of time. Here, by contrast, Bridges is bound to provide service for the life of the franchise. His exclusive right is a narrow one, embracing only the maintenance of the limousine stand at the airport. Bridges concedes in his brief that competing cab companies may deliver departing passengers to the airport and that incoming passengers may telephone for the cab of their choice if they like. The city council's resolution specifically found that there was not enough business for the service to be maintained upon a competitive basis. In view of all these facts we cannot say that the exclusive franchise offends the constitution.

Reversed.

LOUIS MINKOWITZ ET AL *v.* CITY OF WEST MEMPHIS ET AL

5-3994 406 S. W. 2d 887

Opinion delivered October 17, 1966

Ballon & Farrar and *Nance & Nance,* for appellant.

W. H. Dillahunty, for appellee.

PAUL WARD, Justice. Appellants' land, which was located at the end of an airport runway, was condemned to establish a clear zone or avigation easement. A jury trial resulted in a verdict and judgment, giving each appellant the sum of $2,500 as damages. On appeal appellants rely on only one point for a reversal—the trial court erroneously instructed the jury relative to the measure of damages. Below is set out a summary of the pertinent facts involved.

The airstrip in question lies just west of the City of West Memphis. It runs north and south, with the north end abutting or near Highway No. 70 which runs east and west.

Appellants, Louis Minkowitz and Louis Slepian (d/b/a United Iron and Metal Company) each own a

ten acre parcel of land involved here. Each parcel is one-half mile long, and the south end abuts the north side of said Highway No. 70—directly north of the north end of said airport runway. For several years appellants have operated a business on said strips of land.

On September 17, 1964 the City of West Memphis enacted Ordinance No. 467 which established a clear zone or avigation easement across and over a portion of appellants' land. About a year later appellants filed a complaint against the City in circuit court to recover damages for the unlawful taking of their property. The City filed a counter-claim asking that the property be condemned for "a clear zone or avigation easement," and asking that the compensation due appellants be determined by a jury.

At a pre-trial conference the parties agreed: (a) that the City was entitled to an avigation easement, and (b) that the only issue to be determined by the jury was the compensation to which appellants were entitled.

The jury trial which ensued resulted in a judgment against the City in favor of each appellant in the amount of $2,500.

For a reversal, it is the sole contention of appellants that it was error for the trial court to give instruction No. 2 which, in material part, reads:

> "Now, you will find for the plaintiffs in some amount that you think will compensate them for the property rights taken. In finding for the plaintiffs, Louis Minkowitz and Louis Slepian, against the City of West Memphis, you must fix the amount of money which will reasonably and fairly compensate them, each of them, for the difference in the value of the property involved immediately before and immediately after the restrictions placed or imposed on the property and which limits the height of buildings or other objects, and the restrictions imposed on the

property under the terms of the ordinance and by the taking of a clear zone approach or avigation easement."

Appellants sole objection to the above instruction is that it does not allow the jury to award them the full value of the land included in the easement.

It is our conclusion that the trial court was correct in giving the instruction.

It is not denied that the City did not, under the ordinance or the judgment, take a fee in the land subjected to the easement. The fee still remains in appellants. The great weight of the evidence is that said land is still usable to a large degree. One witness testified that each parcel had not been damaged more than $1,000, and another witness thought there had been no damage. The *extent* of damage is, of course, not an issue here. The ordinance permits the use of the land by the landowners by permitting buildings and trees of heights not greater than from 25 to 75 feet—depending on the distance from the runway.

In situations such as obtain here the well established rule appears to be that the land owner is entitled to recover the difference in value of the land before and after the imposition of the restrictions. See: *Ackerman* v. *Port of Seattle,* 55 Wash. 2 400, 348 P 2 664; *Hopkins* v. *United States,* 17 3 F. Supp. 245.

As we understand appellants' position, they do not question the above cited authorities because, they say, our own decisions are to the contrary. In support they rely on *Baucum* v. *Arkansas Power & Light Co.,* 179 Ark. 154, 15 S. W. 2d 399; *Arkansas Power & Light Co.* v. *Morris,* 221 Ark. 576, 254 S. W. 2d 684, and; *State ex. rel. Publicity & Parks Commission* v. *Earl,* 233 Ark. 348, 345 S. W. 2d 20.

In our opinion the above decisions are not in con-

flict with the result we have reached, since they are distinguishable on the facts from the case here under consideration. Here, as pointed out previously, appellants' entire use of the land has not been taken, nor can it ever be taken without remuneration. This is not the situation in the cited cases. In the *Baucum* case the court pointed out ". . . that the company acquired by condemnation proceedings the power to make such use of right-of-way as its future needs required . . . ." In the *Morris* case we made the same statement quoted above. In the *Earl* case, which also involved the taking of land near the landing strip for airplanes, there appears this distinguishing sentence: "The court"—(sitting as a jury)—"concluded that appellants' use of the said strip destroyed *permanently all use* and benefit to appellees, and therefore appellees should be paid full value." (Emphasis ours.)

Affirmed.

McFaddin, J., dissents.

Ed. F. McFaddin, Justice, dissenting. I think the holding of the Majority in the present case is in direct conflict with our holding in *State ex rel Publicity & Parks Comm.* v. *Earl,* 233 Ark. 348, 345 S. W. 2d 20. In that case, as here, land adjacent to an airport was being taken for the protection of the planes entering and leaving the airport; and we held in that case that the landowner was entitled to recover the full value of the land for the easement taken. I copy from that opinion:

> "Appellant states that 'The court erred in fixing the valuation of the easement as if it were a taking in fee.' It will be recalled that appellant sought to obtain a fee in the 350-foot strip of land to be used for a runway, but asked for only a permanent easement as to the 400-foot strip on each side of the said runway. The trial court concluded that appellant's use of the said strip destroyed permanently all use and benefit to appellees, and therefore that

appellees should be paid full value. After careful consideration we have concluded that the trial court was correct.

Although the exact issue here presented has never been passed on by our court we do find support for the trial court's determination in the case of *Baucum* v. *Arkansas Power & Light Co.,* 179 Ark. 154, 15 S. W. 2d 399; *Texas Illinois Natural Gas Pipeline Co.* v. *Lawhon,* 220 Ark. 932, 251 S. W. 2d 477; and *Arkansas Power & Light Co.* v. *Morris,* 221 Ark. 576, 254 S. W. 2d 684. In the *Baucum* case above cited, we find this statement: 'We adopt the view of the Supreme Court of Tennessee in the case of *Kentucky-Tennessee Light & Power* Co. v. *Beard,* 152 Tenn. 348, 277 S. W. 889 where it was held, after a review of the authorities (which we do not repeat), that where an electric light and power company, in condemnation proceedings, acquired a permanent easement across the land of another, it became liable for the full value of the right-of-way as if the fee had been taken.' In the *Lawhon* case above cited this court said: 'Under the law of this State, the owner of land is entitled to be paid the full value of the land embraced within the right-of-way easement, as if the fee had been taken even though the landowner, after the pipe line was constructed, had the right to continue using the surface of the right-of-way for farming or other purposes not inconsistent with the use of the easement.' "

The Majority attempts to distinguish the Earl case from the present case by inferring that there is only a "small taking" of the use of the land in the case at bar. I consider the taking in the present case to be as great as was the taking in the Earl case. In Section 5 of the Municipal Ordinance[1] of the City of West Memphis

[1]Section 5 reads: "Use Restrictions—Notwithstanding any other provisions of this ordinance, no use may be made of land within any zone established by this ordinance in such a manner

there is a restriction in the use of the appellants' land. In Section 6 of the Ordinance[2] the City has the right to go on the land of the appellants at any time it desires and install and maintain markers and lights for the protection of planes entering or taking off from the West Memphis Airport. In Section 7 of the West Memphis Ordinance[3] the landowners are forbidden to make any material change in the use of the land by erection of structures or growth of trees. With all of these provisions in the West Memphis Ordinance, I think the jury should have been allowed to find:

(a) what portion of the use of the appellants' property was fully taken; and

(b) the value of the fee of such portion so fully taken.

The only way I can harmonize our holdings in the

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as to create electrical interference with radio communication between the airport and aircraft, make it difficult for flyers to distinguish between airport lights and others, result in glare in the eyes of flyers using the airport, impair visibility in the vicinity of the airport, or otherwise endanger the landing, taking-off or maneuvering of aircraft."

[2]Section 6 reads: "(b) Marking and lighting—Notwithstanding the preceding provisions of this section, the owner of any nonconforming structure or tree is hereby required to permit the installation, operation, and maintenance thereon of such markers and lights as shall be deemed necessary by the West Memphis Airport Commission to indicate to the operators of aircraft in the vicinity of the airport, the presence of such airport hazards. Such markers and lights shall be installed, operated, and maintained at the expense of the West Memphis Airport Commission."

[3]Section 7 reads: "(a) Future Uses. Except as specifically provided in paragraphs 1, 2 and 3 hereunder, no material change shall be made in the use of land and no structure or tree shall be erected, altered, planted or otherwise established in any zone hereby created unless a permit therefor shall have been applied for and granted. Each application for a permit shall indicate the purpose for which the permit is desired, with sufficient particularity to permit it to be determined whether the resulting use, structure or tree would conform to the regulations herein prescribed. If such determination is in the affirmative, the permit shall be granted."

Earl case and the previous cases would be on the basis of the full value of the land for the easement taken.

Therefore I dissent from the Majority in the case at bar.

JOE HOELZEMAN JR. *v.* STATE OF ARKANSAS

5207 406 S. W. 2d 883

Opinion delivered October 17, 1966

Wright, Lindsey & Jennings and *William R. Overton,* for appellant.

Bruce Bennett, Attorney General; *Jim Wood,* Asst. Atty. Gen., for appellee.

Osro Cobb, Justice. This case involves a re-examination of our statutory requirements in perfecting appeals from inferior courts to the circuit court.

INTRODUCTORY FACTS

At a point some three miles north of Morrilton on Highway No. 9 appellant lost control of his car and went through a ditch some 18 feet in width and struck and knocked over a farm fence post. He was alone and there were no witnesses other than appellant to the incident. Appellant could not extricate his car and locked it and when he reached a telephone called State Patrolman Bill Mitchell to report the incident, and to inquire if his car could be safely left at the scene overnight. It is undisputed in the record that Patrolman Mitchell told him he could do so and, in fact, the officer promised appellant that he would go with him to the scene the following morning; but, instead, went to the scene independently and thereafter arrested appellant for reckless driving.

Appellant pleaded not guilty and at the hearing before the Justice of the Peace, State Patrolman Mitchell was the only witness to testify for the prosecution, and he asserted that he had concluded from the skid marks, which were not clearly identified with appellant's car, that appellant must have been going at a high rate of speed at the time of the accident. On cross examination the officer admitted that appellant had reported the incident to him promptly and had stated that he had been proceeding in a careful and prudent manner when a cow jumped upon the highway, causing him to swerve to avoid a collision, and that in doing so he lost control of the car and possibly stepped on the accelerator rather than the brake. Solely upon the inferences drawn from the markings at the scene by Officer Mitchell, appellant was convicted of the offense of reckless driving and judgment was entered fixing a penalty of $100.00 fine, $50.00 of same to be suspended on the condition that appellant write for the court "I will not drive in a reckless manner" 500 times.

Appellant, who was not represented by counsel at his trial before the Justice of the Peace, advised the Justice of the Peace on the record that he desired to appeal the case to the circuit court. Significantly, the Justice of the Peace advised the defendant, not once but twice, that he would prepare the papers for appellant's appeal. See page 55 of the trial transcript. Thereafter, appellant made repeated requests of the Justice of the Peace to prepare and file the transcript perfecting his appeal to the circuit court and, in reply to each such request, the Justice of the Peace advised appellant that he would do so in time to protect the interest of appellant as to his appeal. Unhappily, the 30 days time in which to file the transcript on appeal transpired without the Justice of the Peace having performed his promises and assurances to appellant. Immediately following the default of the Justice of the Peace in failing to file the transcript, appellant filed his affidavit for an appeal of his conviction in the circuit court. Motion was made to dismiss the appeal because of failure to file the transcript within 30 days and upon hearing the circuit court dismissed appellant's appeal. It is from this action that the case reaches us for review.

Appellant contends that it was the positive and inescapable duty of the Justice of the Peace to file the transcript of the record and that any duty upon appellant in the matter was that of exercising reasonable care and prudence as to those matters relating to the appeal which were within his personal control. On the other hand, appellee takes the position that even if the Justice of the Peace had in fact misled appellant by his promises and assurances to file the transcript, that the expiration of the 30 day time limit foreclosed appellant's right of appeal.

Appellant's contention of error in dismissing his appeal.

The question of fixing the responsibility for filing the certified transcript of proceedings in cases appealed from a judgment of the Justice of the Peace with the circuit court has been the subject of considerable legis-

lative action by our General Assembly over the years.

In 1908 existing statutory provisions made it the duty and responsibility of the Justice of the Peace to file such transcripts. *See* c. 151, *Section* 2, *Acts of* 1905. This Court in a unanimous opinion, *Cain* v. *State,* 86 Ark. 455, 111 S. W. 267, (1908), noting that the Justice of the Peace had failed to seasonably file the transcript and that appellant's appeal had been dismissed because thereof, reversed the dismissal of the appeal, stating:

> "Section 2 of the Act of April 11, 1905, makes it the duty of the justice, and not of the appellant, to file the transcript in the circuit clerk's office."

In 1939, Act 323 was passed by our General Assembly regulating appeals from inferior courts to the circuit courts. We quote Section 1 thereof, which is pertinent:

> "A party who appeals from a justice of the peace judgment or a common pleas judgment or a municipal court judgment must file the transcript of the judgment in the office of the circuit court clerk within 30 days after the rendition of the judgment. If the transcript of the judgment is not filed within 30 days after the rendition of the judgment, execution can be issued against the signers of the appeal bond."

The language quoted from said Act 323 of 1939 cannot be said to be ambiguous. It placed the responsibility for seasonably filing transcripts upon appellants, rather than upon the Justice of the Peace.

Obviously, general opposition developed as to the placement of this responsibility upon the appellants as the General Assembly in 1953 passed Act 203 for the express purpose of repealing Act 323 of 1939, and removing this responsibility from appellants and placing same again squarely upon the Justice of the Peace. We

quote Section 1 of Act 203 of 1953, which is the last statutory expression of our General Assembly upon this subject, same now appearing as *Ark. Stats. Ann.* 26-1307, Vol. 1, (Repl. 1962):

> "26-1307. *Clerk or justice of peace to file transcript of judgment within thirty days.* If a party appeals from a justice of the peace 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. (Acts 1939, No. 323 § 1, p. 851; 1953, No. 203, § 1, p. 645)."

The language of the 1953 statute again is clear and free of any ambiguity. Its purpose is equally clear, being the removal of the evils experienced under the previous law which made appellants responsible for filing their transcripts on appeal. It also repealed authority to issue execution against the signers of the appeal bond as set forth in the Act of 1939.

In *Whitely* v. *Pickens*, 225 Ark. 845, 286 S. W. 2d 4 (1956), we held that the Act of 1953 made it the duty of the Justice of the Peace to prepare and file the transcripts and placed a companion burden upon appellants to see that transcripts were duly filed. It is clear that in situations where the trial Justices of the Peace die, become incapacitated, depart the state or advise the appellant that they are not going to prepare and file the transcript, that an appellant in the face of such notice must assume the burden of taking prudent and diligent measures to protect his rights of appeal, eliminating, of course, therefrom burdens of a character completely beyond the control of such appellants.

In this particular case, which is factually distinguishable from Whitely v. Pickens, *supra,* every time appellant asked the Justice of the Peace to proceed with the filing of his transcript on appeal, appellant was un-

equivocally advised by the Justice of the Peace that same would be done in time to protect his interests, *i. e.,* 30 days from judgment. These unfulfilled promises served to deprive appellant of a proper basis in fact for a petition for relief by mandamus. We are also confronted with the inescapable fact that this appellant could not control the actions of the Justice of the Peace in preparing and filing the transcript, nor could this appellant personally presume to prepare a certified transcript of the proceedings. These functions were peculiarly within the power of the Justice of the Peace.

The constitutional guaranty of a fair and impartial trial of one accused of a crime could become a nullity if trial courts are permitted to mislead persons convicted of a crime as to matters necessary to their appeals and so as to effectively deny such persons appellate review.

Appellant vigorously sought to prosecute his appeal. He made repeated requests of the Justice of the Peace to file the transcript and when the Justice of the Peace defaulted in filing his transcript, appellant filed his affidavit of appeal in the circuit court within a matter of two days. The Justice of the Peace finally filed the certified transcript some 90 days after the judgment of conviction. Thus we conclude that appellant diligently, prudently and seasonably met every burden which could be reasonably placed upon him in seeking appellate review in the circuit court.

The following facts in this case are pertinent:

(a) Here, the trial court and not a deputy or clerk personally made the explicit assurances and promises to appellant.

(b) There was no showing that the certified transcript had been seasonably prepared by the Justice of the Peace, and that appellant had been called to pick it up and file it himself if he cared to do so.

(c) The record here shows no inadvertence or

oversight by the Justice of the Peace with reference to his statutory duty to file the transcript; but, on the contrary, it indicates a deliberate course of action to deprive appellant of his appeal.

(d) Appellant did not stand idly by but diligently and persistently importuned the Justice of the Peace to make certain that the transcript was properly and seasonably filed to protect his rights on appeal, each time being assured that this would be done.

So long as appellant was being assured by the Justice of the Peace that the transcript would be seasonably filed as required by law, appellant could rely thereon. There is certainly no presumption of law that a public official will refuse to discharge a duty detailed by statute.

It is doubtful, in view of the assurances of the Justice of the Peace, that appellant could state adequate grounds for relief by mandamus prior to the default as to such promises.

This appellant seasonably and prudently met every reasonable burden which was his in respect to this appeal. It would abort the ends of justice to deny appellant de novo review in the circuit court.

For analogous reasoning, see *Marshall Motor Service* v. *Norm Co.,* 194 Ark. 805, 109 S. W. 2d 662 (1937), wherein we stated:

> "Of course, if there is a satisfactory showing that the delay is due to matters over which the appellant had no reasonable control, and justice requires that the delay be disregarded and that the cause be heard de novo on its merits, then the Circuit Court should overrule a motion to dismiss."

The cause is reversed and remanded for further proceedings on the appeal from the judgment of the Justice of the Peace.

HARVEY A. BELFORD *v.* ELMO TAYLOR, JUDGE

5-3985 406 S. W. 2d 868

Opinion delivered October 17, 1966

John D. Eldridge, for petitioner.

Fletcher Long, for respondent.

GUY AMSLER, Justice. The capable attorneys in their statements have fairly outlined the issue and undisputed facts. Petitioner's attorney recites these facts:

> "This is a proceedings for a Writ of Prohibition against Elmo Taylor, Circuit Judge of the First Judicial Circuit, to prohibit that court from taking jurisdiction of an action filed by one Brenda Humphrey against the petitioner, Harvey A. Belford, being Cause No. 6553 in said Woodruff Circuit Court.
>
> "The sole question being decided by this court is whether Brenda Humphrey, at the time of the accident and injury complained of, resided in Woodruff County as the term is used in Ark. Stat. Ann. § 27-610 (Repl. 1962).
>
> "On June 3, 1965, Brenda Humphrey was driving her automobile on U. S. Highway 70 between Memphis and West Memphis in Crittenden County when it was collided with by an automobile driven by Har-

vey A. Belford of Pocahontas [Randolph County, Arkansas.] Brenda Humphrey secured employment with the General Electric Plant in Memphis in April, 1961 and worked continuously for that company until the time of the accident in June, 1965. During all of that time she lived either in apartments or rooming houses in West Memphis, Crittenden County, Arkansas. On most weekends she would return to her parents' home in McCrory, Woodruff County, Arkansas. Her driver's license was issued in Woodruff County and in most of the years she assessed and paid her personal property taxes in Woodruff County. She voted absentee ballot in Woodruff County.

"Her address on her income tax return and on her W-2 forms and at her employer's office was given as her address in West Memphis. She would save up her soiled clothing and carry it home to McCrory each week, picking up clean clothing and taking it back to West Memphis. She paid rental on a monthly or weekly basis at her various places of abode in the City of West Memphis. When she was first admitted to the hospital in West Memphis following the accident her address was given as 204 East Cooper, West Memphis, Arkansas, and upon readmission this was changed to show her address as McCrory, Arkansas."

Counsel for respondent added:

"During the time she was working in Memphis, and during the time which petitioner claims she established a residence in West Memphis, lived only in furnished rooms and apartments. She at all times ate her meals at a restaurant, with rare exceptions when she was invited out to the home of a couple she knew there, she kept her winter clothes in McCrory during the summer, and her summer clothes in McCrory during the winter. She was furnished in her various rooming houses and apartments in West

Memphis with linens, towels, and did not so much as own any of the pictures on the walls or other decorations in her room.

"Her automobile registration and her driver's license during the two or three years immediately preceding this collision were issued in Woodruff County and showed Woodruff County as her address.

"Her time spent in West Memphis consisted in Sunday, Monday, Tuesday, Wednesday and Thursday nights of each week, and her time spent in McCrory consisted in Friday nights, Saturdays, and Sundays. So far as the record shows, she never acquired any friends or close acquaintances in West Memphis while she had employment in Memphis. The West Memphis address given her employer was for purposes of receiving company bulletins and tax forms, and this address was required by her employer because they wanted the address where she stayed during working hours."

The sole question is whether the trial court correctly held that respondent was a resident of Woodruff County within the purview of our venue statute, *supra.*

The attorneys have fully analyzed, and compared most of our decisions dealing with the venue act since the legislation was enacted in 1939. *Norton* v. *Purkins, Judge,* 203 Ark. 586, 157 S. W. 2d 765; *Wilhelm* v. *Taylor,* 236 Ark. 85, 346 S. W. 2d 674; *Fort Smith Gas Company* v. *Kincannon,* 202 Ark. 216, 150 S. W. 2d 968; *Twin City Coach Co.* v. *Stewart,* 209 Ark. 310, 190 S. W. 2d 629; *Missouri Pacific* v. *Lawrence,* 215 Ark. 718, 223 S. W. 2d 823; *Burbridge* v. *Redman,* 211 Ark. 236, 200 S. W. 2d 492; *Murry* v. *Maner,* 230 Ark. 132, 320 S. W. 2d 940 (1959).

Twin City Coach Co. v. *Stewart, supra,* involved the death of an 18 year old girl (respondent here is 24)

who worked in Fort Smith (Sebastian County) six days a week, sharing a rented apartment with some other girls, where she kept her clothes. Nearly every weekend, after working six days, the decedent returned to Booneville (Logan County) where her parents lived, bringing along her soiled clothes so that she and her mother could launder them. In the early spring of 1944, the building in which she worked was closed for repairs and she spent the time during closure with her parents. There was no proof of payment of taxes, procuring driver's license or ownership of property.

Miss Stewart lost her life in a collision that occurred in Sebastian County. Her administrator sued in Logan County. The question of residence arose and we held that Logan County was the proper forum under our venue act.

In comparing the instant case with Twin City there are two differences to which we do not accredit major significance. The respondent had been in West Memphis (Crittenden County) somewhat longer than Miss Stewart had worked in Fort Smith and Miss Stewart had attained her majority only a short time before her demise while Miss Humphrey is several years older. On the other hand Miss Humphrey had assessed property, paid poll and property taxes and voted in Woodruff County.

As early as 1884 we said that each case of this type (dealing with residence) must be decided on its own state of facts. *Krone* v. *Cooper,* 43 Ark. 547.

Generally in a case where venue is questioned there must be a determination on the facts. In *Murray* v. *Maner, supra,* we stated the well settled rule of this court that prohibition is not the proper remedy when the trial court's jurisdiction depends on a disputed question of fact. One of the virtues of this rule is that a litigant by protecting his record throughout the trial may give the court the benefit of all the facts before the issue is ruled on.

The able trial judge concluded that venue lies in Woodruff County. We give persuasive weight to his conclusion and are unwilling to say that petitioner has discharged the burden of proving that respondent is not a resident of Woodruff County.

Petition denied.

MYRTLE DOUGAN ET AL *v.* DOUGLAS BOOKER ET AL

5-3945 407 S. W. 2d 369

Opinion delivered October 17, 1966
[Rehearing denied November 21, 1966.]

John L. Wilson and *S. Hubert Mayes Jr.,* for appellant.

Riddick Riffel, for appellee.

HUGH M. BLAND, Justice. This is a Workmen's

Compensation case. The appellants are Mrs. Myrtle Dougan, widow of Neuman Elmore Dougan, deceased, for herself and the other dependents of Mr. Dougan who suffered a heart attack and died on November 2, 1963 while working for Douglas Booker, the appellee. She claims that Mr. Dougan's collapse and death arose out of and in the course of his employment and that point is disputed by the employer and his insurance carrier.

There was a hearing on the claim before the Referee on June 3, 1964 and at that hearing Dr. G. G. Hairston testified that he had been Mr. Dougan's family physician; that he had treated him in a previous heart attack; that he knew Mr. Dougan's condition; that he had advised Mr. Dougan not to overtax himself, and if he had any symptoms of chest pain or fatigue to stop and rest. Dr. Hairston stated that if on November 2, 1963 Mr. Dougan was underneath a house, holding up a 2 x 6 piece of lumber with one hand and nailing it with the other, such exertion would have a straining effect on him and that such straining effect, in Dr. Hairston's opinion, caused the heart attack which Mr. Dougan suffered on the job.

Dr. Hairston was the only medical witness who appeared and testified in person. The other medical witnesses testified by deposition. At the conclusion of the hearing before the Referee on June 3, 1964, it was agreed that expert witnesses could be presented later. On September 17, 1964 the claimants took the deposition of Dr. Phillip Cullen. He pointed out that the evidence showed that Mr. Dougan had done heavy work just before his heart attack and that it was his (Dr. Cullen's) opinion that the excess strain of the heavy work was the cause of the heart attack. The case was allowed to drag along until November 11, 1964 when the respondent insurance carrier took the deposition of Dr. Alfred Kahn. He testified that he never saw Mr. Dougan, but had reviewed the transcript of the testimony taken on June 3rd; that from a reading of that testimony and in answer to a detailed hypothetical question, it was his

(Dr. Kahn's) opinion that Mr. Dougan's work did not contribute to his death. With this opinion evidence of Dr. Kahn's, a Referee (other than the one who heard the witnesses on June 3rd) wrote an opinion on February 5, 1965 denying the claim. The Commission (only two members acting)[1] heard no more evidence and on June 2, 1965 adopted the written opinion of the Referee.

The Circuit Court affirmed the judgment of the Commission and the appellants bring appeal to this Court. The employer-employee relationship is admitted. The factual situation is as follows:

During the week Neuman Elmore Dougan, who had a previous history of heart trouble, worked at Ark-La Village and on weekends and holidays worked as a carpenter for Douglas Booker, a contractor at Emmet, Arkansas. At about 7:30 a.m. on Saturday, November 2, 1963, Dougan did various carpentry work for Booker at a residence where he was required to work on his knees or in a stooped position. He returned to his home about 9:00 a.m. to get a crowbar and took a dose of Milk of Magnesia because he thought his stomach was bothering him. He then left to work at the Home Economic Cottage at Emmet High School where his employer was doing some remodeling work. He returned home at noon still complaining of his stomach. He went back to the Home Economic Cottage and worked by himself for a while and was joined by another worker at 2:00 p.m. The two of them lifted, held and nailed a 2 x 6 board underneath the floor of the house from a cramped position and then sawed and nailed a 4 x 8 piece of plywood on the floor of the house. The two men loaded scrap lumber onto a truck and took it to the employer's house and returned with the employer to the Home Economic Cottage where further work was done by the three of them.

[1]Honorable Osro Cobb was Chairman of the Workmen's Compensation Commission at the time of such opinion, but he did not participate in the decision on the claim by the Workmen's Compensation Commission and is not participating in the case in this Court.

At about 2:00 p.m. Dougan again returned home to get a piece of plywood and asked his wife to go to Prescott to get a prescription refilled. After working a while longer, deceased complained of what he thought was stomach trouble. He continued to work and handed lumber to his employer and the other worker from a seated position. At approximately 4:30 p.m. his employer directed him to go about one block from the Cottage to turn on the water supply to the Cottage. After he had been gone for approximately fifteen minutes, he was discovered lying on the ground by the water valve and was taken to the hospital in the employer's car but was pronounced dead of a heart attack upon arrival.

We thus have a case before us where a worker with a bad heart put forth unusual exertion in his work and collapsed on the job and died; and yet compensation has been denied his widow and dependents. Such is a miscarriage of justice in that the Commission failed to give the workmen's compensation law a liberal interpretation in favor of the claimant which has been our frequently stated rule.

In *Boyd* v. *McKown,* 226 Ark. 174, 288 S. W. 2d 614, the Commission had denied compensation, yet this Court awarded compensation, saying that the testimony relied on by the Commission to deny compensation was not substantial:

> "* * * All of the doctors who examined the claimant over a period of time stated that his disability is due to silicosis; evidence to the contrary is very weak and not substantial. Whether there is substantial evidence is a matter of law. *Arkansas State Highway Commission* v. *Byars,* 221 Ark. 845, 256 S. W. 2d 738.
>
> The law of this State is that workmen's compensation cases should be broadly and liberally construed, and that doubtful cases should be resolved in favor of the claimant. *Arkansas National Bank of Hot*

Springs v. *Colbert,* 209 Ark. 1070, 193 S. W. 2d 806; *Elm Springs Canning Company* v. *Sullins,* 207 Ark. 257, 180 S. W. 2d 113; *Williams Manufacturing Company* v. *Walker,* 206 Ark. 392, 175 S. W. 2d 380; *Peerless Coal Company* v. *Jones,* 219 Ark. 181, 240 S. W. 2d 647.

If this law has any meaning or force or effect, it should be applied here."

In *Tri-State Const.* v. *Worthen,* 224 Ark. 418, 274 S. W. 2d 352, the worker suffered a cerebral hemorrhage and collapsed on the job. The Workmen's Compensation Commission denied compensation and we held the Commission was in error, saying:

"The Commission found that Worthen's collapse was not the result of his work, but was the result of a pre-existing diseased condition. * * *

In a long line of cases we have held that when the worker collapses because of excessive work load or unusual strain, he is entitled to compensation, even though he had a pre-existing weakness which contributed to his collapse. One such case is *Triebsch* v. *Athletic Mining & Smelting Co.,* 218 Ark. 379, 237 S. W. 2d 26; and we quote from that *in extenso*:

'But on the accidental injury phase of the case, the uncontradicted evidence shows that the claimant suffered an *accidental injury* within the purview of our cases such as: *Herron Lumber Co.* v. *Neal,* 205 Ark. 1093, 172 S. W. 2d 252; *McGregor* v. *Arrington,* 206 Ark. 921, 175 S. W. 2d 210; *Harding Glass Co.* v. *Albertson,* 208 Ark. 866, 187 S. W. 2d 961; *Sturgis Bros.* v. *Mays,* 208 Ark. 1017, 188 S. W. 2d 629; *Murch-Jarvis Co.* v. *Townsend,* 209 Ark. 956, 193 S. W. 2d 310; and *Batesville White Lime Co.* v. *Bell,* 212 Ark. 23, 205 S. W. 2d 31.

In *Herron Lumber Co.* v. *Neal, supra,* the worker

had a gastric ulcer which ruptured while he was performing a task that required extra energy. We held that the worker suffered an *accidental injury* within the purview of the Workmen's Compensation Law, and quoted from 71 C. J. 607:

"Injury from strain or over-exertion due to a physical condition pre-disposing the employee to injury is an injury within the terms of the various workmen's compensation acts * * *"

In *McGregor* v. *Arrington, supra,* the worker was a carpenter. He had an impaired heart, and, in trying to move a plank, he over-exerted himself and suffered a collapse and died. We allowed compensation, saying that the decedent's death resulted from an accidental injury arising out of and in the course of his employment.

In *Harding Glass Co.* v. *Albertson, supra,* the worker also had an impaired heart; and while at work suffered a heat prostration and died. In allowing compensation, we quoted from Schneider on Workmen's Compensation Text, Vol. 4, 1328, p. 543:

"It may be stated generally that if the conditions of the employment, whether due to over-exertion, excessive heat, excessive inhalation of dust and fumes, shock, excitement, nervous strain or trauma, tend to increase an employee's blood pressure sufficiently to cause a cerebral hemorrhage, such result constitutes a compensable accident, within the intent of most compensation acts, though the employee may have been suffering from a pre-existing diseased condition which pre-disposed him to such result, or where such result would have occurred in time due to the natural progress of such pre-existing condition. . . The majority of the American Courts follow the English rule as set out in the case of *Clover, Clayton & Co.* v. *Hughes,* A. C. 242: 'An accident arises out of the employment when the re-

quired exertion producing the accident is too great for the man undertaking the work, whatever the degree of exertion or condition of health.'

In *Sturgis Bros.* v. *Mays, supra,* the worker, in the course of his employment, overtaxed his previously weakened heart and died. In allowing compensation, we quoted a leading case:

"Nor is it a defense that the workman had some pre-disposing physical weakness but for which he would not have broken down. If the employment was the cause of the collapse, in the sense that but for the work he was doing it would not have occurred when it did, the injury arises out of the employment.'

In *Murch-Jarvis Co.* v. *Townsend, supra,* the worker became disabled from inhaling fumes and dust in the course of his work in a smelter room. We held such disability to be "an accidental injury within the meaning of our Workmen's Compensation Law," saying:

"There are numerous cases from other jurisdictions holding that a disease, or an aggravation thereof, resulting from inhalation of dust particles or fumes may constitute an accident, or injury, within the meaning of the particular act involved."

In *Batesville White Lime Co.* v. *Bell, supra,* the inhalation of dust particles caused heart trouble, we held such to be an accidental injury, saying:

"Now there is nothing in the proof of this case to justify a conclusion that the injury to appellee's heart by breathing the excessive amount of dust was one which appellee might have reasonably expected or anticipated. Certainly it was accidental as far as he was concerned; and there is much authority for a holding that an injury, not necessarily the

result of one impact alone, but caused by a continuation of irritation upon some part of the body by foreign substances may properly be said to be accidental.''

Then, in *Triebsch* v. *Athletic Mining & Smelting Co., supra,* we applied the rule of the quoted cases to the facts there existing, and announced our conclusion in this language:

''Therefore, to summarize: we have in the case at bar undisputed facts which are similar in essential respects to those which existed in the six cases hereinbefore discussed, in each of which compensation was awarded. These facts are: *a pre-existing ailment, an increased and overtaxing effort to accomplish the work load under the conditions existing, and a collapsed worker resulting therefrom.* These make a case of accidental injury within the purview of the Workmen's Compensation Law.'' (Italics our own.)' ''

After reviewing all the evidence in the case, we concluded in *Tri-State* v. *Worthen, supra*:

''* * * the Commision apparently lost sight of the uncontradicted evidence which shows: (1) a pre-existing ailment; (2) an increased and overtaxing effort to accomplish the work load under the conditions existing; and (3) a collapsed worker resulting therefrom. As we said in *Triebsch* v. *Athletic Mining Co.,* 218 Ark. 379, 237 S. W. 2d 26: 'These make a case of accidental injury within the purview of the Workmen's Compensation Law.' ''

In the case at bar, a man with a bad heart[2] was

[2]For the benefit of those interested in further study of heart cases, we call attention to the following: "The Heart Attack Case in Workmen's Compensation," by Hon. Henry Woods in 16 Ark. Law Review 214; "The Relationship of Effort or Stress to Coronary Heart Disease," by Hon. William B. Putman, in 17 Ark. Law Review 39; and comments in 24 NACCA Law Journal, p. 134; 29 NACCA Law Journal, p. 223; and 30 NACCA Law Journal, p. 244.

trying to support his family. He went under a house, laid on his back, held up a 2 x 6 with one hand and nailed it with the other, thus having excess strain. He died and his family was denied compensation because it was said that he would have died anyway. In *Bettendorf* v. *Kelly*, 229 Ark. 672, 317 S. W. 2d 708, the argument was made that the worker would have died anyway and we said of that argument:

> "We cannot follow appellant in the conclusion urged. Every time a mortal is born everyone knows that some time the mortal will die, so the death of a mortal is never unforeseen or unexpected in the light of human existence. But just when the death will occur and under what circumstances, is certainly unforeseeable and unpredictable. So it was with the heart attack of Mr. Kelly in the case at bar: no one could tell when it would occur. He was engaged in a line of work, he was exerting himself by the driving of nails into the pallets, he collapsed: his death was, therefore, accidental and within the scope of his employment."

To conclude: the Workmen's Compensation Law was adopted to give compensation to workers, not to allow insurance carriers to make fine distinctions to avoid liability. In this case the Commission did not give the liberal interpretation to the law which our cases require. The judgment is reversed and the cause remanded to direct the Commission to allow compensation to the widow and dependents.

Reversed and remanded.

Cobb, J., disqualified and not participating.

Harris, C. J., and Smith, J., dissent.

Carleton Harris, Chief Justice, dissenting. Our rule to the effect that we will affirm the holding of the Workmen's Compensation Commission, if there is any

substantial evidence to support its ruling, is so well established as to require no citation of authority.

I consider that the testimony of Dr. Alfred Kahn, who testified that, in his opinion, Mr. Dougan's work did not contribute to his death, was substantial evidence, and entirely sufficient to support the findings of the commission.

I therefore respectfully dissent.

SMITH, J., joins in dissent.

CURTISS ANDERSON *v.* FRED MONTGOMERY WEBB ET AL

5-3986 406 S. W. 2d 871

Opinion delivered October 17, 1966

H. G. Partlow Jr., for appellant.

Marcus Evrard, for appellee.

HUGH M. BLAND, Justice. The only issues involved

in this appeal are whether or not Act No. 163 of The General Assembly of Arkansas for the year 1957 [Ark. Stat. Ann. § 50-405.1-2 (Supp. 1965)] is constitutional and whether or not a deed executed in conformity with its provisions is sufficient to terminate an estate tail. The facts are stipulated by the parties.

In October 1965 appellant submitted to appellee Fred Montgomery Webb a written proposal to purchase from him a tract of land described therein. Webb accepted the proposal. In accord with the terms of the proposal, appellant deposited in escrow with Blytheville Title Company $30,000.00 to cover full payment of the purchase price to be delivered if and when title to the property was found to be good and upon failure of title, to be returned to appellant.

The title was examined and by reason of the following facts, the title was found to be encumbered by the possibility of an estate tail.

In the year 1943 Mrs. M. J. Webb and J. H. Webb, her husband, being then owners of the property that is the subject of this action, executed and delivered to Fred Montgomery Webb (then a minor, 5 years of age) a deed by which they conveyed to him subject lands for the period of his natural life and created an estate tail to become effective after his death.

In the year 1965 Mrs. M. J. Webb and J. H. Webb, her husband, who were the grantors in the deed creating the estate tail; Fred Montgomery Webb, an unmarried man and life tenant under said deed; Jesse H. Webb, Jr., Sara Lynn Webb, wife of Jesse H. Webb, Jr., Louise Webb Fincannon and Margaret Webb Hay, all persons then in being who might or could ever become remaindermen under said deed, executed and delivered to Ann Norton, a female person of the City of Blytheville, Arkansas, a warranty deed with the intention of vesting in her fee simple title to subject lands. It was stipulated

that in the execution of this deed all provisions of Act No. 163 were followed and complied with.

On August 17, 1965, Ann Norton executed and delivered to Fred Montgomery Webb her warranty deed conveying subject land to him. It was stipulated that Fred Montgomery Webb was an unmarried man and had no bodily descendants.

The only matter in controversy between appellant and appellees in this cause is the question whether or not the deed that was given by all possible remaindermen now in being to Ann Norton was sufficient under the provisions of Act No. 163 of 1957 to dissolve the estate tail that was created by the deed from M. J. Webb and her husband to Fred Montgomery Webb.

Appellant, acting upon advice that the title was bad, made demand upon the escrow agent for surrender of his earnest money and a return to appellee of the deed held in escrow. Upon refusal, appellant filed suit in chancery court to rescind his proposal to buy for failure of title.

On trial the chancellor found that the provisions of Act No. 163, when properly followed, are adequate and sufficient to terminate an estate tail when executed by all then in being who could ever be remaindermen; that the deed in question in this cause was executed by the creators of said estate tail and by all persons in being who could ever be or become remaindermen thereunder; and that said deed did effectively terminate said estate tail and vest title in fee simple in the appellee Fred Montgomery Webb. The chancellor further directed the escrow agent, Blytheville Title Company, to make delivery of the deed to appellant and to pay over the purchase money held by it to appellee Fred Montgomery Webb.

From this holding appellant has perfected his appeal. Appellant contends that Act No. 163 of 1957 vio-

lates Article I, § 10 (paragraph 1) of the Constitution of the United States which provides:

> "No state shall * * * pass any Bill of Attainder, ex post facto law, or Law impairing the Obligation of Contracts * * *"

Appellant further contends that the Act violates the prohibition of § 21, Article 2 of the Constitution of Arkansas which provides:

> "No person shall be taken or imprisoned, or disseized of his estate freehold, liberties or privileges * * * except by the judgment of his peers or the law of the land; * * *"

For many years, title examiners, lawyers, jurists and the general public have been plagued with the errors that unthinking or ill-advised persons commit when they entail property and thereby make it lose its value to the owners and the community. By the joint efforts of the Arkansas Bar Association, the staff of the University of Arkansas School of Law, and many others, Act No. 163 of 1957 was enacted into law. It was considered to be very necessary, expedient and desirable that a method be provided by which an estate tail may be terminated and title vested in fee simple. The preamble to Act No. 163 reads as follows:

> "Whereas, the estate tail is a relic of medieval times and seldom desirable in view of the current necessity for credit and for transfer of title incident to the growth of communities, but nevertheless such an estate is often created without a realization of the delay and difficulty imposed on a conveyance of the land involved, which imposition is later sought to be dissolved; and
>
> Whereas, the common law remedy of fine and common recovery for dissolution of said estates is no longer available as a method of dissolving same and a substitute therefore should be provided; * * *"

The first two sections of the Act are as follows:

"Section 1. Any estate which under the common law would be deemed an estate tail or a fee tail estate, or any estate created by reason of a conveyance to a grantee or grantees and the heirs of his or her body or to other contingent remaindermen, may be dissolved by the grantor creating such an estate and all life tenants and all of the other persons then living who might be remaindermen in event of the death of the life tenant or tenants executing a conveyance of the fee. Such conveyance shall vest in the grantee the fee simple title to the lands therein conveyed.

Section 2. The method of extinguishing the above mentioned estates shall apply equally to those estates now in existence and those which may hereafter come into existence."

We have passed on the question involved here in the case of *Love* v. *McDonald,* 201 Ark. 882, 148 S. W. 2d 170. In that case the court had before it Act 76 of The General Assembly of Arkansas of 1929. Section 1 of that Act provides:

"Whenever any land in this State may hereafter be, or shall have heretofore been, devised by will or conveyed by grant to any person by any language which at common law would have vested in such person an estate in fee tail, then such person who at common law would have been invested with a fee tail estate in said lands, and who under the provisions of Section 1499 of Crawford & Moses Digest of the Statutes of the State of Arkansas, is or shall be invested with a life estate therein, is hereby authorized and empowered to execute oil and gas leases on said land, * * *"

The contention was there made that the Act violated both the State and Federal Constitutions. In disposing of this question the court said:

"The federal constitution does not contain an express guarantee that vested rights shall be protected. However, they are fully secured. The provision of the federal constitution prohibiting states from passing laws impairing obligation of contracts has been interpreted generally to embrace only those contracts wherein the subject-matter is property or some object of value; that is, contracts which confer rights that may be asserted in courts of justice. Only those contracts which create in a person or corporation a vested beneficial interest are the objects afforded protection by the prohibition against impairment expressed in Art. 1, § 10 of the Constitution. As was said in *Douglas* v. *Kentucky,* 168 U. S. 488, 42 L. ed. 553, 18 S. Ct. 199, the provisions of the federal constitution in reference to contracts only inhibit the states from passing laws impairing the obligations of such contracts as relate to property rights, but not to subjects that are purely governmental.

In the chapter on Constitutional Law, 6 R. C. L., § 303, there is this statement: 'In regard to the validity of retroactive legislation, so far as it may affect only expectant or contingent interests, the law seems to be well settled that the power thus to deal with such interests resides in the legislature. Laws enacted for the betterment of judicial procedure and the unfettering of estates so as to bring them into market for sale are usually valid unless they actually impair rights which are vested. It has been said that most civil rights are derived from public laws, and if at any time before the rights become vested in particular individuals, the convenience of the state requires amendments to or the repeal of such laws, individuals have no cause of complaint. The general rule therefore is that the legislature has constitutional authority to change, modify, or abolish expectant estates of all kinds, since a mere expectation of property in the future is not considered a vested right.' "

In the case before us, the only question being the constitutionality of the Act, we hold that it is not contrary to any provision of the State Constitution nor does it violate the Federal Constitution.

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

McFaddin, J., dissents.

Ed. F. McFaddin, Justice, dissenting. In the present case the Majority is holding that the Legislature in 1957 could validly effectuate a change in a deed that had been executed in 1943; and I cannot agree that such retroactive legislation is valid.

I have very little sympathy with estates tail, and I think it would be wise legislation to hold that in deeds executed after the adoption of such legislation the first taker took the fee simple. Some states have adopted such statutes. This is all discussed in detail in 19 Am. Jur. p. 506 *et seq.*, "Estates," § 46 *et seq.* Particularly, I call attention to the following in § 55 of the article: "In most of the jurisdictions of this country statutes have been passed which serve to eliminate, modify, or abolish estates tail . . . In a few jurisdictions the law forbids generally the creation of entailed estates."[1]

Even though entertaining the above views, I still must dissent from the Majority in the present case, because I do not believe the legislature can validly pass a law in 1957 changing the effects of a deed made in 1943; and I think the case of *Love* v. *McDonald,* 201 Ark. 882, 148 S. W. 2d 170, is wrong if it is understood to so hold. That case was decided under Act No. 76 of 1929, relating to oil and gas leases, and most of the language about Act No. 76 of 1929 abolishing estates tail is dictum.

[1]In 161 A.L.R. 612 there is an exhaustive annotation on the subject, "Nature of estate created by grant or gift to one of his children."

In the case before us Mr. and Mrs. Webb executed a deed in 1943 which created an estate tail. Fred Montgomery Webb has a life estate and the subsequent owners are to be determined at his death. Fred Montgomery Webb is still living, descent will not be cast until his death, and the possibility of issue is not extinct. On the death of Fred Montgomery Webb someone will be entitled to the property, and such beneficiary cannot be determined at this time.

I think we should hold as regards Act No. 163 of 1957 just as we held as regards Act No. 340 of 1947: it is valid prospectively, but void retroactively. In *Jenkins* v. *Jenkins,* 219 Ark. 219, 242 S. W. 2d 124, the parties owned property by entirety in 1946. By Act No. 340 of 1947 the Legislature empowered the chancery courts, on granting a divorce decree, to dissolve an entirety estate and change it to a tenancy in common. The question before us was whether the Act No. 340 of 1947 was constitutional when applied to an entirety estate created before the passage of the Act. We held that the 1947 enactment could not change or vary the rights of an estate by the entirety created before the adoption of said legislation. I think the same rule applies in the case at bar, and the 1957 legislation cannot constitutionally change the rights and effects of a deed executed in 1943.

Therefore, I respectfully dissent.

CLAUDE W. GILLIAM *v.* SARAH J. GILLIAM

5-3450 406 S. W. 2d 870

Opinion delivered October 17, 1966

Philip N. Gowen, for appellant.

John P. Gill, for appellee.

Appellant sought relief in this court and as a condition for granting said relief per curiam order was entered on the 28 day of September, 1964, requiring appellant to make a good and sufficient bond in this court in the penal sum of $500.00, conditioned that the said amount "will be paid on any present arrearages in alimony payments we may hereafter determine."

On October 22, 1964, appellant made and filed a cash bond in the sum of $500.00.

On August 17, 1966, appellant filed his motion for release of the bond funds to him.

On September 29, 1966, appellee's attorney filed a formal response for appellee to appellant's motion for release of the bond funds, setting forth that appellant was then in arrears in alimony payments to appellee in the sum of $5,400.00 or for a period of fifty-four months.

On September 15, 1966, the Internal Revenue Service of the United States filed with the Clerk of this Court its Notice of Levy, seeking to assert a tax lien against the said cash funds deposited as a bond by appellant.

We have concluded that the trial court should take jurisdiction as to the question of priority of the various claimants to the bond funds, making certain that all claimants have an opportunity upon appropriate notice to assert their respective claims.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk of this Court deposit the bond funds of $500.00 into the registry of the trial court and that he deliver to the clerk of the trial court all instruments and pleadings relating to the bond funds which have been filed in this Court for the use and guidance of the trial court.

CLAUD JENKINS ET AL *v.* JOHN LEROY SIMMONS ET AL

5-3984 407 S. W. 2d 105

Opinion delivered October 24, 1966

[redacted]

Paul K. Roberts, for appellants.

(No brief filed for appellees).

CARLETON HARRIS, Chief Justice. This appeal relates to the construction of a deed. J. L. Scobey, a widower, married Ella Jenkins, a widow, on January 9, 1938. No children were born of this marriage. However, Scobey was the father of several grown children by a prior marriage, and these children, together with a grandchild, are appellees herein. Mrs. Scobey (Jenkins) also had children by a former marriage, and these children are appellants herein. After their marriage, J. L. and Ella purchased the land involved in this litigation in 1938, from G. W. Martin and wife, said deed conveying the property to "J. L. Scobey and Ella Scobey, his wife." This conveyance, of course, created an estate by the entirety. Thereafter, on April 26, 1947, J. L. and Ella conveyed by warranty deed the land involved to Lera C.

Funk, and on the same date, Mrs. Funk conveyed the land back to the Scobeys, pertinent portions of the deed reading as follows:

"* * * That I, Mrs. Lera C. Funk, * * * do hereby grant, bargain, sell and convey unto the said J. L. Scobey and Ella Scobey not as an estate in the entirety but in equal parts, and unto their heirs and assigns, forever, the following lands lying in the County of Bradley and State of Arkansas, to-wit:

(Description of lands)

"IT BEING EXPRESSLY UNDERSTOOD, each of the grantees is to receive an undivided one-half interest in the lands herein conveyed, to be inherited by their heirs at their death, unless conveyed by both of them prior to their deaths, and cannot be conveyed by either without the other joining therein.

"This Deed to operate as though the grantees were strangers and not husband and wife."

The parties remained married until the death of J. L. Scobey on March 11, 1964; Ella Scobey died less than two weeks later, on March 24, 1964. They had not conveyed the property at the time of their deaths.

Appellants instituted suit in the Chancery Court of Bradley County, contending that, as heirs of Ella Jenkins Scobey, they were entitled to the lands here in issue, because (they assert) that irrespective of the language in the 1947 deed, an estate by the entirety was created, and since their mother had survived her husband, absolute title to the property vested in her. Appellees answered, contending that they were the owners of an undivided one-half interest in the lands by virtue of the deed heretofore quoted. On trial, the court held that the deed conveyed an undivided one-half interest in the property to J. L. Scobey, and a one-half undivided interest to Ella Scobey; that J. L. and Ella were tenants

in common, each holding a one-half interest in the property. The court then found that the heirs of J. L. Scobey, as a class, were the owners of an undivided one-half interest, and the heirs of Ella Scobey, as a class, were the owners of an undivided one-half interest, and appellants and appellees were thus tenants in common as to themselves. From the decree so entered, appellants bring this appeal.

Appellants vigorously contend that the deed from Lera Funk to the Scobeys created an estate by the entirety, for the simple reason that J. L. and Ella were man and wife at the time of the conveyance. Several of our earlier cases are cited in support of this argument, but none of these cases are in point.[1] *Redmon* v. *Hill,* 233 Ark. 45, 342 S. W. 2d 410, is determinative of the issue in this litigation, that case holding that deeds are to be construed in a manner that will most nearly carry out the intention of the parties, consistent, however, with the rules of law. Quoting earlier cases, we said:

"* * * 'In the construction of a deed like any other contract it is the duty of the court to ascertain, if possible, the intention of the parties, especially that of the grantor.' To the same effect is the decision in *Carter Oil Company* v. *Weil,* 209 Ark. 653, 192 S. W. 2d 215, where it was stated that: 'All deeds are to be construed favorably, and as near the intention of the parties as possible, consistently with the rules of law.' "

With the above quoted language as our guide, there

[1]For instance, *Robinson* v. *Eagle and Wife,* 29 Ark. 202, and *Parrish* v. *Parrish,* 151 Ark. 161, 235 S. W. 792, merely hold that a conveyance to a husband and wife (no limitations or conditions were involved) creates an estate by the entirety, *Parrish* holding that this is true though the deed does not reflect that the parties are husband and wife. *Roulston* v. *Hall,* 66 Ark. 305, 50 S. W. 690, holds that an estate by the entirety is not subject to dower. *Weir* v. *Brigham,* 218 Ark. 354, 236 S. W. 2d 435, holds that Act 86 of 1935 (permitting spouses to convey directly to each other) cannot be relied upon to create an estate by the entirety. See however, the later case of *Ebrite* v. *Brookhyser,* 219 Ark. 676, 244 S. W. 2d 625.

remains no doubt as to the correctness of the holding by the trial court. If ever an intent was clearly expressed in a deed, it is in this case. The language literally "spells out" exactly what the parties have in mind—namely, that the heirs of each grantee shall inherit an undivided one-half interest in the property from his or her parent. The court was correct in finding that Scobey and wife were tenants in common, and that their heirs are likewise tenants in common in the lands at issue.

Appellants assert that if the Chancellor was correct in this holding, then "it must be conceded that Ella Scobey had dower and homestead interests in the J. L. Scobey undivided half interest." It is true that Ella Scobey had this interest for nearly two weeks, but when she died, her dower and homestead interests passed completely out of the picture, for, since her husband left children, she only had a life interest in his lands. See *Atkinson v. Van Echaute,* 236 Ark. 423, 366 S. W. 2d 273; also Ark. Stat. Ann. § 61-201 (1947), together with compiler's note to section.

In accordance with what has been said, it is evident that the learned Chancellor reached the right conclusions.

Affirmed.

DELIGHT EGG FARMS, INC. ET AL *v.* RAYMOND CASH

5-3978 407 S. W. 2d 108

Opinion delivered October 24, 1966

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

Jerry Thomasson, for appellee.

ED. F. MCFADDIN, Justice. This is a Workmen's Compensation case. The Commission made an award that the worker, Raymond Cash, was entitled to total permanent disability compensation; the Circuit Court affirmed; and the employer (Delight Egg Farms, Inc.) and its insurance carrier bring this appeal insisting: (a) that Mr. Cash is only entitled to 58% permanent partial disability to the left shoulder; and (b) that there is no evidence that any other disability arose out of and in the course of the employment.

The basic facts are not in dispute. Raymond Cash, a man 54 years of age, was a truck driver for the appellant, Delight Egg Farms, Inc. His duties were to assist in loading crates of eggs on the truck, to haul them to destination, and to assist in unloading them. Dates are important:

(a) In 1963 Mr. Cash had a physical examination preliminary to a driver's license and was found to be in good condition in every respect.

(b) On January 23, 1964, while assisting in load-

ing crates of eggs, he slipped and fell some four or five feet from the loading platform to the ground, thereby receiving injuries, contusions and abrasions to his left shoulder, his left leg, and the left side of his head. He was immediately sent to Dr. George H. Wright at Hope, where he was hospitalized for treatment. Dr. Wright found a postero-inferior dislocation of the left humerus (shoulder); and also the abrasions and contusions previously mentioned. In addition, Dr. Wright found a rather marked hypertension and uncontrolled diabetes mellitus. The dislocated shoulder was reduced and splinted. After five or six days the diabetic condition was controlled and the hypertension improved; and Mr. Cash was discharged from the hospital for out-patient observation.

(c) On January 30, 1964, Mr. Cash returned to Dr. Wright, complaining that pains had developed in the left leg. There was a slight swelling of the foot; and Dr. Wright and his associate, Dr. Forney Holt, diagnosed Mr. Cash's condition as a thrombo phlebitis of the deep vessels of the leg. Bed rest, elastic bandage, and close observation were advised. Mr. Cash remained in the hospital for about two weeks. His hypertension and diabetes seemed to be under control; but his left leg continued to swell when he stood on it for any length of time. He was discharged from the hospital and sent home for further convalescence, with instructions to avoid any exertion.

(d) Some time in February Mr. Cash returned to work in order to support his family, first doing light work for about two weeks, and then gradually doing more work. On the morning of March 27th he assisted in loading his truck with some 60 or 70 cases of eggs (each loaded case weighing about 30 pounds), which he took to Texarkana and assisted in unloading.

(e) The next morning (March 28th) he awakened to find his left hand swollen and his mouth drawn a little; but he went to work that morning and again en-

gaged in loading crates of eggs on the truck. Soon his hand was so drawn that he could not open it, and his mouth was drawn, and he had numbness and loss of use of his left side. He had suffered a paralysis. He was sent to Dr. Wright in Hope, who put him in the hospital, where he remained for some twenty days.

It will be observed that the original injury was on January 23rd; that on January 30th a thrombo phlebitis condition developed in his left leg; and that by March 28th there was a cerebral vascular accident. The doctors call this CVA, but in layman's language it means a paralytic stroke. He filed a claim for total permanent disability. In the hearing before the Referee there was a serious contention made by the claimant that the paralytic stroke of March 28th was the result of the thrombo phlebitis of the leg. That claim was disputed. In the hearing before the Full Commission, the attorney for the claimant—for reasons best known to himself—made this statement: "I, attorney for the claimant Raymond Cash, hereby state that I withdraw any contention that claimant's stroke was caused by a blood clot emanating from his left calf. Claimant retains his contention that the stroke was aggravated by his employment."

Thus, there is now no claim that the thrombo phlebitis condition diagnosed by Dr. Wright on January 30th was the cause of the paralytic condition of March 28th. Rather, it is the contention of the claimant (appellee here) that he has three injuries, all arising out of and in the course of his employment, to-wit: (1) the frozen shoulder injury was the result of the fall on January 23, 1964, and is compensable; (2) the thrombo phlebitis condition was the result of the injury on January 23rd, and is compensable; and (3) the work which appellee performed on March 28th aggravated his hypertension and resulted in the stroke or paralysis which he suffered and is therefore compensable.

As to the first two items (the frozen shoulder and the thrombo phlebitis) the evidence is overwhelming

that these injuries arose out of and in the course of the employment, in that the appellee fell from the loading platform on January 23rd. But as to the paralytic condition of March 28th being aggravated by his work, the evidence is in dispute. A majority of the Commission agreed with the claimant in all of his three contentions; and the only question before us is whether there is substantial evidence to sustain the finding of the Commission as regards the paralytic stroke on March 28th. The doctor for the claimant testified that when Mr. Cash went to work on March 28th his work aggravated his already incipient paralytic condition; and that if he had stayed in bed and avoided exertion he probably would not have suffered the complete disability that he has. Thus, the doctor for the claimant made a case of a workman with a disability collapsing on the job because of exertion.

The eminent doctor for the employer agreed that the exertion put forth at work on the morning of March 28th aggravated the paralytic condition.[1] Thus we have a case wherein a worker in a bad physical condition continued to work and the exertion put forth resulted in a

[1]Here is the testimony of the doctor on the point:

"Q. You wouldn't want him up walking about?

"A. No.

"Q. Now this man testified, and he gave you a history, that he woke up one morning in March . . . that his left hand was numb, paralyzed and drawn and that the whole left side of the body, the face, arm and leg were numb. Do you feel that he was beginning to experience the symptoms of a stroke at that time?

"A. Yes.

"Q. Then he went on to work and Dr. Wright tells us that he saw him at 9 o'clock that morning . . . the record up to date shows that he worked from seven until nine o'clock. He testified that during that time he lifted thirty containers from a railroad boxcar onto a truck and that the containers weighed thirty pounds each. . . . In any event would you say that whether he lifted thirty containers weighing thirty pounds each or drove a truck around the area that morning, that the work aggravated his condition even to the extent of one percent?

"A. I think it is quite reasonable that his condition could have been aggravated by any manner of exertion."

collapse and total disability. Under these circumstances the Commission was correct in awarding total permanent disability,[2] in accordance with our holdings in such cases as *Herron Lbr. Co.* v. *Neal,* 205 Ark. 1093, 172 S. W. 2d 252; *McGregor* v. *Arrington,* 206 Ark. 921, 175 S. W. 2d 210; and *Harding Glass Co.* v. *Albertson,* 208 Ark. 866, 187 S. W. 2d 961.

Affirmed.

COBB, J., disqualified and not participating.

[2]The Workmen's Compensation Commission's award contained this very pertinent paragraph in its findings: "We are aware that where there is life there is hope. Should this claimant make unexpected improvement to such a point that he can resume gainful employment, respondent is in no way foreclosed by this decision to then seek an order of the Commission terminating unpaid compensation benefits."

OLD AMERICAN LIFE INS. CO. *v.* THEODORE WILLIAMS

5-3998 407 S. W. 2d 110

Opinion delivered October 24, 1966

Jack Young, for appellant.

L. A. Hardin, for appellee.

George Rose Smith, Justice. In this action upon a health and accident insurance policy the plaintiff recovered the full amount sued for: Six hundred dollars for the loss of sight in his right eye, $63.27 for temporary disability, the statutory penalty, and an attorney's fee of $1,000. In substance there are three contentions for reversal. (At the outset we deny the appellee's motion for affirmance under Rule 9, as we find the abstract of the record to be sufficient.)

First, the insurer insists that the plaintiff's right eye had been sightless for several years before it was surgically removed following an accident in 1965. In the court below this was an issue of fact upon which the testimony is in conflict. Williams testified that before the accident he could see well enough with his right eye to recognize people and "to tell time and do things." There is some medical evidence to the contrary, but Williams's testimony is amply sufficient to support the trial court's finding of fact.

Second, the appellant argues that the court should have deducted from the judgment the amount of premiums accruing between the filing of the complaint and the date of trial. This argument is without merit, not only because it is raised in this court for the first time but also because the plaintiff's right to recover was not dependent upon the policy's having been in force at the time of trial. As far as the record shows, the insured may have intended for the policy to lapse.

Third, the insurer correctly contends that the trial court allowed an excessive attorney's fee. The total recovery was $663.27. That is the whole case; the judg-

ment does not establish any right in the plaintiff for an additional recovery in the future. We are of the opinion that a fee of $600 for counsel's services in the trial court and in this court is the maximum that should be awarded.

With the indicated modification the judgment is affirmed. Under Rule 24 (c) the appellant recovers its costs.

STUTTGART SHOE REAL ESTATE CORP. *v.* CITY OF STUTTGART ET AL

5-3995 407 S. W. 2d 104

Opinion delivered October 24, 1966

Macom & Moorhead, for appellant.

Cecil C. Matthews and *William C. Daviss,* for appellee.

PAUL WARD, Justice. This appeal involves the validity of Zoning Ordinance No. 615 passed in 1965 by the City Council of Stuttgart.

On July 26, 1965 Stuttgart Shoe Real Estate Corporation (appellant) filed suit in chancery court against

the City and the Baldwin Oil Company, Inc. alleging, in substance, that the City acted arbitrarily in passing said ordinance which rezoned a parcel of land owned by Baldwin from B-2 classification to Industrial-1 classification, and which decreased the value of its property. The prayer was that the ordinance be declared "illegal and void," and that the same be vacated and set aside. Upon trial the court refused to grant the prayer.

For a better understanding of the issues, we set out hereafter some of the pertinent background facts.

The ordinance in question applied only to a small plot of land, owned by Baldwin, approximately 100 feet from north to south and 326.7 feet from east to west—referred to hereafter as the "subject property." Subject property is bounded on the west by Main Street and on the south by 22nd Street, which street is the south boundary of the City. Prior to 1965 the subject property (together with the property on both sides of Main Street and for several blocks north) was zoned B-2 for retail establishments and filling stations.

Abutting the subject property on the east there is a plot of ground (similar in shape and size to Baldwin's property) which is owned by appellant, and on which there is a shoe manufacturing plant. Appellant's property (together with the property to the north and east) is zoned C-1 or quiet industrial property.

After careful consideration we have concluded the decree of the trial court should be affirmed.

The record reveals that Baldwin intends to construct on subject property an aboveground gasoline storage facility with a capacity of 48,000 gallons. Appellant's principal contention appears to be that such a usage will endanger the safety of its employees, that it will increase its insurance rates, and that it will decrease the value of its property. We have concluded that the preponderance of the evidence sustains the chancellor in holding to the contrary.

As stated previously, under zoning classification B-2 Baldwin had the right to build a filling station (including underground gasoline storage tanks) on the subject property. It is undisputed that, without ordinance No. 615 Baldwin could not have constructed proposed business anywhere within the limits of the City. Also, the evidence shows that the City council thoroughly considered all the above possibilities on two or more occasions before it passed ordinance No. 615. The mayor of the City who testified in favor of rezoning said that he had talked with the Fire Department about possible dangers involved and learned it had had some trouble with underground storage tanks but knew of no trouble with the aboveground tanks. There was evidence that the installation would conform with standards required by insurance companies. Also there was evidence that the value of appellant's property would not be decreased because of the said installation.

In *McKinney* v. *City of Little Rock,* 201 Ark. 618, 146 S. W. 2d 167, the chancery court upheld Zoning Ordinance No. 5420. On appeal to this Court we affirmed the trial court, stating:

> "Moreover, to set aside the decree and the finding of the Council would be substituting our judgment for that of the zoning authorities who are primarily charged with the duty and responsibility of determining the question. This we should not do unless we can say from the evidence that the action of the Council and the decision of the court are unreasonable and arbitrary."

In the case of *Economy Wholesale Co., Inc.* v. *Rodgers*, 232 Ark. 835, 340 S. W. 2d 583, in dealing with a zoning ordinance passed by the City of Searcy, we cited the *McKinney* case with approval, stating:

> "We have held that we would not set aside the findings of a city council unless we find that the facts clearly show that the council acted unreasonably

and arbitrarily. To do so would 'be substituting our judgment for that of the zoning authorities who are primarily charged with the duty and responsibility of determining the question' ".

It is our conclusion therefore that the decree of the trial court (upholding the ordinance) must be affirmed.

Affirmed.

FRANKIE KINARD *v.* CITY OF CONWAY

5223 407 S. W. 2d 382

Opinion delivered October 24, 1966

[Rehearing denied November 21, 1966.]

Terral, Rawlings, Matthews & Purtle, for appellant.

Bruce Bennett, Attorney General; *Jerry W. Faubus,* Asst. Atty. Gen., for appellee.

Osro Cobb, Justice. This appellant, a minor, on two separate occasions within a period of less than one year, was arrested, charged and convicted in the Municipal Court of Conway for the offense of driving while under the influence of intoxicating liquor. Appellant appealed his second conviction to the Circuit Court where, following trial on September 20, 1965, appellant was found guilty as a second offender and was sentenced to 120 days in jail and his driving privileges were suspended for 60 days. When imposing sentence, the trial court announced that he was suspending the imposition of the jail sentence for a period of one year conditioned upon the lawful conduct and behavior of appellant during such period of time.

During the one year suspension of the jail sentence appellant was arrested, charged and released upon cash bond for the separate offenses of drunkenness and illegal possession by a minor of intoxicants. These offenses were alleged to have been committed by appellant on February 2, 1966, in the nighttime within the city limits of Conway. On the 14th day of March, 1966 the Municipal Court entered its separate judgments finding appellant guilty on both charges. Appellant was fined $10.00 and $1.00 costs for possessing intoxicants while a minor, and $20.00 plus $1.00 costs for the offense of drunkenness. The record reflects that appellant entered a plea of guilty as to the drunkenness charge.

On April 18, 1966 the Circuit Clerk of Faulkner County notified appellant by letter that a hearing on a petition to revoke his suspended jail sentence would be held by the Circuit Judge on April 28, 1966. A formal hearing was held on that date, appellant being represented by counsel and the City of Conway by the City Attorney. It is significant that in the course of the hear-

ing appellant testified briefly and admitted that at the time of his arrest on February 2, 1966 he was alone in his car and that a quantity of beer was in the car. Following said hearing the Circuit Court entered its order revoking the suspension of the previous jail sentence of 120 days imposed upon appellant. It is from this action of the trial court that the case reaches us on appeal

All points raised by appellant relate to the alleged lack of authority of the Circuit Court, under the facts peculiar to this case, to revoke the suspension of appellant's sentence by invoking the provisions of Ark. Stat. Ann. § 43-2324 (Repl. 1964).

We quote the applicable statutes as to the offense of driving while under the influence of intoxicating liquor and the penalties therefor, as follows: Ark. Stat. Ann. § 75-1027, § 75-1029 (Repl. 1957); § 75-1029.2 (Supp. 1965):

> "75-1027. *Driving under influence of intoxicating liquor.*—It is unlawful and punishable as provided in Section 3 [§ 75-1029] of this Act for any person who is under the influence of intoxicating liquor to drive or be in actual control of any vehicle within this State. [Acts 1953, No. 208, § 1, p. 654.]"

> "75-1029. *Penalty.* * * * On a second or subsequent conviction for an offense committed within one [1] year of the first offense of a violation of this Act [§§ 75-1027—75-1031], he shall be punished by imprisonment for not less than ten days [10], nor more than one [1] year, and a fine of not less than two hundred and fifty dollars ($250.00), nor more than one thousand dollars ($1,000.00), and his privilege to operate a motor vehicle shall be revoked for one [1] year. Imprisonment as provided in this Section shall not be deemed to have begun until after conviction and sentencing of the defendant. [Acts 1953, No. 208, § 3 p. 654."]

> "75-1029.2. *Penalty mandatory.*—The penalty pro-

vided in Section 1 [§ 75-1029.1] hereof is mandatory and no court shall have authority to suspend it. [Acts 1961, No. 52 § 2 p. 108.]" (Italics supplied).

It was, therefore, the mandatory duty of the court when imposing a jail sentence upon appellant for conviction of a second offense of driving while under the influence of intoxicants within one year of the previous offense, to have also included in the sentence revocation of appellant's driving privileges for one year, and to have imposed upon appellant a fine of not less than $250.00. However, this is not raised or at issue on this appeal.

We have many times held that the sufficiency of the evidence to sustain an order of revocation of a suspended sentence is a matter addressing itself to the sound discretion of the trial court. *Bodner* v. *State,* 221 Ark. 545, 254 S. W. 2d 463 (1953); *Calloway* v. *State,* 201 Ark. 542, 145 S. W. 2d 353 (1940); *Spears* v. *State,* 194 Ark. 836, 109 S. W. 2d 926 (1937).

We have examined the entire record in this case and we have concluded that the Circuit Judge did not abuse his discretion in revoking the suspension of the jail sentence. In *Gross* v. *State,* 240 Ark. 926, 403 S. W. 2d 75 (1966), we reviewed both the statutory authority of the trial judge and the proper procedures to be followed by the trial courts in such revocation proceedings. The rules announced by us in the *Gross* case are clearly applicable to this case. The latest legislative enactment as to suspension of sentences and conditions of probation is Act No. 438 of 1965, which now appears as Ark. Stat. Ann. 43-2331 et seq (Supp. 1965).

It has been noted by us in reviewing this case that appellant and his attorney had adequate notice in which to prepare for the hearing upon the petition to revoke appellant's suspended sentence; that appellant must have been aware of the importance of the hearing in-

volving his possible imprisonment and that, in the face of this situation, appellant did not produce a single witness to give testimony in his behalf as to the circumstances that actually existed at the time he was arrested on February 2, 1966 and charged with the offenses of drunkenness and possession by a minor of intoxicants. Furthermore, the charge against appellant for the offense of drunkenness on February 2, 1966, when found in his automobile which was not then in motion, is strikingly similar to the previous convictions of appellant for driving while under the influence of intoxicating liquor, the offense for which he had been given the suspended sentence. Appellant obviously disregarded the warnings given to him by the trial court at the time of the suspension of his sentence.

We therefore affirm the action of the trial court in revoking the suspension of the 120 day jail sentence of appellant.

Affirmed.

WILLIAM FARRAR *v.* STATE OF ARKANSAS

5218 407 S. W. 2d 112

Opinion delivered October 24, 1966

A. M. Coates, for appellant.

Bruce Bennett, Attorney General, *H. Clay Robinson*, Asst. Atty. Gen., for appellee.

GUY AMSLER, Justice. Appellant, William Farrar (referred to in the record as Jack Farrar), on August 14, 1965, was charged by information in the Circuit Court of Lee County, Arkansas, with the crime of robbery.

By separate informations Priest Bob Gates, Joe Cheers and Roland Cheers were charged with participating in the offense. Lafayette O'Donnell was the alleged victim.

Within a few hours after the offense was committed on the evening of July 10, 1965, Joe Cheers and Roland Cheers left the State of Arkansas and were apprehended in Kansas City, Missouri, and returned to Lee County, Arkansas, sometime in the early part of 1966.

On the 18th of February, 1966, all the defendants entered pleas of not guilty, and the court appointed counsel to represent the defendunts, Priest Bob Gates, Joe and Roland Cheers, and thereafter Joe and Roland Cheers changed their pleas to guilty and their sentences were deferred until after the trial of appellant and Priest Bob Gates.

On the 7th day of March, 1966, the charges against appellant and Priest Bob Gates were consolidated and tried. Gates was found not guilty and appellant was convicted of grand larceny. The court entered its judgment sentencing Farrar to one year in prison.

Appellant filed his motion for a new trial, which was overruled, and the case is here on appeal. Five errors are alleged, but our conclusion necessitates a discussion of only one. The inquiry of importance is whether there was any corroborative evidence to support the testimony of an accomplice.

There was considerable testimony regarding the early evening activities of the parties but we deem this of little significance since sometime around midnight of July 10, 1965, the four defendants and the victim were first together at Farrar's cafe. O'Donnell purchased a couple of drinks and a sandwich, which he used a $5 bill to pay for. O'Donnell decided to leave the cafe so appellant offered to haul him but he declined, and then left, walking, with the Cheers boys. He was going by Emma Lee Jefferson's (the Cheers' boys Aunt) to leave his money for safe keeping before going some place else.

There is a conflict regarding subsequent events. O'Donnell and the Cheers boys say that Farrar, with Gates in the car, picked them up and hauled them to Emma Lee's house. Then O'Donnell, according to appellant's brief, says:

> "I got out of the car, and the two Cheers boys got out with me, one on one side and one on the other, and Joe Cheers was the one that took my money. I said, 'Bring my money back,' and he started hollering, 'Wait for me.' I then went down and woke up Moore who was in the same house with Emma Lee and I got his car and he, Emma Lee and Moore got in his car and tried to find this other car, which we did in front of the Supermarket on Highway 79. I got out of the car and went up to the car. Joe Lewis was in and said, 'Give me my money back.'' Farrar did not say anything. Later on he said he did not know anything about any money.''

On the other hand Farrar says that he and Gates, after leaving the cafe, decided to drive to "Millie's Place" out on Highway 44. Then appellant's brief recites:

> "We got out to Highway 1 and made a right turn off of Moton Street. We were going down Moton Street and got to Highway 1 and stopped, then made a right turn and went about a house and a

half, I was at the Chinaman's store. I was driving along real slow with the windows down, it was warm, and Joe Cheers came by and hollered and said, 'Where are you going?' and I said, 'I am going out to Millie's, and he said, 'There is Roland,' and he got in the car. Joe told me to stop for Roland, and he told me they wanted me to take them to the Blue Goose on Highway 79 West of Marianna about two miles. Gates was in the car with me at the time and an old drunk fellow. After Roland Cheers got in the car, he said he wanted to go to the Blue Goose, and I made a left turn on Florida Street, which runs North and South. We were going down Louisiana Street, one block from No. 1 Highway which goes one block to Arkansas Street which took us back to the Chinaman's store and took us back within one house of Emma Lee's house. We then went down Arkansas to No. 1 Highway, which runs back to Moton Street. Arkansas Street terminates and so does Moton. I was on my way out to the Blue Goose. I was going out Marine Street to Mann Fong, the Chinaman's and that is where R. B. Moore pulled up behind me and blowed his horn and Emma Lee Jefferson came up to the car. Emma Lee came over to my car and said, 'Joe, give Son his money' and he said, 'I haven't got his money,' and Son said, 'We are going to the police.' I said, 'I will go with you.' I got in my car and trailed him, and he went back home. I thought he was going to the police. At that time, the Cheers boys, the old drunk and myself and Gates were in my car."

Joe Cheers testified that Bob Gates snatched O'Donnell's purse as they approached Emma Lee's porch, after riding up in appellant's car. He also said that Gates gave the money to appellant and that Farrar divided the money four ways. He claims that he got $27 and his brother a similar amount.

Priest Gates testified that he did not see the money, did not get any of it and did not see it divided. Roland Cheers did not testify.

Lafayette O'Donnell, the victim, testified positively that the Cheers boys took his money and that he didn't think appellant had anything to do with it.

Frank Turner testified that on Monday, following the robbery, he went to Memphis with appellant and that he (Turner) loaned appellant money to replace a defective generator. If appellant had any money "he didn't show it."

It will thus be seen that the only evidence against Farrar is that of the accomplice Joe Cheers—unless, of course, considerable weight is given to the fact that appellant gave the Cheers boys and the others a ride in his car and that he was near the scene of the crime.

We have held that the corroboration of an accomplice must be substantial and that placing the defendant near the scene of the crime is not sufficient. *Strum* v. *State*, 168 Ark. 1012, 272 S. W. 359; *Bright* v. *State*, 212 Ark. 852, 208 S. W. 2d 168.

The state in its brief says:

> "From O'Donnell's testimony alone, the jury could have concluded that the appellant became aware of the fact that O'Donnell was carrying a large sum of money while O'Donnell was in Farrar's place of business; and, although O'Donnell while at Farrar's place refused a ride home in Farrar's automobile, Farrar then followed O'Donnell and the 'Cheers boys' and insisted on giving them a ride for the purpose of participating in taking the money from O'Donnell. From this testimony, it would appear that Farrar, Gates and the 'Cheers boys' had conspired, during the period that O'Donnell was at Farrar's place, to steal the money, and that Farrar was an accessory to the accomplishment of that conspiracy."

This is clearly conjecture as there is not an iota of

proof to support the argument that the defendants knew or discussed the amount of money the victim had or that any plans were made to relieve him of it. The corroboration is insufficient.

Reversed and remanded.

DON WARREN *v.* STATE OF ARKANSAS

5219 407 S. W. 2d 724

Opinion delivered October 24, 1966

[Rehearing denied November 28, 1966.]

Shelby Ferguson and *Bennett & Purtle,* for appellant.

Bruce Bennett, Attorney General; *Lance Hanshaw,* Asst. Atty. Gen., for appellee.

HUGH M. BLAND, Justice. The appellant was convicted for the crime of unlawfully and feloniously selling intoxicating liquor in a prohibited area in Sharp County Arkansas and the jury fixed his punishment at a fine of $1,000.00. From this judgment and conviction appellant has perfected his appeal.

Appellant does not contend that the evidence was insufficient to support the conviction, but relies entirely on two points:

> "I. The defendant was deprived of the protection of Arkansas Statutes 39-206 and 39-208 and of his state and federal constitutional guarantees under Art. 2 Secs. 7, 8, 13, 18, 21 of the Constitution of Arkansas and under the 14th Amendment (relating to due process), the 5th Amendment (relating to due process of law) and under the 6th Amendment (relating to public trial by impartial jury) of the United States Constitution.
>
> II. The court was held at a wrong and improper place, consequently the court was without jurisdiction to try the defendant and the conviction a nullity."

On April 1, 1966 appellant filed his motion to quash the jury panel alleging that Sharp County had been consolidated into one judicial district; that Ark. Stat. Ann. § 39-206 and § 39-208 require that the petit jurors be selected from all parts of the county; that all or 35 of the 36 persons summoned as jurors in this case resided in the old northern district of Sharp County which deprived appellant of his civil and constitutional rights.

On the same day, April 1, 1966, the court heard this motion, including the testimony of the jury commissioners, considered the stipulation entered into between the parties and found:

> "That by Act No. 39 of the General Assembly of Arkansas of 1893 Sharp County was divided into two judicial districts, one being designated the Southern District with the county seat located at Evening Shade, and the other being designated the Northern District with the county seat at Hardy, and thereafter such county seats were established.
>
> That by Act. No. 110 of 1933, the terms of the Cir-

cuit Court for the Northern District commence the first Monday in January and continue for one year and the term for the Southern District commences the second Monday in July of each year and continues for a year thereafter and also by said Act No. 110 of 1933, the jurisdiction of said two districts were made co-extensive, the court in each said district having jurisdiction co-extensive with the entire county.

That on February 1, 1965 the Arkansas Supreme Court affirmed an order of the Sharp County Circuit Court to the effect that by an election held in said county on June 11, 1963, a proper majority had voted to remove the county seats of Sharp County from Evening Shade and Hardy and to build a courthouse and establish a single county seat at Ash Flat, Arkansas.

That as yet no actual construction of a courthouse at Ash Flat has commenced.

That the various county offices and records still remain at Evening Shade and Hardy in the respective buildings heretofore utilized as courthouses and that the county governmental affairs, including the holding of Circuit Court, have been and are being conducted in the same or similar manner as prior to the aforesaid Supreme Court decision of February 1, 1965, and that there are no governmental affairs being conducted as yet at Ash Flat, Arkansas.

That in due time during the Northern district term, which commenced on the first Monday in January, 1965 the court appointed jury commissioners for the purpose of selecting lists of grand, petit and special petit jurors for service during the January 1966 term of the Circuit Court for the Northern District and that at the time designated the same persons selected as jury commissioners, to-wit: Fred Sweitzer, Willie Jean Oyler and Herbert Schales, re-

ported for service and were properly examined as to their qualifications and upon being found to be qualified were sworn as such and were instructed as to their duties as provided by law.

That in view of the fact there is as yet no courthouse at Ash Flat and none of the Sharp County Governmental affairs or offices have been conducted at or moved to Ash Flat, the court instructed said jury commissioners as it customarily had so instructed jury commissioners for the Northern District of Sharp County prior to the aforesaid Supreme Court decision of February 1, 1965 concerning their duties as such officials; that the court informed the jury commissioners as to the location of the line separating the Northern and Southern Judicial Districts of Sharp County and said Jury Commissioners were further informed of the aforesaid Act 110 of 1933 and that while thereunder the Northern and Southern Districts of Sharp County had coextensive jurisdiction in Circuit Courts, the commissioners could confine their jury selection to the area known as the Northern District but that if anyone residing South of the line separating said districts should be selected for jury service and if otherwise qualified, they would be eligible to serve as jurors in the Northern District.

That as shown by the list of jurors selected for the present term of the court, the greater part of the petit jurors so selected reside in the Northern District of the county and that only four were selected who resided in the Southern District.

That there was no systematic exclusion of person or group by the jury commissioners in their selection of persons for petit jury service for the present term of the court.

That the actions of the jury commissioners in their selection of petit jurors for this term of the court

were proper and that none of the defendant's rights have been violated by their actions and the defendant's motion to quash the panel should be overruled."

We think the motion to quash was properly overruled by the court in view of the provision of Ark. Stat. Ann. § 39-208 (Repl. 1962) which is as follows:

> "Preparation of lists of petit jurors and alternates —Indorsement of lists.—The commissioners shall also select from the electors of said county, *or from the area constituting a division thereof where a county has* [2] *or more districts for the conduct of circuit courts,* not less than twenty-four (24) nor more than thirty-six (36) qualified electors, as the court may direct, having the qualifications prescribed in Section 39-206 Arkansas Statutes 1947 Annotated to serve as petit jurors at the next term of court; * * * ".

See, also, *Collins* v. *State,* 200 Ark. 1027, 143 S. W. 2d 1; *Terry* v. *State,* 149 Ark. 462, 233 S. W. 673.

The motion was properly overruled for the further reason that the record here fails to show that the appellant exhausted his peremptory challenges. In such a situation we have held that the appellant cannot complain of the composition of the jury. In the case of *Trotter & Harris* v. *State,* 237 Ark. 820, 377 S. W. 2d 14, cert. denied 379 U. S. 890, we said:

> "* * * Throughout the years, no rule of procedure has been more consistently adhered to than the rule that a defendant cannot complain of the composition of the jury if he does not exhaust his challenges. In *Benton* v. *State,* 30 Ark. 32, decided in 1875, Chief Justice English pointed out that this rule had stood as a precept of criminal practice in this state, for a period of over 22 years. In a long line of cases, we have consistently upheld the rule to the

present time. A cursory examination of our cases reveals over thirty-five criminal cases in which this rule has been cited and adhered to." [Citing cases]

Appellant also contends in Point No. 2 that the court was held at a wrong and improper place and, therefore, without jurisdiction to try the defendant and the conviction resulting was a nullity. As pointed out before, an election was held to abolish the two districts and establish the county seat at Ash Flat. The results of this election came before this court in *Vance* v. *Johnson*, 238 Ark. 1009, 386 S. W. 2d 240, where this court held that only a majority of those voting was sufficient and the election effectively abolished the two districts and established the new county seat at Ash Flat. The election was held in 1963. *Vance* v. *Johnson, supra,* was decided on February 1, 1965 and according to the record nothing has been done to establish a new county seat at Ash Flat. All of the records of the courts are maintained and the business of the county is being conducted as before at the courthouses at Hardy and Evening Shade. Ark. Stat. Ann. § 17-201 et seq (Repl. 1956) provide the procedure necessary for a change of county seats. Ark. Stat. Ann. § 17-208 provides as follows:

"Commissioners for preparation of new county seat—Appointment and oath—Duties—Holding of court at new county seat.—When the deed to the new location shall have been executed and the title vested in the county, as provided in the preceding section, for the purposes and intention of this act [§§ 17-201—17-209], the county court is hereby authorized and empowered to appoint three [3] discreet citizens as the county commissioners, who shall take an oath to faithfully demean themselves as such, and who, under the orders and directions of the county court in pursuance of the provisions of this act, shall superintend and contract for, in the name and behalf of the county, the clearing, grubbing and laying off such new location into suitable and convenient town lots and the erection or pur-

chase of all needful buildings on such new location, preparatory to the actual removal and change of the county seat; and as soon as such buildings shall have been made ready for the several courts holden at the county seat [,] the respective officers thereof and the archives thereof, the commissioners shall report the same to the County Court at the next term, then in that case the next and every succeeding term thereof shall be held at the new county seat, and the Circuit Court and all other Courts for said county of superior or general jurisdiction shall be held at the new county seat, and all processes issuing therefrom shall be made returnable thereto."

In *Williams* v. *Reutzel,* 60 Ark. 155, 29 S. W. 374, at page 158, we find:

"In every county of this state there is, and must be, a county seat. At it the county court is required to erect a good and sufficient courthouse and jail. The county, circuit and other courts held for the county must sit there. There is no other place designated by law for that purpose. The name 'county seat' indicates the object of its creation. It is, as defined by the Century Dictionary, 'the seat of government of a county; the town in which the county and other courts are held, and where the county officers perform their functions.' When the county seat of a county is removed, and the needful public buildings are made ready for the several courts holden at the county seat and the respective officers, the next and succeeding terms of the county court and the circuit court and all the other courts for said county of superior or general jurisdiction are required to be held at the new county seat."

The court has recognized that in cases of emergency, such as the destruction of the courthouse by fire, the court itself may secure other quarters in the county seat for temporary use in the administration of justice. *Mell* v. *State,* 133 Ark. 197, 202 S. W. 33, citing *Hudspeth* v.

State, 55 Ark. 323, 18 S. W. 183; *Lee* v. *State,* 56 Ark. 4, 19 S. W. 16, and *Williams* v. *Reutzel, supra.*

In the proper administration of justice, Sharp County would be without any place to hold court if the contention of appellant were correct. The record does not indicate or show why the county court of Sharp County has not acted under the clear mandate of the electors of the county to establish a new courthouse at Ash Flat but until that action is taken and the new courthouse certified by the commissioners as ready for use, then the courts will have complete jurisdiction to hold court at Hardy and Evening Shade as before.

Finding no error, the judgment of the Sharp Circuit Court is affirmed.

CLAUDE E. BROOKS ET UX *v.* T. D. REEDY, COUNTY JUDGE ET AL AND J. H. ROBINETTE, INTERVENOR

5-3848 407 S. W. 2d 378

Opinion delivered October 31, 1966

Robert W. Henry, for appellants.

Francis T. Donovan, for appellees.

CARLETON HARRIS, Chief Justice. The questions in

this litigation, as presented to the trial court, were whether a certain road, either by dedication or by prescription, had become a public road, and, if so, whether the road subsequently, because of the acts of appellants, lost its character as a public way. Claude E. Brooks and wife, appellants herein, instituted suit in April, 1965, against T. D. Reedy, the County Judge of Faulkner County, two of his road employees, and two landowners, seeking to enjoin the judge and road crew from working a particular roadway which runs through appellants' lands; they further asked that the road be declared a private road. This roadway in question traverses the Brooks' farm in a generally east to west direction, the west end thereof being at appellants' home. In the briefs, it is referred to as the Oak Grove Road. To the immediate east (of the lands owned by appellants), Carrell E. White and wife own 160 acres, and J. H. Robinette owns 40 acres lying adjacent to, and north of appellants' eastern-most lands. Robinette intervened in this lawsuit, and, like appellees, pleaded that the roadway is public, and both appellees and intervener asked that it be declared a public road, and that appellants be enjoined and restrained from blocking same. After a lengthy trial, in which over 30 witnesses testified, the Chancellor took the matter under advisement, and on September 15, 1965, rendered an opinion holding that the road in question was a public road; that there had been no abandonment of the road by the public, or county officials; that appellants should be enjoined from interfering with the maintenance of the road by the County Judge and road crew, and the complaint should be dismissed for want of equity.[1] From the decree so entered, appellants bring this appeal.

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[1]Pertinent portions of the trial court's opinion are as follows: "This is another in a series of cases between these parties, ostensibly about the road, but actually involving other matters. However, the case is presented as a road question and will be decided as such. "The law of this state is in an unfortunate condition in that the cases hold that the public and private individuals lose their easements, if not formally dedicated, by the maintenance of gates for the period of limitations. This makes necessary lawsuits between people who have no objection for gates being maintained for fear

Because of the view that we take, there is no necessity to discuss the question of whether the road under litigation ever reached the status of a public road. We think that the decisive question here is whether such road, if established as public, remained so under the facts hereinafter enumerated.

It might be stated, however, that we do not think the evidence established a dedication, and, in fact, the court did not so find. Accordingly, our discussion will be based on the premise that the testimony established that the roadway in question, through long use by the general public, *i. e.*, by prescription, had attained the identity of a public thoroughfare.

The testimony reflects that there were three gates across this roadway, one at the east end of the land, one

of losing their easement and as a result of loss of population, depreciates the value of isolated tracts of land. The law as I understand it in other states is that the maintenance of gates across the easement for the statutory period only gives the right to maintain the gates and does not terminate the easement.

"Without reciting the applicable cases with which all of you are acquainted, I am making the following findings:

1) The road in question is a public road connecting two main county roads and running past the old Oak Grove school house. It was established at least as early as 1908 according to the evidence. In view of later findings, it is not necessary that I determine whether this road was established adversely or by a dedication. It is true that there is no formal dedication of record, but I cannot conceive of the public adversely establishing this road to the school house and the houses along the road. It appears far more probable that the land owners gave the road and that there was an acceptance by the public even though not recorded.

2) The evidence shows no abandonment of the road by the public or the county officials charged with the duty of maintaining the road and bridges.

3) The gates or wire gaps maintained by plaintiffs and their predecessors in title have not been maintained with such continuity and intent for any definite seven-year period such as would destroy the rights of the public to travel and maintain the road. * * * Any interruption of the maintenance of the gates, such as leaving the gates down in the winter so that the cattle could use the open range, or the use of the road at a time that the gates were down would be such as to make maintenance of the gates for a new period necessary."

about halfway through the land, and one near the home of appellants at the west side of the land. There is a great deal of evidence that these gaps were placed across the road long years ago, and certainly, we think the preponderance of the evidence clearly established that, at least as far back as 1952, the date that Brooks took possession of the lands,[2] fences were standing, with gaps or gates[3] across the roadway. The testimony was in dispute as to whether these gates remained closed, or were, at times, open, the largest number of witnesses testifying that they were always closed, a few testifying that they were always open, and still others testifying that the gates were sometimes open, and sometimes closed. Many of the people who testified had occasion to use the road only a very few times, and this occurred over a period of several years. But it is, we think clearly established that the gates were in existence at all times from 1952 on, whether up or down.

In November, 1958, Mr. Brooks filed a petition with the County Court in which he asserted that the road was not a public road, and was used only once a year for a homecoming at the old schoolhouse, and he asked that the court enter its order, declaring the road closed. The County Judge entered the order, but it was subsequently voided by the Circuit Court for the reason that statutory requirements for closing a road had not been complied with.[4] Appellees vigorously argue that, if Brooks was so certain that this was not a public road, and that people using the road were only doing so by

[2]When the farm was purchased in 1952, it was purchased in the name of appellant's (Mr. Brooks') father, for the reason, according to Brooks, that he did not have the income to obtain the loan in his name. The witness stated that he had a contract with his father to purchase the place, and that he had made all of the payments on the father's purchase, except for one or two payments initially made by the elder Brooks to George Jones, from whom the farm was purchased. This is not disputed. Brooks obtained record title in 1961.

[3]These gaps were made of two posts with four or five wires between them, and were laced with wire.

[4]It does not appear that Brooks consulted or retained an attorney on this occasion.

his permission, there would have been no necessity to file the aforementioned application. Appellees construe this as an admission that the road was a public one. While, of course, this is a circumstance to be considered in connection with all other evidence, we do not consider this evidence to be decisive or conclusive in the matter. It is not unusual for one to take all steps possible to strengthen his position, even to the extent of taking unnecessary or superfluous action, but if this be a well-founded argument, there is an argument just as potent on the other side. In 1965, the County Judge entertained a petition (apparently instituted by some of appellee landowners) to open a new road approximately a quarter of a mile north of the Brooks home. Appellants argue that, if the road here in question was a public road, there was no reason to endeavor to open a new one just a quarter of a mile away.

Appellees also state in their brief:

"There, of course, is another important feature, and that is that the proof shows that the County of Faulkner had maintained this road through the years from 1908-1966."

We do not agree with this argument for two reasons. In the first place maintenance of the road by the county does not make the road a county road. In *Craig* v. *O'Bryan*, 227 Ark. 681, 301 S. W. 2d 18, we said:

"* * * Joe Price, a county employee, testified that the road had been worked occasionally by the county since 1935, but he did not know whether this was done because of the requests of property owners. The evidence does not reflect any order of the County Court establishing this as a public road, and the mere fact that the roadway was occasionally worked by the county would not, of course, make it a county road."

The proof as to the maintenance of this particular road since 1952 could hardly reach the category of even

"occasionally." The evidence reflects that that portion of the road on the Brooks property was graded in 1954, and again graded in 1959. An effort was made to grade the road in 1965, but Brooks would not permit this to be done. Also, the grading in 1954, and in 1959, by the county, was done at the request and for the convenience of citizens who desired to attend the annual homecoming, heretofore referred to.[5] Grading a road every five or six years can hardly be classed as "maintaining a road."

The learned Chancellor was correct in stating that Arkansas cases hold that, even where an easement has been acquired by prescription, the public and private individuals lose such easement, if the owner maintains gates for the period of limitations. He was also correct in stating that this is different from the decisions in some other states, which hold "that the maintenance of gates across the easement for the statutory period only gives the right to maintain the gates and does not terminate the easement."

We think two of our cases are decisive and controlling in this litigation. The first is *Porter* v. *Huff,* 162 Ark. 52, 257 S. W. 393, decided in 1924. The other is *Mount* v. *Dillon,* 200 Ark. 153, 138 S. W. 2d 59, decided in 1940. The latest case quotes the first, as follows:

"* * * It is unnecessary to decide whether the public acquired a right to the use of the road as a public road by prescription or seven years adverse possession, for it lost any right it may have acquired by acquiescing in a permissive use thereof for a period of more than seven years after the road was closed by gates. When appellee inclosed his land and placed gates across the road, it was notice to the public that thereafter they were passing through the land by permission, and not by right. The undisputed evidence shows that these gates were maintained by appellee across the road for ten or

[5]Brooks, in his petition to the County Court, stated that he had no objection to the road being used for that purpose.

eleven years, without objection on the part of the public."

Apparently, in the case before us, the Chancellor's holding was based upon the fact that he found that the gates, though present, were not always up, *i. e.,* closed. Brooks testified that he never left the gates at either end down (or open), and, also, that he did not lock them until 1965. He said that he had never locked them before, "because they didn't abuse my rights of the land;" that he had not objected to the public use as long as they "put the gaps up as they went through." It may well be that those using the roadway did not always put up the gaps; however, be that as it may, the important fact is that the fence and gates were in place for the statutory period, and, under the language in *Mount* v. *Dillon, supra,* the fact that the gates were not always closed does not make any difference. In detailing the facts of that case, this court recited from a stipulation as follows:

"The road crosses the lands of the plaintiffs, so that each of the plaintiffs owns lands on both the north and south side of said road and the said road terminates at the east line of the Woods' property, where it intersects the above-mentioned public road and mail route; that from 7 to 15 years ago, wire gates were placed across the road in three places, namely: at the east side of Woods' property, at the boundary line between the Woods' property and the Mount property, one-quarter of a mile west from the first gate and another gate one-quarter of a mile west from the last-mentioned gate. These gates were so constructed that they could be opened at one side and permit passage through the same. Anyone traveling the road during this period would open and close these gates in passing through. The gates were erected and maintained by the plaintiffs. The defendants, who live in the vicinity, are the principal persons who have occasion to use said road; *that said gates did not remain closed continuously, but were left open*

during certain seasons of the year, especially during winter months.[6]

"Some time in March, 1939, a question arose between the plaintiffs and the defendants as to the right of the plaintiffs to maintain said gates across said road, whereupon the plaintiffs fastened said gates so that they could not be opened and closed, thus obstructing passageway through said road and making passage impossible without cutting and removing the wire fence."

The italicized portion makes clear that the gates were not always closed, and the word "especially" likewise shows that the gates were open at times other than the winter months. The *Mount* case was decided here in 1940, so it is equally clear that the rights of Mount, as declared by this court, were not based upon the fact that the gates were kept fastened for as much as seven years.

We hold that the gates in question were placed on the roadway at least as early as 1952, and that they have been maintained since that time. As stated in *Mount*:

"* * * When appellee inclosed his land and placed gates across the road, it was notice to the public that thereafter they were passing through the land by permission, and not by right."

The decree is reversed, and the cause remanded for further orders not inconsistent with this opinion.

[6]Emphasis supplied.

ROBERT A. PARKER ET AL *v.* L. V. HENDRICKS ET AL

5-4081 407 S. W. 2d 385

Opinion delivered October 31, 1966

Arnold & Hamilton, for appellant.

Brown, Compton & Prewett, for appellee.

ED. F. MCFADDIN, Justice. This is another "Wet" v. "Dry" case from Ouachita County.[1] In the present appeal the "Drys" are the appellants and the "Wets" are the appellees.

In the 1964 General Election there was submitted to the voters[2] of Ouachita County the question of the legal sale of liquor in that County, and on the face of the returns the vote was:

For the legal sale of alcoholic beverages	6310
Against the legal sale of alcoholic beverages	5618

[1]In *Parker* v. *Rowan,* 239 Ark. 929 S. W. 2d 338, we listed in some detail some of the Ouachita County litigation on this issue.

[2]This was in accordance with Initiated Act No. 1 of 1942, as found in Ark. Stat. Ann. § 48-801 *et seq.* (Repl. 1964.)

Thus, on the face of the returns, the "Wets" won the election. The "Drys" asked for and obtained a recount by the Election Commissioners; and the result of such recount showed the certified result to be:

For the legal sale	6364
Against the legal sale	5651

or a majority for the "Wets" of 713 votes.

The "Drys" then filed a contest in the County Court, which contest was unsuccessful; and the case was appealed to the Circuit Court, wherein there was a lengthy trial for a number of days. The "Drys" alleged many irregularities and illegalities connected with the voting and asked that all of the ballots be thrown out[3] from each of eighteen precincts. The Circuit Court judgment was in favor of the "Wets" and the "Drys" bring this appeal, presenting only a partial record and urging only one point:

> "The Lower Court erred in failing to strike all votes cast in Camden Ward 3B from the total votes cast in the local option election."

In Camden Ward 3B the certified returns after the recount showed a total of 828 votes for legal sale and 88 votes against legal sale; or a majority for the "Wets" of 740 votes in that particular ward. As previously stated, the certified returns showed the "Wets" winning by 713 votes; so if the entire vote from Camden Ward 3B should be thrown out, then the "Drys" would win the election by 27 votes. This makes readily apparent the materiality of Camden Ward 3B; and we proceed to the evidence as to conditions surrounding the voting in that ward.

[3]The words, "Thrown out," are frequently used in regard to election contests. Funk & Wagnalls New Standard Dictionary of the English Language says of "throw out," ". . . to cast out or aside; reject; as to throw out dishonest items . . ." Webster's International Dictionary, 2nd edition, says of "throw out," ". . . to cast out, to reject, or discard. . ."

The election was a General Election, with constitutional amendments as well as State and County officers on the ballot. Because of the large number of voters in Camden Ward 3B the election officials realized that with one set of judges and clerks the counting of the ballots would require days; so the Election Commissioners selected two sets of judges and clerks and two ballot boxes and two tables, all being located in the same room.[4] When a voter arrived to vote and entered the room, he went to whichever of the tables had the shortest line of people waiting; the voter was checked against the list of qualified voters and allowed to vote, if qualified. The Chairman of the Board of Election Commissioners testified that this procedure for two sets of judges and clerks was done to speed the voting and to complete the counting of the ballots as soon as possible. Even with the two sets of judges and clerks, as outlined, the counting of the ballots from Camden Ward 3B was not completed until 5:00 a.m. the morning following the election.

Appellants assailed this "two box—two sets of officials" procedure as being highly irregular; and that is one of the grounds for claiming that the entire returns from Camden Ward 3B should be thrown out. In addition, the appellants claim other matters, to-wit:

(a) That while the judges and clerks at the two tables may have signed the oaths of office, nevertheless the notary or other official failed to complete the jurat of such election officials; and this is claimed as a fatal irregularity.

(b) That at least 7 named people voted twice (once at each table), and that some 58 named people voted who were not on the list of qualified voters; and this irregularity is claimed to be sufficient to throw out all the votes in Camden Ward 3B.

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[4]*Each set of judges and clerks counted and certified the votes in the box that such judges and clerks had been using at their table.*

(c) That after the recounting of the ballots (as requested by the appellants) the ballots were not placed back in the same boxes from which they had been taken, so that it is now impossible to determine which set of election judges and clerks allowed any specific person to vote; and this is claimed to be fatal to the entire vote.

(d) That the two sets of election judges and clerks were not properly instructed as to their duties and did not follow the requirements of the law in many instances; and this is claimed to be fatal to all of the votes cast in Camden Ward 3B.

Some, if not all, of the County election officials and judges and clerks in Camden Ward 3B testified in the Circuit Court case, and such testimony is before us. We are impressed with the integrity that these witnesses demonstrated. They did not profess to know all about the election laws in Arkansas (who does?); but they honestly desired to hold a fair and impartial election. There is no showing that any illegal or irregular votes were cast except to the extent of not to exceed 65 specifically named and challenged voters, and this number would not change the result of the election. There is no fraud shown to have been committed in the Camden Ward 3B election. With becoming candor the appellants say:

> ". . . no contention is here made of deliberate fraud on the part of any person serving in the capacity of an election official in Ward 3B Camden. So far as the record is here presented, the multitude of irregularities which unquestionably occurred, were the result of three failures, which are:
>
> "1. The failure by election officials to properly instruct the persons selected by them to serve as election officials.
>
> "2. The failure of election officials to follow the procedure prescribed in order to legally conduct an election in Ward 3B.

"3. The failure of the precinct officials to understand and perform their duties in the manner prescribed by law."

Even after making the above quoted concession, appellants insist that we should throw out all the ballots in Ward 3B Camden; and to sustain such contention appellants cite these cases from other jurisdictions: *Tebbe* v. *Smith* (Calif.), 41 p. 454; *Hatfield* v. *Scaggs* (W. Va.), 133 S. E. 109; *Kerrigan* v. *Vetsch* (Minn.), 71 N. W. 2d 652; *State of Iowa* v. *Community School Dist.* (Iowa), 78 N. W. 2d 86; and *Johnson* v. *Hall* (Ky.), 121 S. W. 2d 935.

It would serve no useful purpose to state the facts and the holdings in each of these cited cases from other jurisdictions because we have Arkansas cases which completely answer the appellants' contentions. In *Henderson* v. *Gladish,* 198 Ark. 217, 128 S. W. 2d 257, we said:

"All provisions of the election law are mandatory, if enforcement is sought before election in a direct proceeding for that purpose; but after election all should be held directory only, in support of the result, unless of a character to effect an obstruction of the free and intelligent casting of the vote or to the ascertainment of the result, or unless the provision affects an essential element of the election, or unless it is expressly declared by the statute that the particular act is essential to the validity of the election, or that its omission shall render it void."

So if we struck out the maximum of 65 votes particularly and specifically challenged in Camden Ward 3B, we would still know the result; and the result of this election would not be changed by striking out the said 65 votes.

Furthermore, we have repeatedly stated the quantum of evidence that must be shown in order to justify a court in throwing out all the ballots in an election or

in a precinct. The case of *Baker* v. *Hedrick,* 225 Ark. 778, 285 S. W. 2d 910, involved a "Wet" v. "Dry" election contest from Bradley County, and the contention was there urged that all of the votes should be thrown out because of irregularity; and in disposing of that contention we quoted from Judge Eakin's language in the case of *Patton* v. *Coates,* 41 Ark. 111, as to what must be shown before all the ballots in a precinct will be thrown out:

> " 'The wrong should appear to have been clear and flagrant; and in its nature, diffusive in its influences; calculated to effect more than can be traced; and sufficiently potent to render the result really uncertain. If it be such, it defeats a free election, ... If it be not so general and serious, the court cannot safely proceed beyond the exclusion of particular illegal votes, or the supply of particular legal votes rejected.' "[5]

In *Jones* v. *Glidewell,* 53 Ark. 161, 13 S. W. 723, Chief Justice Cockrill, speaking for this Court, said:

> "It is a serious thing to cast out the votes of innocent electors for acts done by others, and it is the province of the courts to see that every legal vote cast is counted where the possibility exists."

In the case at bar we are convinced that the Election Commissioners and election officials in Camden Ward 3B honestly and conscientiously tried, to the best of their abilities, to see that a fair and honest election was held. No fraud was shown or claimed. It would be outrageous to throw out all the votes in Camden Ward 3B under the facts in this case. We agree with the Circuit Court that we do not condone irregularities or illegali-

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[5]In a footnote to *Baker* v. *Hedrick, supra,* we cited a number of cases which have followed *Patton* v. *Coates,* and some of these involved the vote in one precinct, as distinct from the entire election.

ties; but we do say that there is substantial evidence to sustain the findings of the Circuit Court to the effect that all of the specific items of irregularities and illegalities, when totalled, were not sufficient to void the entire election in Camden Ward 3B.

Therefore we affirm the judgment of the Circuit Court.

BURL GARROUTE *v.* STATE OF ARKANSAS

5217 408 S. W. 2d 485

Opinion delivered October 31, 1966

[Rehearing denied December 12, 1966.]

Carlos B. Hill and *Sam Montgomery,* for appellant.

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

GEORGE ROSE SMITH, Justice. The appellant was found guilty of having passed a worthless check for $50.55, with intent to defraud. Ark. Stat. Ann. § 67-720 (Repl. 1966). The court, sitting without a jury, sentenced him to imprisonment for two years, this being a second offense.

For reversal appellant contends that the existence of any intention to defraud is completely disproved by the fact that he made complete restitution before he was arrested under the information filed against him. This, however, is not the law. If the original transaction was criminal, the fact that restitution was made is not in itself a defense. *Bruce* v. *State,* 223 Ark. 357, 265 S. W. 2d 956 (1954). Thus the question for the trial court was whether the accused had the requisite dishonest intent in the first instance.

Upon this issue there is substantial evidence to support the judgment of conviction. Garroute issued the check on August 3, 1964, in the purchase of merchandise. It was returned, for insufficient funds. The merchant made repeated efforts to collect the money. Garroute, who was frequently out of town, sent, through his wife, two ten-dollar payments upon the debt, one in February and the other in April. It was not until after the information was filed in November, 1965, that full restitution was finally made. Upon this proof the court was justified in concluding that Garroute knew when he issued the check that it would not be honored. Unlike the accused in *Edens* v. *State,* 235 Ark. 284, 357 S. W. 2d 641 (1962), Garroute obtained full value in return for the check. That fact distinguishes the two cases.

Affirmed.

WESTINGHOUSE CREDIT CORP. *v.* FIRST NAT'L BANK OF GREEN FOREST, ET AL

5-3905 407 S. W. 2d 388

Opinion delivered October 31, 1966

Warren & Bullion, for appellant.

Warner, Warner, Ragon & Smith and *J. E. Simpson* and *Ted Coxey,* for appellee.

PAUL WARD, Justice. One of the two issues on this appeal is whether appellant was indebted to appellee in the amount of $10,087.18. The trial court, sitting as a jury, found, from the testimony, in favor of appellee, and this appeal follows.

In order to understand how the alleged indebtedness arose it is necessary to set out, in some detail, certain background facts.

The parties involved. Appellant, Westinghouse Credit Corporation (hereafter called "WCC") is a foreign corporation (authorized to do business in this State) and is a subsidiary of the Westinghouse Corporation. Appellant is engaged in helping finance appliance dealers by purchasing their retail contracts. It operates through a main office in Dallas and a district office in Little Rock with Paul Moore as manager of the latter. Appellant employs agents to solicit business from appliance dealers in the State and to assist in other ways. One of these agents is J. P. Erion, Jr.

William T. Daniels, d/b/a T. V. & Appliance Supermarket (called "Daniels") is located at Berryville, Arkansas, with a store at Rogers. He retails appliances—often on credit.

Appellee is the First National Bank of Green Forest, Arkansas (called "bank"). Its president is Ray Anderson.

Facts. On January 14, 1964 Daniels and Erion, Jr. drew a draft on WCC, payable to Daniels for the sum of $4,150.65. A similar draft was drawn two days later for the sum of $5,936.53. The drafts were signed as follows.

"T. V. & Appliance Super Mkt.
(dealer)
(per) William T. Daniels
(official title) Owner
J. P. Erion, Jr.
Westinghouse Credit."

Both drafts were presented to and cashed by appellee-bank, and the proceeds placed to the credit of Daniels. The face of the draft, which was printed on a large envelope, bore the following statement: "In consideration of your immediate payment of this draft, covering your purchase of the transaction represented by the papers contained herein . . . ."

When the drafts were presented by appellee to WCC payment was refused, and then appellee filed suit in circuit court against WCC and Daniels to recover the money expended. After hearing all the testimony on the issue presented the trial court (sitting as a jury) found in favor of appellee.

One. We have concluded that the judgment appealed from must be affirmed. It is well established by many decisions of this Court that the decision of the trial judge (as here) has the same force and effect as the verdict of a jury and must be affirmed if supported by substantial evidence.

The evidence shows that on many previous occasions similar drafts had been honored by WCC; that appellee-bank had treated them as cash items for which Daniels had been given immediate credit. There was testimony that WCC's agent had instructed the bank to treat similar drafts as cash items. This testimony was objected to by appellant on the ground that it was an attempt to "vary the terms of a written instrument." We do not agree. The testimony referred to above tended not to vary but explain the meaning of the draft. In the case of *Jackson County Gin Co.* v. *McQuistion,* 177 Ark. 60, 5 S. W. 2d 729, there appears this statement:

> "While parol evidence is not admissible to vary the terms of a written contract, it is admissible to show what the parties intended to express by the language adopted."

The rule thus stated has never been overruled. Also, there is testimony in the record from which the trial court could have found that *Erion, Jr.* was an agent of WCC clothed with authority to approve contract purchases and also drafts drawn in payment thereof.

Two. WCC not only filed an answer to the bank's complaint, as set out above, but it filed a counter-claim against the bank and also filed a cross-complaint against

the bank and its president—Ray Anderson. In both instances WCC alleged, in substance, that the bank and its president, "with intent to deceive and defraud," falsely and fraudulently represented that Daniels "was in good credit and safe to be trusted." It was further alleged that the bank and Anderson well knew at the time that Daniels' business was highly unsound and not in good credit—that he was not worth anything over and above his debts and liabilities, and that they knew of prior fraudulent dealings on the part of Daniels. It was further alleged that WCC relied upon said misrepresentations and, as a result thereof, it granted credit to Daniels in the sum of $256,000 (now due); that of the above amount $150,000 worth of sales contracts were fraudulently issued by Daniels, and; that Daniels is now totally insolvent.

After testimony was introduced tending to support the above allegations, appellees moved for a summary judgment which was granted by the trial court. We think this was error. The general rule, well established by many decisions of this Court, is that a motion for summary judgment will not lie where there exists a genuine issue of fact. See: *Kealy* v. *Lumbermen's Mutual Ins. Co.*, 239 Ark. 766, 394 S. W. 2d 629, and *Jones* v. *Halliburton Co.*, 240 Ark. 919, 403 S. W. 2d 51. We feel that it would serve no useful purpose to discuss at length the many authorities cited by both sides or the somewhat voluminous testimony offered in evidence. We think if suffices to say we do find in the record several genuine issues of fact which, we think should be passed on by a jury.

We are also of the opinion that if, on a trial, appellant can prove all its allegations above mentioned, then a cause of action would lie. See: *Gregory* v. *Consolidated Utilities, Inc.*, 186 Ark. 406, 53 S. W. 2d 854, and *Clay* v. *Brand*, 236 Ark. 236, 365 S. W. 2d 256.

In view of what we have heretofore said it follows

that the bank's judgment against WCC must be affirmed. Likewise, the judgment of the trial court dismissing WCC's alleged cause of action must be reversed. It is so ordered, and the latter cause is remanded for further proceedings consistent with this opinion.

It has been urged that since this is a circuit court action we must remand both causes of action for a complete new trial. We do not agree. We have the power to so divide the two causes since we are not dividing a jury verdict. See: *Martin* v. *Street Improvement District No.* 349, 180 Ark. 298, 21 S. W. 2d 430; *Manzo* v. *Boulet,* 220 Ark. 106, 246 S. W. 2d 126, and; *Callaway* v. *Cherry,* 229 Ark. 297, 314 S. W. 2d 506.

M. L. BEBOUT *v.* EVA BEBOUT

5-3980 408 S.W. 2d 480

Opinion delivered October 31, 1966

[Rehearing denied December 5, 1966.]

W. Q. Hall, for appellant.

Putman, Davis & Bassett, for appellee.

PAUL WARD, Justice. This litigation, relating to a division of property between man and wife, arose out of the factual situation presently summarized. Four separate stages of legal procedure between these parties preceded this appeal.

First. On May 16, 1961 the wife filed a suit for separate maintenance; the husband, on cross-complaint, asked for a divorce and one-half of all real and personal property, and then the wife asked for a divorce and a share of the property. On July 9, 1962 the trial court *found* the wife should have the homestead consisting of forty acres (held by the entirety) and also should have a note (being the proceeds from the sale of 148.46 acres of land) which was held by the entirety; also the wife was granted a divorce.

Second. The above mentioned decree was appealed to this Court, and on March 2, 1964, we reversed the trial court, holding there was no corroborating evidence to sustain the divorce. We also said: ". . . the entire decree must fall." See: *Bebout* v. *Bebout,* 237 Ark. 735, 375 S. W. 2d 798.

Third. On June 28, 1962 the husband filed a complaint in a Nevada court, asking for a divorce. The divorce was granted on July 23, 1962—just two weeks after the wife was granted a divorce in this State (as pointed out previously). It is noted here that on the same day the husband filed his complaint in Nevada he also filed a pleading asking for a divorce in Arkansas.

Fourth. The suit from which comes this appeal was filed by the husband (appellant herein) on April 22, 1964. In the complaint appellant alleged that he and his wife (appellee herein) were the owners by the entirety of the real and personal property referred to previously. He asked that said property be partitioned equally between them. Appellee answered, alleging the invalidity of the Nevada divorce, and that she was entitled to all the property. On January 11, 1965 the trial

court found: (a) the parties previously agreed that appellee was the owner of forty acres of land and that by "reason of said agreement" appellee is the owner in fee simple of said land; The court also found that the parties "are owners as tenants by the entirety" of the promissory note; (b) The court was not required to give "full faith and credit" to the Nevada divorce decree and "the parties hereto are still husband and wife to each other despite the Nevada decree," and; (c) appellant's petition for partition should be dismissed.

From the decree of dismissal appellant now prosecutes this appeal, contending the trial court erred; One, in refusing to give full faith and credit to the Nevada decree; Two, in holding the Nevada decree was obtained by fraud; Three, in holding appellant was not domiciled in Nevada, and; in "awarding to the appellee the real estate."

Under our view of the case it is necessary to discuss only two questions: One, was appellant domiciled in Nevada when that court granted him a divorce, and Two, did the trial court err in awarding the real estate to appellee.

One. We have concluded that the trial court was correct in holding appellant was not domiciled in Nevada. Appellant's own testimony was to the effect that he left his home in Madison County (Arkansas) and went to Nevada, knowing that the divorce suit was pending in this State; he knew when he filed for a divorce in Nevada that he had, on that same day, asked the court here for a divorce; he admitted he left here on a vacation, that he did not work in Nevada, that he rented a motel room while there, that he had read about the "quickie" divorces in Nevada; he admits that shortly after the Nevada decree he returned to his home at Huntsville in Madison County, and that he later bought real estate in that county; he admitted he left for Nevada when he learned it would take over a year to get

a divorce here. It is not disputed that appellee did not, in person or by an attorney, appear in the Nevada court or otherwise contest the divorce action.

Under the above factual situation we think the trial court was fully justified in holding appellant was not at any time domiciled in Nevada even though he did reside there a few weeks. The word "domicile," according to Black's Law Dictionary, means "That place where a man has his true, fixed, and permanent home . . ." Since appellant was not domiciled in Nevada when he secured the divorce, the decree of that court was not entitled to full faith and credit in this State. See: *Williams* v. *State of North Carolina,* 325 U. S. 226. See also: *Cooper* v. *Cooper,* 225 Ark. 626, 294 S. W. 2d 617.

Two. We have concluded it was error for the trial court to give the real estate to appellee. It is not disputed that this property constituted an estate by the entirety. In the case of *Yancey* v. *Yancey,* 234 Ark. 1046, 356 S. W. 2d 649, this Court said:

> "It is necessary that this decree be reversed, because the court exceeded its authority in directing appellant to give appellee a quit-claim deed to his interest in the home held as an estate by the entirety. The Chancellor was evidently undertaking to arrive at an equitable solution relative to property rights in making his findings, and we find nothing erroneous purely from the standpoint of equity; however, we have stated on several occasions that in event of a divorce, property held as an estate by the entirety shall be treated as a tenancy in common. The court may then do one of two things; it may place one of the parties in possession of the premises, or it may order the property sold and the proceeds divided."

The *Yancey* decision was based on Act 340 of 1947—Ark. Stat. Ann. § 34-1215 (Repl. 1962)—which reads:

> "*Dissolution of estates by the entirety or survivor-*

ship. Courts of Equity, designated Chancery Courts within the State of Arkansas, shall have the power to dissolve estates by the entirety or survivorship, in real or personal property, upon the rendition of a final decree of divorcement, and in the division and partition of said property, so held by said parties, shall treat the parties as tenants in common."

The intent and scope of the Act is indicated by certain language in the emergency clause which recognizes that courts of equity in this State have "lacked the power heretofore, upon dissolution of the marital status, to dissolve estates in property created by the marital status."

Thus this, under the statute, limited power of chancery courts to dissolve estates by the entirety is confined to cases involving a divorce—no divorce is involved here. This limitation has been repeatedly recognized and upheld by this Court. See: *McClain* v. *McClain*, 222 Ark. 729, 263 S. W. 2d 911; *Poskey* v. *Poskey*, 228 Ark. 1, 305 S. W. 2d 326, and; *Childers* v. *Childers*, 229 Ark. 11, 313 S. W. 2d 75.

Apart from its statutory power, a chancery court unquestionably is authorized to grant specific performance of an oral contract for the sale of land where there is sufficient part performance. It is necessary, however, that both the making of the contract and its performance be proved by clear and convincing evidence. *Hudspeth* v. *Thomas*, 214 Ark. 347, 216 S. W. 2d 389. Here the proof does not meet that stndard. The appellee did not plead the existence of a contract; she merely asserted as a conclusion that she owned the land. Her testimony was to the effect that the appellant agreed that she could have the property if she made the final payment on the purchase price. The appellant did not corroborate her statement. He testified that he thought that she was to receive the property (in the divorce case) and that "if she was going to get it, let her

pay for it." There were no other witnesses to the transaction. We are unable to say that the making and performance of the asserted oral agreement were established by that high standard of proof that the law requires in such a case.

It is pointed out that the trial court did not award the note (held by the entirety by the parties) to appellee. Upon remand the trial court will have the right (based on the evidence) to determine how much, if any, maintenance shall be awarded to appellee, and to determine whether or not to award appellee possession of (not *title* to) the homestead.

The cause is therefore affirmed in part and reversed in part, and it is remanded for further action consistent with this opinion.

McFaddin, Amsler and Bland, JJ., dissent in part.

Guy Amsler, Justice, dissenting. I respectfully dissent from that part of the majority opinion which reverses the chancery decree.

In the first litigation between these parties, originating back in 1961 (they had already separated and he had moved out of the house), Mr. Bebout assured the court that he had given his interest in the home place to his wife on condition that she make the final payments thereon. At a hearing on February 5, 1962, he testified:

"Q. You let her make the payment then with the understanding that she was to get title to the place, is that it?

A. Right

Q. Then if that was your understanding, if she did make the payment then she was entitled to the title because you were going to let it

go back? You didn't care about it, is that right?

A. That's right."

See *Bebout* v. *Bebout,* 237 Ark. 735, 375 S. W. 2d 798, footnote page 736 (cited in majority opinion).

Subsequent to the 1962 trial, Mr. Bebout took off to Reno, Nevada, procured "a quickie divorce" (which this court is unwilling to recognize) and then drifted around in Ohio, Texas and perhaps other places for sometime before returning to Madison County. Apparently during his travels or after he got back to Madison County he changed his mind about the place belonging to his wife and filed suit for partition. The chancellor refused partition on the grounds that he (Bebout) had already given the property to his wife; that she was in possession and made the payments in accordance with the agreement they had and it belonged to her.

The majority concedes that equity has a right to grant specific performance of an oral agreement for the conveyance of land if there has been part performance, but say that both the making of the contract and its performance must be proved by clear and convincing evidence. Apparently the able and discerning chancellor concluded that the sworn testimony of both parties to the oral agreement that she should have the land, strengthened by possession and payment by the wife, was about as clear and convincing evidence as a court could expect, so he accepted it.

Nearly three years later appellant testified that he didn't remember if he gave the answers quoted above and in the same hearing swore that what he told her was "she could have either place." The trial judge heard the witness on both occasions and I think correctly evaluated the testimony. Appellee (the wife) testified that her husband agreed that the place was hers if she would pay it out; which she did. There is no contention

that the court reporter did not correctly report the testimony of appellant (husband) in the original hearing.

The majority says that "the appellee did not plead the existence of a contract; she merely asserted as a conclusion that she owned the land." In her answer to appellant's present partition suit she denied that he was entitled to have the land partitioned and she claimed ownership of it. If the husband was not informed concerning the basis for her claim of title (which he was) it would have been a perfectly simple matter for his attorney to file a motion to make more definite and certain or to have availed himself of other procedures for obtaining information which would have enabled him to have presented his defense. Prayer in her answer was "wherefore, premises considered, defendant prays that the title to the lands described in the partition be vested in her . . ."

It is my feeling that neither *Yancy* v. *Yancy* (and other cases cited in the majority opinion) nor the statute dealing with the dissolution of an estate by the entirety or survivorship has anything at all to do with this law suit. The statute and the cases relate only to a situation where the chancellor grants a divorce and the parties are unable to agree on a division of property held by the entireties. We have no such condition here.

The exact point in issue here was passed on by us in *Ryan* v. *Roop,* 214 Ark. 699, 217 S. W. 2d 916. Ryan and his wife (who later married Roop) owned an improved lot (by the entireties) in Pine Bluff, Arkansas. In 1943 Ryan filed suit for divorce in Craighead County, Arkansas. There was a property settlement and on March 27, 1944, Ryan quitclaimed his interest in the aforementioned lot to his wife and thereafter on April 19, 1944, they were divorced.

In 1948 Ryan's former wife, Cordie Roop, instituted suit in the Jefferson County Chancery Court to quiet and confirm her title to the lot in question as

against Ryan, her former husband. The lower court granted the relief sought and on appeal was affirmed.

The late, highly regarded, Justice Minor W. Millwee expressed the views of this court as follows:

> "The only question presented is whether a husband can convey directly to the wife his interest in an estate held by them as tenants by the entirety."

Then after referring to Act 86 of 1935, Ark. Stat. Ann. § 50-413 (1947) (conveyances between spouses) Justice Millwee wrote:

> "It is held generally that a husband may by direct conveyance transfer to his wife his interest in an estate by the entirety. This rule has been followed even in jurisdictions where neither spouse can convey any interest in such an estate without the consent of the other, on the theory that such consent is to be implied from the grantee spouse's acceptance of the conveyance. It is likewise held that a husband may convey his interest in the entirety estate to his wife under statutes authorizing conveyances between the spouses. 41 C.J.S., Husband and Wife, p. 607; 26 Am. Jur., Husband and Wife, § 257. The former rule in this state that a conveyance directly from husband to wife conveyed only an equitable title ordinarily necessitated use of the common law device of a conveyance through a third person. This rule was changed by the 1935 act which is all inclusive in its terms and authorizes conveyances between spouses of any interest in real property. The deed of March 27, 1944, divested appellant of any further title or interest in the lot in question."

Under our system of jurisprudence a great deal of responsibility rests on a chancellor in determining the facts and we have said that unless we find his conclusions to be contrary to a preponderance of the evidence,

we will not disturb his findings. The majority is doing the trial court a great disservice when it reverses a decree in which there is only a "smidgen of proof" to justify such reversal and an abundance of "clear and convincing proof" to sustain what the chancellor did. I therefore dissent.

I am authorized to say that Justices McFaddin and Bland join in this dissent.

JAMES DEAN WALKER *v.* STATE OF ARKANSAS

5186 408 S. W. 2d 905

Opinion delivered October 31, 1966
[Rehearing denied December 12, 1966.]

Howell, Price & Worsham, for appellant.

Bruce Bennett, Attorney General; *Jerry W. Faubus,* Asst. Atty. Gen., for appellee.

Osro Cobb, Justice. Appellant prosecutes this ap-

peal from his conviction of the offense of murder in the first degree. The victim was Jerral Vaughn of the North Little Rock Police Department. This is the second time that appellant has been tried and convicted of the particular crime. In *Walker* v. *State*, 239 Ark. 172, 388 S. W. 2d (1965), we reversed his previous conviction and remanded the case for a new trial.

INTRODUCTORY FACTS:

At about 2:30 a.m. on the 16th day of April, 1963, the North Little Rock Police Department was under an alert to stop and investigate a cream colored Oldsmobile. Such a car was first observed by Officer Gene Barrentine, who "tailed" the vehicle as it was proceeding through what is known as Rose City toward England. When Officer Barrentine learned through his radio communications that Officer Vaughn was directly behind him and aware of the situation, he started flashing his red dome light and the cream colored Oldsmobile pulled over and stopped. Officer Barrentine stopped his car directly behind the suspect car. Vaughn stopped his car behind and to the left side of the Barrentine car. The driver of the Oldsmobile, later identified as Freeman Kumpe, got out and came around to the left rear of the Oldsmobile and met Barrentine. While Barrentine was beginning a search of Kumpe, Officer Vaughn went around the right rear of the Oldsmobile, ostensibly to check the other passengers in the car. Almost in the instant that Vaughn disappeared around the right rear of the Oldsmobile, a fusillade of gunfire erupted, the autopsy report subsequently reflecting that Officer Vaughn was killed by a bullet entering his body at the front side of his chest in the heart area.

When Officer Barrentine saw the body of his fellow-officer fall to the ground, he started shooting through the Oldsmobile in the general direction of the right front door. Photographic exhibits introduced in evidence show that two of such shots were fired into

the body of the Oldsmobile at a point slightly below the back windshield. The back windshield was completely shot out and after the shooting appellant was found in a semi-conscious condition lying on the ground upon an empty .38 Smith & Wesson revolver. Appellant was hospitalized and survived the shooting, it being found that he had been shot five times in the course of the exchange of fire. During the excitement of the gunfire, Kumpe temporarily escaped but was captured in a matter of minutes. Officer Barrentine shot twice at Kumpe but missed.

Linda Ford had been riding in the front seat of the Oldsmobile between Kumpe, the driver, and appellant, who was seated at the right side. During the incident, she jumped from the car and ran back toward the police cars for cover. She testified that appellant had a gun in his hand when he opened the right door of the Oldsmobile to meet Officer Vaughn and that appellant started shooting, being the first to fire. Appellant testified briefly in this case but at no time did he attempt to place a gun in the hands of Linda Ford. Since Kumpe was out of the car and unarmed; Linda Ford had no gun and Officer Vaughn was slain by a bullet fired into his body as he faced appellant, the physical facts leave little, if any, doubt as to the fatal bullet coming from a gun fired by appellant.

Appellant's court-appointed attorney began intensive labors in the case in April of 1965. The case was not reached for trial until late December of that year. Lengthy hearings were conducted by the court on various motions by appellant during the months of preparation for the trial. The first motion of appellant was that he be returned from the State Penitentiary to the Pulaski County Jail for convenience of his counsel in conferring with him and preparing for his trial. The court, on the same day of the motion, April 5, 1965, entered the requested order. Appellant therefore was permitted to remain in jail instead of the penitentiary for some seven months.

The second motion on behalf of appellant was for a sweeping order requiring the State to submit to appellant's attorneys each and all of its tangible objects which were to be used in evidence, for copying or photographing, and including ballistics tests reports on the guns of Officers Vaughn and Barrentine and upon the .38 caliber Smith & Wesson revolver alleged to have belonged to appellant; fingerprint reports, if any, of appellant; autopsy report of Dr. Leo Davenport; the coroner's report as to Officer Vaughn; parrafin test reports as to appellant, and all photographs of police vehicles at the scene. The motion continued by requesting that the three guns involved in the gunfire be turned over to appellant's attorneys for private and independent examination, the same request being made as to the bullets recovered from the body of appellant and the empty shells of the gun alleged to have belonged to appellant. Following hearing, the court granted appellant all of the relief sought in the motion.

When the defense had completed its private examination of tangible, documentary and photographic evidence relied upon by the State, the prosecution moved that appellant be required to make available the results of the ballistics tests on the three guns involved. The court granted this motion, directing appellant, by his attorneys, to file with the clerk as part of the record of proceedings the ballistics report of Stanton O. Berg, Firearms Examiner of Minneapolis, Minnesota. Appellant objected to this order but nevertheless complied therewith. We note here that the order of the court did not relate to the introduction of the ballistics report in evidence, but solely to its availability to the presecution as a part of the record.

Appellant moved for a change of venue, alleging that he could not receive a fair and impartial trial in Pulaski County. The motion involved the testimony and affidavits of some two hundred persons on each side of this contention. A separate volume of transcript is devoted to this motion for change of venue alone. The

motion for change of venue was heard and denied, and thereafter appellant filed a motion to disqualify the trial court because of alleged personal prejudice and bias toward the accused. Here again, a lengthy formal hearing was conducted and the motion was denied.

The next motion filed on behalf of appellant was to quash the jury panel. A formal hearing was held, including the taking of testimony of all three jury commissioners, and the motion was denied. We note that no question is raised on this appeal relating to the qualification of any juror selected to try the case.

The case was finally reached for trial in December, 1965. The trial proper took five days. At the outset of the trial all witnesses were individually called to be sworn and the rule was placed upon them. It is significant that Linda Ford and Mary Louise Roberts did not appear to be sworn.

Early in the trial of the case, the court permitted the State, over the objection of appellant, to read into evidence the testimony of Linda Ford and Mary Louise Roberts as given on direct and cross examination at appellant's first trial. Prior to admitting this evidence, the court required the State to introduce proof of its diligent efforts to locate and serve subpoenas upon the witnesses to compel their attendance and on some three occasions during this proof, the court commented that he much preferred to have the witnesses personally present if possible. The court found that the witnesses were unavailable through no fault of the prosecution and admitted the testimony under the provisions of Ark. Stat. Ann. § 28-713 (Repl. 1962).

At the conclusion of the first trial, appellant was found guilty and the jury imposed the death penalty upon him. At the end of this trial, appellant was again found guilty of murder in the first degree but the jury

spared his life and fixed his sentence at life imprisonment.

The case reaches us on appeal involving a voluminous record, the printed volume of argument on behalf of appellant comprising 263 pages. Appellant requested, and was granted, the privilege of arguing the case orally prior to submission.

On appeal appellant urges twelve points:

1. Suppression of evidence.
2. The order requiring defendant's counsel to file the report of its ballistics expert.
3. Denial of motion to disqualify the trial court.
4. Prejudicial comments of the court during the conduct of the trial.
5. Prejudicial comments of the court to the jury.
6. Permitting the State to read into evidence the transcript of previous testimony of Linda Ford and Mary Louise Roberts.
7. Denying defendant's motion to quash the regular, alternate and special jury panels.
8. Refusal of the court to admit defendant's hospital records into evidence.
9. Denial of defendant's petition for a change of venue.
10. Contentions as to error in instructions given or refused by the court.
11. Refusal of the court to instruct the jury on manslaughter.
12. Refusal of the court to reduce the charge against appellant from first degree murder to second degree murder.

We discuss appellant's points in the order in which they have been enumerated.

Point No. 1—Suppression of evidence.

Appellant complains that evidence was introduced by the State in the second trial which was available but

not used and offered in the first trial. Our review is solely limited to what transpired in the second trial. In the second trial, the State handed over to appellant all of its tangible evidence for examination, photographs, etc. The record simply does not support the contention by appellant that the State suppressed any evidence.

We conclude therefore that this contention is without merit.

Point No. 2—The order requiring defendant's counsel to file the report of its ballistics report.

Appellant here attempts to argue that after being permitted by order of the court to have a private examination of the guns, bullets and shells by a firearms expert of his own choice, he was entitled to suppress the report received as to the results of such tests so that same could not be made a part of the record for the information of the State. The court ordered the ballistics report filed as a part of the proceedings, but not as evidence. This was proper in every respect as the report was clearly admissible in evidence if introduced by the maker thereof.

Ark. Stat. Ann. § 43-2010 (Repl. 1964) constitutes a part of our criminal procedures and it provides:

> "The court, on motion of either party, may, by its order and process, compel the production of any written document, or any other thing which may be necessary or proper to be produced or exhibited as evidence on trial, and may punish a disobedience of its orders or process as in case of witness refusing to testify."

We therefore find no merit in appellant's contention under Point No. 2.

Point No. 3—Denial of motion to disqualify the trial court.

Appellant has abstracted the testimony of Reverend

Ray Branscum, who testified in support of the motion to disqualify the court for bias and prejudice toward the accused, as follows:

> "I am pastor of the Markham Street Baptist Church. Several months ago I was present in Judge Kirby's office and heard him make certain statements in reference to this case. Rev. Guy Wilson, Mr. Bryant and myself came to the judge's office and made a request for permission for the Sheriff's office to bring the defendant out to my church where the ordinance of baptism might be observed. Judge Kirby said he didn't have any confidence in James' profession and that he had killed a man but he was going to grant the request. He told the deputy sheriff that he wanted him heavily guarded and if James made a move, to shoot him down because he didn't want him brought back to him because he intended to burn the s.o.b. anyway."

Reverend Guy S. Wilson testified substantially to the same facts as set forth by Reverend Branscum.

The court took a calculated risk in order to accommodate the ministers and appellant.

At the conclusion of the hearing, the court overruled the motion to disqualify, stating:

> "I think I can give him a fair trial, and I have nothing to do with punishing him, certainly. It is up to the jury to do that. If I don't give him a fair trial, the Supreme Court can reverse me. They have reversed me once before when I thought I was right. I don't think my personal feelings have anything to do with it one way or the other. I did make the statement that if he ran to shoot him. I remember that. I don't remember saying that I was going to burn him, because that's silly; I can't burn him."

The fact that a trial judge may have, or develop during a trial, a personal opinion as to the merits of the case does not make the trial court so biased and prejudiced as to require his disqualification in further proceedings. The mischief occurs when the trial court communicates to the jury by word or deed a personal bias, prejudice or animus toward the accused, causing the accused to be denied a fair and impartial trial. Of course, statements made by a trial court long before a jury panel is selected, and in no way communicated to the trial jury, would not constitute any such bias or prejudice in the conduct of the trial. Since the court actually proceeded to try this case, we review the record in the light of what actually transpired.

The trial court gave counsel for appellant some seven months to prepare for this case. The trial court granted appellant's motion to take him from the State Penitentiary and place him in the Pulaski County Jail, for the convenience of his counsel in preparing appellant's defense; and the court promptly granted appellant's sweeping motion for production and private examination of all the tangible objects which were to be introduced by the State in evidence. When the ministers called upon the court requesting that the accused, a man previously convicted of murder in the first degree, be released from jail to go to a local church for baptism, the court acceded to the request but instructed the deputy sheriff to shoot appellant if he attempted to escape. Moreover, at the conclusion of his second trial, appellant, instead of receiving the death sentence upon conviction, was given a sentence of life imprisonment.

We have concluded that the trial court acted properly, and even generously, toward appellant in the course of the second trial and that the court exhibited no personal bias or prejudice to the jury. A jury inflamed against the accused would hardly have convicted him of murder in the first degree and then spared his life by imposing a sentence of life imprisonment.

It is an established rule of law that while a trial

judge may have an opinion as to the merits of the case on trial, this does not make him biased or prejudiced as to the conduct of the trial. When challenged for bias and prejudice, it is for the trial court to search his conscience and decide whether to recuse himself from the case. We find from the record in this case that the trial court conducted the trial in an exemplary manner and without any bias or prejudice toward the accused.

In an early Arkansas case, *Jones* v. *State,* 61 Ark. 88 32 S. W. 81 (1895), we said:

> "* * * If having formed an opinion as to the guilt or innocence of a defendant on trial in a criminal case was a disqualification of a judge presiding at the trial, it would often be a difficult matter to find a judge that would not be disqualified. * * *"

See also *Reaves and Neal* v. *State,* 229 Ark. 453, 316 S. W. 2d 824 (Repl. 1958); *State* v. *Flynn,* 31 Ark. 35 (1896), and 48 C.J.S., *Judges,* § 82 at p. 1,061, from which we quote:

> "* * * A judge is not disqualified by having known defendant in a criminal trial or by having sat in trials of defendant on previous occasions. The fact that a judge is prejudiced against the commission of a crime does not disqualify him from presiding at the trial thereof. He is not necessarily disqualified because he has formed an opinion as to the legal questions involved in the case or as to the guilt or innocence of an accused who is brought before him; nor is he disqualified because of unfavorable comments or an expression of opinion as to the guilt or innocence of such accused. * * *"

The language quoted above applies only to those opinions of the court expressed out of the presence of the jury trying the case, which is the exact situation in relation to the comments of the trial court in this case.

Our trial judges are forbidden from commenting

on the evidence to the jury. § 23, Article VII, Constitution of Arkansas (1874).

We therefore find no merit in appellant's contentions under Point No. 3.

Point No. 4—Prejudicial comments of the court during conduct of the trial.

We have examined the record in this case as to all comments of the trial court made in the presence of the jury and we find no prejudicial error in any of said comments.

We therefore find no merit in appellant's contentions under Point No. 4.

Point No. 5—Prejudicial comments of the court to the jury, prior to trial.

When the jury panel was sworn to answer questions put to them as to their qualifications, the court made the following comments:

> "By way of explanation, I might say to the jury that this is the second time this case has been tried, or will be the second time. Mr. Walker was tried once and convicted and the Supreme Court reversed it and sent it back here for retrial."

The court granted counsel for appellant wide latitude throughout the voir dire examination of the jurors. This examination continued for more than one day. On the second day, two additional jurors reported and for their benefit the court made the following explanatory statement:

> "I might mention, by way of explanation, that Mr. Walker was tried previously, convicted, and the Supreme Court reversed the case and sent it back for a new trial."

Counsel for appellant in the course of this trial cross-examined the prosecuting witnesses at great length upon the testimony they had given in the first trial of appellant, in an effort to impeach their testimony. Throughout the taking of evidence, the fact that appellant had been tried before on the same charge was kept before the jury by counsel for appellant. Appellant is, therefore, in no position to complain because of the explanatory statements of fact made by the court.

Furthermore, when the trial court explained to the jury panel, before the trial jury was selected from the panel, that the previous conviction of appellant had been reversed by this court, necessitating a new trial, the implications of these remarks, if any, could be construed as favorable to the accused.

In *Stanley* v. *State,* 174 Ark. 743, 297 S. W. 826 (1927), it was held that it was not error for the prosecuting attorney in his opening statement to tell the actual trial jury of a previous conviction and reversal by the Supreme Court. In *Ford* v. *State,* 222 Ark. 16, 257 S. W. 2d (1953), a far longer statement by the lower court to the effect that the defendant had been tried and convicted for the same crime previously was held not to be error. See also *Youngblood* v. *State,* 161 Ark. 144, 255 S. W. 572 (1924), cited by appellant. There, it was said that the purpose of the statute, Ark. Stat. Ann. § 43-2205 (Repl. 1964), was to prevent a former conviction from being used in evidence or argument. In the present case, the fact that Walker had been tried and convicted was not offered in evidence nor was it argued.

We therefore find no merit in appellant's contentions under Point No. 5.

Point No. 6—Permitting the State to read into evidence the transcript of previous testimony of Linda Ford and Mary Louise Roberts.

We agree with appellant that the testimony of Linda

Ford in particular, the eyewitness to the shooting, was extremely material to the State's case. We also agree with the trial court that it was necessary to produce her and have her present at the trial if she could be located, picked up and held as a material witness.

Ark. Stat. Ann. § 28-713 (Repl. 1962) provides as follows:

> "Admissibility of testimony at prior trial.—On the trial of any cause, civil or criminal, the properly authenticated transcript of the testimony of any witness, or other evidence of the testimony of any witness when properly proved, which testimony was given in any court at any former trial or examination of the same cause between the same parties or their privies, may be read or admitted in evidence, when the former witness is dead, beyond the jurisdiction of the court, has become insane since the former trial or examination, or when for any reason the former witness may not be available, and also in all cases in which for any reason a former witness refuses to testify concerning the matters as to which he formerly testified. But no such transcript of testimony, nor proof of such testimony, may be admitted on behalf of either party in a criminal case unless it is first shown that the party against whom it is sought to be used was present, in person or by attorney, at the former trial or examination and there had the opportunity to examine or cross-examine the witness whose testimony is offered in evidence. [Init. Meas. 1936, No. 3 § 14; Acts 1937, § 14 p. 1384; Pope's Dig., § 3916."]

Chief of Police Ray Vick of the North Little Rock Police Department, and Chief of Police R. E. Brians of the Little Rock Police Department, testified that several weeks before appellant's trial they had issued general pickup instructions as to these witnesses, including their names, clubs frequented, etc.

Deputy Sheriff Dennis L. Jones testified concerning his sustained effort to find the witnesses in advance of the trial.

We quote from appellant's abstract of the testimony of Deputy Sheriff Jones:

> "I am a deputy sheriff. I attempted to locate Linda Ford in reference to a subpoena. I called the police chief at Lake Village. I was later informed she was living at 1800 Scott St., Little Rock. I attempted to find her mother, who formerly lived with her at 1102½ Main St., Little Rock, and was advised she no longer lived there. I learned today where her mother is supposed to be living and went there and found no one at home in this big rooming house. I rang the bell and looked in the windows but was able to raise no one. I asked for the assistance of the North Little Rock Police Department and the Little Rock Police Department. The last time Mary Roberts was seen in North Little Rock was some two or three weeks before the subpoena was issued. She was on the Wonder Grill lot in North Little Rock. Further information indicated she visited Barbara somebody who lives at 402 E. 12th St., North Little Rock. I made repeated trips by the Wonder Grill and by 402 E. 12th St. attempting to locate her automobile with negative results. Mary Roberts previously gave the address of 2209 McAlmont, which was her sister, Hazel Powell's address. Investigation revealed that Hazel Powell did not live at that address any longer."

It will be recalled that at the very beginning of the trial, all witnesses were required to come forward to be sworn. Linda Ford and Mary Louise Roberts did not appear to be sworn. There was, therefore, no element of surprise to appellant when the State sought during the progress of the trial to offer their testimony as given at the previous trial. We have concluded that an adequate foundation was laid for the introduction of

this previous testimony, and that the trial court did not abuse its discretion in permitting same to be received and to go to the jury.

At the first trial, Linda Ford testified in person and appellant was convicted and received the death sentence. It is generally recognized that the reading of previous testimony of a witness not present in the courtroom is not as effective as having the witness on the stand. It may well be that the inability of the State to produce these witnesses for the second trial had a part in the ultimate lesser sentence of appellant to life imprisonment. Cases of interest on this point include the following:

Mode v. *State,* 234 Ark. 46, 350 S. W. 2d 675 (1961); *Smith* v. *State,* 222 Ark. 585, 261 S. W. 2d 788 (1953); *Marks* v. *State,* 192 Ark. 881, 95 S. W. 2d 634 (1936); *Adams* v. *State,* 176 Ark. 916, 5 S. W. 2d 946 (1928), and *Edwards* v. *State,* 171 Ark. 778, 286 S. W. 935 (1926).

We therefore find no merit in appellant's contentions under Point No. 6.

Point No. 7—Denying defendant's motion to quash the regular, alternate and special jury panels.

Appellant contends that the petit and grand jury panels should have been quashed because they were not selected from a list of qualified electors as required by Ark. Stat. Ann. § 39-208 (Repl. 1962).

Prior to January 1, 1965, a citizen of Arkansas had to possess a current poll tax receipt in order to be a qualified elector. Amendment 51 of the Arkansas Constitution was adopted at the general election of November 3, 1964 and superseded this requirement. It provided a new and permanent system of voter registration in order for a citizen to become a qualified elector. After Amendment 51 became effective the legislature recogniz-

ing the interim period of uncertainty as to the qualified electors pending the accomplishment of sufficient registration of voters to comprise lists of same from which adequate jury panels could be selected, passed Act 126 of 1965 to meet the situation, and we quote the preamble and portions of said act:

> "Whereas, it now appears unlikely that the qualified individuals in Arkansas may be registered under Amendment 51 prior to March 1, 1965, and there will be an interim time from March 1, 1965 until later in the year when voter registration is an accomplished fact.
>
> "Section I—All other persons who otherwise possess the qualifications of a grand or petit juror as now provided by the statutes of Arkansas and who have paid a poll tax between October 1, 1963 and October 1, 1965 are hereby declared to be an eligible grand or petit juror.
>
> "Section II—This Act shall be in full force and effect from March 1, 1965 to October 1, 1965."

The record reflects that the jury panels in this case were selected nearly two months before November 3, 1965, when the hearing on the motion to quash was heard. This necessarily made Act 126 of 1965 squarely applicable to the situation at hand. See *Coger* v. *City of Fayetteville,* 239 Ark. 688, 393 S. W. 2d 622 (1965); *Harris* v. *State,* 239 Ark. 771, 394 S. W. 2d 135 (1965), and also *Tiner* v. *State,* 239 Ark. 819, 394 S. W. 2d 608 (1965).

We therefore find no error in the denial of appellant's motion to quash the jury panels. We also find no abuse of discretion by the trial court in refusing to disqualify the jury commissioners, or as to any other alleged irregularity in the selection of the trial jury.

We therefore find no merit in appellant's contentions under Point No. 7.

Point No. 8—Refusal of the court to admit defendant's hospital records into evidence.

Appellant contends that it was error for the court to withdraw appellant's hospital record after it had been properly admitted in accordance with Ark. Stat. Ann. § 28-928 and Ark. Stat. Ann. § 28-932 (Repl. 1962).

We agree with appellant in that the hospital record was properly admitted and should have been permitted to be read to the jury by the Chief Medical Records Librarian. The librarian as custodian of the medical records could not properly testify as to her opinion or interpretation of records which she held as custodian but did not personally make. The purpose of Ark. Stat. Ann. § 28-928 is to overcome the old rule that such written reports are hearsay and therefore such records are admissible if properly established as being made in the regular course of the hospital's business procedures. However, during the trial, Dr. Robert M. Stainton, the doctor who had prepared the hospital report in question, was called as a witness and at that time it was admitted into evidence and read into the record by Dr. Stainton. Any error was thus completely cured.

We therefore find no merit in appellant's contentions under Point No. 8.

Point No. 9—Denial of defendant's petition for a change of venue.

Ark. Stat. Ann. § 43-1501 (Repl. 1964) states:

> "Prejudice. Any criminal cause pending in any circuit court may be removed by the order of such court, or by the judge thereof in vacation, to the circuit court of another county, whenever it shall appear, in the manner hereinafter provided, that the minds of the inhabitants of the county in which the cause is pending are so prejudiced against the defendant that a fair and impartial trial cannot be had therein. [Crim. Code, § 414 (as added by Act

Apr. 25, 1873, No. 98, § 1 p. 234; C. and M. Dig., § 3087; Pope's Dig., § 3917.]"

The rule as to a change of venue has been frequently examined and is well established. As stated in *Perry* v. *State*, 232 Ark. 959, 342 S. W. 2d 95 (1960), the trial court has wide discretion in passing upon a petition for change of venue and unless it appears that the court has abused that discretion, this court will not reverse. See also *Lauderdale* v. *State,* 233 Ark. 96, 343 S. W. 2d 422 (1961).

The newspaper articles that gave wide publicity to appellant's case were published either before or just after appellant's first trial in 1963, almost two years before the instant trial was held, with the exception of one editorial in the Arkansas Gazette published on May 12, 1965. We have concluded that the impact of the editorial coincided with the general distribution of the Gazette, which is statewide. While we do not approve of some of the inflamatory language in this editorial, we believe its adverse effect, if any, as to appellant had been dissipated at the time of trial.

Furthermore, appellant's counsel, during voir dire, thoroughly examined the jurors on this subject and all jurors who were accepted stated that they could give appellant a fair hearing and verdict, free of any influence by the editorial.

It appears, therefore, that there was ample support in the record for the decision of the trial court to deny the motion for a change of venue. We find no abuse of discretion by the trial court as to this issue.

We therefore find no merit in appellant's contentions under Point No. 9.

Point No. 10—*Contentions as to error in instructions given or refused by the court.*

We have examined all of the instructions given by

the court to the jury. We find no error in the instructions. We have likewise examined the instructions requested by appellant which the court declined to give. All of such instructions were either fully covered by other instructions actually given or refused as erroneous under law.

We therefore find no merit in appellant's contentions under Point No. 10.

Point No. 11—*Refusal of the court to instruct the jury on manslaughter.*

The court refused to grant appellant's request for an instruction on manslaughter, and this ruling is assigned as error. The same circumstances were presented to this court in *Outler* v. *State,* 154 Ark. 598, 243 S. W. 851 (1922), where it was said: "At any rate, the verdict of the jury under this instruction (of first degree and second degree murder) necessarily implied a finding that the killing was not done under circumstances which would reduce the degree of the offense to manslaughter, and no prejudice resulted from the failure of the court to instruct on the subject of manslaughter." See *Newsome* v. *State,* 214 Ark. 48, 214 S. W. 2d 778 (1948), and also *Talley* v. *State,* 236 Ark. 911, 370 S. W. 2d 604 (1963), where again the refusal to instruct on manslaughter was considered harmless error in view of the fact that the appellant was found guilty of first or second degree murder.

We therefore find no merit in appellant's contentions under Point No. 11.

Point No. 12—*Refusal of the court to reduce the charge against appellant from first degree murder to second degree murder.*

At the conclusion of the State's case, the appellant moved for a reduction of the charge from first degree murder to second degree murder and also later requested

a similar instruction to the jury, both of which were refused by the court.

As discussed under Point No. 11, the instructions as given to the jury authorized the jury to bring in a verdict of second degree murder or a verdict of murder in the first degree.

Linda Ford, a passenger in the car of appellant, testified that appellant fired first at Officer Vaughn. The cab driver on the scene testified that he heard shots being fired before observing Officer Vaughn draw his pistol. Appellant must have known from the flashing dome light of the Barrentine police car that his car was being stopped for a police check.

Appellant had no known reason to fear for his personal safety when his car was caused to slow down and pull over and stop by the police car behind it. Appellant opened the car door with a drawn gun in his hand and started the shooting with deadly accuracy. There is no suggestion in this record that he did not act of his own volition and with deliberation. The evidence in the case was certainly sufficient to authorize the jury in finding that appellant killed Officer Vaughn with deliberation, premeditation and malice aforethought.

The necessary elements of deliberation and premeditation in the offense of murder in the first degree may be inferred from the factual circumstances as shown by the evidence, where those circumstances clearly warrant the jury in such an inference or conclusion. In this case, the circumstances as reflected by the evidence are inconsistent with any other hypothesis than that of murder in the first degree. *House* v. *State,* 230 Ark. 622, 324 S. W. 2d 112 (1959), and *Weldon* v. *State,* 168 Ark. 534, 270 S. W. 968 (1925).

We therefore find no merit in appellant's contentions under Point No. 12.

Having found no merit in any of the points urged by appellant, the judgment of the trial court is affirmed.

Affirmed.

See Per Curiam order and dissent, page 663.

J. E. STEVENSON JR. *v.* DORIS M. MARQUES

5-3991 407 S. W. 2d 391

Opinion delivered October 31, 1966

William H. Drew of *Drew & Hollaway,* for appellant.

DuVal L. Purkins, for appellee.

GUY AMSLER, Justice. Mrs. Hazel Cook Townsend owned some 3,500 acres of land in Chicot County, Arkansas, located on what is known as Stewart's Island. On April 6, 1962, she conveyed some 2,000 acres of her holdings to M. Pickett Myers and J. E. Stevenson Jr.,

appellant in this cause, for a consideration of $185,000.00 plus the assumption of a $91,000.00 mortgage debt.

Among other reservations and exceptions contained in Mrs. Townsend's conveyance to Myers and Stevenson was the following:

> "It is further understood that Grantor will retain all present government cotton allotment, which has heretofore and now been allotted to any lands owned by her, and Grantees agree that they, their heirs and assigns, shall never make claim to any cotton allotment that may or could be alloted to the above conveyed lands, unless Grantor shall sell the remaining portion of her property; however, in no event will Grantees, their heirs or assigns, disturb any present cotton allotment now owned or held by Grantor; provided, however, if by reason of a change in the present program, Grantees can obtain a separate and additional cotton allotment, they may do so."

In 1962, Mrs. Townsend farmed all the cotton allotment for the land retained by her and the acreage conveyed. The existence of Mrs. Townsend on this earth was terminated on December 8, 1962. J. W. Loyd was appointed executor and trustee of her estate. Doris M. Marques, appellee, later succeeded Mr. Loyd as trustee of the estate. Prior to the instant litigation Myers conveyed his interest in the land to appellant Stevenson.

In June of 1962, Stevenson, in an effort to obtain assistance for providing the land purchased from Mrs. Townsend with effective drainage and obtain a wheat allotment, filed a copy of his deed with the Chicot County Agricultural, Stabilization and Conservation Service. Then in January of 1963, appellant made application to the County A.S.C.S. for a marketing quota on the 2,000 acres owned by him. The committee then reconstituted the Townsend farm and found that Mrs. Townsend was entitled to 280.2 acres of cotton allotment and Stevenson

73.9 acres. On appeal to the State Review committee this was reversed on July 15, 1963, and Stevenson's allotment was increased considerably while Mrs. Townsend's was reduced.

From the middle of 1963 until December of 1965, appellee and her predecessor (Loyd) trustee, prosecuted numerous complaints before the State Committee and the Federal Courts but were unable to get the desired construction of the cotton allotment "retainer" clause contained in the Townsend conveyance.

On August 19, 1963, J. W. Loyd, executor, filed this cause against the grantees, their wives and the Prudential Insurance Company of America. Prudential was joined because it had made a substantial loan to the grantees of Mrs. Townsend.

The complaint alleged, *inter alia*, that grantees had breached the "retainer" clause in the conveyance because they:

> "knew at the time of the filing of this instrument with said office that this constituted a breach of this provision of their deed as under the applicable law and regulations of the Department of Agriculture, the giving of notice of this conveyance to the local representatives of the Department of Agriculture required them to immediately reconstitute and apportion the acreage allotments on said farm.
>
> "Said Defendants further continued their breach of said provision by filing with the above local office of the United States Department of Agriculture on January 17, 1963, a petition for reconstitution of said farm, the purpose of which was to acquire the apportioned cotton allotment for the lands they had purchased under the deed."

It was also alleged that:

> "both parties to this transaction were informed as

to the consequences of any notice to the Department of Agriculture regarding a sale of a portion of the farm and said Defendants' actions in immediately notifying the Department of Agriculture and subsequently requesting a reconstitution is in effect fraudulent as to this Plaintiff, or such inequitable conduct in the light of all other circumstances as to justify and require a rescission of this contract of sale; that the loss of the cotton allotment to the remainder of the lands retained by Mrs. Hazel Cook Townsend is a direct result of the actions of the Defendants in notifying the Department of Agriculture of the sale and requesting reconstitution; that the value of this remaining portion of the land is greatly reduced by the loss of the cotton allotment and the value of the lands obtained by the Defendants in the sale is greatly enhanced by obtaining the cotton allotment and this is an enhancement for which they paid no consideration and which the said Mrs. Hazel Cook Townsend did not agree to sell and for which she received no consideration."

Prayer of the complaint was that deed from Mrs. Townsend to her grantees and any subsequent conveyances by them be cancelled and that title be reinvested in petitioner as Trustee of the Townsend estate. Alternate prayer was that:

"in the event this Court should find that although Petitioner is entitled to a cancellation of said instrument but, such cancellation should not be decreed due to impossibility of placing the parties in *status quo,* that this Court determine the damages resulting to Petitioner and award Petitioner a judgment for same. . ."

There were a number of interjacent pleadings, one being a motion for summary judgment (which was denied) based mainly on the contention that the reservation "grantor will retain all present government cotton allotment which has heretofore and now been allotted

to any lands owned by her" applied only to the 1962 allotment (contract of sale was entered into on the 26th day of October, 1961, and conveyance executed April 6, 1962) and not to any allotment that might be made by the A.S.C.S. in future years.

Following a number of hearings and the taking of extensive proof the Chancellor declined to set the deed aside and concluded that:

> "1. The contract is not invalid as in violation of any statute of the State of Arkansas, or of the United States of America;
>
> 2. The contract is not invalid as being violative of the public policy of the State of Arkansas, or of the United States of America;
>
> 3. Stevenson is not guilty of fraud;
>
> 4. Stevenson has breached the terms of the contract and is answerable in damages for such breach;
>
> 5. Loyd should have judgment against Stevenson for the sum of $3,695.00, with interest thereon at the rate of 6% per annum;"

Stevenson in prosecuting this appeal relies on six points for reversal. In our view a seriatim treatment of these points is unnecessary.

The trial court's conclusions were predicated on what we consider to be a "strained" construction of the meaning, intent and results of the reservation contained in the Townsend conveyance. We quote briefly from the chancellor's voluminous findings:

> "Under the terms of the contract Stevenson contracted to permit Mrs. Townsend to retain and work the cotton allotment allocated to the Townsend plantation by the Department until such time as the re-

maining acreage of the plantation was sold. This agreement provided that she was to retain and work the cotton allotment to be allocated to the land in issue when the Townsend plantation was reconstituted and the cotton allotment "split-out" by the Department. The agreement to carry out the intent of the parties provided that Stevenson was to make available to Mrs. Townsend a sufficient amount of land on the land in issue to support the allotment. Stevenson has failed and refused to allow Loyd to work said cotton allotment and/or make available sufficient land to support the allotment, thus Stevenson has breached the contract. Stevenson worked 73.9 acres of the cotton allotment in the year of 1963. The rental value of cotton allotments in Chicot County, Arkansas, for the year of 1963 was $50.00 per acre. Loyd should have judgment against Stevenson for $3,695.00."

There are a number of valid reasons why the meticulous chancellor's construction of the reservation cannot be sustained. There was no obligation whatever placed on grantees (appellant) by the retainer except not to make claim to any cotton allotment that they might be entitled to until Mrs. Townsend sold her remaining lands and not to disturb any "present" cotton allotment held by their grantor.

Certainly it cannot be logically declared that this language bound grantees, their heirs and successors in title to guarantee grantor, her heirs and legal representatives a fixed cotton allotment (contrary to law) in perpetuity, on the lands retained by Mrs. Townsend.

This contract was prepared by Mrs. Townsend's legal representative (not the attorney for appellee), and under our rule, if doubt exists regarding phraseology, it is to be construed most srrongly against her. *Foster* v. *Universal C.I.T. Corp.,* 231 Ark. 230, 330 S. W. 2d 288; *Keith* v. *City of Cave Springs,* 233 Ark. 363, 344 S. W. 2d 591.

Cotton allotments are made on an annual basis. At the time of the conveyance by Mrs. Townsend her cotton allotment for the crop year 1962 had already been fixed. In other words there was "a present government cotton allotment" *in esse.* Mrs. Townsend farmed her full quota in 1962. Black's Law Dictionary defines "present" as meaning "now existing; at hand; relating to the present time; considered with reference to the present time." Webster's International Dictionary (3rd ed., 1961) sets out that "present" means "in being at this time; not past or future."

The appellate court of Missouri dealt with this question in 1959 and said:

> "The very nature of a cotton acreage allotment is such that it has no existence except for the one specific year. It expires with the crop year. It is not continuous. The fact there may (or may not) be another allotment fixed for the next year carries no certainty that a successive allotment will be in the same amount or acreage." *Duncan* v. *Black,* 324 S. W. 2d 483 (Mo. 1959).

It is our conclusion that "present government cotton allotment" as used in the "retainer" clause of the conveyance meant the 1962 cotton acreage and that since Mrs. Townsend farmed her full quota for that year appellee cannot be held liable for any subsequent reduction in the cotton allotment to lands held by her legal representative.

It is significant that in drawing the sales contract and conveyance Mrs. Townsend's representative added "heirs and assigns" after grantees' names but omitted including any successor parties after "Grantor." The exact provision being "Grantor will retain all present government cotton allotment." It could reasonably be concluded from this that the "retainer" was intended as a personal covenant, at most, which expired with the demise of Mrs. Townsend. *Field* v. *Morris,* 88 Ark. 148,

114 S. W. 206; *Ft. Smith Gas Co.* v. *Gean,* 186 Ark. 573, 55 S. W. 2d 65.

Here we have a situation where all the parties or their representatives knew that "traffic" in crop allotments was forbidden by federal laws and regulations. They knew that a seller was required to report any sale to the County A.S.C.S., but when the buyer did what the seller was required to do under the law he is sued for damages alleging breach of contract and fraud. Appellee trustee is not entitled to equitable relief. The cause is therefore reversed and remanded to the trial court with directions to dismiss appellee's complaint.

ZILPHA NOWAK *v.* J. E. ETCHIESON, EX'R ET AL

5-3952 408 S. W. 2d 476

Opinion delivered October 31, 1966

[Rehearing denied December 5, 1966.]

Gardner & Stiensiek, for appellant.

Marcus Evrard and *H. G. Partlow Jr.* and *Graham Sudbury* and *Oscar Fendler,* for appellee.

HUGH M. BLAND, Justice. The merits of this controversy involve the construction of the Last Will and Testament of Ida B. Crockett. The will was executed March 27, 1963, consisting of six typewritten pages, signed by Ida B. Crockett and validly witnessed. Also involved is an instrument dated January 16, 1964 entitled "Codicil to Last Will and Testament." Both of these instruments were admitted to probate on September 8, 1965.

By the terms of her will, provision was made for the payment of her just debts, taxes and expenses of administration. She bequeathed certain items of personal property to various persons and gave $1.00 to each niece or nephew not mentioned in the will.

The pertinent paragraphs of the will are nine and ten. In paragraph nine she devised to J. F. Etchieson as Trustee:

> "* * * 'all of the rest and residue of my real estate, wherever the same may be situated, of which I die seized and possessed,' with directions that it be sold and with further directions to 'divide the proceeds of such sale equally among the within named Ella Cunningham, Bertha Miller and Gladys

Martin.' The Trustee was to seek no further authority regarding the sale other than from the three beneficiaries of the trust who have been named herein. Merle Gaines, who was renting Testatrix' farm land at the time of the execution of the will, was given preferential right to purchase said real estate."

Paragraph ten is copied in full from the will:

"I give and bequeath to my nieces, Zilpha Nowak and Ella Lutz, as tenants in common owning equal interests with each other, all of the rest and residue of my property, if there be any such residue, that shall remain after the foregoing provisions of my will shall have been fully complied with."

The codicil to the last will and testament devised a certain savings account in the Blytheville Federal Savings and Loan Association to Ella Lutz Cunningham, dependent on survivorship with remainder over to Don Lutz.

Prior to the death of the Testatrix, a niece, Ella Lutz, who is one and the same person as Ella Cunningham, died intestate being survived by two sons, Don Lutz and Marvin Lutz. It was stipulated that all parties to this action are of full age.

Objection was filed to the admission of the codicil to probate on behalf of appellant and Mrs. Gladys Martin, both of whom are mentioned in the Last Will and Testament of Ida B. Crockett, and also seeking a construction of the will.

On October 29, 1965, the Probate Court heard the objections to the admission of the codicil to probate and the petition to construe the will, and held that the codicil dated January 16, 1964 was not executed in accordance with the laws relating to the execution of wills and testaments and ordered it stricken from the probate records. The court also held that all property devised to

Ella Lutz had lapsed and that this property, excluding that which was mentioned in the codicil, would pass and descend as though Ida B. Crockett had died intestate.

The court further held that the property described in the codicil to the last will and testament, this being the savings account in the Blytheville Federal Savings and Loan Association, would fall into the provisions of paragraph ten of the last will and testament dated March 27, 1963; that Zilpha Nowak is entitled to one-half of all property devised in paragraph ten and the remaining one-half shall be as though Ida B. Crockett died intestate.

Appellant appeals and contends that she is the residuary devisee and that one-half of all property which would have otherwise passed to Ella Lutz would pass to her as residuary beneficiary under the terms of the will.

Don Lutz, who was mentioned in the codicil, filed his notice of cross-appeal from the court's holding that the codicil is invalid.

For reversal appellant relies on two points:

> "1. The Probate Court erred in making determination that all property devised and bequeathed to Ella Lutz under the Last Will and Testament of Ida B. Crockett passes intestate.
>
> 2. That the court should have held that all property devised and bequeathed to Ella Lutz passed into the residuary clause, paragraph 10, of the Last Will and Testament of Ida B. Crockett."

It is crystal clear that the codicil was not executed according to the provision of Ark. Stat. Ann. § 60-403 (Supp. 1965) and the chancellor was correct in denying probate and striking it from the probate record. So, the cross-appeal must be affirmed.

We also think the chancellor was correct in his construction of the will. The will must be construed so as to ascertain or arrive at the intent of the testator from the language used giving consideration, force and meaning to each item in the entire instrument. In *Lockhart* v. *Lyons,* 174 Ark. 703, 297 S. W. 1018, we said:

> "The true rule in the construction of wills, which can be said to be paramount, is to ascertain or arrive at the intention of the testator from the language used, giving consideration, force, and meaning to each clause in the entire instrument. * * *
>
> A testator is presumed to intend to dispose of his entire estate, and it must be borne in mind in the construction of wills that they are to be so interpreted as to avoid partial intestacy, unless the language compels a different construction. * * *"

When we stand far enough away and look at the entire will of testatrix, it is readily apparent how she intended to dispose of her property. After certain bequests, some of personal property and some of real estate, she chose to devise *all* of the remainder of her real estate to a trustee with unlimited power to sell and convert it to cash to be divided equally between Ella Cunningham, Bertha Miller and Gladys Martin. It was clearly her intention, in disposing of all the remainder of her real estate in this manner, to dispose of it equally to the three named devisees. These parcels of land probably had different values and in order that the devisees would share equally in the division of the proceeds of the sale, she would avoid any inequities that might otherwise arise. The bequest to Ella Cunningham, having lapsed because of her demise prior to the death of the testatrix, passes as though Ida B. Crockett died intestate.

The majority rule is stated in 36 A. L. R. 2d 1118 as follows:

> "It would seem to be a not unreasonable view that,

> prima facie, by a gift of all his residuary property to designated persons a testator intends that whatever assets happen to fall within the provision shall go to those persons as being the ones preferred by him in any event as against the whole world, and this whether or not he has defined or regarded them as a class or as joint tenants or possesses any knowledge or awareness of the legal concepts of class gift and joint tenancy. Nevertheless, as the later cases show, the rule which prevails in most jurisdictions, in the absence of statute or distinctly disclosed intention or justified construction of the will to the contrary, is that if the instrument disposes of residuary property or funds to two or more persons and one or some of them renounce the gift, or predecease the testator, or for any reason are or become disentitled to take, the shares affected do not inure to the other residuary beneficiaries in augmentation of their shares but on the contrary pass as in case of intestacy."

It is true that partial intestacy should be avoided if possible. *Galloway* v. *Darby,* 105 Ark. 558, 151 S. W. 1014. But intestacy in this case is inevitable in order to carry out the intention of the testator. Item 9 of the will related to realty only. At common law the rule as to lapsed devises of real estate was that it goes to the heirs at law. I Underhill on Wills, Art. 335. It is the province of this court to construe the will and not make it over. In doing this the will must be read from all four corners and determine the intention from the entire will. Item 9 is a particular residuary clause as distinguished from Item 10 which is a general residuary clause.

Appellant argues that Ella Lutz was not a residuary legatee in Item 9 of the will but rather was named as one of three individual beneficiaries of a Testamentary Trust. The trial court held that these distributees, under the trust, were individuals and not a class. There was no appeal from that ruling. In Restatement of the Law,

Second Edition, Chapter 12, Article 411, sub-paragraph C reads as follows:

> "If real property is devised upon a trust which fails and there is no provision in the will effectively disposing of the residue of the testator's real property, the devisee holds it upon a resulting trust for the heirs of the testator."

The codicil held invalid here attempted to dispose of a savings account in the Blytheville Federal Savings and Loan Association and the devise was to Ella Lutz with the remainder over to Don Lutz. The codicil having failed and this bequest having lapsed, this property would pass to the general residuary clause so that under Item 10 of the will appellant would receive one-half as a tenant in common and the other one-half would pass as though Ida B. Crockett died intestate.

Finding no error, the decree of the chancery court is affirmed on direct appeal and on cross-appeal.

Opinion delivered November 7, 1966

Penix & Penix, for appellant.

Bruce Bennett, Attorney General; *James C. Wood,* Asst. Atty. General, for appellee.

CARLETON HARRIS, Chief Justice. Appellant, Paul William Theodore Moore, Jr., was charged by Information with Forgery and Uttering in Craighead County, Arkansas. After demanding an early trial, and refusing the offer of counsel, stating that he would prefer to represent himself, Moore was tried by the Craighead County Circuit Court sitting as a jury, found guilty as charged in the Information, and sentenced to five years for forgery, and five years for uttering, the sentences to

run consecutively. From the judgment so entered, appellant brings this appeal.[1] For reversal, it is asserted that Moore was not guilty of forgery and uttering, and the proper charge, if any, was False Pretense. It is also alleged that Moore was entitled to trial by a jury, and that he was further entitled to counsel "almost from the moment of his arrest," his constitutional rights under the Sixth and Fourteenth Amendments to the United States Constitution being violated under the holding in *Escobedo* v. *Illinois,* 378 U. S. 478. We proceed to a discussion of these points in the order listed.

The evidence reflects that Moore went into the Mercantile Bank in Jonesboro, and told Tony Futrell, Assistant Cashier of the bank, that he needed "about $30.00 till tomorrow," at which time he would have the opportunity to transfer money from a bank in Texas. Moore represented that he was working at the airport, installing an electrical transmission system. He further said that he was staying at the Holiday Inn, and would be in Jonesboro about three weeks. After some further conversation, Futrell agreed to cash the check, and Moore then took a blank check that he had in his possession on the Midway National Bank of Grand Prairie, Texas, and wrote the check in the amount of $30.00, listing the account number as No. CA-973, and then signing on the signature line, "Carlton Electric Co., Ltd." Immediately beneath the signature line, he wrote, "Vancouver, B. C., Canada," and still below that, added "Paul W. T. Moore." After checking with the airport, Holiday Inn, and the Midway Bank, Futrell called the police officers, and Moore was arrested.

Roland W. Walden, President of the Midway National Bank of Grand Prairie, Texas, testified that he had thoroughly searched the records of his bank with respect to an account of Carlton Electric Co., Ltd., and that no such account existed, or had ever existed. He further stated that no account had ever existed at the

[1]The court appointed counsel to represent Moore in the appeal to this court.

bank under the name of Paul W. T. Moore. Walden testified that the account numbers in his bank had no letters whatsoever, and all account numbers contained more digits than that on the check in question.

Moore subsequently took the stand, and admitted that he was not connected with any Carlton Electric Co., Ltd., and also admitted that that name was entirely fictitious. In addition, he stated that he had no account at the bank.

We disagree with the contention that Moore was improperly charged with forgery and uttering, rather than false pretense, though it appears from the evidence that he could have also been charged with that offense. The basis of appellant's allegation of the erroneous charge is that he signed his own name to the check, but it must be remembered that Moore, in signing this check, represented that *Carlton Electric Co., Ltd., had an account with this bank.* In other words, he did not maintain in signing the check, that he had a personal account in the Midway Bank, but only that he had authority to sign checks on the company—an account which he knew did not exist—and which could not exist, since he had made up the name, and to his knowledge, no such company was in being. We have held on several occasions that forgery can be committed where the name forged is fictitious. See *Maloney* v. *State,* 91 Ark. 485, 121 S. W. 728, *Walker* v. *State,* 171 Ark. 375, 284 S. W. 36, *Tarwater* v. *State,* 209 Ark. 687, 192 S. W. 2d 133, and *Thompson* v. *State,* 293 Ark. 780, 394 S. W. 2d 491[2]. In fact, the contention here made was also relied upon in *Walker* v. *State, supra.* In discussing this argument, we said:

"It was shown that the name of the drawer of the check, T. E. Smith, was that of a fictitious person, and instructions were asked which, if given, would have told

[2]In *Maloney* v. *State, supra,* and *Thompson* v. *State, supra,* we reversed the convictions, holding that the state had not proved the purported drawer to be fictitious.

the jury that, if this were true, appellant would not be guilty of forgery, but would be guilty of the offense of obtaining goods and property under false pretenses, an offense not charged in the indictment, and to acquit the defendant on this account. * * *

"The court did not err in refusing to instruct the jury that, if T. E. Smith were found to be a fictitious person, the crime committed was not forgery, but that of obtaining money under false pretenses. In the case of *Maloney* v. *State,* 91 Ark. 485, it was held that to constitute forgery the name alleged to be forged need not be that of any person in existence."

We find no merit in this contention.

With regard to the second contention, we agree that our constitution grants the right to trial by jury. See Article 2, Section 7, Arkansas Constitution. However, that same section also provides that a jury trial may be waived by the parties in all cases in the manner prescribed by law. Here, the record reflects that Moore, on July 19, 1965, at arraignment, told the court that he desired a speedy trial, whereupon appellant was informed that the next term of the Craighead Circuit Court would not convene until November.[3] Moore replied that he could not make bail, and he requested that he be tried by the judge of the court, sitting as a jury. Other court matters intervened to prevent the court's return until September 2, at which time the trial was held. Ark. Stat. Ann. § 43-2108 (Repl. 1964) reads as follows:

"In all criminal cases, except where a sentence of death may be imposed, trial by a jury may be waived by the defendant, provided the prosecuting attorney gives his assent to such waiver. Such waiver and the assent thereto shall be made in open court and entered of record. In the event of such waiver, the trial judge shall pass both upon the law and the facts."

[3]The record is not clear at this point, but the court evidently informed Moore that a jury would not be impaneled before that time.

This statute was followed, and there was no error. The right to a speedy trial does not mean that all other business of the court must be "shoved to the back" in order to give an immediate trial. Such action, of course, would be impossible, since there are other criminal cases that must be disposed of, those defendants holding exactly the same right as the defendant who desires early disposal of his particular case. Obviously, all could not be heard within a short period of time. The case was heard by the court, sitting as a jury, only because of appellant's insistence that this be done.

Finally, it is urged that Moore was entitled to counsel after he was arrested, and that the failure to furnish counsel at that time was a violation of his constitutional rights as set out in *Escobedo* v. *Illinois, supra.* This allegation is based upon the fact that Moore gave a written statement to Officer Bratton of the Jonesboro City Police, in which he admitted that the name, "Carlton Electric Company," was entirely fictitious, and that he knew there was no account in that name, or his name; also, that he had no account under any name in the Midway National Bank. We do not agree that this case comes under the holding in *Escobedo.* Officer Bratton testified that he advised Moore that the latter was entitled to counsel, and the witness further said that the statement was entirely voluntarily made. The statement itself, signed by Moore, sets out that he has been advised of his right to counsel, and also advised that he did not have to make any statement. This is far afield from *Escobedo,* where a handcuffed prisoner was admittedly not advised of his constitutional rights, but rather was urged to make a statement. In addition, the accused repeatedly asked to speak to his lawyer, and the lawyer, who was present in the building, was refused permission to talk with Escobedo. It is apparent that there is not even a shred of similarity between the cases. For that matter, Moore did not, even at his trial, contend that he had been denied legal counsel, or that he had been deprived of any other right. In fact, before the statement was admitted, the court gave Moore the opportunity to show

the circumstances under which the statement was made, but Moore declined.[4]

Moore certainly could not have been prejudiced by the statement given, since he, of his own volition, took the witness stand to testify in his own behalf, and, in open court, admitted that he signed and cashed the check, that the Carlton Electric Company was entirely a fictitious name, and that he himself had no account at the bank.

The record reflects that the court was apparently very careful, at the time of arraignment, to see that Moore understood that the charges against him constituted a felony, and that appellant understood the court could immediately appoint an attorney for him so that he might have the benefit of counsel during all subsequent proceedings. The offer, as previously mentioned, was declined, Moore preferring to represent himself. The record does not reflect the reason for this choice, but Moore cross-examined all state witnesses and presented one witness for the defense, in addition to his own testimony.[5]

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[4]"The Court: I suggest, at this time, let the defendant look at the statement. He would be entitled, at this time he would be entitled to cross-examine the witness regarding the circumstances under which the statement was made. Take your time, Mr. Moore, read that over before you do that. (Note: Defendant examined statement.)

"The Court: At this time, Mr. Moore, you may ask any questions of this witness, regarding the circumstances under which the document you have before you was taken and prepared and those circumstances prior thereto, may ask him any question. It is necessary for the court to determine, whether or not, the statement was voluntarily made and in subservience to your constitutional rights in the matter. May ask this witness any question, surrounding the circumstances, you desire.

"Mr. Moore: No questions, Your Honor."

[5]Moore admitted, while testifying in his own behalf, that he had been convicted on approximately 22 counts of false pretense, and one parole violation.

Finding no reversible error, the judgment is affirmed.

It is so ordered.

SAMMONS-PENNINGTON CO. *v.* HARRY H. NORTON ET AL

5-3992 408 S. W. 2d 487
Opinion delivered November 7, 1966
[Rehearing denied December 12, 1966.]

Switzer & Griffin, for appellant.

John F. Gibson and *James L. Sloan,* for appellees.

CARLETON HARRIS, Chief Justice. Appellees, Harry H. Norton and Thomas M. Mann, purchased all assets of the Graham-Wilson Company, consisting mainly of coin operated music machines, and Sammons-Pennington Company, appellant herein, financed the transaction for appellees, as hereinafter set out. On February 15, 1964, appellees executed a conditional sales contract and note in the amount of $15,943.05, plus a finance charge of $2,574.79. We shall refer to these instruments hereafter as Contract No. 1. A short time thereafter, Norton

advised the company that the contract and note were unacceptable for the reason that the payments exceeded the sum of $100.00 per week, and appellees did not desire to pay more than this amount, including interest. Appellant company then prepared a new contract and note to be used in lieu of Contract No. 1 (apparently using the same date), which provided for weekly payments over a period of 192 weeks, or 44.3 months, payments being set at $100.00 per week. We shall refer to these instruments as Contract No. 2. The paper was subsequently sold to Walter E. Heller Company of Chicago, the finance company for Sammons-Pennington, appellant guaranteeing payment. According to the evidence, this was the first time that appellant had granted a loan for this long a period of time; theretofore the company had set a maximum term for a loan of this type at 36 months.[1] George W. Sammons, President of Sammons-Pennington Company, and who resides in Memphis, testified that he knew that the legal rate of interest in Arkansas was 10% simple interest, but he did not know how to figure the amount under the new contract; accordingly, he called the Walter Heller Company to ascertain the correct amount to be charged as interest. The finance company, using "Lake's Monthly Installment and Interest Tables," gave him the figure of $3,182.64 for interest, which was added to the principal sum of $15,943.05. On August 1, 1964, Mann and Norton entered into another conditional sales contract with appellant covering the purchase of additional equipment, the note being in the amount of $1,637.71, which included carrying charges of $227.71. This note was to be paid over a period of 36 months, the first 35 installments in the amount of $46.00 each, and the final installment being in the amount of $27.41. We shall hereafter refer to these instruments as Contract No. 3. After appellees defaulted in six payments, appellant instituted suit in June, 1965, in the Ashley County Chancery Court to recover on Contracts 2 and 3, seeking judgment in the amount of $13,220.79, together with interest from Feb-

[1]A 36 months term would have meant that the payments were $130.00 per week.

ruary 1, 1965. Appellee Norton answered, asserting that Contract No. 2 was usurious, and accordingly void, and he contended that both contracts (Nos. 2 and 3) should be cancelled, and title to all property involved should be vested in him.[2] On trial, the Chancellor found that Contract No. 2 was void, because of usury, but that the August, 1964, contract (No. 3) was valid, and judgment was given to appellant for the balance due under that agreement. From that portion of the decree holding Contract No. 2 void, cancelling same, and voiding the lien, appellant brings this appeal.

We have reached the conclusion that this decree should be reversed, though it is stipulated that the amount of interest called for under Contract No. 2 was an overcharge (in excess of 10%) of between $57.00 and $60.00. It might be stated that the Chancellor was not without case authority in reaching his determination, and he cited several cases in a comprehensive opinion in support of his findings. Appellees mainly rely upon our cases of *Ford Motor Credit Company* v. *Catalani*, 238 Ark. 561, 383 S. W. 2d 99, *Brooks* v. *Burgess*, 228 Ark. 150, 306 S. W. 2d 104, and *Holland* v. *Doan*, 228 Ark. 340, 307 S. W. 2d 538. Appellant relies principally upon our case of *Cox* v. *Darragh Company*, 227 Ark. 399, 299 S. W. 2d 193, although other cases are also mentioned in appellant's brief. Actually, it would seem that we have two lines of cases, the line of demarcation between usurious and nonusurious contracts being rather slight. It appears that, in determining whether a usurious charge has been made, all attendant circumstances must be taken into consideration. When this is done, we think it is plain that the overcharge in the instant litigation was the result of an error, made in good faith, rather than being based on an intent to violate the usury law. In the first place, there is no question but that the first contract prepared (Contract No. 1), which called for the retirement of the debt in 36 months, was a valid contract, *i. e.*, there was no usurious charge. The testimony by Sammons, undisputed in the record, was that the

[2]Mann did not employ an attorney, but appeared *pro se*.

company had never before granted a loan for a term of more than 36 months. Sammons testified that, in order to satisfy appellees, he agreed to extend the time for a sufficient period to enable appellees to make payments of exactly $100.00 per week. Sammons then stated:

"* * * I put in a call to my finance man, the man that buys my paper, the Walter E. Heller Company, in Chicago and told him what my deal was and due to the fact that we had a tremendous amount of bad luck down in this area with people trying to pay us and he said that he would make an exceptance to the rule and extend this greater than a 36 months period."

Not knowing how to figure the interest on the new term, he sought the advice of the Heller Company, and requested that company to give him the proper figures. He testified that he used the interest figure given to him by Heller. In this approach, Sammons actually followed, though unknowingly, a suggestion given in *Holland* v. *Doan, supra,* where we stated that if the appellee did not know how to figure interest, "he should have had his calculations checked by one who was familiar with figuring interest."

Another important circumstance to be considered is the fact that the interest rate on the third contract between the parties, which was figured on the basis of 36 months, was entirely legal.

Charles Mott, Jr., a Certified Public Accountant of Little Rock, testified on behalf of appellees that Contract No. 2 (February, 1964) was usurious, though it is interesting to note that he reached an overcharge figure of $67.81, which he stated he only arrived at after quite some length of time, "I would judge that it would take the biggest part of a day to compute it." The witness stated that his computation was not exactly correct, because it was figured on a calendar year of 364 days instead of 365. Mott also said that he was familiar with the book, "Lake's Monthly Installment and Interest Ta-

bles;" that it was widely used, and that he would accept it as conveying valid information. Apparently, the interest under the terms of this particular transaction was difficult to reach, since, as already stated, in stipulating the amount of the overcharge, no definite figure was used, but rather, "approximately $57.00 to $60.00."

Finally, though our determination is not based on that premise, it seems rather ridiculous that any concern would risk cancellation of a principal debt of nearly $16,000.00 (not counting interest), in order to receive "approximately $57.00 to $60.00" excess interest.

Summarizing, we think the circumstances show an honest, unintentional mistake, because of the following evidence:

1. The first contract prepared did not charge any excess interest.

2. The second contract, involved here, executed entirely for the benefit of appellees, was new to appellant, and it relied upon its finance company for the proper interest figure, this company apparently using a recognized interest table.

3. The third contract entered into between the parties did not charge any excess interest.

4. A recognized public accountant, testifying on behalf of appellees, admitted that the figure was difficult to reach, and even his own calculations were slightly in error.

5. Evidently the exact figure has never been reached, since the parties stipulated that the excess interest amounted to "approximately $57.00 to $60.00."

In accordance with what has been said, that portion of the decree holding the February, 1964, contract (by this court designated as Contract No. 2) usurious is re-

versed, and the cause is remanded to the Ashley County Chancery Court, with directions to enter a decree not inconsistent with this opinion.

ELSIE B. BURTON *v.* R. L. BURTON

5-3987 407 S. W. 2d 738

Opinion delivered November 7, 1966

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

Ben M. McCray, for appellee.

ED. F. MCFADDIN, Justice. A marriage of 24 years has culminated in this divorce suit. We deliberately forego a detailing of the evidence because on this appeal the appellant, Mrs. Burton, seeks a reversal on the grounds of condonation, claimed to have occurred after she filed her suit for divorce. She cites such cases as *Harris* v. *Harris,* 209 Ark. 528, 191 S. W. 2d 465; *Buck* v. *Buck,* 205 Ark. 918, 171 S. W. 2d 939; and *McDougal* v. *McDougal,* 205 Ark. 945, 171 S. W. 2d 942. The case was not tried or decided on the issue of condonation; and it does not appear to have been mentioned in the trial court except in a few lines of testimony, which the appellant has seized on for reversal here.

Most jurisdictions hold that condonation is a defense which generally has to be pleaded. 24 Am. Jur. 2d

642, "Divorce and Separation," § 318. But regardless of that matter, the fact remains that condonation, even if pleaded, would not have been a good defense in this case for the reason that we now give.

Mrs. Burton filed her suit for divorce on May 21, 1965. The claimed act of condonation is alleged to have occurred on July 4, 1965. It was not until August 10, 1965, that Mr. Burton filed his cross complaint for divorce. Mrs. Burton never filed any pleadings denying the cross complaint or answering any of the allegations. The case was tried before the Chancellor on September 16, 1965, and resulted in a divorce decree in favor of Mr. Burton. Thus, even if there were any act of condonation (which is doubtful), nevertheless the divorce was granted on a cross complaint on a cause of action which occurred after the claimed condonation.

Even though the husband is prevailing on this appeal, we nevertheless tax the actual costs of this appeal against appellee.

Affirmed.

N. J. HENLEY ET AL *v.* W. L. GOGGIN ET AL

5-4160 407 S. W. 2d 732

Opinion delivered November 7, 1966

Thomas Eisele, for appellant.

John Driver and *Joe D. Villines,* for appellee.

ED. F. MCFADDIN, Justice. This litigation necessitates a decision as to whether Constitutional Amendment No. 51 supersedes the provisions of Ark. Stat. Ann. § 3-1123 and § 3-1123.1 (Repl. 1956).

The appellants are "N. J. Henley, individually and as representative of the Members of the Republican Party, and also as a member of the Searcy County Board of Election Commissioners; W. N. Guthrie, individually and as County Clerk and Permanent Registrar for Searcy County; and Beal Sutterfield, individually and as Sheriff and Collector of Searcy County, Arkansas." The appellees are "W. L. Goggin, individually and as Chairman of the Searcy County Board of Election Com-

missioners; C. H. Campbell, individually and as a member of the Searcy County Board of Election Commissioners: and Mrs. Howard (Donna) Stephenson."

On October 8, 1966, by a majority vote, the County Board of Election Commissioners of Searcy County, proceeding under Ark. Stat. Ann. § 3-1123 and § 3-1123.1, appointed Mrs. Howard (Donna) Stephenson as "Custodian"[1] for the applications for, the issuance of, and voting of, absentee ballots for the General Election of November 8, 1966. On October 13, 1966, the appellants filed this action in the Circuit Court of Searcy County, praying, *inter alia,* for a judgment that the said Ark. Stat. Ann. §§ 3-1123 and 3-1123.1 be declared to have been superseded by Constitutional Amendment No. 51, and also that the action of the Searcy County Board of Election Commissioners, in appointing Mrs. Stephenson as Custodian, be declared void. Trial was held in the Circuit Court on October 20, 1966, and resulted in a judgment holding valid the said sections and also the action of the County Board of Election Commissioners in appointing a custodian under said sections. This appeal followed.

The appeal was filed in this Court on October 25, 1966; and since it involved matters concerning the General Election to be held on November 8, 1966, we advanced the cause for immediate oral argument, hearing, and decision; and on October 31, 1966, we delivered the following *per curiam*:

> "PER CURIAM. We hereby set aside—effective as of this date—the order of the Circuit Court approving the action of the County Election Commissioners in selecting a custodian to act under Ark. Stat. Ann. § 3-1123 and § 3-1123.1 (Repl. 1956), as these sections are in conflict with Amendment No. 51. The ballots of persons who have obtained absentee ballots before this date under the Circuit

[1]We will hereinafter refer to Mrs. Stephenson in such capacity as "Custodian," since this is the designation so used by appellees.

Court order shall be counted if otherwise found to be legal. And all absentee ballots received heretofore or hereafter by the said Custodian shall be forthwith delivered to the Permanent Registrar. An opinion will be delivered later."

This is the opinion referred to. Before an election the provisions of election laws are mandatory, and after the election the provisions are directory. In *Henderson* v. *Gladish,* 198 Ark. 217, 128 S. W. 2d 257, we said: "All provisions of the election law are mandatory, if enforcement is sought before election in a direct proceeding for that purpose; . . ." Here, the litigation is before the election, and if the appellants are correct they are entitled to have the determination of the question *before* the election. The provisions under which the majority of the Election Commissioners of Searcy County were proceeding are Ark. Stat. Ann. § 3-1123 and § 3-1123.1, and in their present form come to us from Act No. 42 of 1951. At that time (1951) our Constitution and laws provided for a poll tax receipt as a prerequisite for voting;[2] but at the General Election in November 1964 the People of Arkansas adopted Amendment No. 51 to the Constitution,[3] which outlawed the poll tax as a prerequisite for voting and provided for a system of permanent registration of voters. It is hornbook law that a Constitutional Amendment subsequently adopted will supersede any previous statute in conflict therewith. (National Prohibition Cases, 253 U. S. 350, 64 L. ed. 946, 40 S. Ct. 486. See also 50 Am. Jur. 546, "Statutes" § 540.) The germane provision of Amendment No. 51 relating to absentee voting is contained in Section 13(d) of said Amendment and reads as follows:

"(d) Absentee voting shall be conducted in the same manner as now provided under the laws of

[2]Except, of course, so-called "Maiden Voters," and possibly a few other rare instances.

[3]The 1965 Arkansas General Assembly enacted several laws recognizing Amendment No. 51. Some of these are Acts 3, 126, 127, 187, and 417 of the Regular Session, and Acts 51, 56, and 57 of the First Extraordinary Session.

the State; provided, that the Permanent Registrar shall determine that the signature on the application for absentee ballot is identical with the signature appearing on the voter's Affidavit of Registration before mailing or passing out an absentee ballot. The Permanent Registrar shall, upon permitting absentee voting in the manner hereinabove authorized, stamp in the first vacant and unused blank space in the Record of Voting Form the date of the forthcoming election and shall note thereafter the words, 'absentee ballot' "

It is true that Amendment No. 51 did not expressly repeal Ark. Stat. Ann. §§ 3-1123 and 3-1123.1, and it is true that repeals by implication are not favored. (*Faubus* v. *Miles,* 237 Ark. 957, 377 S. W. 2d 601); but when the conflict between the statute and the Constitution is irreconciliable, then the statute must be held to be superseded. Here, we cannot fit the Legislative Enactment (§ 3-1123 and § 3-1123.1) into the provisions of the Constitutional Amendment. The Legislative Enactment says that the custodian "shall exercise all powers and duties concerning the applications for, the issuance of, and the voting of absentee ballots, required of the County Clerk. . . ." Under Amendment No. 51 the County Clerk becomes the Permanent Registrar, and under the Constitutional provision previously quoted, the Permanent Registrar "shall determine that the signature on the application for absentee ballot is identical with the signature appearing on the voter's Affidavit of Registration . . . The Permanent Registrar shall . . . stamp in the first unused blank space in the Record of Voting Form the date of the forthcoming election, and shall note thereafter the words, 'absentee ballot'."

Now if the Board of Election Commissioners can appoint a custodian to have charge of all the applications and the issuance of absentee ballots, such custodian would be superseding the Permanent Registrar in the fulfilling of his constitutional duties. The custodian is authorized by statute to have the absentee ballots and

issue them. The Record of Voting Form mentioned in the Constitutional Amendment could not be in the custodian's office and at the same time, in the office of the County Clerk as Permanent Registrar. The mandatory duty of the Permanent Registrar is to compare the signatures and to stamp certain information on the Record of Voting Form. The order of the County Board of Election Commissioners for the custodian to have charge of the applications and the issuance and the voting of absentee ballots is directly in conflict with the provisions of Amendment No. 51 in the particulars here mentioned.

We therefore hold that Amendment No. 51 repealed or superseded the provisions of Ark. Stat. Ann. § 3-1123 and § 3-1123.1. We heretofore issued and now reaffirm the *per curiam* made in this case; and the cause is remanded with directions to set aside the judgment previously entered and to enter a judgment in conformity with this opinion. An immediate mandate is issued.

LIFE & CASUALTY INS. CO. OF TENN. ET AL
v. FABER PADGETT ET UX

5-3921 407 S. W. 2d 728

Opinion delivered November 7, 1966

George F. Hartje Jr. and *Chowning, Mitchell, Hamilton & Burrow* and *Wright, Lindsey & Jennings,* for appellants.

Guy H. Jones, for appellees.

GEORGE ROSE SMITH, Justice. Faber Padgett and his

wife brought this action against the appellants, Life & Casualty Insurance Company of Tennessee and its agent, A. J. Skinner, to recover damages for injuries sustained when Skinner assaulted and beat Padgett with a heavy stick of wood. The jury's verdict, against both defendants, awarded Pagdett $15,000 as actual damages and $35,000 as punitive damages. Mrs. Padgett's cause of action is no longer in issue. The verdict was against her claim, and she has not appealed.

The first question is whether there is substantial evidence to support a finding that Skinner's tortious assault was committed in the prosecution of his employer's business.

The testimony of Mr. and Mrs. Padgett is so similar that we need not narrate it separately. On the afternoon of February 22, 1965, Skinner called at the Padgetts' home, a few miles from Conway, to collect premiums upon policies issued to the Padgetts. A dispute arose about whether the Padgetts were behind in the payment of one weekly premium. Skinner attempted to convince the couple, by his collection records, that there was a delinquency, but the Padgetts insisted that their payments were current. Finally Padgett said that he would write to the company and let them straighten it out. Skinner stamped the floor with anger and said: "Well, you do that."

Two or three times during the altercation Padgett asked Skinner to leave the house. Eventually Skinner did leave, closing the front screen door behind him as he stepped from the living room to the porch. At that point Padgett said: "Don't come back to my house any more, Mr. Skinner. If that's the kind of a man you are, I don't want to have any dealings with you whatsoever." Skinner answered: "There ain't nobody going to tell me what I can do and what I can't do." With that Skinner put down his satchel of papers, seized a heavy piece of firewood, re-entered the house, and struck Padgett

repeatedly about the head. That Padgett suffered serious injuries is not denied.

Counsel for Life & Casualty, in arguing that it was entitled to a directed verdict, cite several out-of-state decisions holding that an employer is not liable for his employee's intentional tort unless the nature of the employment is such as to make the use of force not unlikely. That principle seems really to be a liberalization of the law's bygone reluctance to hold a master liable for his servant's intentional torts. "There was once a great deal of conceptual and procedural difficulty in the way of holding the master for the deliberate and other willful wrongs of his servant in any case where such acts were not specifically commanded. . . . But all this is now a matter of history." Harper & James, Torts, § 26.9 (1956). Prosser takes much the same view, pointing out that the tendency of the modern cases is to hold the employer liable when, as here, the employee loses his temper and attacks the plaintiff during a quarrel arising out of the employment. Prosser, Torts, p. 478 (3d ed., 1964).

We think the law as it stands today is fairly summarized in the Restatement of Torts, where it is said that the master is subject to liability for his servant's intentional tort "if the act was not unexpectable in view of the duties of the servant." Restatement, Torts (2d), § 245 (1958). For a quarrel to arise in the course of an employee's attempt to collect money is certainly "not unexpectable." The jury might well have concluded that disputes over money matters are of such common occurrence that Skinner's conduct could not reasonably be said to be unforeseeable.

Our cases have not been out of step with the trend elsewhere. Not infrequently, in cases similar to this one, our main concern has been whether a dispute arising out of the employment was continuous up to the time of the intentional wrong. Such a case was *Bryeans* v. *Chicago Mill & Lbr. Co.,* 132 Ark. 282, 200 S. W. 1004 (1918),

where we said: "If the quarrel which was started by Breysacre in telling Bryeans that he would have to stop bothering the men in the shop was continuous to the time of the killing, and the killing grew out of such quarrel, then Breysacre at the time of the killing was acting in the scope of his employment. But if the quarrel which was thus started had ceased for an appreciable interval, however short, and was then renewed through the fault of Bryeans and the killing was the result of the quarrel thus renewed by Bryeans, then Breysacre at the time of the killing was not acting within the scope of his authority." We adhered to that view in *American Ry. Express Co.* v. *Mackley,* 148 Ark. 227, 230 S. W. 598 (1921), although there we found from the undisputed proof that there had been an interruption of the quarrel and that the employee renewed it the next day for personal reasons having nothing to do with his employment.

In the present case we think it clear that the jury might justifiably have found that the dispute arose out of Skinner's employment and continued to its conclusion without interruption. Indeed, that was the purport of Skinner's own testimony, who insisted that he acted merely in self-defense, Padgett being the aggressor.

The remaining questions have to do with the award of punitive damages. The appellants contend that under our holding in *Dunaway* v. *Troutt,* 232 Ark. 615, 339 S. W. 2d 613 (1960), the plaintiffs waived their claim to punitive damages by suing two defendants and that the trial court erred in permitting the plaintiffs to introduce proof of the financial worth of both defendants.

In the *Dunaway* case we relied upon *Washington Gas Light Co.,* v. *Lansden,* 172 U. S. 534 (1898), for our conclusion that a plaintiff waives his right to punitive damages simply by asserting such a claim against two or more defendants. In fact, the *Lansden* case did not go that far. There the court merely approved the majority rule that one who sues two or more defendants for punitive damages waives his right to prove the financial con-

dition of any one of them. The court went on to say: "This rule does not prevent the recovery of punitive damages in all cases where several defendants are joined." See also Note, 15 Ark. L. Rev. 208 (1961).

We think the law was correctly stated in the *Lansden* case and that we misconstrued that holding in *Dunaway* v. *Troutt*. In the court below the Padgetts were permitted to prove that Life & Casualty had a net worth of about sixty-one million dollars and that Skinner had a net worth of about one thousand dollars. Under the *Lansden* case the admission of that evidence was reversible error.

Padgett's attorney argues that regardless of the rule in the case of independent tortfeasors proof of financial worth should be allowed when the defendants are employer and employee. That argument is not sound. The reason for the rule—that one defendant should not be punished on the basis of another defendant's wealth—applies just as well to employers and employees as to others not standing in that relation. Hence the rule, as one might expect, is applied in master-servant cases. *Chicago City Ry.* v. *Henry,* 62 Ill. 142 (1871); *Dawes* v. *Starrett,* 336 Mo. 879, 82 S. W. 2d 43 (1935); *McAllister* v. *Kimberly-Clark Co.*, 169 Wis. 473, 173 N. W. 216 (1919).

Does the erroneous admission of the testimony about the appellants' financial means affect the judgment for actual damages as well? In law cases two issues may be so interwoven that an error with respect to one requires a retrial of the whole case. *Mowery* v. *House*, 234 Ark. 878, 355 S. W. 2d 275 (1962). That is the situation here with reference to the compensatory and exemplary damages. It is hardly possible that the jury did not take each into consideration in fixing the other. Furthermore, the inadmissible proof of the defendants' worth may have influenced the jury in its assessment of compensatory damages. The only way in which we can with certainty protect the appellants from

the possibility of prejudice is to grant a new trial upon all issues.

Reversed.

FRED ALVIN BEELER *v.* JAMES WALTERS

5-3974 407 S. W. 2d 739

Opinion delivered November 7, 1966

Wright, Lindsey & Jennings and *William R. Overton,* for appellant.

Acchione & King, for appellee.

GEORGE ROSE SMITH, Justice. This is an action for personal injuries suffered by the appellee in a traffic accident in downtown Little Rock. The jury's verdict was for the defendant, but the trial judge set the verdict aside and ordered a new trial. This appeal is from that order, as the statute permits. Ark. Stat. Ann. § 27-2101 (Supp. 1965).

In a case of this kind we sustain the trial court's order unless the verdict is so clearly supported by the

preponderance of the evidence as to indicate an abuse of discretion on the part of the trial judge. *Koonce* v. *Owens*, 236 Ark. 379, 366 S. W. 2d 196 (1963). In this instance we find no abuse of discretion.

In the court below there was no question about the defendant's fault. Walters was seated as a passenger in a stationary car when it was struck from behind by Beeler's vehicle. The substantial issue for the jury was whether Walters's asserted injuries were real or feigned.

Walters testified that he was shaken up by the collision, that his knee struck the dashboard, and that he developed stiffness in his neck and in his back. Two days after the accident he consulted Dr. Murphy, who prescribed heat therapy and a supporting collar for Walters's neck, which he wore for about a week. Six months after the accident Walters's knee had become so painful that an operation was necessary.

Walter's testimony was by no means uncorroborated. The patrolman who investigated the collision at the scene stated that Walters appeared to be shaken up. Dr. Murphy testified that he found no objective signs of an injury to Walters's neck or back, but he accepted his patient's complaints and prescribed treatment accordingly. Dr. Murphy explained that the knee operation was for the removal of a cyst that antedated the accident and might have been aggravated by it.

At the trial the principal issue was unquestionably that of credibility. The trial judge, who hears the testimony as it is given, is in a much better position than we are to determine where the weight of the evidence lies. Here we cannot say that his determination is contrary to the preponderance of the testimony.

Affirmed.

AMSLER, J., not participating.

KENNIE LEWIS ET UX *v.* FIRESTONE TIRE & RUBBER CO.

5-3997 407 S. W. 2d 750

Opinion delivered November 7, 1966

Bernard Whetstone, for appellant.

Joe D. Woodward and *Mike Kinard,* for appellee.

PAUL WARD, Justice. The question presented on this appeal is whether, under certain circumstances, the trial court has the discretion to extend the time for a garnishee to file an answer.

Facts. On September 28, 1965 Mr. and Mrs. Lewis (appellants) procured a judgment in circuit court against one Robert Tribble in the total sum of $6,000. The judgment was filed for record October 11, 1965. On October 12, 1965 appellants caused a Writ of Garnishment to issue against the Firestone Tire and Rubber Company, Inc. (appellee). At the same time appellants filed "Allegations and Interrogatories" directed to appellee, wherein it was alleged that appellee was indebted to said Tribble in the sum of $6,500, and appellee was asked to state what amount, if any, it owed Tribble. Pursuant to the above, a summons was issued by the clerk to the sheriff commanding him to summons ap-

pellee to appear in twenty days after service to answer the interrogatories. The Writ was served on appellee October 19, 1965, but it was not until November 23, 1965 (thirty four days after service) that appellee filed an answer, stating it owed Tribble only $128.05.

On January 3, 1966 appellants filed a Motion to set aside the answer and to enter a default judgment against appellee in the sum of $6,000 (plus interest) in favor of appellants. The trial court overruled the said motion, but entered judgment against appellee and in favor of appellants in the sum of $128.05 (plus interest). In doing so the court made this comment:

> "I think the Court's got a perfect right, within the Court's own discretion, to enlarge the time to plead here and if there was any default judgment to set it aside for good cause. Good cause certainly exists when these people only owed that man $128. and you want them to pay $6,000."

From the above order and judgment appellants prosecute this appeal and, for a reversal, rely solely on the following Point:

> "The court was in error in holding that good cause was shown (as contemplated by the statute) for the delay in answering (writ of garnishment)."

In support of the above Point appellants rely solely on, and quote extensively from, *Karoley* v. *A. R. & T. Electronics, Inc.,* 235 Ark. 609, 363 S. W. 2d 120. In that case the garnishee failed to file its answer in due time and a default judgment was entered against it. After the term of court had lapsed appellee filed a Motion to set aside the default judgment. This Motion was denied by the trial court and, on appeal, we sustained the trial court. In doing so we said the default judgment was entered against the garnishee as provided by Ark. Stat. Ann. § 31-512 (Repl. 1962). Then we went on to point out that the garnishee ". . . did not comply with the

statute applicable to setting aside a judgment after the lapse of the term (§ 29-506 *et seq.* Ark. Stats.)''.

We are unable to agree with appellants' contention that the *Karoley* case calls for a reversal of the judgment of the trial court in the case under consideration here.

First, it is pointed out that here the term of court had not lapsed and also that no default judgment had been rendered against the garnishee—which was not the situation in the *Karoley* case. In fact it appears to be conceded by appellants that the trial court had the power and discretion to refuse to enter a default judgment against the garnishee and to give it further time to answer. Consequently the vital contention of appellants is that no ''good cause was shown'' for the trial court's action. We are not in agreement with the latter contention.

The writ of garnishment was served on appellee's agent, Joseph H. Street (the Industrial Relations Manager of appellee) who, it appears, was not versed in legal procedure; Street made an effort (though a belated one) to find out what he should do; he called the circuit clerk (whose name was signed to the Writ) for advice; following that Street wrote a letter to the clerk, dated November 22, 1965, stating:

> ''We are holding three (3) checks totaling $128.05 of foremer employee Robert D. Tribble, against garnishment No. 6043.
>
> ''Please notify us as to the disposition of these checks and of the garnishment.''

In view of the facts set forth above, and in view of the further facts that (a) there is no contention appellee did not act in good faith, (b) there is no contention appellee actually owes Tribble more than $128.05, and (c) it would be unjust to force appellee to pay out more

than $6,000 to discharge a debt of only $128.05, we are unwilling to hold no "good cause was shown" for the action taken by the trial court. We find an abundance of legal support for the result we have reached. See: *Wilson* v. *Phillips,* 5 Ark. 183 (pp 185-186); *Pate* v. *Bryan,* 177 Ark. 79 (p. 82), 7 S. W. 2d 776; 38 C. J. S.—*Garnishment,* § 176; *Aiken* v. *Smith,* (Ga.), 23 S. E. 2nd 584, and; 6 Am. Jur. 2d—*Attachment* and *Garnishment*—§ 348.

Affirmed.

DONALD R. WEBB ET AL *v.* STATE FARM MUTUAL INS. CO.

5-3999 407 S. W. 2d 740

Opinion delivered November 7, 1966

Brockman & Brockman, for appellants.

Reinberger, Eilbott, Smith & Staten, for appellee.

Osro Cobb, Justice. Appellants, Donald R. Webb and Delma L. Webb, brothers, were joint operators of a gasoline service station in Pine Bluff, and both resided with their parents.

Donald R. Webb owned a 1957 Chevrolet automobile which was insured for both liability and collision coverage by appellee. The policy contract provided the named insured with additional like coverage while driving an automobile not owned by him as a temporary substitute automobile as same was defined in the policy.

Delma L. Webb was the owner of an uninsured 1962 Volkswagen. In October, 1963, Donald R. Webb loaned Delma L. Webb his Chevrolet to drive to and from Memphis, Tennessee to attend a General Motors training school. While his car was on loan, Donald repaired his brother's disabled Volkswagen and used it for general everyday transportation.

On October 25, 1963, Donald R. Webb was driving the Volkswagen when he swerved to miss a child in the street and ran into a ditch, overturning the automobile and causing considerable damage. On the night of the accident, Donald R. Webb notified appellee's local insurance agent of the accident. On October 28, 1963, appellant Donald R. Webb signed a claims report and a non-waiver clause in the presence of appellee's agent.

Appellants contended below that the provisions of the insurance policy entitled them to recover the amount of the damage to the Volkswagen.

The trial judge, sitting as a jury, found that the Volkswagen as being operated at the time of the accident did not meet the policy requirements to be covered as a non-owned automobile, and that it did not come within the policy definition of a temporary substitute automobile. Judgment was entered in favor of appellee. From this adverse decision, appellants bring this appeal.

POINT I
AMBIGUITY OF THE POLICY SHOULD BE CONSTRUED IN FAVOR OF THE INSURED.

Appellants contend that the language of the policy relied upon as to coverage of the insured while driving an automobile not owned by him is not clear and concise, but is ambiguous and that the ambiguity should be construed and resolved in favor of the insured.

It is well settled that where language used in an insurance policy is ambiguous, it should be construed in favor of the insured. *Aetna Life Insurance Company* v. *Spencer,* 182 Ark. 496, 32 S. W. 2d 310 (1930).

It necessarily follows that the announced rule stated above is applicable where the ambiguity is found in an exclusionary clause as to policy coverage. *State Farm Mutual Auto Insurance Company* v. *Baker,* 239 Ark. 298, 388 S. W. 2d 920 (1965).

It should also be noted that we have consistently followed the rule that contracts of insurance should receive reasonable constructions so as to effectuate the purposes for which they are made. *Milwaukee Insurance Company* v. *Wade,* 238 Ark. 565, 383 S. W. 2d 105 (1964).

We quote the provisions of the instant policy which relate to coverage of the insured while driving a non-owned automobile:

> "Non-owned automobile—means an automobile or trailer not
> "(i) Owned by
> "(ii) registered in the name of, or
> "(iii) furnished or available for the frequent or regular use of *the named insured, his spouse, or any relative of either residing in the same household, other than a temporary substitute automobile.*" (emphasis added)

The Supreme Court of Pennsylvania in the case of

Carr v. *Home Indemnity Company,* 404 Pa. 27, 170 A. 2d 588 (1961) had before it for review the question of alleged ambiguity in a policy of insurance virtually identical in verbiage with the policy now before us. We quote from that opinion:

> "Reading the policy as a whole we find that the term 'non-owned automobile' is clearly defined in the policy as not including an automobile driven by the insured but owned by a relative, and said term is not ambiguous. If we were to hold otherwise we would be rewriting the insurance policy for the parties and this we can not do. *Holliday* v. *St. Paul Mercury Indemnity Company,* 153 Pa. Super. 59 [33 A. 2d 449.]"

We also quote an interesting footnote from the Pennsylvania case:

> "Followed to its logical conclusion, this contention would claim coverage under one policy of all automobiles regularly used by the named insured and a family with four automobiles would require only one policy for which a one-automobile policy premium was paid, an absurd conclusion."

There is no dispute as to appellants being brothers and members of the same household; nor is there any dispute as to the fact that the insured appellant did not own the Volkswagen, same belonging to his brother. The policy clearly limited its coverage as to nonowned automobiles to those not owned by or registered in the name of another member of the same household, with the single exception of use as a temporary substitute vehicle, as defined in the policy.

We therefore find that the non-owned automobile provisions of the insurance policy are not ambiguous, and that there is no merit in appellants' contentions under their Point No. 1. See case authorities cited in 87 A. L. R. 2d 937.

POINT II
THE VOLKSWAGEN WAS A TEMPORARY SUBSTITUTE AUTOMOBILE.

Appellants contend that the Volkswagen was covered under the policy by reason of its use by the named insured as a temporary substitute vehicle. A temporary substitute automobile as contemplated and defined in the policy is one described as follows:

> "Temporary substitute automobile—means an automobile not owned by the insured or his spouse while temporarily used as a substitute for the described automobile *when withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction.*" (emphasis added)

The quoted section of the policy provides a specifically limited coverage as to a non-owned temporary substitute automobile when the automobile described in the policy is withdrawn from normal use by the insured because of its breakdown, repair, servicing, loss or destruction. This language is clear and emphatic. If the insured Chevrolet had broken down, requiring repairs, the insured would have been covered while driving the Volkswagen as a temporary substitute automobile. In this case, however, it was not the insured Chevrolet that became disabled. Indeed the proof shows that the Chevrolet was used on the trip to Memphis because the Volkswagen was not in good operating condition.

Both appellants testified that the insured Chevrolet was in sufficient running order to be driven from Pine Bluff to Memphis and back at least two times while Donald R. Webb used the Volkswagen after making some repairs to it.

Donald R. Webb testified:

> "My car, the Chevrolet, was in Memphis and I was driving the Volkswagen because my brother was at-

tending school in Memphis and his automobile had broken down and he was using my car (the 1957 Chevrolet) to go back and forth to school. * * * He (Delma Webb) was driving my car because his wouldn't run, and the Chevrolet was running all right."

The Chevrolet had not been withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction. Therefore, the Volkswagen could not qualify as a temporary substitute automobile. *Savage* v. *Spicer,* 235 Ark. 946, 362 S. W. 2d 668 (1962), and *Ransom* v. *Fidelity Casualty Company of New York,* 250 N. C. 60, 108 S. E. 2d 22 (1959).

The trial court was correct in its finding that the Volkswagen did not qualify as a substitute automobile as defined in the policy, and therefore we find no merit in appellants' contentions under Point No. II.

POINT III

THE APPELLEE IS ESTOPPED TO DENY LIABILITY UNDER THE TERMS OF THE POLICY.

Appellants assert that through the actions of appellee's agent it is estopped to deny liability under the terms of the contract. Appellant, Donald R. Webb, contacted the agent of appellee on the night of the accident and reported the collision; at which time, the agent informed appellant that the Volkswagen might be covered by the policy. Three days later appellant signed a claims report and a non-waiver clause that authorized appellee to investigate the accident and yet not waive any of its rights to deny any claim arising out of the accident and the contract of insurance. Although appellant testified that he did not know the legal significance of the statement, we find from appellant's own testimony that he did understand the language used in the non-waiver clause.

In addition, Ark. Stat. Ann. § 66-3226 (Repl.

1966) protects the insurer during its investigatory work and processing of claims prior to permitting or denying a claim under the policy:

> "66-3226. Claims administration not waiver.—Without limitation of any right or defense of an insurer otherwise, none of the following acts by or on behalf of an insurer shall be deemed to constitute a waiver of any provision of a policy or of any defense of the insurer thereunder:
>
> "(1) Acknowledgment of the receipt of notice of loss or claim under the policy.
>
> "(2) Furnishing forms for reporting a loss or claim, for giving information relative thereto, or for making proof of loss, or receiving or acknowledging receipt of any such forms or proofs completed or uncompleted.
>
> "(3) Investigating any loss or claim under any policy or engaging in negotiations looking toward a possible settlement of any such loss or claim except that such investigating and negotiations may constitute a waiver of proof of loss requirements. [Acts 1959, No. 148 § 293, p. 418.]"

The trial court sitting as a jury found as a matter of fact that appellee had not waived its right to deny the claim under the insurance contract and, as stated in *Mid-South Insurance* v. *Dellinger,* 239 Ark. 169, 388 S. W. 2d 6 (1965):

> "The findings of a trial court sitting as a jury have the verity and binding effect of a jury verdict and are conclusive of issues of fact * * * therefore, if there is any substantial evidence to support the finding upon which the judgment is based, we must affirm."

We find no evidence that appellant was misled or

damaged by any statement made by appellee. At no time before the true facts were known to appellee did it admit or deny coverage under the policy.

There was substantial evidence to support the lower court's finding as to the question of estoppel. We find no merit in appellants' Point No. III.

Having found no merit in any of appellants' contentions, we affirm the decision.

Affirmed.

MELVIN GORDON BARNER, ETC. *v.* M. I. BARNER ET AL

5-4027 407 S. W. 2d 747

Opinion delivered November 7, 1966

Streett & Plunkett, for appellant.

L. Weems Trussell, for appellee.

INTRODUCTORY FACTS:

OSRO COBB, Justice. This appeal involves a dispute between claimants to the proceeds of insurance benefits which became due following a total loss of a family residence by fire.

In February, 1960, appellee and his wife at that time, Mary Barner, executed their separate warranty deeds conveying a certain parcel of land with the family residence thereon to their son, Melvin Gordon Barner, then approximately four years of age. The record in this case does not indicate that there was any insurance on the residence at the time of the deeds, nor did the deeds contain any language purporting to assume any obligation with reference to the carrying of any insurance on the property. Furthermore, the deed of appellee expressly reserved a life tenancy, use and control of the property.

It appears from this record that appellee and Mary Barner were subsequently divorced, with the mother taking custody of their young son. Appellee remarried and continued to reside in the same residence.

On February 19, 1964 appellee purchased an insurance policy providing three years coverage as to fire damages to the residence in the principal sum of $8,000.00. On April 3, 1965 the residence was totally destroyed by fire.

Appellee made seasonable demand upon the insurance company to settle the claim. The insurance company, while conceding its policy obligation to pay the loss, declined to make settlement with appellee for the stated reason that there was uncertainty as to the legal claimant or claimants to the funds. Thereafter, appellee brought suit against the insurance company. The insurance company, instead of paying the funds represented by the loss into the registry of the court, filed an answer and cross-complaint making Melvin Gordon Barner a

third party defendant, upon the allegation that he was a necessary party to the action. Subsequently, Mary Barner filed an intervention in her capacity as natural guardian and next friend on behalf of Melvin Gordon Barner, contending that intervenor was a necessary party and that the court should determine the respective value of the life estate interest of appellee in the funds due from the insurance company, and that the court should enter judgment directing legal and equitable pro rata payment of said funds between appellee and the intervenor. The intervention alleged an equitable lien on the funds and the intervenor asked the court to transfer the action to equity.

Appellee moved to strike all of the pleadings relating to the assertion of any claim to the proceeds of the insurance loss by Melvin Gordon Barner. Following hearing, the court sustained appellee's motion to strike and entered judgment solely for appellee in the sum of $8,000.00, plus statutory penalties and attorney's fee. The insurance company did not prosecute an appeal from the judgment of the trial court.

The case therefore reaches us for appellate review solely upon the contention that Melvin Gordon Barner had a legal right to some part or all of the insurance funds paid as a result of the fire.

Appellant insists that his interest in the proceeds of the insurance policy is established by the fact that appellee, M. I. Barner, as life tenant of the insured property, held the position of a fiduciary to appellant, as the remainderman of the property. On virtually identical fact situations we have held to the contrary. In *Jackson* v. *Jackson,* 211 Ark. 547, 201 S. W. 2d 218 (1947), we quoted with approval from *Harrison* v. *Pepper*, 166 Mass. 288, 44 N. E. 222, as follows:

> "It is plain that the plaintiff is not entitled to recover unless she has some claim upon the funds in the hands of the defendant. In the absence of any-

thing that requires it in the instrument creating the estate, or of any agreement to that effect on the part of the life tenant, we think that the life tenant is not bound to keep the premises insured for the benefit of the remainderman. Each can insure his own interest, but, in the absence of any stipulation or agreement, neither has any claim upon the proceeds of the other's policy, any more than in the case of mortgagor and mortgagee, or lessor and lessee, or vendor and vendee. . . . The contract of insurance is a personal contract, and inures to the benefit of the party with whom it is made, and by whom the premiums are paid."

In the Jackson case, we also quoted with approval 33 Am. Jur., Life Estates, Remainders, etc., § 332 p. 838, as follows:

"It is clearly the general rule that where a legal life tenant insures the property in his own name and for his own benefit and pays the premiums from his own funds, he is, at least in the absence of a fiduciary relationship between him and the remainderman existing apart from the nature and incidents of the tenancy itself, or of an agreement between him and the remainderman as to which of them shall procure and maintain insurance, entitled to the proceeds of the insurance upon a loss; and the fact that the insurance was for the whole value of the fee is not generally regarded as affecting the right of the life tenant to the whole amount of the proceeds."

We have consistently followed the rule announced in the *Jackson* case. See *Coleman* v. *Gardner,* 231 Ark. 521, 330 S. W. 2d 954 (1960), and *Brown* v. *Brown,* 233 Ark. 422, 345 S. W. 2d 27 (1961).

In the instant case, appellant did not show or plead that there was any agreement or stipulation that would produce a fiduciary relationship. Furthermore, when

the mother took custody of Melvin Gordon Barner she became the sole natural guardian of his person and estate. Ark. Stat. Ann. § 57-646 (1965 Supp).

We therefore have concluded that the trial court properly determined that appellant had no interest in the proceeds of the insurance policy and properly granted appellee's motion to strike the intervenor's claim thereto.

Affirmed.

CHRISTINE BYRD *v.* LOWELL BYRD

5-3946 407 S. W. 2d 731

Opinion delivered November 7, 1966

J. B. Milham, for appellant.

No brief filed for appellee.

GUY AMSLER, Justice. This controversy is a sequel to prior unconsummated matrimonial litigation between the parties. Appellant (wife) and appellee (husband)

were married in 1941. They have four children. The oldest (Edward) was married and not living with his parents at the time final decree was entered on January 31, 1966. Arlene was 17 in September of 1966. Frances is 14 (she is a cripple confined to a wheel chair) and the youngest son will be 11 in February of 1967.

In 1963 appellant was permanently injured as a result of falling from a wheel chair. She and appellee received damages in the sum of $37,000.00 as a result of the incident. After payment of hospital bills, medical expense and attorney's fees the remainder was used for making the down payment on a house in Bryant, Arkansas, buying furniture, constructing an additional room to the house, buying two automobiles, a boat, trailer and outboard motor.

The marital relation between the parties gradually deteriorated subsequent to 1963 and on September 25, 1965, appellee filed suit against appellant seeking a divorce, custody of the children and possession of the house with all furniture and household goods.

Appellant counterclaimed and prayed for separate maintenance, custody of the children, possession of the house with its furniture and that appellee be required to "carry proper" medical insurance on her.

On September 30, 1965, appellant (defendant below) was awarded custody of Frances (the crippled daughter) and appellee was directed to pay $175.00 monthly into the court registry for the benefit of appellant and Frances. On November 2, 1965, appellant entered the Arkansas Baptist Hospital for treatment of a hip injury she received in a fall. She remained there for several weeks. On the 3rd of December, appellant still being in the hospital, the court placed Frances in temporary custody of appellee and ordered support and alimony payments for the little girl and appellant discontinued pending a change in conditions and further orders of the court.

In January of 1966 the chancellor decreed that appellee should have a divorce; should have custody of the three minor children (Arlene, Frances and Phillip) with reasonable visitation privileges to appellant; that he should have possession of the home and furnishings (he to make the monthly payments due thereon) until the youngest child reached his majority (about 11 years); that $50.00 per month should be deposited in the court registry for the use of appellant "until such time as she may remarry" and that he should pay appellant's attorney $100.00. Division of property held by the entireties was postponed until the youngest child attains majority. This appeal ensued.

Appellee is a foreman for ALCOA with an income of over $6,000.00 annually. Appellant is a hopeless cripple who will be able to do nothing but light housekeeping in the future. It is our conclusion that the alimony awarded appellant is wholly inadequate and it is hereby increased to $150.00 per month.

The proof in this case amply supports the granting of a divorce to appellee. It was in evidence that the children perform most of the housekeeping work and that there is ill-feeling between appellant and the older daughter. In fact they are barely on speaking terms while appellee and the children live harmoniously.

It would serve no useful purpose for us to relate in detail all the unfortunate circumstances on which the chancellor based his decree. Our feeling is that, under present conditions, his conclusions were in the best interest of the parties concerned and especially the minor children. We are not unmindful of the fact that the trial court has continuing jurisdiction for making any future adjustments that may be proven to be advisable.

The attorney for appellant is allowed an additional fee of $150.00, to be paid by appellee, for his services to date. Appellee is to pay all costs.

As modified the decree is affirmed.

NORMAN HOGAN ET AL *v.* CLARA BELLE HOGAN

5-3971 407 S. W. 2d 735

Opinion delivered November 7, 1966

Guy H. Jones, for appellant.

Lynn R. McClinton, for appellee.

HUGH M. BLAND, Justice. This is an action to set aside a deed from Dan Hogan to his daughter, Danna Fleming, conveying 38 acres, more or less, in Faulkner County, Arkansas.

Dan Hogan died testate in Faulkner County, Arkansas on February 3, 1965 survived by appellee, his widow, and by several children of prior marriages, including appellants. At the time of his death and for several years prior thereto, he held title to and was in possession of the 38 acres in dispute which was his home place. The deed sought to be cancelled was, according to appellants' testimony, executed on December 16, 1963 at Greenville, Mississippi and mailed to her in Texas with instructions not to mention the conveyance or record the deed. Appellee knew nothing about the deed and it was not recorded until after Dan Hogan's death. Appellant Danna

Fleming contends that she kept the deed until about three months after Dan Hogan's death then sent it to her brother to have it recorded. When it was returned to her she put it on the refrigerator and possibly one of her children cut it up or it got into the washing machine.

Appellee claims that she was the residuary devisee under the will of Dan Hogan which was admitted to probate on April 30, 1965. Appellee was housekeeper for Dan Hogan for approximately 11 years before they were married on January 16, 1964. By amendment to her complaint she complained that Dan Hogan had promised her that if she would take care of him for the rest of his life that he would will to her the 38 acres involved in this action. The will of Dan Hogan was executed on February 4, 1964. The deed in question was recorded on April 8, 1965.

On August 23, 1965 appellant Norman Hogan, by use of force and firearms, ran the appellee away from the premises, moved in and remained in possession of the property until the date of the decree in this case.

Trial was held on November 18, 1965 and the court held that the deed from Dan Hogan to appellant Danna Fleming be cancelled, set aside and held for naught and that the appellee be in possession of said property, retaining jurisdiction to determine rental value of the land from August 23, 1965 until date of the decree. From that judgment comes this appeal and appellants rely upon one point: That the trial court erred in cancelling and setting aside the deed from Dan Hogan, made, executed and delivered on December 16, 1963 to Danna Fleming, his daughter.

Even if we could believe the doubtful circumstances surrounding the execution, delivery, recording and loss of the deed from Dan Hogan to appellant Danna Fleming, there would still be only a question of law involved in this case. That question is whether appellee is an innocent purchaser for value of the premises as devisee

under the will of Dan Hogan, deceased. We find no conflict in the evidence as to whether or not appellee had knowledge of the conveyance. Ark. Stat. Ann. § 16-115 (Repl. 1965) provides:

> "Unrecorded instruments invalid against subsequent purchaser.—No deed, bond, or instrument of writing, for the conveyance of any real estate, or by which the title thereto may be affected in law or equity, hereafter made or executed, shall be good or valid against a subsequent purchaser of such real estate for a valuable consideration, without actual notice thereof; or against any creditor of the person executing such deed, bond, or instrument, obtaining a judgment, or decree (which by law may be a lien upon such real estate), unless such deed, bond, or instrument, duly executed and acknowledged, or proved, as is or may be required by law, shall be filed for record in the office of the clerk and ex officio recorder of the county where such real estate may be situated."

In *Harrison* v. *Harrison,* 198 Ark. 64, 127 S. W. 2d 270, we said:

> "The law is well settled in this state that if, shortly before marriage, the future husband conveys away his real estate, without the knowledge of his betrothed, the courts will set aside such conveyance. This court said in the case of *Roberts* v. *Roberts, Admx.,* 131 Ark. 90, 96, 198 S. W. 697; 'In 9 Ruling Case Law, page 591, it was said: "That the wife's right of dower is a substantial property right, entitled to protection by the courts, is perhaps most strikingly shown in action by her to set aside conveyances made by the husband for the purpose of defeating her expectation (though not yet vested even as in inchoate right) of dower. If shortly before a marriage, the future husband conveys away his real estate without consideration, and without the consent or knowledge of his betrothed, with the

purpose and result of unfairly depriving her of dower, the courts will set aside the conveyance as a fraud upon her rights; and even the fact that it was made for a valuable consideration will not save it, if the grantee participated in the intent to defraud the wife." Numerous cases are cited which support the test.

In our recent case of *West* v. *West,* 120 Ark. 500, 179 S. W. 1017, we stated our own views on this subject in the following language: "This brings us to a consideration of the law governing cases of this character. The general rule is that if a man or woman convey away his or her property for the purpose of depriving the intended husband or wife of the legal rights and benefits arising from such marriage, equity will avoid such conveyance or compel the person taking it to hold the property in trust for or subject to the rights of the defrauded husband or wife. Perry on Trusts and Trustees, (6th Ed.) vol. 1, § 213; Bishop on The Law of Married Women, vol. 2, § 350; *Smith* v. *Smith,* 2 Halstead Ch. (N. J.) 515; *Leach* v. *Duvall,* 8 Bush. (Ky.) 201; *Dearmond* v. *Dearmond,* 10 Ind. 191; *Collins* v. *Collins,* 98 Md. 473, 57 Atl. 597, 103 Am. St. Rep. 408, (1 Ann. Cas. 856) and case note".'

This rule has recently been approved in the case of *O'Connor* v. *Patton,* 171 Ark. 626, 286 S. W. 822."

The evidence is undisputed that the appellee performed her part of the bargain and took care of Dan Hogan until his death.

In this case we are not bound by the rule that a parol contract to execute a will may be enforced in equity only where the agreement is established by clear, cogent and convincing testimony because in this case there was an executed contract by both Dan Hogan and appellee which will be specifically enforced in equity against the prior unrecorded deed with the deceased re-

maining in possession of the property and with the appellee having no knowledge of the unrecorded deed. This places the appellee in the position of being an innocent purchaser for value in possession and with title to her vested by the will, relating back to the death of Dan Hogan and prior to the recording of the deed. *Long* v. *Langsdale*, 56 Ark. 239, 19 S. W. 603; *Halbrook* v. *Lewis,* 204 Ark. 579, 163 S. W. 2d 171.

The decree of the chancellor is affirmed with jurisdiction retained in the chancery court for the purpose of determining the amount of rent due from appellants to appellee.

Affirmed.

CITY OF LITTLE ROCK ET AL *v.* MR. AND MRS. JOHN A. PARKER ET AL

5-4005 407 S.W. 2d 921

Opinion delivered November 14, 1966

[Rehearing denied December 12, 1966.]

Joseph C. Kemp and *Perry V. Whitmore,* for appellants.

Butler, Greene & Byrd, for appellees.

CARLETON HARRIS, Chief Justice. This appeal relates to an application for rezoning. Appellee, the "100" Club, is the owner of vacant property located at the southeast intersection of John Barrow Road and West Markham Street in the City of Little Rock. Immediately adjacent to this property, and also abutting West Markham Street, the other appellees, Mr. and Mrs. J. A. Parker, own property, which is improved with a brick dwelling that is the home of Mr. and Mrs. Parker. This area was annexed by the City of Little Rock in 1961, and appellees' properties, by reason of such annexation, were by operation of city ordinances, placed into an "A-One Family" zoning district. Appellees joined together in an application to the City of Little Rock, seeking to have the zoning classification changed to "F-Commercial." The City Planning Commission and Board of Directors of the City of Little Rock denied the application, and suit was instituted in the Pulaski County Chancery Court, wherein the court was asked to declare the action of the city in refusing to rezone in accordance with their application to be arbitrary. On trial, the court found that the properties belonging to appellees bordered and were adjacent to an already existing "F-Commercial" district, and that such properties were no longer desirable for residential purposes, because of the proximity to the "F-Commercial" zone; further, that the refusal to rezone, as requested, had the effect of arbitrarily depriving appellees of the use of their properties. The city was enjoined from interfering with the use of the realty for "F-Commercial" purposes. From the decree so entered, appellant brings this appeal.

The property owned by the Parkers is bounded on the east by commercial usage in the form of a shopping center, and the "100" Club property is bounded on the west by John Barrow Road, across which there is a single family residence and substantially open lands. Across West Markham Street, and north of Parkers' residence and the lands belonging to the "100" Club, there is a well-developed residential subdivision known

as Brookfield. The southern boundaries of the "100" Club property abuts Cunningham Lake Road, where this road intersects John Barrow Road, and the Parker property is separated from Cunningham Lake Road by one plot of unoccupied ground. Cunningham Lake Road, in general, runs parallel to the north bank of Rock Creek, and across this creek is located Henderson Junior High School. There are plans to develop a park on the land surrounding the school, and Federal funds have been requested.

William Putnam, a real estate broker of Little Rock, testified that, in his opinion, the involved properties were not suitable for residential purposes, and the highest and best use would be for commercial purposes. He was also of the opinion that a rezoning to commercial would not adversely affect property in Brookfield Addition. Putnam stated that these properties could be used as "E-1 Quiet Business," but such a classification would not result in their highest and best use. James M. East, a real estate broker, likewise agreed that the highest and best use of the real estate at issue was "F-Commercial." He said that the rezoning of the properties "would not affect the residential property in Brookfield any more than they were already affected at the time they were constructed." More specifically, Mr. East stated that the best use for the premises was for retail stores, though he did not think that a service station or "drive-in" would adversely affect the value of the homes in Brookfield Subdivision. James L. Larrison, a real estate dealer, agreed substantially with East. When asked if the existence of a service station within a proximity of a homesite would adversely affect the marketability of that homesite, he replied, "That varies with people and circumstances. I don't think you can answer that question categorically."

A number of residents of the neighborhood testified in opposition to the rezoning. Mr. and Mrs. G. W. Blankenship, who reside in Brookfield, both strenuously objected, particularly mentioning their objections to a

service station, a "Kwik-Chek," and a "drive-in." Mrs. Claudia Berthe, likewise a resident of Brookfield, who testified that she had invested about $27,000.00 in her house and lot, also vigorously objected, stating, "We have no idea what is being put in front of us. It could be a liquor store, honky-tonk, gasoline station or that quick check to which I object." Mrs. Berthe is a real estate dealer, and she said that the traffic situation would be much more difficult, and that at present "it takes 40 minutes time to unsnarl coming both ways." Mrs. Berthe testified that if the property were rezoned, "I intend to sell and get out." Curtis Glover and William Payne, residents of the area, also vigorously objected, Mr. Glover citing inconveniences of living in the near vicinity of a service station. Mr. Payne, a realtor, testified that he had also had the personal experience of living in the vicinity of a service station, and that such use of land adversely affects the market value of residential property.

C. V. Barnes, a real estate counselor, testified that, in his opinion, this particular area of the city has sufficient lands zoned commercial to meet the growth and needs of the area for the next ten years. It was his view that the highest compatible use for the properties is "E-1 Quiet Business," which would permit uses such as doctors' offices, clinics, dentists' offices, insurance offices, and others of a similar nature. He was also of the opinion that the rezoning of the premises involved would have a detrimental effect on the Brookfield Subdivision. Barnes agreed that the highest and best use of the properties would be commercial, but that this would not be the highest *compatible* use, *i.e.,* a use which takes into consideration the surrounding areas.

Russell McLean, a real estate appraiser, testified that Brookfield is a subdivision where the homeowners exhibit pride in ownership by taking care of their properties, and that, in his opinion, Brookfield would be adversely affected if appellees' petition for "F-Commercial" were granted. He was also of the view

that the highest and most compatible use would be an "E" or lower zoning classification. Henry de Noble, Director of Community Development in Little Rock, testified that the city is experiencing an extensive problem in the handling of traffic on West Markham Street in the general area involved, "especially because of traffic created by John Barrow Road and traffic going to Henderson Junior High and also the normal flow of traffic during the peak periods on West Markham, which is traveling east and west to feed into different parts of the city. But we experience our heaviest times in the afternoon when school lets out and in the morning roughly around 8:30." Mr. De Noble also stated that locating a service station on this corner would be detrimental from the standpoint of safety; that a station would add to the traffic. He further testified that, as a result of the application of appellees before the Planning Commission, his staff recommended that the lands be rezoned to "E-1 Quiet" use, and he also stated that a study reflected "that there is enough commercial zoning at this time on a two-mile circle of a point just up road from this map, which includes this area there is enough commercial zoned property available today to serve over 100,000 people," but that only about 36,000 people could live within this radius.

Paul R. Fair, Deputy Superintendent of Schools, opposed the petition, stating, "We like residential property around the school. * * * Commercial property around the school is less desirable." Mr. Fair said that commercial property increases the traffic around a school, thus constituting a more serious safety hazard, and that commercial districts create more noise and "disruption." Mr. Fair testified that the district had applied for a Federal program to develop some of the property surrounding Henderson Junior High School as a park.

Appellees, for affirmance, rely almost entirely on *Little Rock* v. *Pfeifer,* 169 Ark. 1027, 277 S. W. 883, and they quote from that case as follows:

"There are numerous witnesses in the case, and they express various opinions as to the effect of the construction of a business house on contiguous residence property, and they also differ as to whether or not the locality should be regarded as business or residence property. Giving due effect to the statement and opinions of all the witnesses, we are of the opinion that the evidence establishes very clearly and beyond controversy that the locality in question is a business district which has been well established, and which is now expanding, the expansion having reached the point where appellees are constructing their building. There is substantial evidence tending to show that the value of some of the adjacent residence property will be depreciated on account of the lessening of usable value of the property for residence purposes, but we do not think that this affords justification for interfering with the gradual expansion of the business district, which has already been established. As the size of the business district grows, it ceases to be a residence district to that extent within the purview of the zoning ordinance, and any attempt on the part of the city council to restrict the growth of an established business district is arbitrary."

In the case before us, the court found that appellees' properties are adjacent to an existing "F-Commercial" district, and that the property is no longer desirable for residential purposes, because of its proximity to the "F-Commercial" classification. We do not think however, that the *Pfeifer* case can be relied upon to uphold the "F-Commercial" classification. *City of Little Rock* v. *McKenzie,* 239 Ark. 9, 386 S. W. 2d 697, also mentioned by appellees, will be later discussed. The statute in force at the time of *Pfeifer* was Act 6 of the Second Extraordinary Session of the General Assembly of 1924, and cities of the first class were authorized to establish zones limiting the character of buildings erected thereon. There were only three zoning classifications under that Act, one, that portion of the city where manufacturing establishments might be erected, two, those portions of

the city where business, other than manufacturing, might be carried on, and finally, those portions of the city set apart for residential purposes.[1] Act 186 of the Acts of the General Assembly of 1957, Ark. Stat. Ann. § 19-2825 (Supp. 1965) is a comprehensive act authorizing cities of the first and second class to adopt and enforce plans "for the coordinated, adjusted and harmonious development of the municipality and its environs." The purposes of the act are set out in Subsection a. as follows:

"The plan or plans of the municipality shall be prepared in order to promote, in accordance with present and future needs, the safety, morals, order, convenience, prosperity and general welfare of the citizens; and may provide, among other things, for efficiency and economy in the process of development, for the appropriate and best use of land, for convenience of traffic and circulation of people and goods, for safety from fire and other dangers, for adequate light and air in the use and occupancy of buildings, for healthful and convenient distribution of population, for good civic design and arrangement, for adequate public utilities and facilities, and for wise and efficient expenditure of funds."

The Act itself consists of nine lengthy sections, including approximately forty sub-sections, and composing fourteen pages (Acts of Arkansas 1957), all dealing with the preparation of plans for the orderly growth of a city. Included is the authority of the city council to pass proper zoning ordinances, which "shall designate districts or zones of such shape, size or characteristics as deemed advisable." Section 8 provides that the provisions of the Act shall be construed liberally.[2]

[1]Section 3 authorized an exception to be made in a particular instance "only for good cause, and in case of abuse the adjacent property owners shall have the right to appeal to the courts of Chancery to protect their property from depreciation by reason of the setting up of such exceptional business within the zone."

[2]This act is a "far cry" from Act 6 of 1924, which consisted of five short sections, and comprised only a page and a half in the volume containing the acts of the special session of 1924.

It is apparent that the passage of Act 186 of 1957, to some degree, necessarily modified our holding in *Pfeifer,* for a strict and literal interpretation of all the language in that case would certainly result in nullifying the effort by a city to coordinate development of lands, and, more than that, in effect, would nullify Act 186. The right and responsibility for classifying the various areas in the city are with the zoning authorities, and their decision will only be disturbed if it is shown that they acted arbitrarily. *Lindsey* v. *City of Camden,* 239 Ark. 736, 393 S. W 2d 864.

The sole question before this court on this appeal is "Did the preponderance of the evidence before the Chancellor show that the city acted arbitrarily in refusing to rezone the properties here at issue as 'F-Commercial'?" While the word, "arbitrary," has several definitions, probably the most generally accepted one is, "arising from unrestrained exercise of the will, caprice, or personal preference; based on random or convenient selection or choice, rather than on reason or nature." (Webster's Third New International Dictionary, 1961) After carefully reviewing the evidence, we are of the opinion that the answer is, "No, the preponderance of the evidence does not show that the city acted arbitrarily." The testimony has been set out rather fully, and we think it clearly shows a reasonable basis for the decision by city authorities. Several property owners in Brookfield testified in opposition to the rezoning change, and this opposition was probably intensified by the fact that no definite decision had been reached by appellees as the the type of commercial business that would be placed at the location sought to be rezoned.[3]

The increase in traffic, and the fact that a junior

[3]At the meeting of the Board of Directors of the City of Little Rock, when the proposal for rezoning was presented, counsel for appellees stated that he could not specify the definite use of the property, if rezoned, though he did state that certain specific uses of the property would not be made.

high school is located nearby are also cogent reasons to support the city's position.

However, the fact that the city was justified in refusing to rezone to "F-Commercial" does not mean that the properties should remain within the residential classification. Appellees, as previously mentioned, cite *City of Little Rock* v. *McKenzie, supra,* in support of their contention that *Pfeifer* is controlling. In *McKenzie* we quoted *Pfeifer* as follows:

"* * * 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."

But here, we are not saying that the city would not be acting arbitrarily in refusing to rezone these properties to *any* type of business property. We are only saying that the refusal to rezone same as "F-Commercial" was not arbitrary. In fact, in *McKenzie* the east half of the property involved was rezoned from one family residential use to quiet business, and the west half was rezoned from one family residential to apartments not exceeding three stories in height. It might also be pointed out that in *McKenzie,* the City of Little Rock *approved* the rezoning (while here, it rejected it, and we simply held that the rezoning by the city was not shown to be arbitrary.

In line with what has been said, we find that the court erred in holding that the city had acted arbitrarily in refusing to rezone the involved properties as "F-Commercial," and the decree is accordingly reversed.

It is so ordered.

WARD, J., not participating.

TECH-NEEKS, INC., ET AL *v.* KELTON FRANCIS AND JUANITA POE, ETC.

5-4021 407 S. W. 2d 938

Opinion delivered November 14, 1966

Cockrill, Laser, McGehee & Sharp for appellants.

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

CARLETON HARRIS, Chief Justice. Appellant, Tech-Neeks, Inc., entered into a contract to construct a water system for the town of Biscoe, Arkansas. The company entered into a sub-contract with Kelton Francis and Juanita Poe, d/b/a Francis and Poe, for the latter to perform certain portions of the contract, consisting of trenching and laying pipe, payment to be made on the basis of a unit price according to certain plans and specifications, appellees to furnish tools, equipment,

labor, trucks, etc. The contract further provided that if satisfactory performance was not rendered by the subcontractor, Tech-Neeks reserved the right to take over the job and complete same, "deducting expenses incurred from the above contract." During the period from November 21, 1964, to January 30, 1965, appellees performed pursuant to the contract, and were due for that period an amount totaling $7,952.30. Appellees were entitled to be paid by the general contractor by the 5th day of each month for the previous month's work, but during this entire period, only one payment (representing payment for the first week's work) of $1,561.50 was received.

Sometime during the first week of February, Tech-Neeks became unable to pay the bills, and the job was shut down. Appellant General Insurance Company of America, surety for Tech-Neeks, was notified, and in April, 1965, assumed its obligation of finishing the project. In the meantime, appellees had moved their men and equipment, and were engaged in other work. L. L. Lounsbury of the Claim Department of the insurance company contacted appellee Francis by telephone on April 19 to determine whether appellees desired to finish their part of the work (under the sub-contract) at Biscoe. According to Francis, he informed Lounsbury that he could not go back on the job unless he received payment on the work already done.[1] The amount of money due appellees (after crediting the $1,561.50) was $6,390.80, and appellant insurance company offered to pay the sum of $3,000.00 on that amount, but wanted to withhold the balance to cover the cost of any corrective work that might be required after the contract was completed. Appellees would not agree to this condition, and instituted suit for the entire amount due. Appellant insurance company employed Wooten Construction Com-

[1]Lounsbury testified that Francis also told him that his equipment was on another job, and it would be at least three weeks before he could return to the Biscoe project. Since time was of the essence in the original contract, and liquidated damages were accumulating at the rate of $50.00 per day, Mr. Lounsbury stated that the company needed to complete the job as quickly as possible.

pany to complete the work called for in the sub-contract. On trial, it was admitted by appellants that the reasonable value of the work performed was $7,952.30, but appellants contended that there should be a charge-back of $644.08, that amount having been expended by the surety in repairing leaks on that portion of the lines installed by appellees. After hearing evidence, the court held, *inter alia,* that the general contractor had breached its contract with appellees by failing to make payments, as agreed upon, and that this breach relieved appellees of the obligation to complete the subcontract, and justified them in ceasing performance. The court held that Francis and Poe were due the reasonable value of their work and labor, less any sum already paid, and accordingly entered judgment in the amount of $6,390.80, plus statutory penalty and an attorney's fee in the amount of $1,500.00, making a total judgment of $8,657.69, together with interest at the rate of 6% per annum. From this judgment, appellants bring this appeal. Appellees cross-appeal from the trial court's refusal to allow interest on their claim from the date of the filing of the complaint.

The principal question at issue can be succinctly stated: "Were appellees entitled to the full amount of monies due under their sub-contract with Tech-Neeks at the time of the general contractor's breach, or were they only entitled to the amount of money due at that time, less any amount expended to correct alleged faulty work (repairing leaks) that had been performed by them?"

Appellant offered the evidence of R. K. Wooten, a general contractor who completed the sub-contract, and J. B. Jones, his foreman on the job, Wooten testifying that $644.08 was expended to correct appellee's faulty work (water leakage), and Jones testifying that there were eight or nine leaks, all underground, one involving a bursted pipe, this occurring because the pipe "did not have proper sub foundation under it." Wooten also offered to testify that the concrete was not poured to support the lines in certain instances, which caused the

joints to separate, and that there were likewise other leaks due to the fact that valves and fittings were not tight. This offer of testimony was refused by the court, and this is asserted as error, which will be subsequently discussed. Both men, as well as Robert W. Thweatt, a registered civil engineer and witness for appellees, testified that it is common for leaks to be found when the line is tested after completion of the work; Thweatt stated that it would be most unusual to construct a system without leakage. We think it is clearly established by the evidence that the mere fact that there are leaks does not mean that the construction work is faulty, and, according to the preponderance of the evidence, it appears that this is "normal." Of course, a line cannot be properly tested for leaks until the job has been completed, and it is customary to test a line, following completion, and then to make corrections.

Appellants rely on the cases of *Thomas* v. *Jackson,* 105 Ark. 353, 151 S. W. 521, *Roseburr* v. *McDaniel,* 147 Ark. 203, 227 S. W. 327, *Hollingsworth* v. *Leachville Special School District,* 157 Ark. 430, 249 S. W. 24, and *Harris* v. *Holder,* 217 Ark. 434, 230 S. W. 2d 645. We do not agree that these cases are in point for the reason that the contracts involved in each of those suits, except Hollingsworth,[2] had been *completed.* It is likewise quite true in the instant case that, if appellees' contract had been completed, they would also, under their agreement, have been required to correct the leaks, and would have been responsible for the cost in making such corrections, but this contract was not completed by appellees—and this was through no fault of their own.

Appellant, Tech-Neeks, breached the agreement when it failed to make the monthly payments as they became due; in fact, it is noteworthy that appellees stayed on the job for over two months, while only receiving payment for one week. As far back as 1899, this

[2]The factual situation in this case is entirely different, the contractor involved having breached his contract with the school district.

court held that one who enters into a contract with another to perform some service, payment to be received in installments, is entirely within his rights, after making partial performance, to abandon further execution of the contract where the other party has failed to pay the installments due, and one may also collect for the work already done at the contract price. *Eastern Ark. Hedge Fence Co.* v. *Tanner,* 67 Ark. 156, 53 S. *W.* 886. See also *Abel of Arkansas* v. *Richards,* 236 Ark. 281, 365 S. W. 2d 705. In instituting suit, appellees set out the provisions relating to payment under the contract, but this was done as a matter of establishing the reasonable value of the work done to the time of the breach, appellees seeking a recovery on the basis of *quantum meruit.*

To summarize this particular phase of the litigation, appellant, Tech-Neeks, breached its contract with appellees by its failure to make payments on the work performed as it had agreed to do. This breach relieved appellees of any further obligation; furthermore, appellees were entirely within their rights in refusing to continue the contract at the request of appellant, General Insurance Company of America, without first being paid amounts *past due.*

Appellant asserts that the court erred in not admitting the testimony of Mr. Wooten, but under our holding (that appellees were not required to perform after the contract was breached), this is a matter of no importance. If we consider Mr. Wooten's proffered testimony at full value, it cannot change the controlling fact in this litigation—the breach. Not only that, but substantially the same testimony was given by the witness Jones. We have held that exclusion of testimony which is the same as that of other witnesses is harmless error. *Fitzhugh* v. *Leonard,* 179 Ark. 816, 19 S. W. 2d 1010.

The court allowed a $1,500.00 attorney's fee, and appellant contends that this amount is excessive. It is mentioned that no testimony was offered through other at-

torneys as to the amount that would constitute a reasonable fee, but this was not necessary. In *Phoenix Insurance Company of Hartford* v. *Fleenor,* 104 Ark. 119, 148 S. W. 650, this court said:

"It is also true the record does not show that any proof was taken upon the question of a reasonable attorney's fee before one was fixed by the court, but he had the whole matter before him, was familiar with the case, and the service done by the attorneys therein, and we cannot say that there was no evidence warranting his fixing the amount of the fee, which was a matter within the discretion of the court. Neither do we think the amount allowed is excessive."

It is also pointed out in *John Hancock Mutual Life Insurance Company* v. *Magers,* 199 Ark. 104, 132 S. W. 2d 841, that testimony relating to a reasonable fee is only advisory and "by no means conclusive." We do think, however, that the amount allowed in the instant case is adequate for both the work done at the trial level, and in this court, and the request for an additional $300.00 attorney's fee in this court will be denied.

Appellees requested the Chancellor to allow interest on the amount sought by suit (which was recovered) from the date of the filing of the complaint. The Chancellor refused, and we think this was error. Interest at the rate of 6% should have been allowed. *Loomis* v. *Loomis,* 221 Ark. 743, 255 S. W. 2d 671.

In accordance with what has been said, the decree is affirmed on direct appeal, and reversed on cross appeal.

It is so ordered.

Opinion delivered November 14, 1966
[Rehearing denied December 5, 1966.]

S. C. Ferguson, for appellant.

Bruce Bennett, Attorney General; *James C. Wood,* Asst. Atty. Gen., for appellee.

ED. F. MCFADDIN, Justice. Appellant was convicted of driving while under the influence of intoxicating liquor (Ark. Stat. Ann. § 75-1027 [Repl. 1957]). There was evidence offered that this was the second offense within the year; and he was fined $250.00 and sentenced to ten days in jail (Ark. Stat. Ann. § 75-1029 [Repl. 1957]).[1] From such judgment there is this appeal, urging the points which we will now discuss.

I. *Location Of The Court.* Appellant claims that the Circuit Court of Sharp County could legally be in

[1]The statute also requires the revocation of driving license for such second offense within one year. This point is not before us.

session only at Ash Flat, and that his trial in Hardy was therefore void. We find no merit in this point. The same argument about the location of the Sharp Circuit Court was made and answered in the recent case of *Don Warren* v. *State* (No. 5219), 241 Ark. 264, 407 S. W. 2d 724 (opinion delivered October 24, 1966); and reference is hereby made to that opinion for a full answer of appellant's contention.

II. *Evidence Of Intoxication.* Appellant was charged with violating Ark. Stat. Ann. § 75-1027, and that statute reads:

> "It is unlawful and punishable . . . for any person who is under the influence of intoxicating liquor to drive or be in actual control of any vehicle within this State."

The person must be "under the influence of intoxicating liquor"; but a person does not have to be maudlin drunk to be "under the influence."[2]

Officer Porter, a State policeman, testified as regards the condition of the appellant, Walker:

> "Q. State to the jury what you found when you went up there?
>
> "A. I found Mr. Walker behind the wheel and I asked him to get out of the car and he did.
>
> "Q. Will you state to the jury, the manner in which he acted?
>
> "A. He was very slow to react to what I told him. I told him to get out two or three times and he just sat there and looked at me.

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[2]In 142 A. L. R. 555 there is an annotation entitled: "Degree or nature of intoxication for purposes of statute or ordinance making it a criminal offense to operate an automobile while in that condition."

"Q. All right, sir. Did you have a chance to observe his condition?

"A. Yes, I did.

"Q. State to the jury what facts you found?

"A. He had the odor of alcohol in his person and was very unsteady on his feet. It was quite obvious that he was drunk.

"Q. Did you have any conversation with him?

"A. Some, yes, sir.

"Q. Tell the jury what his manner of speech was —were his words coherent?

"A. No, it was incoherent. Nothing he said made any sense. He would start talking about one thing and break off in the middle of it and start on something else."

The above quoted testimony made a jury question as to whether appellant was "under the influence of intoxicating liquor"; and we find no merit in appellant's contention to the contrary.

III. *Evidence Of Previous Conviction Within The Year*. The offense for which appellant was on trial in this case occurred on September 12, 1965, and the State called Justice of the Peace Claude Huffmaster who testified that appellant had pleaded guilty to driving while under the influence of intoxicating liquor on August 13, 1965. The Justice of the Peace had the original of the court proceedings of August 13, 1965, written on a note paper and said that he had not yet transcribed the note paper into his docket. Appellant insists that a Justice of the Peace record on note paper is no record at all and that such testimony should have been totally disregarded. We find this contention to be without merit. In *Price* v. *Shope,* 212 Ark. 420, 206 S. W. 2d 752, we held that a Justice of the Peace judgment written on note paper was valid.

IV. *Operation Of The Vehicle.* It is inferentially claimed by the appellant that the evidence of the State was insufficient because the appellant was not *driving a car with the motor running at the time of his arrest.* The evidence shows that appellant was in the driver's seat of the vehicle, that the motor was not running, and that the car was being pushed down the highway by another vehicle. The statute under which the appellant was being tried, as previously quoted, says that he must be "in actual control of any vehicle." Certainly the appellant was in control of the car while he was in the driver's seat and the car was being pushed on the highway.[3] The Supreme Court of Missouri in *State* v. *Edmondson,* 371 S. W. 2d 273, held that one steering an automobile being pushed by another car on a public street was operating and controlling the vehicle.

Finding no error, the judgment is affirmed.

[3]In 47 A. L. R. 2d 570 there is an annotation entitled: "What constitutes driving, being in control of, or operating a motor vehicle within statute making such act, while intoxicated, an offense."

STATE COMM'R OF LABOR *v.*
UNIVERSITY OF ARKANSAS BOARD OF TRUSTEES

5-3939 407 S. W. 2d 916

Opinion delivered November 14, 1966

Curtis E. Rickard, for appellant.

Owens, McHaney & McHaney, for appellee.

ED. F. MCFADDIN, Justice. The decisive question is whether the Commissioner of Labor of the State of Arkansas can successfully sue the Board of Trustees of the University of Arkansas, in the teeth of the Constitutional Provision (Art. 5, Sec. 20, which reads: "The State of Arkansas shall never be made defendant in any of her courts." The Chancery Court held that the suit could not be maintained; and we affirm that holding.

The University of Arkansas maintains a food service at Fayetteville and employs a number of persons, among whom are 68 women, for whose benefit the present suit was filed. In August 1965 Bill Laney, as Commissioner of Labor of the State of Arkansas, filed this suit, naming as defendant, "University of Arkansas Board of Trustees, d/b/a University of Arkansas and University Food Service." The complaint alleged that the 68 named women, working for the University Food Service, had been required to work in excess of eight hours per day and had not received overtime pay, as required by Ark. Stat. Ann. § 81-613 *et seq.* (Repl. 1960). The prayer of the complaint was:

> "Wherefore, plaintiff prays that said defendant, its agents, servants and employees, be temporarily restrained and enjoined from working plaintiffs in violation of the labor laws of Arkansas, and more particularly Ark. Stat. Ann. § 81-601 (Repl. 1960); that upon final hearing this injunction be made permanent in effect, that defendant be required to compensate plaintiffs for their labor and penalized according to law, for all cost and other proper relief."

The defendant Board of Trustees of the University of Arkansas, after first unsuccessfully objecting to venue (and we do not pass on that issue), then pleaded that the suit against the Board of Trustees of the University of Arkansas was a suit against the State and could not be maintained because of the language of Art. 5, Sec. 20 of the Arkansas Constitution, as previously quoted. From the ruling of the Chancery Court sustaining such

plea, the Commissioner of Labor brings this appeal.

In the light of the holding of the United States Supreme Court in *Arkansas* v. *Texas,*[1] we hold that this suit against the University of Arkansas Board of Trustees is a suit against the State. In the cited case, Arkansas sued Texas in the United States Supreme Court. It was alleged that the Wm. Buchanan Foundation had made a contract with the Board of Trustees of the University of Arkansas, and that the State of Texas was interfering with the contract. The basis of the jurisdiction was because of Art. 3, Sec. 2 of the United States Constitution, which gives the Supreme Court of the United States jurisdiction of suits between States. Texas denied the jurisdiction of the United States Supreme Court, claiming that the Board of Trustees of the University of Arkansas was a body politic and corporate entirely separate from the State of Arkansas. Thus, the status of the Board of Trustees of the University of Arkansas was the decisive point on the matter of jurisdiction. The United States Supreme Court sustained Arkansas' claim of jurisdiction, saying:

> "The contention that the controversy is between two States is challenged on the ground that the injured party is the University of Arkansas, which does not stand in the shoes of the State. Arkansas must, of course, represent an interest of her own and not merely that of her citizens or corporations. *Oklahoma ex rel. Johnson* v. *Cook,* 304 U. S. 387, 82 L Ed 1416, 58 S Ct 954. But as we read Arkansas law the University of Arkansas is an official state instrumentality; and we conclude that for purposes of our original jurisdiction any injury under the contract to the University is an injury to Arkansas.
>
> "The University, which was created by the Arkansas legislature, is governed by a Board of Trustees appointed by the Governor with consent of the Senate. The Board, to be sure, is 'a body politic and corporate' with power to issue bonds which do not

[1]346 U. S. 368; 98 L. Ed. 80, 74 S. Ct. 109.

pledge the credit of the State. But the Board must report all of its expenditures to the legislature, and the State owns all the property used by the University. The Board of Trustees is denominated 'a public agency' of the State, the University is referred to as 'an instrument of the state in the performance of a governmental work,' and a suit against the University is a suit against the State."

Our own cases are to the same effect as is the said holding of the United States Supreme Court. *The Allen Engineering Co.* v. *Kays,* 106 Ark. 174, 152 S. W. 992; and *Watson* v. *Dodge,* 187 Ark. 1055, 63 S. W. 2d 993.

Since the present suit by the Commissioner of Labor against the "Board of Trustees of the University of kansas" is a suit against the State, it cannot be maintained; and there is no necessity for us to consider any of the other questions presented.

The decree of the Chancery Court is affirmed.

GROVER EDWARD SNUGGS *v.* BOARD OF TRUSTEES OF ARK. STATE EMPLOYEES RETIREMENT SYSTEM ET AL

5-4022 407 S. W. 2d 933

Opinion delivered November 14, 1966

G. E. Snuggs, pro se.

Bruce Bennett, Attorney General; *Wm. Powell Thompson,* Asst. Atty. Gen., for appellee.

George Rose Smith, Justice. In 1957 the legislature adopted a comprehensive retirement system for public employees. Ark. Stat. Ann., Title 12, Ch. 25 (Supp. 1965). The appellant, as a former court reporter, was a member of the system until he retired on July 1, 1963. In 1965 the legislature, by Act 153, increased the benefits provided by the retirement plan. The trustees in charge of the system refused to recognize the appellant's right to share in the increased benefits. Snuggs then brought this suit for a writ of mandamus to compel the trustees to increase his retirement pay in conformity with the 1965 statute. The chancellor upheld the trustees' position in the matter.

We agree with the chancellor, for there are two provisions in the 1965 act which make it clear that the increase in benefits was not meant to be available to employees who had already retired. First, the increase in benefits is authorized by Section 11 of the 1965 act, which applies to "[a]ny member who retires." Snuggs, however, was not a member of the system in 1965, because the original act, as amended in 1959, included this provision: "Upon a member's retirement or death he shall thereupon cease to be a member of the System." Ark. Stat. Ann. § 12-2507 (Supp. 1965). In a similar situation, in *Cross* v. *Graham,* 224 Ark. 277, 272 S. W. 2d 682 (1954), we held that a retired police officer was not a "member" of the police department and therefore was not eligible for a pension increase that applied to members of the department.

Second, under the original retirement plan the contributions made by each employee (and matched by his

employer) are deposited in the "members deposit account" in the state treasury. Sections 12-2504 and 12-2508. The latter section goes on to provide that upon the retirement of a member the accumulated contributions standing to his credit in the members deposit account shall be transferred to the retirement reserve account. Hence upon Snuggs's retirement his individual members deposit account ceased to exist.

One effect of the 1965 act was to permit members of the system to enjoy greater benefits, the increase being based upon public employment that occurred before the effective date of the original retirement system. But to participate in the enhanced benefits each member is required to pay in cash an amount equal to the contributions that would have been deducted from his salary if the system had been in effect when he first became a public employee. These payments shall be credited to "the member's individual account in the members deposit account." Section 11 of Act 153 of 1965. Inasmuch as Snuggs and other retired employees no longer had individual members accounts when Act 153 became effective, the language of the statute is not applicable to them. We conclude that the usual presumption against retroactive legislation is reinforced in this case by the express language of the act.

Affirmed.

BERT CONNOR *v.* AUDREY BEATRICE CONNOR

5-4029 408 S.W. 2d 486

Opinion delivered November 14, 1966
[Rehearing denied December 5 1966.]

Richard W. Hobbs, for appellant.

Macon & Moorhead, for appellee.

GEORGE ROSE SMITH, Justice. The appellee, Audrey Beatrice Connor, brought this suit for a divorce upon the ground of personal indignities. Most of the friction that led to the couple's separation involved Mrs. Connor's children by an earlier marriage. Mrs. Connor finally left her husband because he refused to permit her children to live in the family home at Hot Springs. The chancellor granted the plaintiff's prayer for a divorce. Connor contends that the proof is insufficient to establish a ground for divorce and, alternatively, that the plaintiff's testimony was not corroborated.

There is really not much dispute about the salient facts. Connor was 68 and Mrs. Connor was 43 when they married in 1964. Mrs. Connor's oldest child was married and living with her husband. Her other four children, whose ages ranged from 14 to 20 when the case was tried, were living with their mother in Stuttgart.

At the end of the 1964 school term Mr. and Mrs. Connor moved to Hot Springs. Some antagonism had already arisen between Connor and the four children. In an effort to avoid dissension Mrs. Connor sent three of the children to visit their father in Texas and the fourth to visit her married sister. This arrangement could not continue indefinitely. Eventually the children's stepmother sent first one and then a second child back to their mother.

There is hardly any dispute about Connor's unwillingness to allow the children to live with him and their mother. Mrs. Connor, whose testimony is amply corroborated by that of her children, returned to Stuttgart when her husband refused to take her son Michael back into the family home. She explained to Connor that she would have to go where she could be with her children. Connor himself admitted on cross examination that he had made no effort to persuade his wife to return and that he did not want the children in his home.

Under our decisions the chancellor was justified in granting a divorce to Mrs. Connor. In *Rigsby* v. *Rigsby,* 82 Ark. 278, 101 S. W. 727 (1707), the plaintiff-husband refused to allow his wife's sixteen-year-old daughter to live in the family home. In the course of the opinion we said: "Besides, her sex and tender age required that she should be under the control and care of her mother. The conduct of the plaintiff in refusing to allow her to return was, as far as the evidence shows, utterly unreasonable. As the mother was entitled to the society and services of her young daughter, as she owed a duty to see that she was properly reared and protected during the period of her girlhood, this conduct of plaintiff would have gone far towards justifying the defendant in leaving his home in order to be with her child had she chosen to do so."

The *Rigsby* case was followed, upon similar facts, in *Rosenbaum* v. *Rosenbaum,* 206 Ark. 865, 177 S. W. 2d 926 (1944). This language from that opinion is perti-

nent here: "Appellant married appellee knowing that she had this daughter and with a full realization that appellee owed her child the love and care that only a mother can give. . . Appellant, therefore, had no right to insist that his wife give up her daughter, and doubtless this insistence on his part led to the rupture of their married relations." In the *Rosenbaum* case the wife asked and obtained separate maintenance only, but such a decree must rest upon the same grounds that are required for an absolute divorce. *Myers* v. *Williams,* 225 Ark. 290, 281 S. W. 2d 944 (1955).

The decree must be affirmed, with an allowance of an additional $100 attorney's fee to the appellee.

BILLY LAWSON *v.* NINA MAE STEPHENS

5-3977 407 S. W. 2d 917

Opinion delivered November 14, 1966

N. M. Norton, for appellant.

Fletcher Long, for appellee.

PAUL WARD, Justice. This litigation grows out of a collision between two cars at the intersection of Division Street with Washington Street (which is also Highway No. 1) in Forrest City. The pertinent facts presently set out appear not to be in dispute.

Facts. Washington Street (a through trafficway) runs approximately north and south. It is intersected by Division Street which runs approximately east and west. At this point there is a "stop" sign on the right (or south) side of Division Street and on the west side of Washington Street.

At about 1:30 p.m. on December 24, 1964 Billy Lawson (appellant herein) was driving his car easterly on Division Street, and, as he approached the intersection, a car driven by Nina Mae Stephens (appellee herein) on Washington Street also approached the same intersection from the north. Appellant entered upon Washington Street and, in doing so, was struck by the car being driven by appellee. There was a conflict of evidence as to whether appellant stopped at the "stop" sign. In any event appellee was injured and her car was damaged.

Suit was filed by appellee against appellant, and, in her complaint, she alleged negligence in that appellant failed to keep a proper lookout for vehicles on the public highway; he failed to "yield the superior right-of-way" to appellee in violation of the state law, and; he was driving at an excessive speed. A jury trial resulted in a judgment in favor of appellee for $75 damage to her car and $14,125 resulting from personal injuries.

On appeal to this Court appellant relies on only two

general points for a reversal. *One* pertains to instructions and *Two,* the judgment was excessive.

One (*a*). Appellant says: "The rights of drivers entering an intersection were erroneously defined by Instruction No. 3."

The above mentioned instruction, in pertinent parts, reads:

> "The law requires that the driver of a vehicle approaching a stop sign shall stop, and, after having stopped, shall yield the right of way to any vehicle on the through street which has entered the intersection or which is approaching so closely as to constitute an immediate hazard. *When he has so yielded and has time to move safely across the entire intersection he may then proceed,* and the drivers of all other vehicles approaching the intersection shall yield the right of way to him." (Emphasis ours.)

This instruction is in accord with AMI 905.

Appellant's objection to the above instruction relates to that portion of the instruction which we have emphasized. The burden of appellant's argument is to the effect that these words are an addition to the "statute" and consequently place an unauthorized burden on him in this case. For reasons mentioned below we are unable to agree with appellant.

1. Appellant relies on language used in Ark. Stat. Ann. § 75-623 (a) (Repl. 1957), enacted in 1937, which reads:

> ". . . but said driver having so yielded may proceed and the drivers of all other vehicles approaching the intersection on said highway shall yield . . . ."

However, appellant overlooks two important items. One, the above section does not seem to be dealing with a

stop sign situation, and, two, the said section has been superseded by Ark. Stat. Ann. § 623 (a) (Supp. 1965), enacted in 1959. The pertinent statute now is Ark. Stat. Ann. § 623 (b) (Supp. 1965).

2. While the pertinent statute just mentioned does not contain the exact questioned language used in Instruction No. 3 (AMI 905) we think the meaning is essentially the same. The obvious purpose of both the statute and AMI 905 is to help the less favored driver to get completely across the intersection without having a wreck.

3. In our opinion Instruction No. 3 and AMI 905 are justified in view of what we said in *Shroeder* v. *Johnson*, 234 Ark. 443 (p. 447), 352 S. W. 2d 570. Consequently it was not error for the trial court to give said Instruction No. 3.

One (*b*). We find no error in the trial court's refusal to give appellant's requested Instruction No. 1 which, in essence, would have put a duty on the favored driver (on the through highway) to keep a lookout and not to assume due care on the part of the unfavored driver. We think the requested instruction was superfluous because the trial court (as previously mentioned) gave AMI 905, a portion of which reads:

> "A driver using a through street or highway has a right to assume, *until the contrary is or reasonably should be apparent,* that another driver will obey a stop sign." (Emphasis ours).

To the same effect was Instruction No. 4 (AMI 907) which was also given to the jury.

One (*c*). The trial court gave, with conformatory modifications, AMI Instructions 2201, 2202, 2204, 2205, 2206, 2207, and 2210, dealing with extent and duration of injury, medical expenses, pain and suffering, loss of earnings, present value of future earnings, etc. We re-

frain from discussing the merits or demerits of any of the instructions because we fail to find (with one exception) any objection in the record.

One (*d*). The trial court instructed the jury (without objection or offer of a substitute instruction) regarding the present value of future earnings as follows:

> "The value of any loss of earnings that have already been lost and the present value of any future earnings that may be reasonably certain to be lost."

In a related instruction the trial court also told the jury that "the statute, section 50-705, provides that the *average* life expectancy of a person forty-two years of age is twenty-nine years." (Our emphasis.) It is the contention of appellant that the court committed reversible error in giving this instruction.

While we are not commending the practice of the trial court in reading statutes to the jury, and while we are not holding that said statute was intended for a situation of this kind, we do not believe reversible error has been shown. In the first place it has not been shown by appellant that the information given to the jury was incorrect, or just how it could have affected the jury's verdict. It was undoubtedly the kind of information which the jury needed to consider in order to arrive at a just verdict. Also, it appears the jury was given some discretion by the use of the word "average" used in the statute.

Two. Finally, appellant contends the jury verdict was excessive, but again we are unable to agree.

It was up to the jury to weigh the testimony and, based thereon, to fix the amount of damages. In appellant's brief it is pointed out: Medical expenses, $884.74; appellee was in the hospital for one week where she received medical treatment; she was knocked unconscious, with blood running down her face; her chest, head, legs

and arms were injured; she suffered pain, and had trouble sleeping; she was unable to work because of pains in her head, chest and back; she had some broken ribs; she couldn't stay on her feet long at a time, and; she had a cough and high blood pressure. Before her injury she worked regularly, earning $52 per week—not including overtime. There is evidence that her losses to date of trial amounted to about $3,525, and that the loss would continue in the future—with a life expectancy of twenty-nine years.

In view of the above we cannot say the jury verdict is not supported by substantial evidence.

Affirmed.

CHICAGO, R. I. & PAC. R. R. CO. *v.* RACHEL ADAIR ET AL

5-3962 407 S.W. 2d 930

Opinion delivered November 14, 1966

Wright, Lindsey & Jennings, for appellant.

McMath, Leatherman, Woods & Youngdahl, for appellee.

INTRODUCTORY FACTS:

Osro Cobb, Justice. Appellant railway company serves Wheatley, Arkansas, a point located between Little Rock, Arkansas, and Memphis, Tennessee. Williams Grain Company has a very large grain storage and processing facility at Wheatley, which is served by appellants' spur track. The spur accommodates two or three other manufacturing plants and crosses U. S. Highway No. 70, a heavily traveled main highway, although limited to a single lane in each direction in the Wheatley vicinity.

On October 23, 1963, at approximately 7:00 p.m., and well after sunset, appellants in the course of their switching operations on the Williams Grain Company section of the spur, improvidently moved and stopped its boxcars in a position crossing Highway No. 70 so as to completely block the flow of traffic in each direction. No flagman or warnings of any kind were provided by appellants. Indeed the train conductor testified that in the switching operation they unintentionally overshot their mark, blocking the highway. No other member of the train crew was called as a witness by either party.

E. B. Adair, plaintiff in the original action, was driving his 1963 Ford automobile eastwardly on Highway 70. The vehicle crashed into the boxcar which was blocking the highway. Suit was brought for his injuries. Prior to trial, Adair died and the case was revived and prosecuted by his widow, Rachel Adair, as administratrix. Upon trial the jury returned a verdict for substantial damages and judgment was entered thereon.

Appellants have prosecuted an appeal urging some six points for reversal. We limit our discussion to appellants' Point IV, as our decision on this point is dispositive of the case.

Appellants' Point IV—The Court erred in commenting upon the weight of the evidence.

All of the record in this case relating to this point was made during the course of the testimony of eyewitness Daniel Heath. Appellants seasonably made objections to certain testimony of the witness and to remarks made by the court in the presence of the jury.

We quote the pertinent parts of the record:

"Q. Where was the boxcar?

"A. On the highway crossing and I almost hit it and my sister-in-law said—

"MR. JENNINGS: I object to what his sister-in-law said.

"THE COURT: The objection is sustained.

"Q. Was the freight car moving at the time?

"A. No, sir.

"Q. Did you hear the bell ringing?

"A. No, sir.

"Q. While you were sitting there did you hear the whistle blowing?

"A. No, sir.

"Q. Were there any lights at the crossing?

"A. No, sir.

"Q. Was there a watchman at the crossing?

"A. No, sir.

"Q. Then after it hit what happened?

"A. One door flew open on the car, on the driver's side and the man's legs came out and his feet was on the pavement and I thought they was maybe dead. * * * I went immediately to the

closest phone and called for an ambulance and the police.

"Q. While you were down there did you see anybody representing the railroad?

"A. Not before I went to call.

"Q. After you came back?

"A. When I came back there was two men walking down the track from toward this grain dryer with lights in their hand and when they walked up one of them made the remark—

"MR. JENNINGS: I object to any unidentified person's remarks.

"THE COURT: The objection is sustained.

"Q. How did you identify them as being with the railroad?

"A. They had lanterns in their hands.

"Q. What did they do?

"A. They came up and seen what had happened and they asked for the train to pull up and clear the highway.

"Q. At that time did they make a remark?

"A. One of them said—

"MR. JENNINGS: He may answer whether or not a remark was made but I object to what the remark was.

"THE COURT: Did they make a remark?

"A. Yes.

"THE COURT: Do you intend to ask him what the remark was?

"MR. McMATH: Yes, sir.

"THE COURT: Do you object to that?

"MR. JENNINGS: Yes, sir.

"THE COURT: The objection is overruled.

"MR. JENNINGS: There has been no identification of who the persons were; and certainly not that they were in any position to speak for the railroad company or Mr. Rosell.

"THE COURT: *The court holds that they were employees of the railroad company and that they asked that the train be moved.* (emphasis supplied)

"MR. JENNINGS: We object to that.

"MR. WOODS: We think it is a part of the res gestae, it was immediately after the accident happened and they were discussing the movement of the train.

"THE COURT: The objection is overruled.

"Q. Tell the jury what these people with the lantern said?

"A. One of them said, 'It looks like I really messed up and good this time,' and the other one said 'we sure did'."

It simply cannot be said that from the meager testimony concerning the two men with lanterns that their status as employees of appellant railroad had been conclusively established. Indeed this was a material fact question for the jury in determining the weight to be given to the statements of the men with the lanterns.

The statement of the court in the presence of the jury was not merely a comment on the evidence but constituted a disposition by the court of this material fact question. Appellants argue that the statement of the court removed from the jury's consideration any issue

of whether the men were in fact railroad employees, but that it also placed the court's stamp of truth upon the testimony of Daniel Heath concerning the employment of the persons and the actions taken by them, so that when Mr. Heath testified immediately theraefter one of the men said "it looks like I really messed up and good this time," and the other one said "we sure did"; the jury was justified in concluding that Heath's testimony in this regard was also true. Appellants insist that the practical effect of the remarks of the court was to instruct the jury that the appellant railroad had admitted that the collision was its fault.

We agree, in large measure, with appellants. The remarks of the court did tend to irrevocably fix in the minds of the jury that the railroad was at fault, causing or contributing to the accident and Adair's injuries, but the question of equal or greater fault upon the part of others at interest in the litigation was left open. The damage to appellants was not cured by any subsequent action of the court.

§ 23, Article VII, Constitution of the State of Arkansas, provides:

> "Charge to juries—Judges shall not charge juries with regard to matters of fact, but shall declare the law and in jury trials shall reduce their charge of instruction to writing on the request of either party."

This court has consistently held, in a great many cases involving the constitutional injunction against comments by trial courts on questions of fact, that same constitutes clear reversible error. See *Arkansas State Highway Commission* v. *Suddreth,* 239 Ark. 359, 389 S. W. 2d 423 (1965); *Cameron* v. *State,* 214 Ark. 512, 216 S. W. 2d 881 (1949), from which we quote:

> "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. *Hinson* v. *State,* 133 Ark. 149, 201 S. W. 811; *Williams* v. *State,* 175 Ark. 752, 2 S. W. 2d 36."

In *Western Coal & Mining Company* v. *Kranz,* 193 Ark. 426, 100 S. W. 2d 677 (1937), we said:

"No principle is better settled than that a judge presiding at a trial should manifest the most impartial fairness in the conduct of the case. Because of his great influence with the jury, he should refrain from impatient remarks or unnecessary comments which may tend to result prejudicially to a litigant or which might tend to influence the minds of the jury. By his words or conduct he may, on the one hand, support the character and weight of the testimony or may destroy it in the estimation of the jury. Because of his personal and official influence, uncalled for or impatient remarks, although not so intended by him, may give one of the parties an unfair advantage over the other."

See also *Roe Rice and Land Company,* v. *Strobhart,* 123 Ark. 146, 184 S. W. 461 (1961).

In *St. Louis Southwestern Railway Company* v. *Britton,* 107 Ark. 158, 154 S. W. 215 (1913), we said:

"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."

We have therefore concluded that this case must be reversed and remanded for a new trial, and it is so ordered.

Reversed and remanded.

ELMER D. CURRY AND EMMA JEAN CURRY *v.*
COMMERCIAL LOAN AND TRUST CO. ET AL

5-4036 407 S. W. 2d 942

Opinion delivered November 14, 1966

Levine, Williams & Bryant and *Edward M. Owens,* for appellant.

James A. Ross and *James A. Ross Jr.,* for appellee.

OSRO COBB, Justice. On January 23, 1963, appellants executed their first mortgage installment note to appellee bank in the amount of $12,500.00, the note being secured by a real estate mortgage executed by appellants on the same day, and embracing certain lands which included appellants' homestead. The mortgage recited that it was to secure all other advances up to and including the legal lending limit of appellee bank, which was set forth upon the mortgage at $42,000.00.

On September 27, 1963, appellants sought and obtained an additional advance of $8,500.00 from appellee bank for which they also executed a first mortgage installment note. On February 17, 1964, appellants sought

and obtained a further advance in the sum of $7,500.00 for which another first mortgage installment note was executed. The installment notes of September 27, 1963 and February 17, 1964 were co-signed by Hulbert Crute, it being conceded by appellants that Crute was a paid accommodation endorser of the paper.

When the notes of September 27, 1963 and February 17, 1964 were offered in evidence, they contained a typed notation as follows: "This note is further secured by real estate mortgage dated January 23, 1963 and recorded in Book 142, Page 65."

The controversy in this case involves appellants' insistence that the additional advances of September 27, 1963 and February 17, 1964 were not secured by their mortgage dated January 23, 1963.

The controversy was tried by the Chancellor who, after hearing, found against appellants' contentions and the case is now before us for appellate review.

No evidence was introduced during the hearing before the trial court attacking the genuineness of the signatures on all of the executed instruments which were involved, nor was there any evidence suggesting that appellants did not in fact receive the benefit of the additional advances. Furthermore, the evidence does not suggest that there was any discussion between the parties prior to the two advances as to any collateral to secure same, except the mortgage of appellants executed on January 23, 1963. Moreover, the notes covering said advances had printed in bold type thereon: "First Mortgage Installment Note." There was no evidence of any other mortgage than the one executed by appellants on January 23, 1963.

Appellants urge that the notations at the bottom of the notes for the advances were placed thereon after delivery to the bank. The witness for the bank could not pinpoint the exact time when the notations were

placed upon the instruments. However, this was immaterial to the bank's contention that the advances were secured by appellants' mortgage. *Benton State Bank* v. *Reed*, 240 Ark. 704, 401 S. W. 2d 738 (1966); *Holt* v. *Gregory,* 219 Ark. 798, 244 S. W. 2d 951 (1952); *State National Bank* v. *Temple Cotton Oil Company,* 185 Ark. 1011, 50 S. W. 2d 980 (1932).

No contention has been made that the language of any of the instruments involved was ambiguous. Our duty is to enforce valid agreements between parties and not to rewrite them. *McLeod* v. *Meyer,* 237 Ark. 173, 372 S. W. 2d 220 (1963); *State Farm Mutual Insurance Company* v. *West,* 181 F. Supp. 779 (W. D. Ark. 1960).

We have examined the record in this case and the instruments relied upon by appellees and we have concluded, as did the trial court, that the advances of September 27, 1963 and February 17, 1964 were secured by appellants' mortgage of January 23, 1963. Such a conclusion is supported by a clear preponderance of the evidence.

The decree of the trial court is affirmed.

Affirmed.

C. H. NOLAN LUMBER CO. ET AL *v.*
MRS. MADIE MANNING, ET AL

5-4012 407 S. W. 2d 937

Opinion delivered November 14, 1966

J. Fred Jones and *B. T. Jackson* and *Paul L. Barnard,* for appellant.

Bernard Whetstone, for appellee.

GUY AMSLER, Justice. This is a workmen's compensation case in which the commission decided against appellees, which decision was appealed to the circuit court. From an order by the trial court remanding the case to the commission for further development comes this appeal. Appellees suggest that the order remanding the controversy is not final and appealable and we agree.

A brief review of the background facts will serve to focalize the issue. On May 11, 1961, at 7:30 a.m., Roy Manning was driving toward Strong, Arkansas (where he worked for appellant Lumber Co.) in his panel truck.

Some two miles south of Strong he was involved in a head-on collision with another vehicle. Four days later he died as a result of injuries sustained in the incident.

On January 14, 1963, his widow filed a claim for workmen's compensation benefits for herself and two allegedly incompetent adult sons. Appellants resisted the claims by pleading the statute of limitations and alleging that the deceased was traveling from his home to work at the time he was injured and was not on business for his employer.

Following a hearing the referee decided against the widow and in favor of the two sons. On appeal the full commission heard additional testimony and ruled against all the claimants. An appeal was lodged in the Union County Circuit Court on October 25, 1963.

On March 23, 1966, the Circuit Court entered its order remanding the case to the commission for further development of the facts. From that order this appeal comes.

We have had a number of cases involving remanding of workmen's compensation litigation by the trial courts. The first that has been brought to our attention in *Mason* v. *Lauck,* 232 Ark. 891, 340 S. W. 2d 575. This case embraced a motion addressed to the Circuit Court for a remand to the Workmen's Compensation Commission in order that newly discovered evidence might be presented. The trial court when ruling on the remand request also ruled on the merits and affirmed the commission. This of course was a final and appealable order.

The next case is brought to our attention by appellees. *Ward Furniture Mfg. Co.* v. *Reather,* 234 Ark. 151, 350 S. W. 2d 691. In Ward Furniture the trial judge, on his own motion, remanded the case for further development of the medical testimony. In doing so however he spelled out with meticulous care deficiencies in the proof. In this case the appealability of the order was

not questioned (only that it was a second remand) and we expressly reserved ruling on whether such orders were appealable.

A third case of a related nature is *Dednam* v. *Amer. Machine & Foundry Co.*, 235 Ark. 962, 363 S. W. 2d 419. Here the court denied a motion to remand for further proof and movant appealed. Finality of the order was not questioned. The trial court was upheld and we stated the prerequisites for a remand:

> "The 'proper conditions' referred to are, for example, that the movant has exercised due diligence, that the evidence is not cumulative, and that the new evidence would justify a different result."

The authorities generally hold that trial courts have broad discretion in the matter of remanding proceedings from administrative boards and commissions and unless there is an abuse of discretion the court's action will not be disturbed. The remanding tribunal should however set out with particularity the alleged deficiencies. 2 Am. Jur. 2d Administrative Law § 764; 4 C.J.S. Appeal and Error § 152.

The general rule in our state is that appeals lie only when and if there is a final judgment, decree or order. *Foley, et al* v. *Whitaker, Ex'r,* 26 Ark. 95; *Batesville* v. *Ball,* 100 Ark. 496, 140 S. W. 712; *Ark. State Highway Comm.* v. *Ponder, Judge,* 239 Ark. 744, 393 S. W. 2d 870; Ark. Stat. Ann. § 27-2101 (Supp. 1965).

Since the order entered by the trial court in this case is not appealable the appeal should be dismissed and it is so ordered.

HARRIS, C. J., and SMITH, J., dissent.

PHELPS-POWELL BUILDING SUPPLY CO., INC. *v.* SILVER DOLLAR HOMES, INC., ET AL

5-4019 407 S. W. 2d 925

Opinion delivered November 14, 1966

Greenhaw & *Greenhaw* and *Bob Scott,* for appellant.

Little & *Enfield* and *Eli Leflar,* for appellee.

GUY AMSLER, Justice. Appellant Phelps-Powell Building Supply Company, Inc. (herein called Supply Co.) owns and operates a lumberyard and building materials supply business in Rogers, Arkansas. One of the appellees, Silver Dollar Homes, Inc., (called Homes) is a general contractor which for several years prior to this litigation purchased building materials from appellant.

Beginning May 19, 1964, and ending September 30, 1964, Supply Co. sold Homes, on an open account, materials having a value of $4,708.14 to be used in the construction of a condominium apartment in the city of Rogers, Arkansas.

According to the allegations contained in the first amendment to Supply Co.'s complaint sometime after September 30th Supply Co. assumed that construction

on the apartments was completed and made inquiry of Homes as to when payment of the account might be expected. The President of Homes agreed verbally with Supply Co. to transfer to it what was known as the "Buckelew Property" located across the street from the condominium apartments in satisfaction of several delinquent accounts including the one for material used in the apartment building.

On January 23, 1965, Homes wrote Supply Co. that its attorney would prepare the conveyance that day and transfer of the "Buckelew Property" would be consummated when the deed was ready. According to its amended complaint, Supply Co. relied upon this agreement and did not file its lien against the condominium apartments within one hundred twenty days from the purchase on September 30th. Fraudulent conduct on the part of the president of Homes is claimed.

On April 15, 1964, Homes deeded the property upon which the condominium was to be constructed to Harold R. Clayton and his wife Evelyn (called Claytons). The deed was recorded on April 20, 1964. There was a separate agreement between the parties which provided that Claytons would convey the property back to Homes upon payment of a $60,000 loan.

Appellees F. Carlyle Jones and Debrow N. Jones purchased apartment "A" from Claytons on November 18, 1964, and appellee Hazel Buckelew purchased apartment "C" from the Claytons on February 18, 1965.

The First Federal Savings and Loan Association of Rogers, Arkansas, made loans, took and recorded mortgages on the individual units, on the dates and in the amounts indicated: Apartment "A", December 3, 1964, $7,000; on March 11, 1965, apartment "B", $9,000, apartments "D" and "E", $8,000 each and apartment "F", $5,300.

On March 19, 1965, Homes purchased from Supply

Co. eight sets of weather stripping for $10.47. The stripping was installed in the condominium apartments. This amount was added to the open account which had been dormant since September 30, 1964.

Appellant filed suit on July 15, 1965 (which was within one hundred twenty days from the purchase of March 19, 1965). Supply Co. sought judgment on the account and imposition of a materialman's lien, on the apartments for the cost of materials furnished from May 19, 1964 to March 19, 1965.

The original verified complaint of Supply Co. contained the following allegation:

> "That the first materials furnished for the construction of said condominium apartments was on the 19th day of May, 1964, and continued through the 19th day of March, 1965, which was the last day of furnishing materials to defendant, Silver Dollar Homes, Inc. by the plaintiff."

A further allegation was:

> "That the final delivery of material in the construction of said condominium apartments was the 19th day of March, 1965, and that one hundred twenty (120) days will have expired on the 17th day of July, 1965. That the plaintiff desiring to avail itself of the benefits of Arkansas Statutes § 51-601 et seq brings this action within the one hundred twenty (120) days from the last date of delivery of materials pursuant to Arkansas Statutes 51-613."

Separate demurrers were filed by all the defendants (appellees here) except First Federal Savings and Loan Association, which pleaded by answer.

The demurrer by Homes was sustained and the demurrers of the other defendants were treated as motions to make more definite and certain. Thereafter Supply

Co., with an express reservation of rights amended its complaint and alleged *inter alia* that the account covering materials for the construction of the condominium apartments covered the period from May 19, 1964, to March 19, 1965, and that Homes had acted fraudulently as aforementioned.

Again separate demurrers were filed and sustained. Supply Co. refused to plead further and orders dismissing the complaint and amendment thereto were entered, except as to the last item purchased, the cost of which was $10.47. This appeal followed.

Appellant contends that the trial court erred in sustaining the demurrers and appellees take a contrary position. No other points are raised. Appellant relies on *Huffman Wholesale Company* v. *Terry,* 240 Ark. 368, 399 S. W. 2d 658, for a reversal and appellees contend *Streuli* v. *Wallin-Dickey & Rich Lumber Co.,* 227 Ark. 885, 302 S. W. 2d 522, fully supports the chancellor's ruling.

It is our feeling that the case was not sufficiently developed to enable an application of the criteria enunciated in either of the cases relied on by the parties.

In *Howell* v. *Ark. Power and Light Co.,* 225 Ark. 535, 283 S. W. 2d 680, we said:

> "In testing a complaint on demurrer we must assume that all allegations that are well pleaded, are true. Also our rule is well established that pleadings are to be liberally construed and every reasonable intendment is to be indulged on behalf of the pleader in determining whether a cause of action is stated. *Rice* v. *King,* 214 Ark. 813, 218 S. W. 2d 91; *Story* v. *Cheatham,* 217 Ark. 193, 229 S. W. 2d 121."

When the foregoing rule is applied to the quoted extracts from the appellant's complaint and amendment thereto it will readily be discerned that appellant is en-

titled to an opportunity to present proof in an effort to establish its contentions.

There is another reason why this cause must be remanded to the trial court. Supply Co., in addition to seeking a lien on the apartment property, prayed judgment against Homes for the total cost of all materials furnished for the job. As the record now stands Supply Co. would be entitled to a judgment in the trial court against Homes for the full amount due on its account.

Reversed and remanded.

ARKANSAS STATE HIGHWAY COMM'N *v.* R. L. LOVEGROVE ET AL

5-4013 407 S. W. 2d 928

Opinion delivered November 14, 1966
[Rehearing denied December 12, 1966.]

George O. Green and *Don Langston,* for appellant

Floyd G. Rogers, for appellee.

HUGH M. BLAND, Justice. This is a condemnation suit in which the State Highway Commission condemned 20.5 acres of a 40-acre tract owned by appellees. The

facility to be built is a segment of Interstate Highway 40, a controlled access highway.

On May 25, 1965 the appellant filed its declaration of taking in the Crawford Circuit Court and deposited into the registry of the court, as estimated just compensation for the taking, the sum of $9,000.00.

Appellees answered, alleging the insufficiency of the deposit and demanding a trial by jury. Trial was held on October 27, 1965 and resulted in a verdict in favor of appellees in the sum of $18,000.00 and judgment was entered for that amount.

Appellant does not contend that the judgment for appellees is excessive, nor does appellant question any instructions given by the trial court, but relies entirely on two points:

> "I. The trial court erred in overruling appellant's motion to strike appellee's opinion as to the before value of the property because he gave no fair and reasonable basis for that opinion.
>
> "II. The trial court erred in permitting appellees' lay-witness, Jay Neal, to state his opinion as to the before value of the property without first stating the facts upon which the opinion was based."

Motions were made to strike the testimony of R. L. Lovegrove and Jay Neal. Both motions were denied by the court.

We find no merit in the contention of appellant in either Point I or II.

In the recent case of *Arkansas State Highway Commission* v. *Drennen*, 241 Ark. 94, 406 S. W. 2d 327, opinion delivered September 26, 1966, we affirmed the Crawford Circuit Court on the same issues raised by appellant in this case:

Appellant contends that the two witnesses, R. L. Lovegrove and Jay Neal, had no basis for their testimony fixing the before value of the property. Appellees produced four witnesses and appellant two. The before, after and damage figures of all the witnesses were as follows:

	Before	*After*	*Damages*
"R. L. Lovegrove	$25,000	$2,000	$23,000
Mack Bolding	24,000	3,450	21,050
Robert Gelly	23,000	2,100	20,900
Jay Neal	25,000	1,725	23,275
Bryan McArthur	12,500	4,000	8,500
Harry Word	12,000	3,000	9,000"

Appellant does not question the qualifications or background basis of the testimony of Mack Bolding and Robert Gelly fixing the before value at $24,000 and $23,000 respectively.

The verdict was well within the range of the testimony and was submitted to the jury on instructions and guidelines unquestioned by appellant.

We have repeatedly held that this court will not disturb the jury's findings of fact on conflicting evidence if there is any substantial evidence to support the jury's verdict. *Norman* v. *Gray,* 238 Ark. 617, 383 S. W. 2d 489; *Manhattan Factoring Corp.* v. *Orsburn,* 238 Ark. 947, 385 S. W. 2d 785.

We conclude, therefore, that there was no proper basis for the motions to strike the testimony of R. L. Lovegrove and Jay Neal and that the trial court committed no reversible error in overruling the motions of appellant.

We also conclude that the issues were fairly presented to the jury on proper instructions and its verdict will not be disturbed on appeal.

Finding no merit in the contentions of appellant, the judgment of the trial court is affirmed.

MRS. J. G. BURLINGAME *v.* VERNON J. GISS ET AL

5-4032 407 S. W. 2d 935

Opinion delivered November 14, 1966

Leon B. Cattlett and *Julius C. Acchione* and *U. A. Gentry*, for appellant.

Herschel H. Friday, Jr. and *Robert S. Lindsey* and *J. W. Barron,* for appellee.

HUGH M. BLAND, Justice. The issues in this appeal grow out of and follow from our decision in *Giss, et al* v. *Apple, et al,* 239 Ark. 1124, 396 S. W. 2d 813. The background facts are that Pleasant Valley proposed that it would convey to Riverdale Country Club approximately 250 acres of land with an 18-hole golf course and a 9-hole golf course, constructed in accordance with plans and specifications submitted to Riverdale, including tees, fairways, and watering systems; that it would make available $1,150,000.00 to Riverdale for a club house, pro shops, youth center, tennis courts, parking areas and drives, and swimming pools; that it would make available to Riverdale an amount not to exceed $170,000.00 in order to pay off Riverdale's existing mortgage indebtedness.

In return Riverdale would convey to Pleasant Valley its presently owned land and facilities and meanwhile not increase its mortgage indebtedness. Riverdale would change its name to Pleasant Valley Country Club.

After a study of the proposal by a committee ap-

pointed by Riverdale, a majority of the membership present voted in favor of the proposal. Mr. William Apple and another regular member obtained an injunction in the Pulaski Chancery Court restraining the Board of Governors of the Riverdale Country Club from entering into the proposed exchange agreement with Pleasant Valley. The lower court held that Riverdale had no authority under the constitution and by-laws to effectuate the proposed trade with Pleasant Valley, Inc., without proper authorization of the members of said club and that the vote 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, did not legally authorize or empower the board of said club to enter into said agreement with Pleasant Valley whereby all the assets of Riverdale Country Club would be sold or exchanged. The case was appealed to this court and decided in *Giss* v. *Apple, supra.*

The same contentions were made in the *Giss* case by opponents of the sale that are made in this case; that the consummation of the exchange would constitute a radical and fundamental change in the corporate purposes which may not be done against the wishes of the minority.

The decision in the *Giss* case, which was in the natur of a declaratory judgment, held:

> "(1) The club itself did have the power to make the proposed sale and exchange with Pleasant Valley.
>
> (2) Under the applicable statutes, the club having been granted the power to establish its own form of government, it had the right to establish its own rules and regulations governing the acceptance or rejection of the Pleasant Valley proposal, including and defining the number of votes necessary to ap-

prove the same. But it had not done so, and the Board itself had not been expressly granted this power by the Constitution or By-laws.

(3) The consummation of the proposed exchange would not have the effect of destroying the original purpose of the incorporators or dissolving the corporation or abandoning the purpose for which it was created. On the contrary, it would further the object and purposes of the club. Therefore, a majority of the members having voting rights could legally authorize the Board to enter into the Exchange Agreement, but less than such majority could not do so."

Pending this court's decision in the *Giss* case, Riverdale called and held a meeting on June 14, 1965 to vote upon the proposed amendment to the constitution now under attack in this case and did authorize the board to sell or exchange all of its properties upon the majority vote of the regular members at a proper meeting at which a majority of all the regular members were present in person or by proxy. At this time there were 550 regular members and the amendment carried by a vote of 314 for to 172 against.

Subsequently, at a meeting held on June 28, 1965, the board was authorized and empowered to consummate the proposed exchange by a vote of 347 regular members for and 133 regular members against.

The sole point relied upon by appellants is that the court erred in holding that the Riverdale Country Club had the power to amend its constitution to provide for the exchange of its entire assets against the will of a a minority of its members. The decision in *Giss* v. *Apple, supra,* is conclusive and determinative of this issue and we adopt that opinion as the law of this case.

The chancery court held, in the instant case, that by virtue of the action taken at special meetings of the Club held on June 14, 1965 and on June 28, 1965, the Board

of Governors of Riverale Country Club was legally authorized and empowered to proceed and act with respect to the proposed sale and exchange with Pleasant Valley, Inc., and dismissed the petition for injunction with prejudice.

We find no error in the action of the chancery court and the decree is, therefore, affirmed.

WARD, COBB, and AMSLER, JJ., disqualified and not participating.

WALTER BROOKS *v.* BALLENTINE TRUCKING, INC.

5-4028 408 S. W. 2d 497

Opinion delivered November 21, 1966

Gean, Gean & Gean, for appellant.

Wright, Lindsey & Jennings, for appellee.

CARLETON HARRIS, Chief Justice. Walter Brooks, appellant herein, instituted suit against Ballentine Trucking, Inc., in the Circuit Court of Pulaski County, alleging that he was injured in North Little Rock on High-

way 67-70, on February 28, 1962, while operating a tractor and trailer for Arkansas Best Freight Systems, Inc. Brooks stated that he drove over a truck tire and wheel in the middle of the highway, causing him to sustain injuries to his knee, back and spine, such injuries partially disabling him, and resulting in extreme pain, loss of wages, and doctor and hospital expenses. The complaint averred that the tire fell from a trailer being pulled by a tractor operated by the agent, servant, and employee of Ballentine, engaged in the employer's business, and that the driver of appellee's truck, Marvin F. Coffey, was negligent in permitting the truck tire to remain upon the highway, at nighttime, and during a rain, the driver sitting nearby in a truck, and failing to remove the tire. Ballentine answered, denying that any agent or employee of Ballentine was operating a tractor-trailer unit at the time and place alleged in the complaint; further, it was asserted that the accident was an unavoidable mishap, and still further that whatever injuries were sustained by Brooks were directly and proximately caused by the driver's own negligence and carelessness. On trial, the jury returned a verdict for Ballentine, and from the judgment so entered, appellant brings this appeal. For reversal, only one point is raised, *viz,* "The trial court erred in granting the appellees Instruction No. 2."

The principal defense in this litigation was that Coffeey was not an agent, servant, or employee of appellee company, and was not engaged in the business of said company when the accident occurred. The proof reflected that Coffey, along with S. T. Lawson, who was also an alternate driver of the truck, and who was riding in the vehicle at the time the tire fell in the road, was employed by HLH Parade Company; neither man was employed by Ballentine. These men had been on a "run" from Alma, Arkansas, to Louisville, Kentucky, and were returning to Alma when the mishap occurred. HLH paid the salaries and expense accounts of these drivers, and both received directions relating to their duties from HLH. This company carried Workmen's Compensation

Insurance on these men, made the withholdings from their pay, reported the withholdings to the Federal Government, and made payments with respect to unemployment compensation, according to Ike Thomas, who handled the routing of the trucks. Thomas testified that HLH owned some trucking equipment, and leased other equipment from Ballentine, and that HLH employees operated both the owned units and the leased units. The witness stated that he had charge of the drivers, and the power to discharge employees, and that he did discharge Coffey sometime subsequent to February 28, 1962. Perry Newman, assistant manager of HLH products at Alma, concurred in the testimony given by Thomas, and John Ballentine, Secretary of the Ballentine Company, also testified that the particular truck involved was one which had been leased to HLH.

A lease agreement between Ballentine and HLH was offered into evidence, such lease being dated September 21, 1961, and executed by John P. Ballentine of the trucking company, and W. B. Beeman, Secretary Treasurer of HLH Parade Company. Included in its provisions are Sections 5 and 6, which read as follows:

"5. Lessee shall purchase and pay for any fuel necessary to operate said equipment during this period. Lessor warrants and represents that the leased equipment is, and that he will repair said equipment and maintain same at his own expense, in first-class condition and in every respect suitable for the transportation of Lessee's products, except as to such repairs as may be necessitated by the sole negligence of Lessee, its agents, servants or employees; that the leased equipment is so constructed and equipped as to comply with all rules and regulations governing its operation over the highways of the United States; * * *

"6. Lessee, during the term of this lease, shall have absolute control over the use of said equipment in the same manner as though it were the absolute owner thereof and shall employ, pay and have absolute control supervision over the operators thereof."

Appellant's sole evidence of agency was his testimony that the name, "Ballentine Trucking Company," appeared on the side of the vehicle,[1] and that Coffey told him that the tire and wheel, heretofore mentioned, "belonged to Ballentine Trucking Company, that he worked for."

Following the introduction of the lease agreement, appellant moved that the pleadings be treated as amended to conform to the proof, and this motion was granted by the court. At the conclusion of the evidence, instructions were given, which included Defendant's Instruction No. 2. In that instruction the jury was first told that Brooks claimed that he had been damaged as a result of negligence on the part of Coffey, the allegation of negligence being that Coffey had knowingly permitted a truck tire to remain upon the highway during a rain, at night, though sitting by in a truck, knowing the tire was on the highway. The court then said:

"If you find and believe from a preponderance of the evidence that at the time and place of the occurrence, Marvin F. Coffey was not an employee of Ballentine Trucking, Inc., then it will not be necessary for you to consider or decide any other issues and your verdict should be returned in favor of defendant, Ballentine Trucking, Inc."

Appellant made a general objection to the entire instruction, but made a specific objection to the quoted portion, stating that it "conflicted with the evidence and the granting of plaintiff's motion to amend the pleadings to conform to the evidence." It is the giving of the quoted portion of the instruction that appellant contends to be reversible error, entitling him to a new trial. This contention is based on appellant's assertion that Ballentine, under Section 5 of the lease, was responsible

[1]Appellee offered evidence that there was also lettering on the tractor, which stated, "Leased to HLH Parade Company." Likewise, painted on the side were fuel permits for Tennessee, Kentucky, and Colorado, which were HLH Parade Company permits.

for the maintenance of the truck in question, and that Ballentine was negligent by not furnishing "devices" that would fasten the spare tire to the rack (where the spare tire was housed under the truck).

This case is unusual in that appellant's sole point for reversal relates to evidence that developed during the trial which was totally alien to the theory upon which appellant had instituted his suit. In filing his complaint, appellant contended that Coffey was an agent, servant and employee of Ballentine Trucking Company, and engaged in that company's business at the time of the accident. It was not until the lease was offered in evidence that the new theory of negligence on the part of Ballentine arose, and the theory was not even fully pursued after the pleadings were amended to conform to the proof, *i. e.,* no instructions relating to this alleged negligence were offered.

As far as agency is concerned, there is no question but that the proof overwhelmingly established that the two truck drivers, Coffey and Lawson, were employed solely by HLH. In fact, the question of agency is not argued in appellant's brief.

We do not agree that prejudicial error was committed. Appellant relies on Section 5, but it will be noted that Section 6 provides that HLH shall have "absolute control over the use of said equipment in the same manner as though it were the absolute owner thereof." The evidence shows that the control was exercised over the equipment (tire and wheel) which is the subject of this litigation. Lawson testified that the tire was on the rack under the truck, and that he kept it tied in place. He stated that the last time he looked at it, "I guess at West Memphis somewhere along in there it was," it was secure. Lawson stated that the truck traveled through rather deep water in North Little Rock, and that this water "washed it [the tire] out." Accordingly, the testimony reflects that the tire was in place in the earlier part of the day, and at a time when the vehicle was in

complete charge of the employees of HLH. There was no testimony reflecting that the tire rack was inadeuate or defective at the time Ballentine last had the truck in its possession for maintenance work, nor does the evidence reflect when this truck last was seen or worked on by appellee. Also, there is no evidence that the method of carrying the tire and wheel on this truck was any different from the accepted practice among truckers with similar equipment. In other words, there is a complete absence of proof as to any negligence by Ballentine, and, on this aspect of the case, a jury would have been forced to guess and speculate in order to render a verdict for appellant. This, of course, is not permissible. *Kapp* v. *Sullivan Chevrolet Company,* 234 Ark. 395, 353 S. W. 2d 5. Actually, appellee was entitled to a directed verdict. This being true, any erroneous instructions to the jury are considered harmless. *Carodine* v. *Southern National Insurance Company,* 193 Ark. 376, 99 S. W. 2d 586.

Finding no reversible error, the judgment is affirmed.

JUDITH E. DANNER CLIFFORD *v.* HERMAN L. DANNER

5-3960 409 S. W. 2d 314

Opinion delivered November 21, 1966
[Rehearing denied January 9, 1967.]

Jack L. Lessenberry, for appellant.

U. A. Gentry, for appellee.

ED. F. MCFADDIN, Justice. This is a petition by the mother to require the father to provide child support for his three children. The Chancery Court denied the prayed relief and the mother prosecutes this appeal.

Judith and Herman Danner were married in Little Rock in June 1958; and three little boys were born of that marriage: David, born June 1959; Curtis, born September 1960; and Roger, born December 1961. The Danners separated in August 1964 and in November 1964 Judith Danner was awarded a divorce, the care and custody of the children, and $150.00 per month for support of the children; but she was restrained "from permanently removing the said minor children out of the State of Arkansas without the consent of the Court or the written consent" of Herman Danner.

In March 1965 Judith Danner petitioned the Pulaski Chancery Court for permission to allow her to permanently remove the children to another State. This petition was resisted; and on March 30, 1965 there was a hearing by the Court; and the order recites:

> "The Court finds the parties have agreed that the plaintiff, Judith E. Danner, may take the children of the parties . . . from the jurisdiction of the Court and may establish a permanent residence in a foreign State . . . . The plaintiff [Judith E. Danner] agrees to support said children and the defendant is relieved from any further obligation for support thereof as long as the children remain out of the State. The Court finds that such agreement is reasonable under the circumstances, and that it is for the best interest of the children that said agreement be confirmed by order of the Court."

The order of March 30th confirmed the agreement but had this further recitation:

> "And the Court doth retain control and jurisdiction

of this cause for such further orders and proceedings as may be necessary to enforce the rights of the parties and for the well-being of the said three minor children."

Mrs. Judith Danner married Mr. Clifford on March 24, 1965, and removed the children to the State of Georgia, where they are now living with their mother and stepfather, Mr. Clifford; and there was a proceeding in Georgia in September 1965 to have the children's last name changed to Clifford, but this was without notice to Mr. Danner.

On November 5, 1965 Mrs. Judith Danner-Clifford filed her present petition in the Pulaski Chancery Court, seeking an order to require Mr. Danner to contribute to the support of the children, even though they continued to live in Georgia with her and her new husband. She claimed: (a) that she did not fully understand the agreement on which the said consent order of March 1965 was based; and (b) that there had been a change in conditions in that the children were growing up and needed more financial support and that Mr. Danner was making more money than he had formerly made. The petition was resisted by Mr. Danner. The Chancery Court heard the evidence offered in support of and in resistance to the petition; and on December 1, 1965, entered an order denying the petition. From that order there is the present appeal.

Mr. Danner urges that the consent order of March 1965 is *res judicata* and final. We find no merit in this contention. No order for child support is ever final insofar as concerns the obligation of a father to support his own children. *Lively* v. *Lively,* 222 Ark. 501, 261 S. W. 2d 409; *Robbins* v. *Robbins,* 231 Ark. 184, 328 S. W. 2d 498; and *McCall* v. *McCall,* 205 Ark. 1123, 172 S. W. 2d 677. Furthermore, in the consent order of March 1965 the Chancery Court specifically retained jurisdiction of the case concerning the welfare of the children.

Mrs. Danner-Clifford says that she did not fully understand what was the force and effect of the consent order of 1965; but she has no corroboration for her present claim of misunderstanding, and we attach very little weight to such claim.

We come then to the real issue: do the children need support money from Mr. Danner, their father? Mr. Danner is a pipefitter by vocation and makes approximately $6,000.00 per year and is not shown to have any other assets. From this amount he could contribute to the support of the children if they needed it; but we find no such need shown. Mr. Clifford, the present stepfather (who has had the children's name changed to Clifford), is a drug salesman in Atlanta, Georgia, and earns over $8,000.00 per year and is buying a home. When he married Mrs. Danner-Clifford he agreed to support and care for her and her children. He is doing it and does not seem to be complaining about it. There is no evidence that the three children are other than amply provided for; and we do not find any such evidence of change of circumstances as would justify a modification of the March 1965 order. In *Haney* v. *Haney,* 235 Ark. 60, 357 S. W. 2d 19, we said: "Any increase in allowance for the support of minor children must be based on a showing that conditions have changed since the entry of the divorce decree."

After a careful review of the evidence we cannot say that the chancery decree is against the preponderance of the evidence.

Affirmed.

WORTH JAMES CONST. CO. *v.* CATHERINE FULK EX'X

5-4023 409 S.W. 2d 320

Opinion delivered November 21, 1966
[Rehearing denied January 9, 1967.]

McMillen, Teague & Bramhall and *John B. Plegge,* for appellant.

Fulk, Wood, Lovett, Parham, & Mayes, for appellee,

GEORGE ROSE SMITH, Justice. In April of 1964 the defendant, Worth James Construction Company, was engaged in the performance of a private contract by which it was to construct a storm-sewer system to serve the pleasant Valley Addition to the city of Little Rock. On the morning of April 23, after a night of heavy rainfall, the plaintiff Frank M. Fulk, who lived near that subdivision, discovered that the den and utility room in the basement of his home were flooded to a depth of fourteen inches or more. There was extensive water damage to the residence itself and to furniture and other personal property. Fulk and his wife brought this action

against the Worth James company, asserting that its negligence had caused water from the uncompleted Pleasant Valley system to flood a manhole in front of the Fulks' house to such an extent that the water backed up through a floor drain in their utility room and inundated the premises.

The Worth James company denied any negligence on its part, insisting that its construction methods conformed to the plans and specifications set out in its contract with Pleasant Valley, Inc. The jury verdict was for the defendant, but the trial judge found the verdict to be against the preponderance of the evidence and ordered a new trial. This appeal is from that order. In such a situation the question here is whether the preponderance of the evidence supports the verdict so clearly that we must find an abuse of the trial judge's discretion. *Koonce* v. *Owens,* 236 Ark. 379, 366 S. W. 2d 196 (1963). (Frank M. Fulk died soon after the trial; the cause has been revived.)

Worth James, in the course of its construction, had connected the new Pleasant Valley 21-inch sewer line to the manhole in front of the Fulk home. That manhole was served by an existing 18-inch line that was part of the municipal storm-sewer system. When the Worth James employees quit work at the end of the day on April 22 they left an open unfinished manhole at a short distance up the new line from the Fulks' residence. Grassy Creek was only a few feet from that open manhole. According to the plaintiffs' evidence the rainfall during the night was so heavy that the creek overflowed its banks and discharged so much water into the unfinished manhole that the new 21-inch line was filled to capacity. Since that volume of water could not be carried away at once by the 18-inch municipal line, the water in the older manhole rose to a height above the Fulks' floor drain and caused the damage complained of.

At the trial the key point of controversy was whether the Worth James company should have plugged

the new line during construction by putting in a bulkhead or stopper below the unfinished manhole. Porter Pryor, an expert witness for the plaintiffs, testified that "in lines of this size normally bulkheads are installed." Worth James himself, as a witness for his company, testified that it was not customary to use such bulkheads and that his contract with Pleasant Valley, Inc., did not call for them. He conceded on cross examination, however, that in the construction of sanitary sewers (as opposed to storm sewers) "normally we will plug up our lines at night . . . to keep the surface water out of the drains if it happens to rain."

In seeking a reversal counsel for the appellant rely upon our familiar rule that a verdict supported by any substantial evidence will be upheld in this court. That rule does not apply to a case such as this one, where the trial court has set aside the verdict as being against the weight of the testimony. Here the issue, as we have said, is whether the trial judge abused his discretion.

In the case at bar we find no such abuse. We cannot attach controlling weight to the fact that the Worth James contract did not require the use of bulkheads. Presumably the contractual plans and specifications described the proposed storm-sewer system in detail, to the end that Pleasant Valley, Inc., would be sure of getting the exact system that it wanted and was willing to pay for. But that does not mean that the Worth James company had no responsibility in deciding *how* the contract was to be performed. The company unquestionably had the duty of using reasonable care in the construction of the system. Restatement, Torts (2d), § 384 (1965). If, for example, a building contractor should leave a live electric wire dangerously exposed overnight, it could not defend an ensuing action for personal injuries on the ground that the plans and specifications did not require that such wires be made safe before the workmen quit for the day. In the same way the jury could have found that this contractor was careless in not

taking any precautions against the overflow that actually occurred.

A salient fact, one that cannot be overlooked, is that the Fulks were plainly not at fault. They had no warning of the danger that threatened their house. Worth James, in his testimony, sought to disclaim responsibility by saying that his company had no way of anticipating such a heavy downpour. He admitted, however, that "we get rains like that occasionally, but they aren't common." We are not convinced that the clear preponderance of the evidence supports the view that the appellant was wholly free from negligence in failing to protect the Fulk home by installing a bulkhead or by temporarily reducing the output of the 21-inch main. It follows that there was no abuse of discretion in the court below.

Affirmed.

ROBERT L. CROUCH ET AL *v.* JOHN CROUCH ET AL

5-4024 408 S. W. 2d 495

Opinion delivered November 21, 1966

Kirsch, Cathey & Brown, for appellant.

Rhine & Rhine, for appellee.

PAUL WARD, Justice. This litigation is between the heirs of W. M. Crouch, deceased, over certain lands, involving also certain grantees of two of said heirs. There appears to be no dispute over the pertinent facts, the only question for determination being one of law.

Facts. W. M. Crouch, a widower, procured a Donation Certificate in 1932 from the State for 160 acres of land. He made some improvements on the land but died in 1933 before a donation deed was made by the State. However, the donation undertaken was completed in 1935, and the State executed a deed conveying the land to "W. M. Crouch Estate". W. M. Crouch left seven children, one having since died leaving six children.

In 1958 the lands forfeited for taxes. At the tax sale one of the sons (John) bought the north eighty acres for $13.97, and another son (Adolph) bought the south eighty acres for $11.40. Each one received a tax deed. Later these two sons conveyed the 160 acres to Harold J. Conrad and his wife.

Suit filed. On or about March 16, 1965 the heirs of the deceased (except, of course, John and Adolph) filed a complaint in chancery court against John and Adolph and their grantee, seeking a 5/7 interest in said lands and asking that the lands be sold (if they cannot be divided) and the proceeds divided among the several parties as their interests appeared.

After a trial, the court made, in essence, the following findings: (a) The plaintiffs are not barred by laches or adverse possession; (b) the heirs of the deceased received no interest in the said lands by reason of the donation deed because said deed was void, having been made to "W. M. Crouch Estate". Accordingly the complaint was dismissed, and title to the land was quieted in Harold J. Conrad and his wife.

From the above decree appellants now prosecute this appeal for a reversal.

The decisive issue involved is whether the deed from the State to the "W. M. Crouch Estate" conveyed the 160 acres of land to the heirs of said W. M. Crouch, there being no dispute as to who the heirs are.

It is the contention of appellees that every valid deed must have a grantee, and that the words "W. M. Crouch Estate" do not constitute a "grantee" as contemplated by law, citing authorities which we deem it unnecessary to discuss in view of the conclusion we hereafter reach.

We think the deed in question was valid for the following reasons. Ark. Stat. Ann. § 10-929 (Repl. 1956), in pertinent part, reads:

> "In case the donee should die before the expiration of the time herein required to submit final proof of the right to perfect, the same shall extend, first to the widow of the donee, and if she be dead, then to the children of such donee . . . ."

In the early case of *McCracken* v. *Sisk,* 91 Ark. 452 (p. 457), 121 S. W. 725, the facts were very much the same as here, and the Court said:

> "In the case at hand the donee died before the expiration of the time required by the statute to submit final proof of the right to a perfect donation. In that event the right to perfect the donation and submit final proof thereof was by the statute extended to the widow in her own right as an original donee, and to the exclusion of all children, if there had been any, and to the exclusion of all other persons. Upon making the final proof the widow was entitled to and did receive a deed to the land from the State in her own right and as her individual property, and which she could thereafter alienate as her separate estate."

In the case under consideration it is not disputed that the State deeded the land as heretofore stated, and we will presume, in the absence of proof to the contrary, that all necessary prerequisites had been complied with by the heirs.

We are not convinced by appellees' contention the deed was void because there was no legal grantee. In 23 Am. Jur. 2d., *Deeds,* § 50, we find this statement:

> ". . . In short, where the instrument refers to someone in such terms that there is no doubt that he is the grantee, the deed will be effective although his name is not specifically stated as being the grantee.
>
> "To pass title to the grantee intended, a deed need not describe him by name if it otherwise identifies him or makes him susceptible of identification by extrinsic evidence."

The case of *Black* v. *Brown,* 129 Ark. 270, 195 S. W. 673, is also very much in point here to reverse the holding that the deed was void for lack of a proper grantee. The case deals with the legality of a tax deed made by the county clerk to "P. M. Black Estate". In holding the grantee was sufficient the court, among other things, said:

> "P. M. Black being dead at the time of the execution of the deed, his heirs were known with certainty and there could be no two parties claiming adversely as grantees under the deed. We are of the opinion that the validity of the deed should be upheld . . . ."

In the case under consideration here there is no dispute about who constituted the heirs of W. M. Crouch. It is certain that one of the appellees thought the deed was valid because he moved on the land and made improvements thereon.

We are not here holding that in all circumstances a deed to a person's estate is valid, but do hold it is valid in this instance.

There appears to be no contention (nor could there be any valid contention) that John and Adolph Crouch acquired title to the land by virtue of the 1958-1959 tax deeds. Being co-tenants with the other heirs, the purchases amounted only to a redemption for all the heirs. In *Jones, Ark. Titles,* § 200 there appears this statement:

> "Purchase by one co-tenant at a tax sale amounts merely to a redemption, and neither such tenant nor his grantee can acquire title through such purchase. . . ."

The above stated rule has been approved many times by this Court. See: *Zachery* v. *Warmack,* 213 Ark. 808, 212 S. W. 2d 706, and *Spikes* v. *Beloate,* 206 Ark. 344, 175 S. W. 2d 579.

In view of what we have said above, the decree of the trial court is reversed, and the cause is remanded for any further necessary orders or proceedings consistent with this opinion.

Reversed.

INTL. HARVESTER CO. ET AL *v.* LYLE BROWN, CIRCUIT JUDGE

5-4043 408 S. W. 2d 504

Opinion delivered November 21, 1966

Owens, McHaney & McHaney and *Autrey & Goodson,* for appellant.

Charles A. Potter, for appellee.

PAUL WARD, Justice. This is a Petition for a Writ of Prohibition asking this Court to enjoin the Circuit Judge from proceeding further in a damage suit filed in his court in Miller County.

The pertinent facts, which are not in dispute, are hereafter briefly stated.

On February 28, 1966 Arney Hayes filed a suit, in Miller County Circuit Court, against the International Harvester Company (called International) and Eaton, Yale & Towne, Inc. (called Eaton) for damages resulting from the purchase of an allegedly defective truck from International, parts of which had been manufactured by Eaton, and "that by reason thereof defendants

breached the implied warranty of merchantability''. The complaint alleged: that International was a foreign corporation, authorized to do business in Arkansas, and that the designated agent for service is The Corporation Company, 221 West Second Street in Little Rock, and; that Eaton is also a foreign corporation, and its designated agent for service was R. G. Hengst, 100 Erieview Plaza, Cleveland, Ohio. The prayer was for judgment against both defendants in the sum of $3,298.94. Service of summons on International was had on its agent in Little Rock, and service on Eaton was had by mailing a copy of the summons to its office in Ohio.

To the above complaint the defendants (petitioners herein) filed separate ''Motions to Quash Service'', alleging: Both are foreign corporations, duly qualified to do business in Arkansas; both have registered agents for service in Little Rock, and; neither has a place of business or officer in Miller County.

The allegations in the motion not being disputed, the trial court overruled said motion as to International, holding its designated agent in Little Rock was served and that Miller County was the proper venue. The court sustained the Motion to quash as to Eaton because service was attempted by mailing the summons and a copy of the complaint by registered mail to R. G. Hengst in Cleveland, Ohio. The court further held, however, that Eaton had a designated agent for service in Little Rock and that service on that agent would give Miller County jurisdiction.

Both petitioners objected to the above ruling of the trial court, and they now petition this Court to enjoin further proceedings in Miller County.

All parties agree that only one decisive question is presented to this Court, to-wit: Is the action below governed by Ark. Stat. Ann. § 27-611 (Repl. 1962), as contended by respondent, or by Ark. Stat. Ann. 27-613

(Repl. 1962), as contended by petitioners.

For reasons hereafter set forth we have concluded the petitioners are correct, and that the Writ of Prohibition must be granted.

Section 27-611, relied on by respondent, reads:

> "Any action for damages to personal property by wrongful or negligent act may be brought either in the county where the accident occurred which caused the damage or in the county of the residence of the person who was the owner of the property at the time the cause of action arose."

We construe this section to apply only where there has been "personal injury" or where there has been actual force or violence—such as a collision between two automobiles. This is the interpretation placed on the statute in *Terry* v. *Plunket-Jarrell Grocery Co.,* 220 Ark. 3, 246 S. W. 2d 415, and we think the decision is sound. No such factual situation exists in the case under consideration. Here Hayes' cause of action is predicated on a breach of contract, or on a breach of an implied warranty.

Section 27-613 reads:

> "Every other action may be brought in any county in which the defendant, or one of several defendants, resides or is summoned."

It is here admitted that neither of the petitioners resided in or was served in Miller County.

It is to be noted that section 27-611 originated as a part of Act 317 of 1941, but that section 27-613 is an exact copy of § 96 of the Civil Code of Arkansas. Section 27-613 is clearly shown to be a "venue" statute. It is preceded in the Code by more than ten other sections relating to venue in different factual situations, none of which include those in this case.

It cannot be disputed that section 27-613 applies to

corporations. See: *Harger* v. *Oklahoma Gas & Electric Co.*, 195 Ark. 107, 111 S. W. 2d 485.

Writ granted.

FRANK KNOX *v.* J. A. WILLIAMSON, COUNTY JUDGE

5-4018 408 S. W. 2d 501

Opinion delivered November 21, 1966

William E. Henslee, for appellant.

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

OSRO COBB, Justice. The dispositive question raised on this appeal is whether a nursing home rendering services of a nursing home may be classified as a county hospital under the provisions of Amendment No. 17 to our present Constitution. Section 1 of Amendment No. 17 provides as follows:

"County court house, jails and hospitals.—The power and right is hereby vested in the qualified electors of each respective County in this State by a majority of the said electors voting on the question, to authorize the construction, reconstruction, or extension of *any* County Court House, County Jail, or *County* Hospital, and to authorize the levy of tax not to exceed one-half of one per cent on the dollar of the valuation of all properties in such County subject to taxation to defray the costs and expenses thereof, or to take up any indebtedness existing at the time of adoption hereon incurred in building, construction, or extending any County Court House, Jail, or Hospital. [As amended by Amendment No. 25.]" (emphasis supplied)

On December 21, 1965, a special election was held in Jackson County at which a majority of the voters participating in the election voted in favor of constructing an addition to a nursing home building owned by the county, in order to provide needed additional accommodations and nursing home facilities for the citizens of Jackson County. Construction bonds in the sum of $250,000.00 were authorized to be issued to complete the proposed improvements. Suit was instituted in chancery seeking a permanent injunction against appellee, the County Judge of Jackson County, as to any further proceedings in connection with the levy and collection of a building tax and the issuance of the bonds for the project, it being contended that a nursing home was not a county hospital and that the instant construction project was not authorized under the provisions of Constitutional Amendment No. 17, nor authorized by any other statute or constitutional amendment.

The case was heard by the Chancellor upon the pleadings and upon stipulation of the parties as to the pertinent facts. We quote from such stipulation as follows:

"That the proposed construction will be an addi-

tion to a building owned by the County which building now meets the minimum standards for licensing as a 'Nursing Home' under the provisions of Act No. 414 of the Acts of Arkansas of 1961, but does not meet the minimum standards thereunder for licensing as a 'hospital'. After the construction is completed, the building, as it then exists, will still meet the minimum standards for licensing as a Nursing Home, but not as a hospital, under the said Act No. 414. The building will be hereafter referred to as 'Nursing Home'.

"The Nursing Home will provide medical and nursing services to patients, but will not provide all of the services that would be required to be provided by a building qualifying as a hospital under the provisions of Act No. 414 (which type of building will be hereafter referred to as 'General Hospital'). The major areas of service provided by a General Hospital and not by a Nursing Home are surgical, X-ray and obstetrical. Other similarities and differences between a Nursing Home and a General Hospital include:

"(a) Every patient in either a Nursing Home or a General Hospital must be under the medical supervision or care of a physician and all medications administered under the direction of the physician. Provision must be made in the case of either type patient for emergency treatment. Neither type institution is required to have physicians constantly present.

"(b) Both General Hospitals and Nursing Homes are required to have nursing staffs under the supervision of a registered nurse. Both may also employ licensed practical nurses.

"(c) General Hospitals are required to have surgical departments offering services and having facilities of a type approved by rules and regulations

of the Arkansas State Board of Health. Nursing Homes are not required to have surgical facilities or offer surgical services.

"(d) General Hospitals are required to have obstetrical departments, with labor beds, delivery rooms and nurseries, with the facilities, and offering the services prescribed by the Arkansas State Board of Health. Nursing Homes are not required to have such facilities or offer such services.

"(e) Nursing Homes are required to have facilities for recreation and dining for ambulatory patients which are not required of General Hospitals.

"(f) A General Hospital is required to have a more elaborate bedside call system to enable patients to summon assistance than are Nursing Homes, although Nursing Homes are required to have a call system sufficient to enable patients to attract attention.

"(g) A General Hospital is an institution designed for performing more intensive services to the sick and infirm than is a Nursing Home, but a Nursing Home also provides services to the sick and infirm and a 'Boarding Home' or home providing primarily domiciliary care would not be eligible for licensing as a Nursing Home under Act No. 414.

"(h) Because of the 'central core facilities' (operating room, delivery room, X-ray equipment, et cetera) required in a General Hospital and not in a Nursing Home, the cost per square foot of constructing a Nursing Home is considerably less than the cost of constructing a General Hospital to house the same number of patients.

"(i) A General Hospital is required to provide facilities for emergency treatment, as prescribed by

the Arkansas State Board of Health. A Nursing Home is not required to have such facilities."

The Chancellor held that the nursing home was a type of hospital within the meaning of Constitutional Amendment No. 17 and denied appellant injunctive relief as to the construction project, and the case now reaches us on appeal.

In a recent case decided by this Court, *Raney* v. *Raulston, County Judge,* 238 Ark. 875, 385 S. W. 2d 651 (1965), we held that the construction of a combination general hospital and nursing home as a single facility could properly and validly be built and equipped under authority of Amendments 17/25 of our Constitution. In the case before us, there is no showing that the nursing home facility owned by the county, which is proposed to be expanded, is in any way consolidated with a county general hospital, nor is it suggested in the record that the administrative personnel of a county general hospital will control and operate the expanded nursing home facility.

The stipulation of facts in this case illustrates the numerous and substantial differences in the services of a nursing home and those of a hospital.

We have liberally construed Amendment No. 17 in the past. See *Garner* v. *Lowery,* 221 Ark. 571, 254 S. W. 2d 680 (1953); *Hollis* v. *Erwin, County Judge,* 237 Ark. 605, 374 S. W. 2d 828 (1964), and also in Raney v. Raulston, County Judge, *supra.* We have also said that in construing the provisions of the constitution we endeavor to effectuate as nearly as possible the intent of the people in passing the measure, and, if necessary, as a means of attaining that end, a liberal interpretation will be warranted, but we have also added, "as it may be ascertained from the language used". See *Walton* v. *Arkansas Construction Commission,* 190 Ark. 775, 80 S. W. 2d 927 (1935). But to say that the nursing home in this instance, an entirely separate facility, is a hos-

pital within the meaning of Amendment No. 17 would require us to go far beyond the bounds of a liberal construction of Amendment No. 17.

We have therefore concluded that the nursing home project in this case was not a county hospital project as contemplated under the provisions of Amendment No. 17 to our Constitution.

The decree entered by the Chancellor is reversed with directions that a substitute decree, not inconsistent with this opinion, be entered.

Reversed and remanded with directions.

BREWER ET AL *v.* HAWKINS

5-3912 408 S. W. 2d 492

Opinion delivered November 21, 1966

Bethel B. Larey and *Richard S. Arnold,* for appellants.

Gordon & Gordon and *Jack L. Lessenberry,* for appellee.

GUY AMSLER, Justice. This is a taxpayers' suit against the Sheriff and Collector of Conway County that was originally filed in the Conway County Chancery Court. The defendant (appellee here) demurred and the Chancellor, sua sponte, transferred the case to the Circuit Court. The Circuit Judge denied a motion to transfer the cause back to equity, sustained the demurrer and dismissed the suit with prejudice. This appeal followed.

The petition in chancery set forth the duties of the collector with respect to the collection of various fines, costs, fees, commissions and other emoluments of his office and accounting therefor and then alleged, *inter alia*:

> "That Plaintiffs are informed and believe that Defendant, Marlin Hawkins, beginning at least as early as 1955 and continuing at least until 1961, wrongfully appropriated, exacted, and converted to his own use, substantial sums of money collected and received as fines and costs, which sums should have been paid over into the County Treasury of Conway County as required by the laws of the State of Arkansas.
>
> "That Plaintiffs are informed and believe that beginning at least as early as 1955 and continuing at least until 1961, Defendant, Marlin Hawkins, collected, received, wrongfully appropriated, exacted, and converted to his own use substantial sums of money as fees, costs, fines, salaries, emoluments, commissions, and perquisites of office in excess of

his lawful yearly compensation, to-wit, five thousand ($5,000.00) Dollars per annum, which sums he has failed to pay into the County Treasury of Conway County as required by the Constitution and laws of the State of Arkansas.

"That the wrongful appropriations and exactions hereinabove alleged were carried out by means of a continuing combination, conspiracy, agreement, and concert of action by and among the Defendant Marlin Hawkins and others, consisting of the following scheme and device: Said Defendant would cause to be arrested certain persons and would charge them with one serious offense carrying a large fine; upon conviction, however, the case would be entered of record as though a number of small offenses, totaling in fines far less than the initial single charge, had been committed; thus, per-conviction fees would be multiplied, and a small fraction only of the large fine originally exacted would be paid to the County, the remainder being converted by said Defendant and his confederates to their own use. Plaintiffs have available to them documentary evidence of more than 25 such transactions, and verily believe that hundreds of others, as yet unknown, took place.

"That Plaintiffs are informed and believe that at diverse times beginning at least as early as 1955 and continuing at least until 1961, Defendant, Marlin Hawkins, with intent to deceive, did knowingly make or cause to be made numerous inaccurate, untrue, and false entries in certain public records, to-wit:

> Transcripts and dockets of proceedings of Justice of the Peace Courts in Conway County, Arkansas,

which entries were calculated to, and did in fact, prevent disclosure of his wrongful appropriations and conversions above described. As a result of the

inaccuracies, untruths, and falsifications in these public records, Plaintiffs were not able in the exercise of reasonable diligence to detect the wrongful appropriations, wrongful exactions, and conversions until 1964, when it was discovered that said public records contained inaccurate, untrue, and false entries.

"That Defendant, by his high office, has been placed in a fiduciary position to Plaintiffs and all those others similarly situated, was permitted access to, custody of, and dominion over the complained of transactions and records of these transactions; that these transactions were numerous, complicated, and involved, and peculiarly within the knowledge of Defendant; and that Defendant accordingly has an affirmative duty to make a full fiduciary accounting."

Prayer was for an accounting, judgment in favor of the county and related relief.

We have an abundance of cases of this sort approving equity as the proper forum, especially where an accounting is involved. *State Use Greene County* v. *McCoy,* 187 Ark. 827, 62 S. W. 2d 967; *Fuller* v. *State, Use of Craighead County,* 112 Ark. 91, 164 S. W. 770; *McCoy* v. *State, Use of Greene County,* 190 Ark. 297, 79 S. W. 2d 94. The learned Chancellor should not have transferred the case to the Circuit Court.

The Circuit Judge predicated his dismissal of the suit largely on the statute of limitations and we think he thereby fell into error.

In testing the sufficiency of a complaint that is assaulted by means of a demurrer we accept as true all allegations in the complaint that are properly pled. Also all inferences reasonably to be drawn therefrom. *Perrin* v. *Price,* 210 Ark. 535, 196 S. W. 2d 766; *Watson* v. *Poindexter,* 176 Ark. 1065, 5 S. W. 2d 299; *Herndon* v. *Gregory,* 190 Ark. 702, 81 S. W. 2d 849, 82 S. W. 2d 244;

St. Paul-Mercury Indemnity Co. v. *City of Hughes,* 231 Ark. 530, 331 S. W. 2d 106.

The averment of concealment in plaintiffs' petition in Chancery, when accepted as true, renders the pleading invulnerable to demurrer and presents a fact question on which the appellants are entitled to offer proof. If it can be shown that there was in fact concealment by appellee the statute of limitations would not begin to run until discovery of the condition complained of. *State of Tennessee* v. *Barton,* 210 Ark. 816, 198 S. W. 2d 512; *Quattlebaum* v. *Busbea,* 204 Ark. 96, 162 S. W. 2d 44; *City National Bank* v. *Sternberg,* 195 Ark. 503, 114 S. W. 2d 39.

Appellee makes reference to a number of suggested deficiencies in the complaint and the possible necessity for bringing in additional parties but these are all matters that may be brought to the attention of the trial court.

The case is reversed and remanded to the Circuit Court with directions that it be transferred back to the Chancery Court of Conway County for further consideration after the demurrer has been overruled.

SOLOMON JEROME SMITH JR. *v.* ELLA SMITH ET AL

5-3982 409 S. W. 2d 317

Opinion delivered November 21, 1966
[Rehearing denied January 9, 1967.]

G. E. Snuggs, for appellant.

L. Weems Trussell and *Thomas D. Wynne Jr.* and *Frank W. Wynne,* for appellee.

GUY AMSLER, Justice. This is another of numerous futile efforts by appellant to obtain relief which he alleges has been denied him by this court and by two trial courts on some five different occasions.

A summary of background facts will demonstrate the persistency and vainness of the endeavors in behalf of appellant's position.

Henderson Smith died in October, 1942, leaving a widow, appellee Ella, (his second wife) and two children as his only heirs at law. At the time of his demise he owned two parcels of land consisting of 25 acres. His home was located on one tract. Appellant Solomon Jerome Smith, Jr., a grandson of Henderson Smith, succeeded to ownership of an undivided one-half interest in

the estate upon the death of his father Solomon Smith, Sr.

On March 20, 1958, Ella Smith filed a partition suit in the Chancery Court of Dallas County, Arkansas, against the heirs at law of her deceased husband. Solomon Jerome Smith, Jr. and his guardian, Ira Lee O'Guinn, filed an answer and counter claimed against Ella Smith for waste allegedly committed by her. Affirmative relief was granted Solomon Jerome Smith, Jr. and his guardian (for waste committed by the widow) in a decree rendered on April 14, 1961.

The chancellor also decreed that the land was not susceptible of division in kind hence a commissioner was appointed to make public sale of all the land except two acres, which were set aside as Ella's homestead. A ten-acre tract of wild and unimproved land was sold to appellee Edgar McCollum, and a thirteen-acre tract was sold to appellee Billy A. Puterbaugh. McCollum and Puterbaugh then became parties to the Chancery proceedings by virtue of their purchases at the commissioner's sale.

Solomon Jerome Smith, Jr. and his guardian appealed to this court from the partition decree entered on April 14, 1961. Reversal of the decree was sought on the grounds that there had been no service of process upon him or his guardian and that there were other irregularities in the partition proceedings. He also contended that Ella Smith could not maintain a suit for partition of the lands in which appellant had an undivided interest.

We found no error in the proceedings and decree of the Dallas Chancery Court. *Smith* v. *Smith,* 235 Ark. 932, 362 S. W. 2d 719. Judgment on the mandate was entered in Dallas County and Solomon Jerome Smith, Jr. and his guardian, Ira Lee O'Guinn, accepted the benefits accruing to him under the decree of partition and accepted his part of the proceeds from the commissioner's sale.

On February 28, 1964, the Arkansas Highway Commission filed suit in the Circuit Court of Dallas County, Arkansas, to acquire right-of-way for an intersection of Highways No. 79 and 167 and a controlled access bypass of Fordyce.

The two-acre homestead allotted to Ella Smith in the 1958 partition suit was condemned and Solomon Jerome Smith, Jr. and his guardian (because of his remainder interest) were made parties defendant. Solomon Jerome Smith, Jr. received his share of the proceeds deposited by the Arkansas Highway Commission for the homestead land and improvements located thereon. There was a court order determining the commuted value of dower and homestead rights of Ella Smith and the amounts to be paid to the widow and the remaindermen.

A part of the land which Billy A. Puterbaugh acquired under the commissioner's deed from the aforementioned partition sale was also involved in a condemnation suit. Solomon Jerome Smith, Jr., by his guardian, Ira Lee O'Guinn, intervened in this suit for asserting claim to the funds deposited in the registry of the court for the taking of Puterbaugh's land. By answer Smith alleged that he owned an interest in the Puterbaugh land because of the invalidity of the partition decree of April 14, 1961, by which Puterbaugh acquired title. The Circuit Court, on April 10, 1964, found that Solomon Jerome Smith, Jr. had no interest in the Puterbaugh land and that any claim by Smith and his guardian was without foundation.

Timely notice of appeal to the Supreme Court from the findings and judgment entered by the Circuit Court was filed, and an appeal bond was made. However, the appeal was never perfected.

On August 18, 1964, Solomon Jerome Smith, Jr., having reached the age of 21, filed a second intervention in the Circuit Court condemnation case. In a num-

ber of pleadings Smith claimed a half interest in the Puterbaugh land and the funds deposited by the Highway Commission for the partial taking. These pleadings again placed in issue the alleged invalidity of the decree of partition in Chancery Court under which Puterbaugh acquired title to the land involved.

On November 2, 1964, the Circuit Court found that Smith had no interest in the Puterbaugh tract; that his claim of title to this land had been fully adjudicated; that the judgment entered on April 10, 1964, had become final because no appeal had been perfected; that this judgment was a complete bar to the attempted intervention filed on August 20, 1964. Relief was again denied.

On December 1, 1964, Smith filed notice of appeal from the order of the Circuit Court of November 2, 1964. This appeal was never perfected and the Circuit Court judgment entered on November 2, 1964, became final. This was a third adjudication of the claim of title of Solomon Jerome Smith, Jr. to the Puterbaugh land.

The record in *Smith* v. *Smith, supra,* shows that no notice of appeal was ever filed or served on McCollum and Puterbaugh, (appellees here) who were purchasers at the partition sale ordered by the Chancery Court in 1961. The decree therefore became final as to them. *Miller* v. *Henry,* 105 Ark. 261, 150 S. W. 700.

On June 2, 1965, the instant case was filed (pursuant to the provisions of Ark. Stat. Ann. § 29-506 sub paragraph 8 [Repl. 1962] and § 29-508 [Repl. 1962]) in the Chancery Court of Dallas County against Ella Smith, Billy A. Puterbaugh, Edgar McCollum, and Arkansas State Highway Commission (no service was obtained on the Highway Commission) seeking a review and modification of the partition decree previously entered on April 14, 1961. The complaint is largely a review of the Smith family background and a step by step summary of the multitudinous pleadings and orders in the first case (1961). By and large the complaint em-

bodies only allegations that were contained in pleadings filed by appellant's present attorney in *Smith* v. *Smith, supra,* and the aforementioned litigation in the Circuit Court. About the only new information is that appellant has attained his majority, is in the military service and contends that his constitutional rights have been impinged upon.

Prayer was that the trial court review the decree of April 14, 1961; that such decree be modified and corrected in such manner that appellant will be accorded "due process of law," "equal protection of the law," and that he "have his property rights adjudicated in accordance with the mandates of the Constitution and Laws of the United States of America, and of the Constitution and Laws of the State of Arkansas."

Appellee Puterbaugh filed a motion to dismiss and a counterclaim in which he alleged that Solomon Jerome Smith, Jr. had maliciously slandered the title to his (Puterbaugh's) land by the numerous pleadings, interventions, notices of appeal, willful delay and dilatory tactics in failing to perfect appeals, and the filing of repetitious pleadings alleging matters known to have been previously adjudicated. Appellees, Ella Smith and Edgar McCollum, filed motions to dismiss bottomed on pleas of res judicata. Following a hearing the chancellor dismissed the complaint of appellant holding that all issues had been previously adjudicated and transfered the counter-claim of Puterbaugh to the Circuit Court. There is no cross appeal from the transfer order, hence we are requested to review only the trial court's order dismissing appellant's complaint.

In *Ted Saum & Co.* v. *Swaffar,* 237 Ark. 971, 377 S. W. 2d 606, we said:

> "The true reason for holding an issue res judicata is not necessarily for the identity or privity of the parties, but the policy of the law to end litigation by preventing a party who has had one fair trial of a

question of fact from again drawing it into controtroversy..... Further, res judicata is applicable not only to an issue actually litigated, but also governs as to matters within the issue that might have been litigated. *Thomas* v. *McCollum,* 201 Ark. 320, 144 S. W. 2d 467; *Rose* v. *Jacobs,* 231 Ark. 286, 329 S. W. 2d 170."

When the facts related above are considered in the light of the foregoing well established rule it becomes crystal clear that the learned chancellor properly dismissed appellant's complaint and that it is our duty to affirm his holding, which is accordingly done.

McFaddin, J., not participating.

J. H. Robinette et al *v.* Claude H. Brooks et al

5-3951 408 S. W. 2d 490

Opinion delivered November 21, 1966

Guy H. Jones, for appellant.

Robert W. Henry, for appellee.

HUGH M. BLAND, Justice. This is a suit to quiet title to 40 acres of land in Faulkner County, Arkansas. In 1953 appellees leased the 40-acre tract from Mrs. Minnie Meeks, constructed fencing around the land thereby enclosing it within their overall or perimeter fences. In 1956 Mrs. Meeks discovered that she did not own this particular tract but appellees continued in possession, pasturing the lands, built a road to and across it, cut posts off of it and otherwise used the land as their own.

In 1964 appellants obtained a quitclaim deed to the land from the widow of C. E. Gentry who had obtained a deed from one John Griffith purporting to convey to him an undivided one-half interest in the land. The only claim Griffith had was a tax deed from the State issued in January 1930 for forfeiture of the taxes in 1923. On January 20, 1930 Mr. Griffith executed and delivered a quitclaim deed to H. L. Henry and C. E. Gentry. Mr. Gentry died testate in 1952, devising his property to his widow, Edna M. Gentry. Mrs. Gentry then executed and delivered a quitclaim deed to appellant, John H. Robinette, on May 21, 1964. Appellants' predecessors in title, including John Griffith, were never in possession of the lands and did not pay the taxes.

The taxes upon these lands for 1945 to and including 1962 were paid by Robert C. Carmichael, originally a party to the suit until appellees obtained a quitclaim deed from Carmichael and his wife. Mr. Carmichael testified he paid these taxes by mistake. Appellee paid the taxes for 1963 and appellants paid them for 1964.

Four witnesses testified for appellees and clearly established that appellee purchased 410 acres in 1952 and all of these lands were enclosed with a continuous fence and since leasing the lands in 1953, has maintained

his fences so as to enclose the subject property within his overall fences.

To rebut this testimony appellants produced one witness, John H. Robinette, who testified as to the fencing but added little, if any, to the testimony already adduced since he had not seen subject lands and had not been in the area from 1953 to 1963.

After trial, the court found that the appellees have had actual pedal, adverse possession of the 40 acres in question for the statutory period prior to institution of this suit on September 16, 1964; that the pasturing of cattle for at least seven years prior to suit, when taken together with the cutting of posts, working a small road to reach said lands, the maintenance of substantial fences around the lands and all of the other lands occupied by appellees by lease or otherwise; that said lands were enclosed and appellees' cattle were kept within the overall fence and enclosure. The court entered a decree quieting title to the lands in appellees.

For reversal, appellants contend (1) that appellees do not have a claim of adverse possession under color of title, (2) non-payment of taxes by appellees, (3) appellees did not occupy said lands for statutory period, (4) no notice to anyone that appellees claimed said lands and (5) that appellees never had any actual, open, notorious, continuous, hostile and exclusive possession of the land involved.

We see no merit in any of the contentions of appellants.

Both parties cite Varn's Annotated Supplement to Jones, Arkansas Titles, § 1498, page 910, as a correct statement of the law of this state:

> "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 owner."

The testimony of the witnesses clearly establishes that notoriety of possession, as defined in *Terral* v. *Brooks,* 194 Ark. 311, 108 S. W. 2d 489 and *Newman* v. *Newman,* 205 Ark. 590, 169 S. W. 2d 667, was proven by a preponderance of the evidence.

On the question of notice, we have consistently held that notice of adverse possession may be actual or it may be implied by facts and circumstances such as pasturing stock, the existence of fences, the cultivation or improvement of land. *Black* v. *Clary,* 235 Ark. 1001, 363 S. W. 2d 528; *Lollar* v. *Appleby,* 213 Ark. 424, 210 S. W. 2d 900.

The main contention urged by appellants is that appellees did not construct a fence around all four sides of this particular 40-acre tract. This 40 acres is, however, within the perimeter of the overall fence around all of appellee's lands. This contention is refuted in the case of *Burns* v. *Mims,* 224 Ark. 776, 276 S. W. 2d 76, where we said:

> "* * * Hostility of possession is to be judged by the views and intentions of the person occupying the property, not by those of the landowner whose title is being extinguished. *Trapnall* v. *Burton,* 24 Ark. 371, 395. It was enough for the appellee to erect a single fence encircling the entire tract; he was not required to subdivide his claim by the construction of cross fences conforming to the record ownership of the interior lots. The appellant was put on notice of the hostile claim by the fact that his access to his lots was obstructed from every direction."

See, also, *Kieffer* v. *Williams,* 240 Ark. 514, 400 S.W. 2d 485 (1966).

The chancellor made the following findings of fact:

"The sole issue for decision in this case is whether plaintiffs have had actual pedal, adverse possession of the 40 acres in question for the statutory period prior to institution of this suit on September 16, 1964. It is held that the pasturing of cattle for at least 7 years prior to suit, when taken together with the cutting of posts, the road work, and the overall enclosure, is sufficient to constitute adverse possession of the lands in question. The evidence shows that substantial fences were maintained around plaintiffs' lands and all of the other lands, and even though gates were across the public road, this did not prevent the enclosure. The cattle were kept within the overall fence and this was not an open range type of situation..."

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

MADELYN FRAZIER *v.* JAMES L. SEWELL

5-4034 408 S. W. 2d 597

Opinion delivered November 28, 1966

Howell, Price & Worsham, for appellant.

Wright, Lindsey & Jennings, for appellee.

CARLETON HARRIS, Chief Justice. On May 1, 1965, an automobile driven by James T. Frazier, Madelyn Frazier, his wife, being a passenger in the car, was struck by an automobile operated by James Sewell. The collision occurred on Highway 65, about five miles south of Conway. Subsequent thereto, the Fraziers, appellants herein, instituted suit against appellee Sewell, Frazier seeking property damages in the sum of $750.00, and $5,000.00 as punitive damages, and his wife seeking damages for personal injuries in the amount of $50,000.00. Sewell answered, asserting that the collision was caused by the negligence and carelessness of Frazier; that Mrs. Frazier failed to exercise ordinary care for her own safety, and that negligence and carelessness on her part contributed to her alleged injuries. The case proceeded to trial, but Mr. Frazier took a non-suit prior to submission to the jury, leaving Mrs. Frazier's cause of action still at issue. The jury returned a verdict for appellee, and from the judgment so entered, Madelyn Frazier brings this appeal. For reversal, appellant presents two points, first, that the court erred in refusing the comparative negligence instruction requested by both appellant and appellee, though instructing on "contributory negligence," and this was error. The second ground for reversal is that the verdict was contrary to the weight of the evidence.

Appellant requested an instruction numbered AMI 2102, which relates to comparative negligence. The court refused to give this instruction as offered, and appellant made a general objection. Thereupon, the court modified the instruction, and gave it to the jury. To the instruction, as modified, there was a general objection by appellee, but appellant made no objection whatsoever. Appellee asked for a similar instruction to AMI 2102 (defendant's requested instruction No. AMI 2109), but it was refused. The court also gave an instruction on the burden of proof, as follows:

"As a defense to the claim of Madelyn Frazier, it is contended by J. L. Sewell that she was guilty of

negligence which was a proximate cause of her damages. A party who asserts the defense of negligence on the part of a person claiming damages has the burden of proving this defense."

Appellant made only a general objection to this instruction.

There is no merit in appellant's contention. Let it first be said that, of course, appellant cannot complain of the court's failure to give an instruction requested by appellee, nor was there any objection by appellant to the giving of the instruction requested by her, as modified by the court. At any rate, the request for appellant's instruction AMI 2102 was subsequently withdrawn. The withdrawal of the requested instruction actually meant that appellant no longer wanted that instruction, and she was thereby placed in the same status as though the instruction had never been requested.[1] We have repeatedly held that a party cannot complain of a trial court's failure to give an instruction unless same is requested. *Ragon* v. *Day,* 228 Ark. 215, 306 S. W. 2d 687, and *Clay* v. *Garrett,* 228 Ark. 953, 311 S. W. 2d 522. As far as the instruction on the burden of proof is concerned (termed "contributory negligence" by appellant), appellant made a general objection, which would only be effective if the instruction was inherently erroneous. *Vogler* v. *O'Neal,* 226 Ark. 1007, 295 S. W. 2d 629. The instruction is obviously not inherently erroneous.

It is next urged that the verdict is against the weight of the evidence, but there is no point in setting out the evidence, since, though we should agree that this is true, there is no action that this court can take. We have held on divers occasions that the weight of the evidence and credibility of the witnesses are solely with-

[1]In 88 C.J.S. § 305, Page 821, we find: "Instructions may and should be confined to issues insisted on at the trial, and where issues are abandoned or expressly withdrawn by the parties, the court may omit to submit them to the jury."

in the province of the jury. In *Jonesboro Coca Cola Bottling Company* v. *Holt,* 194 Ark. 992, 110 S. W. 2d 535, this court, quoting 4 C. J. 859, 860, said:

" 'The fact that the appellate court would have reached a different conclusion had the judges thereof sat on the jury, or that they are of the opinion that the verdict is against the preponderance of the evidence, will not warrant the setting aside of a verdict based on conflicting evidence.' 4 C. J. 859, 860."

Appellant relies upon *Koonce* v. *Owens,* 236 Ark. 379, 366 S. W. 2d 196, but there, the *trial court* set aside the judgment, finding the verdict to be against the weight of the evidence. On appeal, we simply held that the trial court did not abuse its discretion in ordering a new trial. In the instant case, appellant made no motion for a new trial in the court below.

Finding no reversible error, the judgment is affirmed.

MOZELLE BINGAMIN ET AL *v.* CITY OF EUREKA SPRINGS ET AL

5-4132 408 S. W. 2d 607

Opinion delivered November 28, 1966

M. D. Anglin, for appellants.

Hardy W. Croxton and *James B. Coates,* for appellees.

CARLETON HARRIS, Chief Justice. This is an appeal in an election contest, in which, *inter alia,* the validity of certain absentee ballots is questioned.

On June 7, 1966, a special election was held in the City of Eureka Springs, at which time three different questions were submitted to the voters, but two of those questions are not involved in this appeal. The question at issue relates to a proposed bond issue under Amendment 49 to the Constitution of the State of Arkansas. On the face of the returns, the bond issue was certified by the election commissioners as having been adopted by a vote of 363 for the issue and 359 against the issue. Within proper time, Mozelle Bingamin, and others as contestants, filed an action in the Circuit Court contesting the result of the election. Among other allegations (with which we are not here concerned), appellants challenged the votes of six persons who were residents of the Municipal Hospital in Eureka Springs, and who purportedly voted by absentee ballot.[1] After hearing testimony, the court held that the six absentee votes were valid, found that the final vote was 363 for the bond issue and 359 against, and appellants' complaint was dismissed.[2] From the judgment so entered, comes this appeal.

The absentee ballots challenged were those of Mattie Rowland, Verda Cox, Alice Aimes, Jessie Dukeminier, Joe T. Nelson, and Roscoe Fowlks. During the course of the trial the Circuit Court, with the lawyers

[1]Other votes cast at the polling place were also challenged, but under our holding, there is no need to discuss the validity or invalidity of these ballots.

[2]The court held one vote invalid, which had been allowed by the election commission, but validated another, which had been disallowed by the election commission, leaving the same total.

and court reporter (apparently by agreement), went to the hospital and took the testimony of these voters.

Before considering this evidence, we deem it first proper to review the statutes relating to absentee voting. Ark. Stat. Ann. § 3-1125 (Repl. 1956) sets out the manner of making applications for absentee ballots, as follows:

"Applications for absentee ballots may be made in one of the following three [3] ways, *in no other manner* [emphasis supplied] and then only on the form set out in this Act [§ § 3-1123—3-1136].

(a) In person at the office of the County Clerk of the county of residence of the voter.

(b)[3] By mail; provided that, applications by mail must be received in the office of the County Clerk of the county of residence of the voter not sooner than ninety (90) days, nor later than one (1) day before the election for which such application was made. When there are first and second primaries, one (1) application may be used to request ballots for both primaries if the request is made as provided on the application form. Provided, however, that no ballot shall be mailed to any applicant except in strict compliance with the provisions of Amendment 51 to the Arkansas Constitution.

(c) By delivery of the application form to the office of the County Clerk of the county of residence of the applicant not later than 1:30 p.m. on the day of the election. *Delivery may be made only by the elector,*[4] *or the husband, wife, son, daughter, sister, brother, father or mother of the applicant.*" [Emphasis supplied.]

[3]This sub-section, originally passed with the other sections in 1949, was amended by Act 417 of 1965.

[4]The word, "elector," is somewhat confusing, and could be included by mistake; it also could have reference to the right of the voter to return his application to the clerk, and obtain a ballot at any time prior to election day. This word does not appear in § 3-1130, which deals with the manner of voting an absentee ballot.

Section 3-1126 sets out the required application form, in which the prospective voter directs the clerk to either mail a ballot to him, or to "send by (name of relative) an absentee ballot."

Section 3-1130 provides the manner in which absentee ballots must be cast, and reads as follows:

"Absentee voting may be accomplished in one of three [3] following methods, *and in no other manner* [emphasis supplied]:

(a) On ballots cast in the office of the County Clerk in the County of residence of the voter during regular business hours of any day not earlier than the fifteenth [15] day before election day, not later than 6:30 p.m. on election day.

(b) By ballot cast by mail which must be received in the office of the County Clerk of the county of residence of the voter not later than 6:30 p.m. on election day.

(c) By delivery of ballot to the office of the County Clerk of the county of residence of the voter not later than 6:30 p.m. on election day. *Delivery may be made only by the husband, wife, son, daughter, sister, father or mother of the absentee voter.*" [Emphasis supplied.]

Amendment 51, Section 13, Sub-section (d), the Voter Registration Amendment, provides:

"(d) Absentee voting shall be conducted in the same manner as now provided under the laws of the State; provided, that the Permanent Registrar shall determine that the signature on the application for absentee ballot is identical with the signature appearing on the voter's Affidavit of Registration before mailing or passing out an absentee ballot. * * *"

With these provisions in mind, let us examine the testimony. The evidence reveals that the application forms were filled out for the voters in question by Ruby Bailey, Deputy Clerk, and were apparently taken by Mrs. Maxine Weaver to the Eureka Springs Municipal Hospital, where the six absentee voters in question were staying. Though the deputy clerk stated that she received requests for these ballots by mail from these six persons, none of the voters testified that they mailed in such a request. Excerpts from the testimony of several voters are herewith quoted.

From the testimony of Mattie Rowland:

"Q. Did you vote by absentee ballot where somebody brought the ballot around to you and you voted?

A. Yes, I guess I did.

Q. Who brought the ballot in here and gave it to you? The affidavit?

A. Did you, Sister?

Q. Did you put in any request for it? To anybody to send you a ballot?

A. Well, I don't know. Did I, Sister?

Q. Now, wait a minute. Did you write any letter or have any of your relatives write a letter?

A. No.

Q. Did anybody come in here and ask you to vote in that election?

A. No.

Q. Did you know there was going to be an election before the ballot was brought in?

A. No, sir, I sure didn't.

Q. Did you mark your own ballot?

A. I guess I did, didn't I Sister?"

From the testimony of Alice Aimes:

"THE COURT: I used to know you down at the Basin Park. Now, did you vote in this bond election?

A. No, sir, I didn't. I didn't vote at all. They said they was coming for me to vote. I can't go out, see. * * *

THE COURT: Did you mark a ballot, a piece of paper?

A. No.

THE COURT Was this the bond election?

A. Well, now, this was the election they had just a few days ago.

THE COURT: But now, in June, the bond election, do you remember?

A. Well, now I just don't know whether I did, or not. I wouldn't say. It's just too long ago. I remember now when they had it but I guess I did.

THE COURT: You won't say you did, or you didn't?

A. No, I won't.

THE COURT: Did you vote for the bond, or against it?

A. I voted for it if I voted at all.

THE COURT: You voted for it?

A. Uh-huh. If I voted at all.

THE COURT: But you wanted to vote and you asked for a ballot and did you ask for the ballot to be brought up?

A. No, they just brought it up to me and asked me if I wanted to vote and I said —. * * *

MR. ANGLIN: Q. Do you know who brought the ballot in here and gave it to you, Alice?

A. No, in fact, I believe it come through the mail.

Q. Did you apply for it through mail?

A. No, Mrs. — somebody came in and signed up for all the papers. I guess she did; I don't know."

From the testimony of Verda Cox:

THE COURT: Did you know about this bond election they had in the City of Eureka in June?

A. Well, the bond election for what? They've had so many. * * *

THE COURT: You voted absentee?

A. Well, then I was able to stand on my own two feet and vote.

THE COURT: Did you go down June 7th and vote?

A. I believe it was the last time that they brought me by the polling place.

THE COURT: You think you went to the polling place?

A. Well, there was a little house down here on the side of the street.

THE COURT: Who took you down?

A. Well, I come up with a cab driver who was coming to the hospital and I stopped off to vote."

Subsequently, the last two persons, after an extended and somewhat leading examination, finally stated that they voted absentee, though it is, we think apparent, from the quoted portions of their testimony, that these statements (that they voted absentee) can hardly be taken as completely reliable, and certainly cannot be considered substantial evidence.

Jessie Dukeminier, whose vote was likewise counted as valid, testified that she went to the polls and voted, and did not vote absentee, and the reasons for the court sustaining this vote are not apparent.

Joe Nelson, another patient in the nursing home, testified that someone at the hospital made the request for the applications; that both the applications and the ballots were brought to the hospital.

Mrs. Bailey testified that she "thought" that the applications were taken to the hospital, by Mrs. Weaver. Mrs. Weaver admitted going to the hospital, but did not say whether she took applications and ballots, or either; she stated that she had no part in voting any of the persons whose votes are here in question, was not related to any of the voters, and she did not testify that she mailed the applications or ballots to the registrar. Mrs. Bailey's testimony is very confusing. Reading it one way, it could be interpreted as stating that the absentee ballots were returned by United States

Mail. Reading it another way, it could be interpreted to mean that the applications were received by United States Mail, and actually, the evidence tends toward this interpretation. In fact, the testimony of both Mrs. Weaver and Mrs. Bailey is ambiguous, vague, and completely unsatisfactory.

Sister Mary Martina Bowles is the Administrator of the Eureka Springs Municipal Hospital. Relative to the manner in which the applications and ballots were received, Sister Bowles testified as follows:

"Q. Do you know who brought those affidavits up there to the hospital and left them there for them for absentee ballots?

A. Mrs. Maxine Weaver. * * *

Q. Who took these ballots and affidavits and gave them to the patients?

A. I did. * * *

Q. Who asked you to do it?

A. Mrs. Maxine Weaver brought the applications up and I took them to the patients and they signed them and I brought them back to her.

Q. Did you tell them what they were voting for?

A. Yes, I did."[5]

We think the quoted testimony makes clear that the statutes setting forth the manner of absentee voting were not complied with, and, in fact, the evidence, all taken together, lends itself to no logical interpretation, except that both the applications for absentee ballots, and the ballots, were handed to the voters and executed on the same occasion. This is in direct conflict with the

[5]No criticism is intended of the hospital administrator for taking these ballots and applications around, since she evidently thought she was rendering a service to her patients, and was not familiar with election laws.

requirements of Sub-section (d), Section 13, Amendment No. 51, heretofore mentioned, which provides that the permanent registrar (County Clerk) "shall determine that the signature on the application for absentee ballot is identical with the signature appearing on the voter's Affidavit of Registration *before mailing or passing out an absentee ballot.*"[6]

Suits in election contests frequently show irregularities, and Amendment 51, adopted comparatively recently by the people, contains provisions aimed at correcting this situation. It is necessary that these provisions of the amendment, and the statutes referred to, relating to the duties of voters in applying for, and casting, absentee ballots, be strictly complied with.

Here, not a single one of the six voters directly stated that he or she *first* executed an application to vote absentee. Conflicting statements were made by some of the witnesses relative to the manner in which the ballots were received. As previously pointed out, one stated positively that she voted personally at the polls; another first testified that she voted at the polls, but finally said that she voted absentee; another stated at the outset that she did not vote at all, then testified that she did not know whether she voted absentee or not, and finally, that she did. Another "guessed" that she voted, but she also testified that she did not know from whom she received the ballot, or whether she requested it; she did state that she did not know there was to be an election until the ballot was brought to her.[7] It might be added that not a single one of the six testified either that he (or she) mailed an application, or

[6]Emphasis supplied.

[7]While the record does not reveal the exact project for which the bond issue election was held, it is clear that it was held under the provisions of Amendment 49, which authorizes, after an election, the issuance of bonds for the purpose of securing and developing industry within or near the Municipality holding the election. It is interesting to note that two of the voters made statements whch indicated that they thought they were voting for the nursing home.

requested that one be mailed for him—or that he mailed a ballot, or requested someone to mail it for him. Nor did anyone say that he requested a relative to return an application, or ballot, to the clerk.

We hold there is no substantial evidence that the mandatory provisions of our law, herein cited, were complied with.

Reversed.

BERNARD WHETSTONE *v.* ATLAS DRILLING AND PRODUCTION CO. ET AL

5-4001 409 S. W. 2d 322

Opinion delivered November 28, 1966
[Rehearing denied January 9, 1967.]

William Powell Thompson, for appellant.

Harold L. Hall, for appellee.

ED. F. MCFADDIN, Justice. The big question in this

case is whether a judgment was discharged or assigned. The decision on that question leads to two other questions to be discussed.

By its decree of February 3, 1966, the Chancery Court awarded appellant a judgment against R. Q. Couey for $3,000.00, but refused judgment against any of the other appellees herein; and also quashed an execution which appellant had obtained against some of the appellees. From said decree of February 3, 1966, there is this appeal. The appellant is Bernard Whetstone, Trustee, and Bernard Whetstone, Attorney. The appellees are: Atlas Drilling and Production Company, Jessie Wedgeworth, Lorene Wedgeworth, Bernard N. Nusko, R. Q. Couey, Charles Cammack, C. B. Carpenter, W. C. Dacus, Dave Hilliard, James W. Sedberry, Kay Matthews, Scott Medlin, and James M. Barker.

The facts, while largely undisputed, are quite complicated, and will be detailed chronologically:

1. By judgment entered March 30, 1965, the Chancery Court of Ouachita County awarded to Bernard Whetstone, Trustee, and Bernard Whetstone, Attorney (hereinafter called "Whetstone"), a joint and several judgment against Atlas Drilling and Production Company, Jessie Wedgeworth, Lorene Wedgeworth, Bernard N. Nusko, R. Q. Couey, Charles Cammack, and C. B. Carpenter, in the sum of $16,040.98, with interest and costs. These named persons against whom the said judgment was rendered are hereinafter referred to as "judgment debtors."

2. The judgment debtors gave notice of appeal and filed a supersedeas bond with the following named sureties, each being liable for the amount shown: W. C. Dacus for $3,000.00; Dave Hilliard for $3,000.00; Scott Medlin for $6,000.00; James W. Sedberry for $3,000.00; and Kay L. Matthews for $3,000.00.

3. Even though the intention was to prosecute an

appeal to the Supreme Court from the judgment of March 30, 1965, nevertheless no such appeal was ever perfected. Rather, on October 7, 1965, James Barker, an attorney of Hamburg, Arkansas, had a conference with Whetstone about two matters: one was in regard to obtaining an assignment of the said judgment; and the other was in regard to purchasing the so-called "Moon Lease."[1] Whetstone refused to discuss the Moon Lease with Barker in any way unless and until Barker would first pay for and take an assignment of the judgment.[2]

4. As a result of the said dealings, Whetstone, for $16,800.00, assigned to James M. Barker[3] the aforementioned judgment by proper assignment dated October 7, 1965, and duly recorded in Ouachita County on October 13, 1965. After the assignment of the judgment had been consummated and Barker had paid Whetstone $16,800.00 therefor, the parties then discussed the matter of Whetstone conveying to Barker for some consideration the so-called Moon Lease; and Whetstone and Barker consummated a deal whereby Whetstone deeded his interest in the Moon Lease to Barker for a consideration of $3,000.00, which was to be paid from the first $3,000.00 that should be collected on the said judgment assigned to Barker by Whetstone. In other words, Barker assigned back to Whetstone the first $3,000.00 collected on the judgment. This assignment to Whetstone was duly recorded in Ouachita County on October 13, 1965.

5. The next step in the tangled affairs occurred in November 1965, when James M. Barker filed in the orig-

[1]In the deed which Whetstone made to Barker the description of the Moon Lease is as follows: "The so-called Moon Lease covering the North Half of the Northeast Quarter, Section 32, Township 15 South, Range 17 West" in Ouachita County.

[2]This is made clear by Barker's testimony: "Mr. Whetstone wouldn't talk to me about the 7/16ths interest until we had disposed of the judgment . . . he wouldn't even talk to me about the 7/16ths interest in the Moon Lease until we got the judgment out of the way. . ."

[3]The assignment to Barker contained no qualifying words such as "attorney" or "trustee" etc. It was simply to James M. Barker.

inal case of *Whetstone* v. *Atlas Drilling Company et al* a "Motion for summary judgment," in which Barker sought summary judgment against all of the original judgment debtors as named in Paragraph numbered 1, *supra*, and also against the sureties on the supersedeas bond as named in Paragraph numbered 2, *supra*. Barker alleged that he was the owner and holder of the judgment and that the failure of the parties to perfect the appeal gave Barker the right to judgment against the sureties for the amount for which each was liable. Whetstone intervened against the motion for summary judgment and asserted his rights to the first $3,000.00 collected against the judgment debtors and/or the sureties on the supersedeas bond. His intervention was because of the assignment that Barker had made to him of the said first $3,000.00 collected.

6. The Chancery Court entered judgment for Barker on his Motion for summary judgment on November 5, 1965, and for Whetstone on his intervention on December 13, 1965. On December 13, 1965, Whetstone had execution issued to Pulaski County for $3,000.00 against only these named parties, to-wit: C. B. Carpenter, Dave Hilliard, Scott Medlin, W. C. Dacus, James W. Sedberry, and Kay Matthews.

7. On January 21, 1966, the said Pulaski County parties as just named filed in the original case in the Ouachita Chancery Court a "Motion to quash execution," and later filed a "Motion to set aside judgment." The allegations in these two motions were: (a) that the assignment to Barker fully satisfied the judgment and Whetstone could not thereafter acquire any rights in a satisfied judgment; (b) that motion for summary judgment against the sureties was without the notice required by Ark. Stat. Ann. § 29-107 (Repl. 1962); and (c) that the execution to Pulaski County was void as not being in compliance with Ark. Stat. Ann. § 30-108 (Repl. 1962).

8. On February 3, 1966, the Chancery Court of

Ouachita County had a trial on the Motion to quash and the Motion to set aside judgment; and, after hearing the evidence offered, entered a decree dated February 11, 1966, finding and holding: (1) that the $16,800.00 paid Whetstone by Barker was a full, complete, and final satisfaction of the judgment, and that Whetstone could have no further rights therein; (2) that R. Q. Couey, individually, was indebted to Whetstone for $3,000.00 as consideration for the Whetstone deed to Barker of the Moon Lease, and judgment was rendered in favor of Whetstone and against Couey individually for said amount; and that the judgments of November 1965 and December 13, 1965 (as mentioned in Paragraph numbered 6, *supra*), were set aside.[4]

So much for the chronological recitations. From the decree of February 3, 1966, Whetstone prosecutes this appeal, urging three points, which we now list, but will discuss in our own topic headings:

"I. The Court erred in holding that the assignment discharged the judgment.

"II. No notice was necessary to enter judgment against sureties.

"III. The Court erred in overlooking the fact that regardless of any notice, and regardless of any prior proceedings, that all parties had notice and all parties were present at the time of the hearing on February 3, 1966, and that there was no reason in law or equity why the court could not grant equitable relief to all concerned at that time."

[4]The judgment of February 3, 1966, recites: "IT IS, THEREFORE, BY THE COURT, CONSIDERED, ORDERED AND DECREED, that the judgment entered on March 30, 1965, has been paid in full to the plaintiff, Bernard Whetstone, Trustee. All writs of execution issued subsequent to October 7, 1965, are quashed, and the judgments entered on November 5, 1965, and on December 13, 1965, are set aside. Bernard Whetstone, Trustee, is granted judgment against R. Q. Couey in the amount of $3,000.00, together with all costs of this action."

I. *Was The Judgment For* $16,040.98 *Fully Discharged By The Assignment From Whetstone To Barker?* This is the first and vital question to be decided; because if the assignment from Whetstone to Barker was a discharge of the judgment, then no further rights can flow therefrom. On this point the appellees claim that the assignment to Barker was in fact payment by Couey and/or Nusko; and that payment by one judgment debtor is a discharge of the judgment as to all judgment debtors. Cited in support of such claim is *Biggs* v. *Davis,* 184 Ark. 834, 43 S. W. 2d 724.

We find no merit in appellees' claim; and we hold that the judgment was assigned to Barker just as the assignment instrument stated. Certainly Whetstone did not intend or understand that the assignment to Barker was a discharge of the judgment, because Whetstone accepted back from Barker an assignment of the first $3,000.00 on the judgment. Barker intended to hold the assignment against the judgment debtors and the sureties, as is evidenced by his motion for summary judgment. He did not intend that the money paid Whetstone would be a discharge of the judgment.[5] In American

[5]Here is Barker's testimony:

"THE COURT: The Court would like to ask you a few questions. You bought the judgment from Mr. Whetstone. Did you ever recite what you paid for it?

"A. I paid him exactly what it recited, $16,800.00.

"Q. You then bought from him his right to Moon Lease?

"A. Correct.

"Q. And to pay for that, you assigned him the first Three Thousand Dollars collected under the judgment?

"A. Yes, sir, to be collected. I have the assignment here. It says: 'do hereby grant, bargain, sell, convey, set over and assign unto the said Bernard Whetstone, Trustee, and unto his heirs and assigns forever, all our rights of contribution or otherwise to the first $3,000.00 from Claude B. Carpenter and his bondsman or bondsmen in connection with that certain judgment dated February 10, 1965, in Case No. 10, 216 of the First Division of the Chancery Court of Ouachita County, Arkansas, styled "Bernard Whetstone, Trustee, etc., Plaintiff, v. Atlas Drilling and Production Company, Jessie Wedgeworth, Lorene Wedgeworth, B. N. Nusko, R. Q. Couey, Charles Cammack, and Claude B. Carpenter, Defendants, which judgment has heretofore this day been assigned to James M. Barker

Jurisprudence Vol. 30A, p. 866 *et seq.*, "Judgments" § 1009, there is a splendid discussion of the holdings in various jurisdictions as to when an assignment may be held to be a satisfaction of a judgment:

> "In a considerable number of instances, one who pays a judgment takes an assignment thereof. By so doing, the general principles governing the effect of such payment are not materially modified. The effect of the assignment depends largely upon the same principles as those that govern the willingness of courts of equity to apply the doctrines of contribution and subrogation, namely, the existence of an equity and the intent of the parties. In the case of an assignment of a judgment, the mere making of the assignment discloses the intent that the payment should not operate as a discharge of the judgment."

Certainly in this case the real intent and effect of the entire transaction clearly demonstrates that the assignment to Barker was an assignment and not a satisfaction of the judgment. In a court of equity we pierce the fiction, and so we hold that there was no satisfaction of the judgment, and Whetstone's rights against the judgment debtors and the sureties on the supersedeas bond still exist to the extent of the $3,000.00 reassigned to him. Having thus answered the main question, we will consider the two other points which require decision.

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by said Bernard Whetstone, Trustee, and his wife, in consideration of the payment of $16,800.00.' " That was October 7, 1965.

"Q. The question in the Court's mind is whether these were two separate transactions or divided transactions?

"A. It was two separate transactions. Mr. Whetstone wouldn't talk to me about the 7/16ths interest until we had disposed of the judgment. I believe I am right in that. That was all consummated at one sitting but he wouldn't even talk to me about the 7/16ths interest in the Moon Lease until we got the judgment out of the way and disposed of.

"Q. You paid for the Moon Lease by assigning him a $3,000.00 interest in the judgment you had just bought. $3,000.00 contribution rights or otherwise?

"A. Yes, sir. . . ."

II. *The Summary Judgment.* The only appellees who have filed a brief in this Court are C. B. Carpenter, one of the judgment debtors, and Kay Matthews, one of the sureties on the supersedeas bond; but, regardless of the absence of briefs, we consider the case on its merits as to all appellees because Rule 10 of our Court so provides.[6]

Matthews claims that the Court orders of November and December 13, 1965, awarding Barker and Whetstone judgments against the sureties on the supersedeas bond (as detailed in Paragraph numbered 6, *supra*) were and are void because no notice was given to Matthews of the intention to apply for such judgments. We find no merit in this contention. The sureties on a supersedeas bond become in legal effect parties to the suit. In *White* v. *Prigmore,* 29 Ark. 208, Chief Justice English said:

> "To the argument of counsel, that the sureties have no day in court, it may be answered, that they have the same day in court that the appellant has, having, in legal effect, made themselves parties to the appeal, and agreed to abide and satisfy the judgment."

In *Rogers* v. *Brooks,* 31 Ark. 194, Chief Justice English said:

> "The sureties, having made themselves parties to the suit by entering into the appeal bond, are not entitled to notice before decree against them."

To the same effect, see *Chavis* v. *Golden,* 226 Ark. 381, 290 S. W. 2d 637. So the summary judgment against the sureties was proper in this case.

III. *The Execution To Pulaski County.* By the

[6]This rule reads in part:

"When the appellee has failed to appear and file brief, when the case is called for submission the court may proceed to hear argument for the appellant and give judgment according to the requirements of the case."

judgment of December 13, 1965, Whetstone was awarded a separate judgment for $3,000.00 against Atlas Drilling and Production Company, Jessie Wedgeworth, Lorene Wedgeworth, Bernard N. Nusko, R. Q. Couey, Charles Cammack, C. B. Carpenter, Dave Hilliard, Scott Medlin, W. C. Dacus, James W. Sedberry, and Kay Matthews, jointly and severally; and on the same day (December 13, 1965) Whetstone had execution issued to the Sheriff of Pulaski County against only these named parties: C. B. Carpenter, Dave Hilliard, Scott Medlin, W. C. Dacus, James W. Sedberry, and Kay Matthews.

In its judgment of February 3, 1966, the Court quashed this execution, and the question here presented is the correctness of the Court's quashing of the execution. That question is really rendered moot now because the execution of December 13, 1965, has, by lapse of time, become *functus officio*. See *Page* v. *Griffin*, 255 Ark. 1032, 287 S. W. 2d 453. Furthermore, the execution of December 13, 1965 should have been quashed because of the provisions of Ark. Stat. Ann. § 30-102 (Repl. 1962). That section provides: "No execution shall issue on any judgment or decree, unless ordered by the court, until after the expiration of ten days from the rendition thereof." The judgment in favor of Whetstone for the $3,000.00 was rendered on December 13, 1965, and there was nothing in the judgment that authorized an immediate execution; so the present execution of December 13th was premature by at least ten days.

Many other nice questions might suggest themselves as to executions, but these need not be discussed as they may not arise in view of our holdings on Points I and II herein.

CONCLUSION

It follows that the decree of the Chancery Court of February 3, 1966, is reversed and the cause remanded to the Chancery Court with directions to set aside its decree of February 3, 1966, and reinstate its judgments of November and December 13, 1965, and authorize the

issuance of an execution by Whetstone on the said judgment for $3,000.00. All costs are taxed against appellees.

A. BENJAMIN WHITE ET UX *v.* MRS. HARRY MUNRO

5-4041 408 S. W. 2d 599

Opinion delivered November 28, 1966

Pope, Pratt, Shamburger, Buffalo & Ryan; By *Donald S. Ryan* and *D. Michael Huckabay,* for appellant.

Wright, Lindsey & Jennings, for appellee.

GEORGE ROSE SMITH, Justice. On a rainy night in December of 1964 the plaintiff-appellants, A. Benjamin White and his wife, were traveling south on the Arch Street Pike, near Little Rock. As they drew abreast of Mac's Market, a grocery store owned by the appellee, Mrs. Harry Munro, they collided with a car being driven by A. T. Massery, who was attempting to re-enter the highway after having been shopping at the market. The Whites brought this tort action against Massery and Mrs. Munro. This appeal challenges the trial court's action in directing a verdict for Mrs. Munro.

The charge that Mrs. Munro was negligent rests solely upon the location of her premises with respect to the paved highway. The pavement was twenty feet wide and lay in the center of a sixty-foot public easement. Mrs. Munro's store building was set back from the pave-

ment for a distance varying from 19 to 23 feet, so that it encroached upon the public easement by as much as one foot at one point. For many years the area between the store building and the highway had been paved with asphalt and had been used by the the market's customers for ingress, parking, and egress. It is the appellants' contention that Mrs. Munro was culpably negligent in maintaining a building that impinged upon the public easement by twelve inches and in maintaining a paved parking area that lay within the boundaries of the public easement. It is argued that these physical conditions were unreasonably hazardous to people traveling up and down the highway.

In rejecting the appellants' contentions we need not go beyond the basic issue of simple causation. We lay aside the twelve-inch encroachment, which obviously had nothing whatever to do with this collision. All that remains is the assertion that the existence of a paved area next to the highway involved actionable negligence. This contention is unsound. There are, as we know, thousands upon thousands of commercial establishments—filling stations, grocery stores, drive-in restaurants, and the like—that have paved aprons adjoining city streets and public highways. On balance, such aprons doubtless promote traffic safety, in that they provide off-the-street parking and permit motorists to avoid the dangers incident to right-angle turns into and from the paved highway. If the mere existence of such aprons is a basis for a charge of negligence, then thousands of owners of property along our streets and highways are subject to potential liability for accidents that occur in front of their premises. We need cite only two of our decisions, which show, by their discussion of proximate cause in analogous situations, that there is no basis for a finding of liability upon the facts now before us. *Chicago, R. I. & P. Ry.* v. *Davis,* 239 Ark. 1059, 397 S. W. 2d 360 (1965); *Ben M. Hogan & Co.* v. *Krug,* 234 Ark. 280, 351 S. W. 2d 451 (1961).

Affirmed.

EDDIE MCNEELY *v.* CLEM MILL & GIN CO. ET AL

5-4007 409 S. W. 2d 502

Opinion delivered November 28, 1966
[As amended on denial of petition for rehearing January 16, 1967.]

Tom Gentry, for appellant.

Riddick Riffel, for appellee.

GEORGE ROSE SMITH, Justice. This is a workmen's compensation case. The principal question is whether an employee who suffers a scheduled injury which proves to be totally and permanently disabling is entitled only to the restricted compensation specified for the scheduled injury or to the greater benefits provided for total and permanent disability. The commission took the more liberal view, but its award was set aside by the circuit court. We agree with the commission.

The claimant, at the time of his injury in 1961, was a 50-year-old manual laborer, unable to read or write. His accident resulted in the total loss of the use of his right leg below the knee. That is a scheduled injury, for which he received compensation for the full statutory period of 125 weeks. Ark. Stat. Ann. § 81-1313 (c) (4) and (21) (Repl. 1960). When the present claim for additional benefits was heard the claimant could walk only with the aid of crutches and a leg brace. The commission found, upon proof that we consider to be substantial, that McNeely was totally disabled. Upon that finding the commission ordered that the payment of compensation be continued.

In our opinion the commission gave effect to the legislative intent. The statute defines disability as the incapacity to earn, in the same or any other employment, the wages which the employee was receiving at the time of his injury. Section 81-1302 (e). With respect to total disability the act provides: "Loss of both hands, or both arms, or both legs, or both eyes, or of any two thereof shall, in the absence of clear and convincing proof to the contrary, constitute permanent total disability. *In all other cases,* permanent total disability shall be determined in accordance with the facts." (Our italics.) Section 81-1313 (a). If the statute means what it says, the present case is one in which the question of permanent total disability is to be determined as an issue of fact.

We are convinced, as the appellant contends, that the benefits for scheduled injuries are meant to provide minimum compensation for those injuries rather than complete compensation when, as here, the workman is totally disabled. Indeed, it is demonstrably apparent that in many instances the benefits for scheduled injuries may have little or no relation to the claimant's period of disability. For example, the award for the loss of hearing in one ear is compensation for 40 weeks, but that injury would hardly ever be disabling. Again, the award for the loss of one hand is compensation for 150 weeks, de-

spite the fact that such an injury might be totally disabling to a musician, a surgeon, or a watchmaker, and not at all disabling to a lawyer, a stock broker, or an educator.

Elsewhere the cases are not in harmony. Larson discusses the authorities in Section 58.20 of his treatise on Workmen's Compensation (1961). He points out that in the great majority of modern decisions the benefits for a scheduled injury are not held to be exclusive if the injury affects some other part of the body, resulting in total disability. Larson then goes on to criticize the distinction made by some courts in reaching a contrary result when the scheduled injury has no such side effects, even though it is totally disabling. We agree with his analysis of the problem now before us:

"The usual statute provides for both total disability and specific loss of a leg, without expressly saying that either shall be exclusive. It could therefore be argued that, since the act must be given a liberal construction, destruction of the more favorable remedy should not be read into the act by implication in a case where claimant is able to prove a case coming under either heading. Loss of a leg may or may not cause total disability as defined in the preceding section. To refuse total disability benefits in such a case, when total disability is otherwise established to the satisfaction of the usual tests, has the effect of ruling out the inability-to-get-work element in a listed group of injuries which just happen to take the form of a neatly classifiable loss of a member. It has already been shown that the inability-to-get-work factor is an indispensable ingredient in the concept of total disability. If this is so, it is difficult to see why this factor is relevant in case of loss of a lung but not in case of loss of a leg. Logically, there is no reason to make the distinction turn on physical extension of the effects beyond the lost member." *Id.* Cases that have adopted Larson's view include *Van Dorpel* v. *Haven-Busch Co.*, 350 Mich. 135, 85 N. W. 2d 97 (1957), overruling an earlier case to the contrary; *Gonzales* v. *Gackle Drilling* Co.,

70 N. M. 131, 371 P. 2d 605 (1962); and *Johnson* v. *Anderson,* 188 Tenn. 194, 217 S. W. 2d 939 (1949).

The appellees complain of the fact that the commission, in finding this claimant's disability to be total, failed to find that it was also permanent. Instead the commission said that the duration of the disability is not determinable at this time. Inasmuch as there was substantial evidence that might have sustained a finding of permanency—a fact issue upon which we express no opinion—we fail to see how appellees are hurt by the commission's deferment of this question until the exact extent of the disability might become clearer.

Reversed.

Cobb, J., disqualified.

Ark. State Hwy. Comm. *v.* James Henry Clay et ux

5-4037 408 S. W. 2d 600

Opinion delivered November 28, 1966

George O. Green and *Don Langston,* for appellant.

Robinson & Rogers and *N. D. Edwards,* for appellee.

PAUL WARD, Justice. This is an eminent domain proceeding.

On May 25, 1965 the Arkansas State Highway Commission (appellant) filed suit to condemn several lots and parts of lots owned by James Henry Clay and his wife (appellees) for use in construction of Interstate Highway No. 40. A jury verdict awarded appellees the sum of $22,500.

When appellant attempted to prosecute an appeal to this Court it learned that, due to a defect in the reporter's recording machine, all of the testimony and proceedings had not been recorded and that a complete record could not be furnished. Thereupon appellant prepared and served on appellees its *statement* of evidence and proceedings in accordance with the provisions of Ark. Stat. Ann. § 27-2127.11 (Repl. 1962). Then appellees filed objections and amendments to appellant's statement (in accord with the same statute) over the objections of appellant.

On June 9, 1966 the trial court approved the statements of both parties, and on the same day appellant filed a motion for a new trial on the ground that the failure to obtain a complete record was the result of the unavoidable situation above mentioned. The motion was denied, and this appeal follows.

One. We find no merit in appellant's contention the trial court erred in refusing to grant a new trial. Appellant's remedy was to prepare its "statement of the evidence or proceedings . . ." by the method provided in said section 27-2127.11. This section has pre-

viously been construed by this Court (against the contention of appellant) in *Mowrey* v. *Coleman,* 224 Ark. 979, 277 S. W. 2d 481, and *Tomlin* v. *Reynolds Mining Corp.*, 231 Ark. 393, 329 S. W. 2d 552.

Two. As previously mentioned, appellant prepared a *statement* and presented it to the trial court for approval pursuant to the statute above mentioned. A copy of this *statement* was served on appellees in due time. It appears, however, that appellee failed to *serve* its objections or proposed amendments within the time (ten days) required by the same statute. However, the trial court approved appellees' statement. We think the court was in error, but we also think it was harmless error. It must be kept in mind (as was referred to in the Mowery case, *supra*) that the jury had already reached its decision before it was learned that a complete transcript of the testimony and proceedings could not be obtained. They heard and considered all the testimony. Therefore the burden was on appellant to show error or lack of substantial evidence to support the verdict. As pointed out hereafter, appellant has not met that burden.

Three. We do not agree with the contention of appellant that the trial court should have declared a mistrial.

During the trial appellees' witnesses made references to damages caused to lots outside of the taking. Each time such a reference was made appellant objected, and the trial court sustained the objection. On one occasion the trial court reprimanded appellees rather severely. At no time did the witnesses attempt to say to what extent appellee had been damaged. We are unable to see how the jury was prejudiced in favor of appellees or against appellant. In this connection appellant calls particular attention to remarks made by appellees' attorney in addressing the jury, to which objection was made by appellant. All the attorney said was: ". . . we are not permitted under the law . . . to talk about this

type of damage." . . . "The court has instructed us that we could not consider those damages in arriving at our damages." The trial court was not asked to give the jury any cautionary instruction, and we do not think it was an abuse of discretion for the court to refuse a new trial.

Four. Finally, appellant contends "there is no substantial evidence to support the verdict". Again, we do not agree.

The record contains twenty three pages of testimony which the court reporter verified, and to which appellant makes no objection. Included therein is the testimony of several qualified witnesses each of whom valued the property damage at approximately $8,000 more than the amount fixed by the jury.

Affirmed.

HENRY DECKARD *v.* STATE OF ARKANSAS

5231 408 S. W. 2d 604

Opinion delivered November 28, 1966

Trantham & Knauts, for appellant.

Bruce Bennett, Attorney General; *Fletcher Jackson,* Asst. Atty. Gen., for appellee.

Osro Cobb, Justice. Appellant pleaded guilty to forgery and was sentenced to a term of six years in the State Penitentiary. On May 18, 1966, while so confined, appellant filed with the trial court his motion to vacate and set aside his penitentiary sentence. This motion for post-conviction relief was filed under the authority and provisions of our *Criminal Procedure Rule No.* 1, 239 Ark. 850a (1965).

Appellant alleged in his motion that he had been denied substantial constitutional rights during the criminal proceedings against him by the absence of counsel to represent him.

The trial court scrupulously observed the provisions of Criminal Procedure No. 1 by appointing an attorney to represent appellant at the hearing on the motion; by conducting a formal hearing of record permitting appellant and his witnesses to testify, and by reviewing the criminal docket entries and the judgment entered against appellant. Following this comprehensive review, the trial court made and entered detailed written findings of fact adverse to appellant's contentions and denied appellant's motion. The case now reaches us on appeal.

Appellent now insists that he was an indigent and that the court erred in not appointing an attorney to represent him prior to his plea of guilty.

When appellant was arrested, he employed a local attorney, E. L. Holloway, to obtain his release upon bond and paid him a fee of $25.00 for these services. A period of approximately 90 days remained before the

next criminal term of circuit court, and during that time appellant earned from $85.00 to $100.00 a week and testified that he had $140.00 in cash at the time he entered his plea of guilty on June 8, 1964. There was no evidence offered which tended to show that appellant was unable to employ an attorney and entitled to court appointed counsel as provided under § 43-1203, Ark. Stat. Ann. (Repl. 1964).

Appellant discussed with Attorney Holloway the matter of representing him at trial in the circuit court and was advised that the fee would be $250.00. Appellant testified that he was very pleased with the legal services of Mr. Holloway.

Appellant had been previously convicted of the same offense of forgery and knew that he would be tried at the ensuing term of court unless he entered a plea of guilty. He had an attorney ready, willing and able to represent him for a reasonable fee and he was financially able to take care of the fee, but neglected to secure such services. Mr. Holloway, when called as a witness for appellant, testified that he understood (without setting forth the basis for the understanding) that appellant intended to plead guilty anyway. Appellant admitted that he had discussed the merits of his case with Mr. Holloway.

About a week before the trial term of the Circuit Court, appellant appeared before the court in person and asked that his case be passed for a substantial time in order to give him a chance to employ counsel. We note here that appellant was asking for time to employ counsel and not for court appointment of counsel. When the court advised him that his case would not be tried for at least another week; that he still had time in which to engage counsel and prepare his defense and that there would be no postponement of the trial, appellant then, according to his testimony, amended his request to one for immediate appointment of counsel to represent him. This testimony does not coincide with the official rec-

ords and documents prepared by the trial court. Those records reflect that appellant did ask to continue his case but that when the continuance was denied, appellant at a later date came in voluntarily and entered an unconditional plea of guilty to the charges. We quote from the criminal docket entry of January 8, 1964:

> "Upon inquiry, court finds that defendant is not represented by counsel and further that he is not an indigent within the meaning of the law. Formal arraignment and plea of guilty entered to charge of forgery."

The language of the judgment against appellant is significant, and we quote same:

> "*Judgment.* Now on this 8th day of June 1964 this cause coming on to be heard, the Plaintiff appearing by A. S. "Todd" Harrison, Prosecuting Attorney for the Second Judicial District of Arkansas, and the defendant appearing in person and after being questioned by the court and responding in an intelligent and understanding manner and stating in open court his full and complete understanding of all charges as filed herein and also the court determining from answers to questions propounded to the defendant that he is financially able to employ his own counsel and the defendant stating in open court that he did not desire to employ any counsel, whereupon the court formally arraigned the defendant and on arraignment he entered his plea of Guilty as charged. No reason being offered why sentence should not be imposed, the court proceeded to sentence this defendant."

Appellant does not contend, even now, that he was not in fact guilty as charged.

This case presents no new question of criminal law. There is nothing in this record to indicate that the trial court failed to discharge its full duty to appellant at all

stages of the criminal proceedings against appellant. Sentence was lawful. § 41-1803, Ark. Stat. Ann. (1964).

We have therefore concluded that none of appellant's constitutional rights were breached or compromised in any manner. We do not deem it necessary to discuss the following cases which support our conclusion: *Burks* v. *State,* 241 Ark. 1, 405 S. W. 2d 935 (1966); *Slaughter and Scott* v. *State,* 240 Ark. 471, 400 S. W. 2d 267 (1966); *Gideon* v. *Wainwright,* 372 U. S. 335; *Johnson* v. *Zerbst,* 304 U. S. 458; *Turner* v. *State,* 224 Ark. 505, 275 S. W. 2d 24 (1955); *Therman* v. *State,* 205 Ark. 376, 168 S. W. 2d 833 (1943); *U. S.* v. *Arlen,* 252 F. 2d 491 (1958).

The action of the trial court in denying appellant's motion to vacate sentence is affirmed.

Affirmed.

PAULINE ADAMS HARPER *v.* ELGIN C. HANNIBAL ET UX

5-4009 408 S. W. 2d 591

Opinion delivered November 28, 1966

Smith, Sanderson, Stroud & McClerkin, for appellant.

Autrey & Goodson, for appellee.

Guy Amsler, Justice. The appellees, Elgin C. Hannibal and his wife Gladys own and reside on a 150 acre farm-ranch located inside the horseshoe formed by "Adams cut-off lake" in Little River County, Arkansas. Due to a change in the river channel caused by flood waters some years ago the land is presently situated on the Miller County side of Red River. Appellees' property is located in Section Twenty-Six (26), Township Thirteen (13) South, Range Twenty-Seven (27) West.

Appellant, Mrs. Pauline Adams Harper, owns considerable acreage to the west and south of appellees in Sections Twenty-Seven (27) and Thirty-Four (34), Township Thirteen (13) South, Range Twenty-Seven (27) West. This litigation involves the use of a road that runs from appellees' home across appellant's farm and out through her barn yard to a public road that connects with "the loop road," near appellant's home.

Appellee, Elgin Hannibal, purchased his land in two transactions—one parcel in 1937 and the other in 1944. Title to the Harper land has been in appellant's family for over 100 years (Mrs. Harper was a daughter of L. C. Adams, the previous owner). Appellees moved into an old house on their property in early 1946 and later built a new home. During the period that Elgin Hannibal was in the military service in World War II his brother Fred (now deceased) looked after the place for him and proof is that by permission of Mr. Harper (appellant's deceased husband) Fred, at times, used the road in dispute.

At the time appellees moved onto their porperty it

could be reached from the north over the Shults place or across the Harper plantation. In 1947 the road leading north "caved" into the river and thereafter the only access to appellees' property was over the Harper farm. There were some half dozen gates, cattle guards and gaps between the first gate near Mrs. Harper's home, and the gate farthest north which was on the property line between the parties. Some of these gates were kept closed all of the time and others only during periods when cattle were grazed in certain areas. There were times when one (or more) of the gates was kept locked, when Mr. Harper who died in 1957 was living, wih all parties having access to a key or keys.

The road across appellant's farm, which is referred to as "originally being a log road", is now (and has for many years been) used daily by appellees and their families and friends. Elgin Hannibal (one appellee) works at the Red River Arsenal and travels over the road twice each work day in going to and from his employment. Appellees have three children of school age who travel this route to reach the school bus that runs close to appellant's home. The road is also used in transporting stock and farm products to market and for such other travel as is normally done by an average family and their friends.

Effective April 15, 1965, appellant gave appellees notice that she would no longer permit them and their visitors to pass through the gates and other enclosures on her land, and that if they undertook to do so they would be considered trespassers.

Thereafter appellees instituted proceedings in equity seeking injunctive relief against appellant and alleging that a public and private easement across appellant's lands had been established because:

(a) The prescriptive use of plaintiffs and their predecessors in title and by the public for over 40 years.

(b) It has been worked by the county (Ark. Stat. Ann. § 76-101).

(c) Of Ark. Stat. Ann. § 76-104 relating to most direct route to the County Courthouse of 10 or more families.

(d & e) It is used as a mail and school bus route (Ark. Stat. Ann. §§ 76-105 and 106).

(f) It constitutes a way of necessity.

(g) Defendant (appellant) is estopped because of:

> ". . . . the long and continued reciprocal use of the said roadway by the Defendant and her predecessors in title across the said lands of the Plaintiffs to that portion of the lands of the Defendant and her predecessors in title north of Adams Cut-Off Lake in the said Section thirty-five (35) above described."

(h) "An easement in favor of the Plaintiffs has been established by estoppel as a result of the Defendant and her predecessors in title encouraging the said Plaintiffs to make substantial improvements upon the said roadway from time to time and to expend at one time an amount in excess of one thousand five hundred ($1,500) dollars for gravel and grading work on the roadway on the Defendant's lands."

(i) "The Defendant and her predecessors in title have granted a perpetual easement in the said roadway to the Plaintiffs and their successors in title and the same has been taken out of the Statute of Frauds by part performance by the Plaintiffs in their expenditure of substantial sums upon the said roadway and in their continued use of the said roadway for more than twenty-five (25) years under claim of right."

The relief sought was that appellant be enjoined temporarily and finally from:

> "interfering with the use of the said roadway for ingress and egress to and from Plaintiffs' home and lands by the said Plaintiffs, their children, and the Plaintiffs' social and business invitees."

that she:

> "be restricted to the use of only such cattle gaps, cattle guards, and cattle gates as may be reasonably necessary for her use of said lands; that Plaintiffs be permitted, at their expense, to construct suitable cattle guards in said roadway as replacements for cattle gaps and gates found to be reasonably necessary for the Defendant's use of her land and that said Plaintiffs be allowed to make reasonable maintenance and repairs to said roadway."

and that she be:

> "restrained from interfering with the maintenance and repair of said roadway by Miller County, the State of Arkansas, or any other Local or State Governmental Unit which is willing to perform maintenance and repairs to the said roadway."

Prior to trial the parties agreed that the road running from the "loop road" to the mail boxes located near appellant's home was a public roadway so that the controversy is reduced to a dispute over that part of the traveled way extending from the appellant's front yard, across her farm to the property line between the parties.

The lower court issued a temporary order on April 14, 1965, and then on the following January 17th issued its final decree granting appellees substantially the relief sought. The case is here on timely appeal.

Appellant relies on four principal points for reversal and appellees cover three points in their brief.

In our view the two crucial questions in the case are whether appellees have established a prescriptive right to use the roadway and whether appellant is estopped to deny appellees passageway over her property.

The attorneys have, in their excellent briefs, cited literally dozens of authorities from this and other jurisdictions and to undertake comparing, distinguishing and analyzing all of them would be redundant and add little of value to our opinion.

In considering the question of appellees' claimed prescriptive right we are at the outset confronted with a brief statement contained in the opinion of Special Justice Sol F. Clark in *Johnson* v. *Lewis,* 47 Ark. 66, 14 S. W. 466, where in commenting on the acquisition of a prescriptive right across another's land he wrote: "It should be occupied and used as a right, and not merely as a favor or privilege granted by the owner of the servient lands."

The Supreme Court of the State of Washington stated the rule more succinctly:

> "A user which is permissive in its inception cannot ripen into a prescriptive right, no matter how long it may continue, unless there has been a distinct and positive assertion by the dominant owner of a right hostile to the owner of the servient estate." *Northwest Cities Gas Co.* v. *Western Fuel Co., Inc., et al,* 123 P. 2d 771.

And our own court in the late case of *Still* v. *Still,* 239 Ark. 865, 394 S. W. 2d 733, said:

> "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."

For cases from other jurisdictions see Adverse Possession Key No. 60, American Digest System.

The legal principle being well established we must then determine how the law squares with the facts in the case at bar. In reality there is not a great measure of factual difference reflected by the evidence.

Appellee Elgin C. Hannibal's brother Fred had looked after Elgin's farm while Elgin was away on military duty and during that time had arranged with Mr. Harper (appellant's deceased husband) to use the farm road in dispute. Elgin knew of this arrangement. It appears that this road also caved into the river once or twice and that Elgin, with Mr. Harper's permission selected another location and had some work done on the new road. Appellees say they never discussed the use of the road with appellant.

A review of the evidence of witnesses for both parties points up the fact that appellant at all times undertook to maintain constant control over the use of the road in question.

A witness for appellees who "worked a little bit" of their land in 1950 used the road across the Harper property for traveling back and forth while doing the farming. He was asked, "She (Mrs. Harper) rides herd on that road pretty closely, does she not?" His answer was, "I think so."

Another witness for appellees, who had known the parties and their farms since he was eight years old and whose father had leased the Hannibal land some years back, now lives on Route 4 out of Texarkana. He stated that during the fishing season, "I'd go back over there all the time to visit the Hannibals or fish." Then:

"Q. Have you had any difficulty in driving over there to the Hannibals any of the time since you have been going over there getting through the roadway?

A. You mean difficulty from them or the road, or what?

Q. Yes, Mr. Harper or Mrs. Harper?

A. I've been stopped about going in there; I mean, they never did just tell me absolutely I couldn't."

This witness also testified that he didn't believe that Mrs. Harper had ever caught him going in, but that Mr. Harper would tell him it was a private road, "but he never did just tell us we absolutely couldn't go through."

Appellee Elgin Hannibal testified that some of the gates were closed part of the time and that one (perhaps two) was closed all the time. A significant bit of evidence by this witness was adduced to the effect that he cautioned his visitors to not leave gates open:

"Q. That's people who came in to see you and your ownself?

A. Yes, sir, and all the people that come to see me I said, 'Take care of Mrs. Harper's gates; don't let nothing in or out.' "

A witness for appellant (defendant below) who bought some timber from appellees in 1962 was concerned about a route for hauling the timber out so he discussed the matter with appellee, Elgin Hannibal. He testified:

"Q. At that time did you and he have a discussion as to how you could haul the timber out, the logs out?

A. Yes, sir.

Q. As nearly as you can, relate the conversation, the words you used, and the words Mr. Elgin Hannibal used at that time, about how you were going to haul the logs out.

A. I asked Mr. Elgin how I was going to haul that timber out, and he said, 'Back up the road there.' He said, 'The old road that you came in there before, it's all in the river. You will have to go out through Mrs. Harper's place.' I said, 'Do you mean to tell me' I says, 'all those gates is posted?' He says, 'She doesn't mind it.' I said, 'But the road goes right through her yard.' He says, 'She doesn't mind it.'' He says, 'You can ask her; she is a mighty nice lady. I don't think she will object.' I did ask Mrs. Harper, and she gave me permission.''

Appellees say the county did work on the road and this appears to be true but there was never any effort by the county judge or appellees to comply with statutory requirements for establishing a public road. It is to be noted that even with respect to this work the determined will of Mrs. Harper was controlling.

Judge B. B. Lanier, who served as Miller County Judge from 1953 to 1963, after explaining that he arranged with Mrs. Harper to straighten the road leading from the loop road up to her house (and for making a turn around) testified:

''Q. She said she didn't want a public road in where now?

A. On into her farm.

Q. From what spot?

A. From the gate.

Q. Turn-around gate?

A. From the turn-around gate.

* * * *

"Q. What instructions did you give your road crew about going beyond the turn-around road that you talked about?

A. I told them to talk to Mrs. Harper; I didn't want to get crossways with her, and she told me what to do and that's what I did."

Members of the road crews that worked under Judge Lanier and other county judges with rare exceptions testified that they graded the road in dispute only when told to do so by the county judge.

Perhaps the most damaging circumstance against appellees is the continued maintenance of gates across the roadway by Mrs. Harper. It is undisputed that the gates (and "gaps") were there and that some, if not all, of them bore "Posted—No Trespassing" signs.

In the ancient case of *Jones* v. *Phillips,* 59 Ark. 35, 26 S. W. 386, this court dealt with a problem very similar to the one confronting us here. From 1860 to 1884 or 1885 a road passed through the fee owner's field (Jones) with a gate where the road entered the field and a gate as the road left the field. Sometimes the gates were locked with keys furnished the owner's neighbors who would use the road; other times the gates were not locked and anyone could use the road who pleased.

The trial court decided that the public had acquired prescriptive rights to use the road. In reversing, this court said in part:

"But while they permitted the public to thus use this piece of road through their field, there is no evidence that they surrendered any of their rights or dominion over the same in any manner whatever, but continued at all times to exercise just such con-

> trol over the same as any farmer would over a private road through his plantation, which he is willing that his neighbors and such of the public as chose to do should make use of for their convenience.
>
> * * * *
>
> "The owners of this property have never ceased to keep gates or fences where it (that is, the road) enters this field on either side. They have, therefore, never ceased to exercise dominion absolute or qualified over this passageway. The public, therefore, cannot be said to have held at any time adversely to the owner."

We think the rationale of *Jones* v. *Phillips, supra,* is sound and that it is controlling in this case regarding the prescriptive rights claimed by appellees.

Appellees say that appellant is estopped because they (appellees) spent $1,500 or more in improving the road over the years that it has been used by them and that appellant "stood by" and knowingly permitted them to expend this money. Appellees' own proof refutes this contention. When Elgin Hannibal was asked if he said anything to Mr. or Mrs. Harper about putting gravel on the road he replied, "No, sir. Never said anything about it." Again, "I don't think I said anything to nobody—I didn't discuss it with anybody but the man who hauled the gravel." He also testified that Mr. Harper saw the gravel after it was spread, but whether this information was conveyed to Mrs. Harper is not revealed. It seems clear that the road was improved for appellees' convenience rather than for the purpose of establishing any claim of right antagonistic to appellant.

A recent case involving the creation of a prescriptive right by estoppel is cited by appellees, *Craig* v. *O'Bryan,* 227 Ark. 681, 301 S. W. 2d 18. The Craig case is easily distinguished on the facts. A turn-row road ran across Craig's open field (no gates). This road was the only access to an area on "Old River" where a number of landowners wanted to construct homes. They revealed

their desires to Mr. Craig who granted them permission to cross his farm. Relying on this assurance these people graveled the road and expended large sums in constructing homes on the lake front. We held under those circumstances that Craig was now estopped to deny the lake-shore owners use of the road. In the case at bar appellees claim no assurances or promises from appellant.

We have said that estoppel may be invoked when a party who, "by his acts, declarations or admissions, either deliberately or with willful disregard of the interests of another, induces him to conduct or dealings which he would not have otherwise entered upon is estopped to assert his rights afterwards to the injury of the party so misled." (citing authorities) *Thomas* v. *Spires,* 180 Ark. 671, 22 S. W. 2d 553.

In the same opinion is this statement, "The underlying principle is that the conduct of the party misleading the other involves fraud, and the remedy is available for the protection of the party induced to act to his injury by reason of the fraudulent conduct and declarations of the other."

We are convinced that a preponderance of the evidence does not establish an estoppel against appellant.

The fact that appellees have no other access to their home doubtless weighed heavily on the conscience of the good chancellor. However, the proof is simply not sufficient to justify granting appellees relief under the rule governing "a way of necessity." *Craig* v. *O'Bryan, supra,* and cases there cited.

Accordingly the case is reversed and remanded. The Chancery Court is reinvested with jurisdiction for allowing appellees a reasonable time within which to pursue the statutory method [Ark. Stat. Ann. § 76-110 et seq. (Repl. 1957)] for establishing a private road that will afford them ingress and egress. *Quality Excelsior Coal Company* v. *Reeves,* 206 Ark. 713, 177 S. W. 2d 728.

C. P. HARRIS, ADM'R, ETC. *v.* SEARCY FED. SAVINGS & LOAN ASSN. ET AL

5-4044 408 S. W. 2d 602

Opinion delivered November 28, 1966

W. J. Dungan, for appellant.

John D. Eldridge, for appellee.

HUGH M. BLAND, Justice. On January 6, 1961 Glenn D. Harris deposited $5,000.00 with the Searcy Federal Savings & Loan Association in a savings account which was given Number 1982. This account continued in force and operation under No. 1982 until the death of Glenn D. Harris on April 1, 1965. During the continuance of the account Glenn D. Harris enlarged the amount on deposit by adding the dividends as they accrued and making new deposits of $1,850.00 on January 2, 1962 and $1,500.00 on January 2, 1964. The last enlargement was made by adding the accrued dividend on December 31, 1964 in the amount of $199.00. So the total balance in the account amounted to $9,564.60. In opening the account he designated Geneva Jeffries, a niece, as joint owner. Geneva Jeffries died on October 31, 1963 and thus

terminated the joint ownership of account No. 1982 and left Glenn D. Harris as the sole owner.

On January 2, 1964 the account was changed by Glenn D. Harris with a direction to pay the fund to "Glenn D. Harris or at death to Johnnie Chaney." On the death of Harris, April 1, 1965, the Probate Court of Woodruff County appointed C. P. Harris, his brother, as administrator of his estate on April 12, 1965. The administrator being unable to reach an agreement as to the ownership of the savings account, the probate court made an order directing him to make a demand on the Searcy Federal Savings and Loan Association for payment to him as administrator of the savings fund. This demand was made and resulted in the litigation here under review.

On January 4, 1966 the Searcy Federal Savings & Loan Association filed a bill of interpleader in the Chancery Court of Woodruff County, Arkansas and named C. P. Harris as administrator of the estate of Glenn D. Harris and Johnnie Chaney and Horace Chaney, Jr., as defendants. An amendment to the bill of interpleader was filed showing that Horace Chaney, Jr., was not in the designation and, hence, not a proper party defendant. Answer and cross complaint were filed by Johnnie Chaney and after that a motion for summary judgment. Cause was heard on April 20, 1966 and a decree was entered awarding the funds deposited in court by Searcy Federal Savings & Loan Association in the total sum of $9,975.40 to Johnnie Chaney.

Appellant brings appeal to this court and for reversal relies upon three points:

"Point 1. Act 343 of 1939 General Assembly of the State of Arkansas (Digested as 67-820 (b) of Arkansas Statutes (1947) Annotated) became an integral and non-severable part of the Contract and savings account, No. 1982, when made on January 6, 1961, and this continued, under the same number and record keeping, to the date of the death of Glenn D.

Harris on April 1, 1965. During this period of time the Searcy Federal Savings & Loan Association and Glen D. Harris, nor either of them, had the authority or power to deal with, or in any way alter, the contract and savings account, established on January 6, 1961, except as authorized and provided by Act 343 of 1939. * * *

Point 2. Act 343 of 1939 General Assembly of Arkansas [67-820 (b) Arkansas Statutes (1947) Annotated] provides for and authorizes the making of contracts for savings accounts, and without this law the Searcy Federal Savings & Loan Association and Glenn D. Harris could not have made the contract and established the savings account number 1982 on January 6, 1961. This Act and law authorized the Searcy Federal Savings & Loan Association to make a contract with Glenn D. Harris individually or with Glenn D. Harris and a joint owner of the account. It did not authorize the Association to permit Glenn D. Harris to establish or to change the designation to 'Glenn D. Harris or at death Johnnie Chaney' as was attempted in this case. We will contend this designation to be ineffective and that the account was in the name of Glenn D. Harris only at his death on April 1, 1965.

Point 3. The Chancellor committed error in decreeing: 'on January 2, 1964, the deceased, Glenn D. Harris being the holder of a savings account, number 1982, executed a new signature card directing that the account should be paid on death to Johnnie Chaney; that under Act 227 of 1963, which was in effect on January 2, 1964, upon the death of the said Glenn D. Harris title to the funds in said savings account vested in Johnnie Chaney, defendant herein, whom the court finds to be entitled to the proceeds deposited in the court by the Searcy Federal Savings & Loan Association.' ''

We find no merit in any of these contentions.

In 1963 the Legislature passed an omnibus bill governing Federal and State Savings and Loan Associations. This became Act 227 of 1963 and is digested as Chapter 18 of Volume 6 of Arkansas Statutes (Repl. 1966) §§ 67-1801—1862. This Act became effective March 13, 1963. Section 38 of Act 227 (§ 67-1838), insofar as it relates to the facts in this proceeding, provides as follows:

> "Section 38. Savings accounts in the names of two or more persons. Savings accounts may be opened in any association or a Federal Association in the names of two or more persons, either minor or adult, or a combination of minor and adult, and such savings accounts may be held:
>
> * * * *
>
> 5. If a person opening or holding a savings account shall execute and file with the Association a designation that on the death of the person named as holder, the account shall be paid to or held by another person or persons, the account, and any balance thereof which exists from time to time, shall be held as a payment on death account and unless otherwise agreed between the person or persons opening the account and the Association:
>
> (a) Upon the death of the holder of the account, the person or persons designated by him and who have survived him shall be the owners of the account (as joint tenants with right of survivorship if more than one) and any payment made by the Association to any of such persons shall be a complete discharge of the Association as to the amount paid:
>
> (b) The person to whom such account is issued may change during his lifetime the designation of any of the persons who are to be holders at his death, by a written direction accepted by the Association;

(c) The person to whom such account is issued may pledge; withdraw or receive payment and any such payment made by the Association shall be a complete discharge as to the amount paid."

The real issue before us is whether the disposition of the funds on deposit with the Savings Association is governed by Act 343 of 1939, the statute in force when the account was established on January 6, 1961, or by Act 227 of 1963 which was enacted into law and signed by the Governor on March 13, 1963.

Appellant, in contending that Act 343 of 1939 governs this account, overlooks the fact that when Geneva Jeffries died in October, 1963, Glenn D. Harris became the sole owner of this account with the right to make any valid designation he desired. The character of the account had changed. Act 227 of 1963 became effective before the death of Geneva Jeffries. The signature card signed by the decedent on January 2, 1964 was a new contract between decedent and the Searcy Federal Savings & Loan Association and could not be affected by any provisions of Act 343 of 1939 because at that time this Act had been superseded by Act 227 of 1963. Section 64 of Act 227 of 1963 provides:

"Antecedent Legislation Repealed. Sections 1, 3, 4, 12, 16, 17, 18, 20, 22, 25, and 36 of Act No. 128 of 1929 and all other Acts of the General Assembly of the State of Arkansas and parts of Acts inconsistent with the provisions of this Act are hereby repealed."

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

ROBERT T. WALKER *v.* WITTENBERG, DELONY & DAVIDSON, INC. ET AL

5-4008 412 S.W. 2d 62

Opinion delivered December 5, 1966
[Supplemental opinion on rehearing delivered March 3, 1967, 242 Ark. 97.]

Howell, Price & Worsham, for appellant.

Cockrill, Laser, McGehee & Sharp; Rose, Meek, House, Barron, Nash & Williamson; *House, Holmes & Jewell,* and *Robert M. McHenry,* for appellees.

CARLETON HARRIS, Chief Justice. Sometime prior to December, 1961, Ruebel and Company, Little Rock fu-

neral directors, decided to construct a funeral home on West Markham Street. Wittenberg, Delony and Davidson, Inc., Little Rock architects, were employed to design the building, and in furtherance of the employment, these architects prepared plans and specifications. In doing so, they designed the outer walls to be built from pre-cast concrete slabs. The architects then sent their proposed design to Harter Marblecrete Stone Company, Inc., the proposed manufacturer, for suggestions. Harter made some suggestions for change in the design of the slabs, and thereafter manufactured them in accordance with these changes. The architects let the contract for construction to Cone and Stowers, and agreed with Ruebel, for an additional fee, to supervise and inspect the construction. The exterior walls of the building were to be these pre-cast slabs, 10 feet high, 8 feet wide, and 3 inches thick.

Robert Walker, appellant herein, was a brick mason, who had been engaged in the task of laying light aggregate blocks behind the pre-cast concrete slabs. After these blocks had been laid on the east wall of the building, nearly to the top, the bracing, which had been holding the slabs upright, was, at the direction of the assistant superintendent for Cone and Stower, removed in order for the top two courses of blocks to be laid. Walker was standing on top of the wall, and when the last brace had been removed, the wall fell outward, and appellant suffered the injuries for which he subsequently brought suit. Complaint was instituted against the architects,[1] it being alleged that said architects were negligent in failing, under their contract, to prepare proper plans, and in failing to supervise construction after award of the contract. Subsequently, the complaint was amended to make Ruebel and Company a defendant, it being alleged that this company was negligent in failing to have a licensed architect to supervise the work as provided by Little Rock Ordinance No. 204,[2] and still

[1]Wittenberg, Delony and Davidson is incorporated, but we shall refer to this appellee in the plural.

[2]On trial, the undisputed proof reflected that Ruebel employed

later, Harter Marblecrete Stone Company, Inc., was made a defendant, it being alleged that the pre-cast stone panels were of faulty design; that Harter negligently failed to warn of the inadequacy of the design and the danger created thereby, and also negligently failed to submit specifications for the use and erection of said panels to prevent them from falling during construction. After the filing of answers, amendments and interrogatories, the case proceeded to trial, and at the conclusion of appellant's evidence, the court instructed the jury to return a verdict for both appellees. From the judgment so entered, appellant brings this appeal.

We think the court erred in directing a verdict for the architects. In the first place, an architect's liability for negligence which results in personal injuries or death may be based upon his supervisory activities. 5 Am. Jur. 2d 688, Paragraph 25. It is undisputed that Wittenberg, Delony and Davidson, in addition to preparing the plans and specifications, were also employed to supervise the construction, and for this they received a special fee. The employment of the architects was done under Little Rock City Ordinance No. 204, which requires that an owner engaged in the erection of a building where the estimated value exceeds $25,000.00, shall employ a registered architect, or a licensed engineer, to supervise the construction of the building. The A.I.A.[3] General Conditions were explicitly made a part of the specifications in the contract (with the construction company), stating, "A.I.A. Document No. A-201, 1952 Edition of the American Institute of Architects, are hereby made a part of this specification to the same extent as if bound herein." Article 38 of the A.I.A. General Conditions of the contract provides, *inter alia*:

"The Architect shall have general supervision and direction of the work. He is the agent of the Owner only to the extent provided in the Contract Documents and

Wittenberg, Delony and Davidson in a supervisory capacity, and the complaint as to Ruebel was dismissed without objection.

[3]A.I.A. is an abbreviation for American Institute of Architects.

when in special instances he is authorized by the Owner so to act, and in such instances he shall, upon request, show the Contractor written authority. He has authority to stop the work whenever such stoppage may be necessary to insure the proper execution of the Contract."

It is the contention of appellant that, since the architects agreed with the owner to supervise, and inspect, and were paid a fee for it, they had a definite duty to supervise the work, including the responsibility of taking steps to secure the safety of the workmen. Witnesses for this appellee admitted that the owner had no one else to inspect the work and see that it complied with ordinances, regulations, etc., and it was further admitted that no one from the architectural firm performed any supervisory activities. Mr. Tom Gray, an employee of Wittenberg, Delony and Davidson, testifying for these appellees, agreed that a free-standing wall, *i. e.,* a wall that does not have any lateral support, is not stable, and when braces are removed, such a wall will not stand.

The architects defended primarily on the contention, and they argue here, that their duty was to supervise and inspect *only to the end* that when completed the building would conform to plans and specifications, and they were also to determine that the construction was in compliance with the Little Rock Building Code. They assert that there was no duty upon them to direct or control the contractor in reference to the temporary support of the panels during construction. It is further contended that they were only required to make *periodic* visits to the job site (as a matter of determining that, when completed, the building would conform to the plans and specifications); that they were not responsible for the "on the spot" directions given by the assistant supervisor for the contractor, Henry Bowden, who directed that the braces be removed from the east wall; they were not present when the order to remove the bracing was given, had no knowledge thereof, and accordingly, cannot be held legally responsible.

It is true, of course, that if there was no obligation upon the architects to be present during construction, this argument would be valid. The contention that the sole duty of the architects was to supervise to the end that the building would conform to plans and specifications when completed, was likewise the principal defense in *Erhart* v. *Hummonds,* 232 Ark. 133, 334 S. W. 2d 869, but we upheld a judgment against the appellant architects in that case. These appellees say there is a distinction between the present case and *Erhart,* for there, in setting out the duty of the contractor to shore and protect walls of excavations, there was additional language, "or as directed by the architects," and here, there is no specific reference to the architect in Article 12 of the General Conditions.[4] We do not agree that these particular words preclude any possible liability on the part of architect appellees, for under A.I.A., as heretofore stated, the jury could have found that there was a responsibility on Wittenberg, Delony and Davidson to supervise in a manner consistent with appellant's contention. Appellant, and architect appellees, apparently are far apart in their interpretation of the meaning of the word, "supervise," and it is interesting to note that Webster's Third New International Dictionary shows the word, "supervise," (among other definitions, as meaning) "To look over, inspect, oversee, * * * to coordinate, direct, and inspect continuously and at first hand the accomplishment of."

The architects insist that they were not derelict in any duty that they owed to the owner, but we stated in *Erhart*:

"* * * The issue here, we think, is not whether the architect breached any duty to the owner, but whether there was a breach of duty owed to the workmen by the architect arising out of the safety provisions of the contract."

[4]Article 12 sets out the requirements which are imposed upon the contractor to take necessary precautions for the safety of employees during the construction.

Appellee cites cases (nearly all from other states) in support of the position taken, but, as stated, we think *Erhart* is applicable.

We hold there is a fact question here as to the duties imposed upon the architects under the term, "supervision." Does this term prescribe only such supervision as contended by appellee? Is there significance in the omission of the phrase appearing in the contract in *Erhart,* "or as directed by the architects," or, on the other hand, was there a duty, as contended by appellants, upon the architects, under the term, "supervision," to take positive steps to insure the safety of workmen during the construction? To some extent, the agreement is ambiguous, and where a contract is ambiguous, a question of fact is created to be passed upon by the jury. *El Dorado Real Estate* v. *Garrett,* 240 Ark. 483, 400 S. W. 2d 497. We think sufficient evidence was offered to submit the question to the jury.

We agree with the trial court that appellant's proof was insufficient to make a jury question as to the liability of appellee Harter Marblecrete Stone Company, Inc. There is no proof that the slabs were defectively designed or manufactured, and, in fact, this question (which was an allegation in the complaint) is not argued in the brief; as a matter of law, we agree with the trial court that these slabs were not inherently dangerous, nor was it reasonably foreseeable that a use would be made of the slabs which would cause injury to some individual. Similar contentions are discussed in our case of *Lilly* v. *Riggs Company,* 238 Ark. 1027, 386 S. W. 2d 488. There, Roy Lilly was killed while endeavoring to repair a broken cable on a Caterpillar machine. His widow instituted suit against the tractor company, alleging that proper warnings were not given as to the safe manner for unsnarling a broken cable, and that the failure to give proper instructions and warnings constituted negligence on the part of the company, its agents, and employees. On trial, the court directed a verdict for the company, and Mrs. Lilly appealed. After dis-

cussing the function and manner of operation of the Caterpillar, this court, in affirming the action of the trial court, said:

"Appellant asserts that the Caterpillar was inherently dangerous, but we do not agree. Black's Law Dictionary, Fourth Edition, Page 921, defines 'inherently dangerous' as 'danger inhering in instrumentality or condition itself at all times, so as to require special precautions to prevent injury, not danger arising from mere casual or collateral negligence of others with respect thereto under particular circumstances.' Of course, no citation of authority is necessary to support the statement that the mere fact that one is injured by a machine, or instrument, does not mean that the machine or instrument is inherently dangerous. It has been said that a product is inherently dangerous where the danger of injury stems from the nature of the product itself. An automobile, driven at a high rate of speed—or without proper brakes—or, if at night, without headlights—or if operated by one who is intoxicated—can certainly become a highly dangerous instrument, capable of causing death and crippling injuries. Yet, there is a general agreement among the jurisdictions that motor vehicles are not inherently dangerous (Annot. 74 A.L.R. 2d 1111). Numerous articles or substances, which have been held not to be inherently dangerous within the meaning of the rule, include an electric body-vibrating machine, an electric stove, a chain, a haybaler, a flat iron, a gas stove, a porch swing, a sofa, a refrigerator, and others too numerous to mention. See *Defore* v. *Bourjois, Inc.,* 105 So. 2d 846. Still, all of the articles or instruments mentioned can, by particular use, cause death or severe injury. In fact, as this court stated in *Reynolds* v. *Manley,* 223 Ark. 314, 265 S. W. 2d 714, 'It is possible to use most anything in a way that will make it dangerous.' Of course, certain substances or articles are inherently dangerous, such as dynamite, nitroglycerin or other explosives, poisons, and many others. In the case before us, we are definitely of the opinion that the Caterpillar itself was not inherently dangerous; it was *the manner*

of repairing that created the danger, *i. e.,* it was the fact that the cable was deliberately cut, causing the spring to pull the ejector sharply back, that caused Lilly's death, rather than the fact that the Caterpillar was equipped with a cable and spring."

We think the reasoning in that case is applicable to this phase of the present litigation. It was not a manufacturing defect that caused the east wall to fall—rather the collapse of the wall was occasioned by the fact that the bracing, which had been holding the manufactured slabs upright, was removed. The designed wall met all requirements of the building codes of the city of Little Rock. Nor do we think that Harter could have forseen that the bracing would be removed from the slabs while the wall was still being worked on. After all, Harter sold these concrete panels to a licensed and experienced contractor, and there was no reason to assume that the panels would not be handled with ordinary care and in accordance with good construction procedures. As Harter states in its brief: "This panel is no more an inherently dangerous object than a ladder which will fall if not placed against a steady object." As stated, there is no evidence that the panels contained any latent defects, nor any proof that they were in any manner dangerous when used in a manner consistent with the use for which they were made. We find no showing of negligence on the part of this appellee.

In accordance with what has been said, we affirm the holding of the Pulaski County Circuit Court (Second Division) in dismissing appellant's complaint against Harter Marblecrete Stone Company, Inc., but that portion of the judgment dismissing the complaint against Wittenberg, Delony and Davidson, Inc., is reversed and set aside, and the cause of action against this defendant is remanded back to the trial court, with directions to proceed in a manner not inconsistent with this opinion.

AMSLER, J., disqualified.

BESSIE MCGINTY, ADM'X *v.* BALLENTINE PRODUCE, INC.

5-4006 408 S. W. 2d 891

Opinion delivered December 5, 1966

Elwyn L. Cady Jr., for appellant.

Shaw, Jones & Shaw, for appellee.

ED. F. MCFADDIN, Justice. A traffic mishap occurred in the State of Missouri on October 14, 1962, resulting in the death of Mr. Marvin Glick. On October 8, 1965 this present action was filed in the Crawford Circuit Court by appellant, Bessie McGinty, as administratrix of the estate of Marvin Glick, against the appellee, Ballentine Produce, Inc., which is an Arkansas corporation with a place of business in Crawford County.

The complaint alleged that the mishap occurred solely because of the negligence of the driver of the Ballentine vehicle. Damages were sought by the administratrix for the benefit of those claimed entitled to recover under the Arkansas statutes. To this complaint

the appellee, Ballentine Produce, Inc., filed a demurrer stating:

"I. The complaint does not state facts sufficient to constitute a cause of action.

"II. There is another action pending between the same parties for the same cause.

"III. The causes of action alleged in the complaint are barred by the statute of limitations."

From the order of the Trial Court sustaining the demurrer and dismissing the complaint, there is this appeal in which appellant urges three points:

"I. Demurrer contending that the complaint failed to state a cause of action was faulty under modern conflict of laws principles of forum preference.

"II. Demurrer grounded on a claim of *res adjudicata* was improper since there was not the requisite identity of parties and the pleading relied on was held to have omitted essential allegations.

"III. Demurrer based on interposition of the defense of the statute of limitations was erroneous inasmuch as the action was filed within applicable limitation periods."

Without separately discussing each point, it is sufficient to say that we have concluded that the Trial Court was correct in sustaining the demurrer. There has been other litigation arising from the same traffic mishap here involved. See *Glick et al* v. *Ballentine,* 343 F. 2d 839, cert. denied, 382 U. S. 891, 86 S. Ct. 184; 15 L.Ed. 2d 149; and *Glick* v. *Ballentine* (Mo. S. Ct.), 396 S. W. 2d 609, Ap. dis. 385 U. S. 5, 87 S. Ct. 44, 17 L.Ed. 2d 5. These cases afford interesting information and side-

lights on the present case. We start with the fundamental fact that the traffic mishap resulting in Mr. Glick's death occurred in the State of Missouri. At common law no cause of action survived for wrongful death, and the only cause of action that arises is because of wrongful death statutes, which must be strictly adhered to in determining the cause of action, the parties, and the period of limitations. Both the Missouri Court and the Arkansas Court have so held. For Missouri cases see: *Knorp* v. *Thompson,* 352 Mo. 44, 175 S. W. 2d 889 (1943); *Nelms* v. *Bright,* 299 S. W. 2d 483 (Mo. *en banc* 1957); *Plaza Express Co.* v. *Galloway,* 365 Mo. 166, 280 S. W. 2d 17 (1955). For Arkansas cases see: *Smith* v. *Mo. Pac. RR. Co.,* 175 Ark. 626, 1 S. W. 2d 48; *Vines* v. *Ark. P. & L. Co.,* 232 Ark. 173, 337 S. W. 2d 722.

If the Arkansas wrongful death statute is the applicable law in the case at bar, then there would be a cause of action that could be brought by the administratrix, just as was here done, and this cause of action would have been timely filed within the applicable period of limitations in Arkansas. Ark. Stat. Ann. § 27-906 *et seq.* (Repl. 1962). If the Missouri wrongful death statute applies to this case, then § 537.080 *et seq.* Vernons Annotated Missouri Statutes governs; and the cause of action must be brought by the surviving spouse within six months, or the minor children within one year; and the amount of recovery is limited. The Missouri wrongful death statute has a built-in statute of limitations. See *Forehand* v. *Hall* (Mo.), 355 S. W. 2d 940. Therefore, the prime question for decision in this case is whether the Missouri statute governs, or the Arkansas statute governs.

In the case of *Wheeler* v. *Southwestern Greyhound Lines, Inc.,* 207 Ark. 601, 182 S. W. 2d 214, we had this identical question before us, and we there said:

> "An action for wrongful death is based on the statute of the place where the injury occurred that caused the death, that is, the *lex loci delicti. Earnest*

v. *St. Louis, M. & S. Ry. Co.,* 87 Ark. 65, 112 S. W. 141; *Tipler* v. *Crafton,* 202 Ark. 351, 150 S. W. 625; 15 C. J. S. 899; Leflar on 'Conflict of Laws,' § 79. In the case at bar the injury causing the death occurred in Missouri, so the Missouri law governs. *Midland Valley Ry.* v. *LeMoyne,* 104 Ark. 327, 148 S. W. 654; *American Ry. Express Co.* v. *Davis,* 152 Ark. 258, 238 S. W. 50, 1063."

In *Wheeler* v. *Southwestern Greyhound Lines, supra,* we also said:

"The period of limitations (one year) contained in the Missouri statute is a part of the law governing the cause of action and must be enforced in this State. *Earnest* v. *St. Louis, M. & S. Ry. Co.,* 87 Ark. 65, 112 S. W. 131; 25 C. J. S., § 28, p. 1100. . . .

"So we conclude that since the cause of action of the plaintiffs was barred by limitations when the action was filed, and this fact appeared on the face of the plaintiff's pleadings, therefore the defense of limitations could be raised by demurrer. *McGinnis* v. *Less,* 147 Ark. 211, 227 S. W. 398; *Cullins* v. *Webb, ante,* p. 407, 180 S. W. 2d 835."

With admirable candor the appellant's learned counsel concedes that in order to agree with the appellant and reverse the Trial Court in the present case, we would be required to overrule our holding in *Wheeler* v. *Southwestern Greyhound Lines,* and also all the other cases so holding. We are asked to do this on the claim that the old holdings on "*lex loci delicti*" are archaic, and that the more recent cases have abandoned the "*lex loci delicti*" rule (that is, the law of the place where the mishap occurred) and have embraced the new and modern rule sometimes called "the better rule of law" or the "choice of law" rule. We copy this pertinent sentence from the appellant's brief:

"Appellant makes this direct appeal for justice by asking this Court to choose its modern, realistic and

salutary law of wrongful death over the outmoded, unrealistic and anachronistic law of Missouri."

This "choice of law" rule urged by the appellant is sometimes also called the "forum preference" rule. Appellant lists the following cases and Law Review articles, among others, as supporting the contention: *Griffith* v. *United Airlines, Inc.* (Pa.), 203 A. 2d 796; *Babcock* v. *Jackson* (N. Y.), 191 N. E. 2d 279; *Clark* v. *Clark* (N. H.), 222 A. 2d 205; and *Kilberg* v. *Northeastern Airlines,* 172 N. E. 2d 526; and also the following Law Review articles: "Choice-influencing considerations in conflicts law," 41 N. Y. University Law Review, p. 267; "Conflicts of Laws—torts—the passing of the *lex loci delicti,*" 19 Ark. Law Review, p. 168; "State's rights in conflict of laws," 19 Ark. Law Review, p. 142; "Conflict of Law—Torts—What Law Governs," 18 Ark. Law Review, p. 96; "Choice of the applicable law," 52 Columbia Law Review, p. 959; "The Lex Fori—Basic rule in the conflict of laws," 58 Mich. Law Review, p. 638; and "Comments on Babcock v. Jackson. . . ." 63 Columbia Law Review, p. 1212.

We recognize that some courts, and a growing number of Law Review writers are going to the so-called "forum preference" rule. We cannot now say whether this Court will, in a stronger case than the one here presented, abandon the "*lex loci delicti*" rule in favor of the "forum preference" rule; but in the case at bar we adhere to the *lex loci delicti* rule, just as we held in *Wheeler* v. *Southwestern Greyhound, supra.* Here, the deceased was not a resident of Arkansas; the administratrix was not appointed by any court in Arkansas; the traffic mishap did not occur in the State of Arkansas. The only contact that Arkansas had to the mishap was the fact that the defendant has a place of business in Arkansas. All of the other factors—residence of the deceased, place of mishap, the appointment of the administratrix—had their locale in Missouri. Under such circumstances we feel that the plaintiff should not be allowed to "shop around" to find some forum (Arkan-

sas, in this instance) which has a more favorable statute than that of Missouri. And we certainly feel this is true after the Federal Court of Missouri had denied relief in the interrelated case of *Glick* v. *Ballentine*, 343 F. 2d 839. There is no escape from the logic and the conclusions stated by the Court of Appeals for the 8th Circuit in *Glick* v. *Ballentine,* when, in speaking of what the United States District Judge (Duncan) had held, the Circuit Court of Appeals stated:

> "From what has transpired, we believe Judge Duncan was justified in concluding that 'the sole reason for attempting to maintain the action in Arkansas is [because] the laws of the jurisdiction are more favorable to the elements of damage than * * * the laws of Missouri.' Appellants concede as much. Although they seemingly have recognized from the beginning that their complaint was deficient under Missouri law, they obstinately refused the opportunity to amend their complaint to state a cause of action. Perhaps they are more desirous of attempting to establish a new principle. Be that as it may, on this record and in the light of the controlling legal principles, we are required to affirm the judgment of dismissal."

We adhere to our holding in *Wheeler* v. *Southwestern Greyhound, supra.* The Missouri wrongful death statute had a built-in period of limitation, as previously stated. This cause of action arose in Missouri and the Missouri law governs; and the cause of action is barred by the Missouri statute. It thus becomes unnecessary for us to discuss the other points urged by appellant.

Affirmed.

WILEY LEE BAKER ET AL *v.* MRS. C. L. MATTHEWS

5-4040 408 S. W. 2d 889

Opinion delivered December 5, 1966

Ike Allen Laws Jr. and *Mobley & Bullock,* for appellant.

James K. Young and *Robert J. White,* for appellee.

ED. F. MCFADDIN, Justice. When the plaintiffs rested their case the Trial Court directed a verdict for the defendant, and from that judgment of dismissal the appellants prosecute this appeal. At the outset, we mention our well known rule that in such a situation we view the evidence in the light most favorable to the party against whom the verdict was directed. *Baratti* v. *Koser Gin Co.,* 206 Ark. 813, 177 S. W. 2d 750; *McCollum* v. *Graber,* 207 Ark. 1053, 184 S. W. 2d 264; *Dolly Parker Motors, Inc.* v. *Stinson,* 220 Ark. 28, 245 S. W. 2d 820; and *Ben Pearson, Inc.* v. *The John Rust Co.,* 223 Ark. 697, 268 S. W. 2d 893.

The plaintiffs-appellants are Wiley Lee Baker, a minor, by his father and next friend, Lee R. Baker; and Lee R. Baker, individually. The defendant-appellee is Mrs. C. L. Matthews. On the date of the traffic mishap (March 27, 1964) Wiley Lee Baker was a minor, 15 years of age, and was riding his motor scooter south on Boston Street in Russellville, Arkansas; and Mrs. Mat-

thews was driving her automobile east on "K" Street in said city. At the intersection of "K" Street and Boston Street there was a collision between the automobile and the motor scooter; and Wiley Lee Baker received serious and painful injuries. This action was filed by the minor and his father claiming that the traffic mishap was the direct result of the negligence of Mrs. Matthews. She denied all liability and the cause proceeded to a jury trial.

Neither side seems to have introduced evidence as to which street in Russellville had the right-of-way over the other, or as to any regulation of speed of vehicles on these particular streets. Wiley Lee Baker (supported in some respects by other witnesses) testified that he was proceeding south on Boston Street at a speed of 25 miles per hour; that Mrs. Matthews was coming from the west on "K" Street at a rapid speed; that he "tilted" his motor scooter to the left in an effort to avoid the collision; that nevertheless the left front bumper of Mrs. Matthews' car struck the right side of the motor scooter. The boy's right leg was severely injured, and the damage was to the right side of the motor scooter. The boy was thrown southeast, and the motor scooter was thrown northeast. The boy testified:

"Q. Now, is it true that the car hit you, or that you slid into the side of the car?

"A. The car hit me.

"Q. You're positive of that?

"A. Yes, sir."

One of the City Policemen of Russellville who investigated the traffic mishap was called by the plaintiff and he testified that he talked to Mrs. Matthews at the scene of the mishap shortly after it occurred; and here is the germane portion of such testimony:

"Q. Now, Mr. Ferguson, did you talk with either

of the parties there at the scene of this accident?

"A. I talked with Mrs. Matthews and her daughter.

"Q. Did Mrs. Matthews make any statement to you concerning the accident, or whether she saw the boy prior to the accident?

"A. Yes, sir.

"Q. What did she say specifically?

"A. She said that as she approached the intersection, the closer she got the more she wondered if the boy was going to stop or not.

"Q. Did she state whether or not she saw the boy?

"A. Yes, she said she saw the boy coming.

"Q. And then what?

"A. That the closer she got to the intersection the more she wondered if the boy was going to stop or not."

There was some evidence that the motor scooter ran into the side of the Matthews car about the left front hubcap. The motor scooter was introduced in evidence as an exhibit and has been brought to this Court, and an examination of the motor scooter shows that it was struck on the right side and that it did not run head-on into the automobile.

Further detailing of the evidence is unnecessary. The question to be decided was which party was negligent, and if both were negligent then which was the more negligent. Such is the effect of our comparative negligence statute, as found in Ark. Stat. Ann. § 27-1730.1 *et seq.* (Repl. 1962). We have unanimously concluded that it was the province of the jury to determine

the negligence, if any, or degree of negligence of each of the parties.

The judgment is reversed and the cause is remanded.

CATHEY THOMAS SUMMERS ET AL *v.* AVA DAWN SUMMERS ET AL

5-4064 408 S. W. 2d 887

Opinion delivered December 5, 1966

O. H. Hargraves and *McKnight & Blackburn,* for appellant.

Fletcher Long and *Carroll C. Cannon,* for appellee.

GEORGE ROSE SMITH, Justice. Leland Summers died testate in 1964, leaving his property to his widow and an adopted daughter, the principal appellees. At his death Leland was in possession of the 49 acres now in dispute. The appellants, Leland's seven children by his first wife, brought this suit for partition of the property. They contend that Leland received, under his father's will, only a life estate in the property, with the fee simple passing at Leland's death to all his children. The chancellor rejected this contention, holding that Leland owned the land in fee simple. The sole question is that of determining what estate vested in Leland under his father's will.

Leland's father, V. L. Summers, owned the land at his death in 1932. V. L. evidently prepared his own will, which was written in longhand. In quoting the will we have twice italicized one word, the pronoun "they," because the only real problem in the case is that of deciding to whom V. L. meant this pronoun to refer. Here is the will:

> March 24—1930
>
> To who this may concern.
>
> I this day do write my last will and testiment. That my wife and my son Leland Summers shall have all my land stocks or money what ever or where ever it is or what ever it may be now or in the future of any kind.
>
> And that they shall not be required to make bond of any kind.
>
> That my wife Page Summers shall have the land or the rent her comon life to do as she will and that after all dets and all my dets has been paid and the dets of my wife Page Summers, my son Leland shall take the whole of the remainder, and shall keep same till all his children is of age and then if *they* wish *they* shall have the write to sign their write a way to who ever they may wish and their deed shall be good to all who ever or what so ever. This is my last and only will.
>
> March 24—1930. V. L. Summers.
>
> Witness C. T. Moore
>
> Witness C. E. Willis March 24, 1930

We think it clear that the pivotal pronoun was meant to refer to Page and Leland, not to Leland's children. When the will is so construed the testamentary scheme is stated with simplicity and clarity, despite V. L.'s limited education. He directed that his widow

(who died in 1949) have a life estate, with the remainder going to Leland. Leland was to keep the property until his children became of age. At that time "they," meaning Page and Leland, would have the right to sell the property "to who ever they may wish and their deed shall be good." Quite evidently V. L. did not mean for their deed to be good immediately after his own death; so he added this precautionary clause to avoid any uncertainty about his intentions.

By contrast, if the pronoun "they" is construed as a reference to Leland's children, the will lacks both simplicity and clarity. Under that view the explicit remainder to Leland would be reduced to a life estate, even though V. L. plainly realized that the two estates were not the same. Moreover, the asserted devise of the remainder to Leland's children would have to be tortured, by inference and indirection, from the beneficiaries' declared right to sign their rights away. No doubt it is true, under the strict rules of grammar, that the antecedent of a pronoun is usually the nearest preceding noun, but that rule ought not to be woodenly applied to defeat what clearly appears to have been the testator's intention.

Affirmed.

Opinion delivered December 5, 1966

Hall, Purcell, Boswell & Tucker, for appellant.

Bruce Bennett, Attorney General; *H. Clay Robinson,* Asst. Atty. Gen., for appellee.

PAUL WARD, Justice. Appellant, Deola Fisher Sr. was charged and tried for murder in the first degree for the killing of Peter Collier by shooting him with a pistol. The jury returned a verdict of murder in the second degree and fixed the punishment at fifteen years in the penitentiary.

Collier was shot about seven p.m. while he was standing in front of a cafe in Benton. Nearby witnesses saw the shooting. Collier was rushed to a hospital where he later died. Appellant makes no contention here that there is any insufficiency of evidence to sustain the conviction for murder in the second degree.

On appeal, appellant argues fourteen separate points for a reversal, however, we find that all issues raised can be more conveniently and just as adequately treated under the eight subdivisions hereafter discussed.

One. We find no reversible error in the trial court's failure to continue the trial. Appellant was charged on November 5, 1965, and the trial was set for December 7, 1965. On Motion of appellant the case was continued until January 3, 1966, but on December 27, 1965 appellant asked for a continuance until March 29, 1966 (the beginning of the next term of court). This request was denied, but the court did grant a continuance until February 14.

The granting of a continuance is largely in the discretion of the trial court, as we have frequently held. We are unable to say the court abused its discretion in this instance. The only specific cause urged by appellant for a continuance was "that one eye witness, Robert Higgs, who was probably closer to the scene of the encounter than anyone else was absent . . . ." although he

had been subpoenaed. However, no showing is made as to what the absent witness' testimony would have been or whether it would be corroborative, as is required under our decisions. *Gallaher* v. *State,* 78 Ark. 299, 95 S. W. 463 and *Caldwell* v. *State,* 214 Ark. 287, 215 S. W. 2d 518. The record here discloses that the absent witness was only one of several who saw the shooting.

Two. During the trial appellant, on six separate occasions, asked for a mistrial, and each time the request was denied by the court. These are alleged to constitute reversible error, but we do not agree.

(a) At the beginning of the trial and in preparing to select the jurors, the judge asked the members of the special panel if there was any reason why they could not serve. He then said it would be to their benefit to serve because they would be excused from jury service for the next two years. It appears the judge was in error in the last statement, but even so we see no possible prejudice resulting to appellant, and none is pointed out by appellant.

(b) On *voir dire* examination of the jurors the court stated that both the deceased and appellant were members of the Negro race, and then the prospective jurors were asked if they knew of any reason why they could not give the defendant a fair trial. Their answer was in the negative. It appears to us that this information would tend to help and not to hurt appellant because the jury was certain to know he was of the Negro race.

(c) The Prosecuting Attorney asked one of his witnesses a question, and the answer received was a "surprise". Then the witness was asked: "Do you remember telling me anything different from that, John"? The District Attorney then stated: "Your Honor, I am surprised. This witness has made a different statement to me", but the trial court refused to allow the matter to proceed further. In the first place, since the witness

appeared hostile, we think it would have been proper to allow further questioning. *Ray* v. *State,* 102 Ark., 145 S. W. 190, and *Shands* v. *State,* 118 Ark. 460, 177 S. W. 18. Also, we think the matter tended to help rather than hurt appellant.

(d) During the closing argument of the State's Attorney he mentioned the fact that never before in that county had a member of the Negro race, upon conviction, received a life sentence. At that instant appellant moved for a mistrial, which was refused, and the court was not asked to admonish the jury. It is well settled by many decisions of this Court that the trial judge is vested with wide discretion in determining the propriety of counsel's remarks to the jury. *Greene* v. *State*, 38 Ark. 304; *Lemuels* v. *State,* 113 Ark. 598, 166 S. W. 741; *Head* v. *State,* 221 Ark. 213, 252 S. W. 2d 617. Moreover, the verdict shows the jury was not persuaded by the remarks.

We have examined other contentions by appellant that a mistrial should have been granted, but find no reversible error in any of them.

Three. Appellant challenged two jurors for cause, but was refused by the trial court. The only basis for the challenge was that these jurors were employed at the same place where the deceased was employed. It is admitted by appellant that no actual prejudice was shown, and we think none was indicated.

Four. In preparing its case the State took a statement from one of its witnesses whose name was on the information. Appellant requested the trial court to compel the State to turn the statement over to him. The court refused the request, and we think properly so. In the case of *Edens* v. *State,* 235 Ark. 178, 359 S. W. 2d 432, this same issue arose and we said:

> ". . . The defendant was not entitled to receive copies of the statements that the prosecuting attor-

ney had obtained from the various witnesses for the State, as this was a part of the prosecuting attorney's work papers . . . ."

Five. At the trial the Chief of Police was allowed, over the objections of appellant, to testify concerning a certain statement appellant had made to him after the arrest was made. At the time of the arrest the officer asked appellant why he killed the deceased, and the prompt reply was that he needed killing. It is not contended any force, promise or persuasion was used to induce appellant to talk, but it is contended that the error consists in the failure to show appellant was first advised of his constitutional rights—such as to keep silent and to be represented by an attorney.

We think no reversible error has been shown, based on our holding in the case of *Turney* v. *State,* 239 Ark. 851, 395 S. W. 2d 1. In the case (as shown at page 854 of the Ark. Reps.) the arresting officer asked the accused why he would get involved "in something like this", and the accused promptly replied he didn't know and that he must have been out of his mind. In holding the officer's testimony regarding that incident was proper, we said: "The simple statement, above quoted, was responded to by the spontaneous admission of guilt by Turney".

We also point out this case was tried in February, 1966 and therefore is not controlled by the *Miranda* case which did not (according to *Johnson* v. *New Jersey,* 384 U. S. 719) become applicable to cases tried before June 13, 1966.

Six. Appellant contends it was reversible error for the trial court to allow the former employer of the deceased to sit behind the witness stand. Appellant makes no attempt to show any actual or suspected prejudice against him. This was a matter which addressed itself to the sound discretion of the trial court, and we cannot say he abused such discretion in this instance.

In fact it was not known that he would be a witness until he was called to testify.

Seven. Reversible error is predicated on the failure of the trial court to give an instruction on manslaughter. It is true the court refused one such instruction, but this was not error because the court had already given instruction No. 2 on manslaughter, as requested by appellant.

Eight. Finally it is urged that the trial court erred in limiting, in time, the argument of one of appellant's counsel, but again we cannot agree. Here is substantially what occurred during the argument:

> "The Court: Mr. Boswell, how much longer do you propose to argue?
>
> "Mr. Boswell: I didn't know the Court had put a time limit on argument.
>
> "The Court: I didn't put a time limit on it. I am going to give your associate time to argue in the morning. It is after five o'clock. We are going to finish with yours this afternoon if we stay til nine o'clock."

Due to the lateness of the hour, we think the court's question was pertinent.

Finding no reversible error, the judgment is affirmed.

Affirmed.

JAMES E. JOHNSTON *v.* MARY G. JOHNSTON

5-3981 408 S. W. 2d 885

Opinion delivered December 5, 1966

James E. Stein and *Bernard Whetstone,* for appellant.

Spencer & Spencer and *Don Gillaspie,* for appellee.

OSRO COBB, Justice. The parties were divorced in September, 1963. Prior to the divorce they entered into a written property settlement, which included a substantial allowance for alimony and child support. Both parties asked the court to incorporate the terms of their property settlement into the decree of divorce, which was done.

On July 19, 1965, appellant filed his petition seeking to amend and reduce his decreed obligations as to alimony and child support, based upon changes in his financial condition.

On hearing it developed that appellant had remarried; that his new wife earned $3,600.00 per year and that appellant's personal gross income had been $16,-511.70 in 1963; $22,537.13 in 1964 and $23,000.00 in 1965.

The trial court found that it was without jurisdiction to amend a decree as to alimony based upon a written agreement of the parties fixing the alimony as part of their property settlement contract. We quote from the findings of the court:

> "The Defendant's testimony further reveals that his most valuable assets at the time of the property settlement were the retirement fund held by the Equitable Life Assurance Society, and the value of future commissions to be received from renewals of insurance policies written in Equitable Life Assurance Society and Occidental Insurance Company. The Plaintiff, in the property settlement agreement gave up any claim that she might have had to these assets in return for the provisions for her benefit contained in the property settlement agreement, including the child support and alimony payments therein provided.
>
> "* * * In this case, the Defendant does not attempt to show any change in the needs and necessities of his family and the evidence in regard to his personal income shows *that it has increased in amount, rather than decreased* since the date of the property settlement agreement as entered into and incorporated into the Decree of this Court." (Emphasis supplied)

Appellant conceded that the needs of the children had not changed and the only issue on review here is whether the court erred in refusing to reduce the previously decreed alimony payments to appellee of $325.00 per month. This is the dispositive question on this appeal.

We have many times recognized the rule of law that, while the court is not bound by the contract of the parties in effecting a property settlement, once it enters a decree awarding support money upon the agreed property settlement, it thereafter has no power to modify the decree as to alimony. *Reiter* v. *Reiter,* 225 Ark. 157, 278 S. W. 2d 644 (1955); *Bachus* v. *Bachus,* 216 Ark. 802, 227 S. W. 2d 439 (1950); *McCue* v. *McCue,* 210 Ark. 826, 197 S. W. 2d 938 (1946).

The rule has always reserved to the court the right to review and modify in accordance with changing circumstances awards for support of children, increasing or reducing same as warranted. *Lively* v. *Lively,* 222 Ark. 501, 261 S. W. 2d 409 (1953).

Of course, where payment of part or all of the alimony becomes an impossibility through no fault of the party obligated to pay, the court will not invoke contempt proceedings against the party for such default; this rule, however, being without prejudice to the rights of the party due arrearage in alimony to a remedy at law to collect the balance due under the contract, (Property Settlement Agreement). *Pryor* v. *Pryor,* 88 Ark. 302, 114 S. W. 700 (1908).

We do not recede from the rule announced in the cases cited. Refusal of the trial court to entertain modification of the contract of the parties as to alimony was proper.

The decree of the Chancellor is therefore affirmed.

Affirmed.

UNION BANKERS INS. CO. *v.* NATL. BANK OF COMMERCE OF PINE BLUFF, EX'R

5-4014 408 S.W. 2d 898

Opinion delivered December 5, 1966

John B. Plegge and *Perry V. Whitmore,* for appellant.

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

OSRO COBB, Justice. On December 3, 1962, William R. Felkins purchased a policy of insurance from appellant purporting to cover certain medical and hospital expenses thereafter incurred by Felkins and his wife.

The annual premium for the policy was substantial—$149.20 for the primary policy and $14.40 for a physician's supplement.

When Felkins applied for this insurance coverage, he set forth as a part of his past medical history that he had suffered from a stomach ulcer which required surgery, and that he had made complete recovery. The company attached two exclusionary riders to the policy.

In 1964 Mr. Felkins developed a jejunal ulcer. Such an ulcer is in an area outside the stomach and within the second portion of the small intestine which extends from the duodenum to the ileum. Felkins was hospitalized and received treatment, including surgery.

In February, 1965, Mr. Felkins was hospitalized for a circulatory embarrassment of the small intestine which resulted from a blood clot in the superior mesentery artery. Radical surgery was again performed. Mr. Felkins did not survive the second operation and appellee, National Bank of Commerce of Pine Bluff, was appointed executor of his estate.

Appellee made seasonable demand upon appellant for policy benefits as to both periods of hospitalization. Appellant denied any coverage and suit was instituted. The case was tried to the court sitting as a jury. The policy was introduced in evidence and proof was made of the exact amount of the hospital and medical expenses alleged to be reimbursable under the provisions of the policy.

Appellant in its answer admitted the issuance of the policy and the payment of all premiums due thereon during the lifetime of W. R. Felkins; admitted the period of hospitalization and made no effort to contest the accuracy of the medical and hospital bills which were offered in evidence. Appellant denied liability upon the contention that the periods of confinement to the hospital were caused or contributed to by physical conditions for which coverage was excluded under the terms of the policy.

Appellant called Dr. Raymond A. Irwin, Jr., general surgeon, Pine Bluff, Arkansas, and Dr. Walter J. Wilkins, Jr., also a surgeon, who testified concerning their treatment of Mr. Felkins and the surgery performed.

Neither side requested written findings of fact by the trial court and the court following hearing entered a judgment for appellee for all sums claimed to be due and owing under the policy, together with statutory penalty and a reasonable attorney's fee. It is from this judgment that appellant brings the appeal, urging that the trial court erred in that it misconstrued or interpreted the provisions of the policy erroneously.

Appellant does not contend that the primary policy did not provide the coverage as claimed by appellee, but insists that the coverage for all claims asserted by appellee was excluded by the provisions of the two riders attached to the policy.

We are therefore required to construe the riders attached to the policy to determine whether the trial court committed error in entering judgment against appellant.

THE FIRST POLICY RIDER. We set forth the pertinent language of this rider, as follows:

> "* * * the insured agrees to waive any claim for indemnity on account of any loss or disability hereafter sustained which shall be caused or contributed to by *Stomach ulcer* or *any disease or affection of the digestive tract, and/or any complication therefrom* * * *." (Emphasis supplied)

It has long been the established rule of this Court that any intent to exclude coverage in an insurance policy should be expressed in clear and unambiguous language, and the burden is upon the insurance company to present facts at trial that come within the stated ex-

clusion. It has also been an established rule of this Court that any ambiguity in an exclusionary clause must be construed strictly against the insurance company and liberally in favor of the insured. *State Farm Mutual Insurance Company* v. *Baker,* 239 Ark. 298, 388 S. W. 2d 920 (1965).

It is equally well settled that the findings of the trial court sitting as a jury will be sustained if there is any substantial evidence to support them. *Mid-South Insurance Company* v. *Dellinger,* 239 Ark. 169, 388 S. W. 2d 6 (1965).

The ancient rule of ejusdem generis, frequently invoked by this Court, is applicable here. This rule is defined in Black's Law Dictionary, Fourth Edition, as follows:

> "EJUSDEM GENERIS. Of the same kind, class or nature.
>
> "In the construction of laws, wills, and other instruments, the "ejusdem generis rule" is, that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned. Black Interp. of Laws, 141; *Goldsmith* v. *U. S.,* C.C.A. N. Y., 42 F. 2d 133, 137; *Aleksich* v. *Industrial Accident Fund,* 116 Mont. 69, 151 P. 2d 1016, 1021. The rule, however, does not necessarily require that the general provision be limited in its scope to the identical things specifically named. Nor does it apply when the context manifests a contrary intention.
>
> "The maxim "ejusdem generis" is only an illustration of the broader maxim, "noscitur a sociis". *State* v. *Western Union Telegraph Co.,* 196 Ala. 570, 72 So. 99, 100."

In *Jones* v. *State,* 104 Ark. 261, 149 S. W. 56 (1912), this Court approved a terse statement of the ejusdem generis rule, which we quote:

> "When general words follow an enumeration of particular things, such words must be held to include only such things or objects as are of the same kind as those specifically enumerated."

See also *Hempstead County* v. *Harkness,* 73 Ark. 600, 84 S. W. 799 (1905).

The stomach is a recognized, primary and essential part of the digestive tract. If it had been the intent of the rider to exclude all diseases and complications of all diseases along the entire digestive tract, it was unnecessary to single out and isolate the stomach as one of multiple parts of the entire digestive tract. To say the least, the language employed in the rider is specific and certain as to the stomach but unclear and uncertain in other respects. We must resolve such uncertainties in favor of the insured.

We have therefore concluded that the effect of this rider was to exclude claims arising solely from ulcers and diseases of the stomach and complications therefrom. Appellee's claim for medical and hospital services which were required because of his jejunal ulcer were properly allowed by the trial court.

THE SECOND POLICY RIDER. We set forth the pertinent language of this rider, as follows:

> "* * * the insured agrees to waive any claim for indemnity on account of any loss or disability hereafter sustained which shall be caused or contributed to by *any disease or affection of the cardio-vascular-renal system or any part thereof, and/or any complication therefrom* * * *." (Emphasis supplied)

Dr. Walter J. Wilkins, Jr., who was called as a wit-

ness for appellant, testified in part on direct examination as follows:

"Q. Dr. Wilkins, what, in your opinion, was the main reason that Mr. Felkins was hospitalized on February 2nd '65 to March the 1st '65?

"A. Circulatory embarrassment of the small intestine.

"Q. What was this brought about by?

"A. By a blood clot in the superior mesentery artery that provides the circulation to this portion of the digestive system.

"Q. And this is a disease or *malfunction* or infection of the cardiovascular-renal system, is this correct?

"A. It is." (Emphasis supplied)

Dr. Williams testified in part on cross examination as follows:

"Q. Now what caused the clot?

"A. We actually have no proof as to what caused the clot per se, in this particular instance.

"Q. Well then, the loss of circulation which caused these other problems was caused by the clot, but you are not able to say what caused the clot?

"A. In this instance we are not.

"Q. In a general sense is a clot a disease?

"A. Normally that would depend on when a clot forms and why it occurs, whether it's the cause or the effect of the circumstance. A clot that forms when one cuts oneself is a healthy normal reaction and the formation of a clot or the coagulation of the blood is basically not

an abnormal reaction. It's suppose to be a normal function of the body. If a clot doesn't form it's an abnormal reaction, and actually here one would say the formation of a clot is not a disease because one can find clots in other portions, other areas, however, what the clot resulted in is a disease.

"Q. What it resulted in, the clot itself is not?

"A. Yes sir.

"Q. Doctor, when you take the terms digestive system and the cardiovascular-renal system in their broad medical meanings are there any major systems of the body left?

"A. The muscular skeleton system is left and the nervous system."

We note that Dr. Wilkins, during his direct examination, confirmed that the blood clot in this case could have been one of three things—a disease, a malfunction or an infection. However, on cross examination, he stated quite clearly that he was not able to state any cause for the clot and went further to explain that a blood clot could be a normal function of the body. It was established in this case that the blood clot in the superior mesentery artery caused the insured's terminal disabilities and hospitalization. What is totally unclear is the cause of the clot in the first instance. It is certain that Dr. Wilkins did not testify that this clot was caused by a disease of the cardiovascular-renal system. It could have been a malfunction or accident.

We therefore find substantial evidence in the record to support the action of the trial court in entering judgment for appellee for claims asserted under the policy by reason of disabilities and hospitalization resulting from the blood clot.[1]

[1]Dr. Wilkins, a witness for appellant, testified that eliminating the entire digestive and cardiovascular-renal systems in their broad

We find no error in the action of the trial court in entering judgment for appellee and the judgment is affirmed.

Affirmed.

Harris, C. J., disqualified and not participating; George Rose Smith, J., dissenting.

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medical meanings, the only major systems of the body remaining were the muscular skeleton system and the nervous system. Section 3 of Part 10 of the insurance policy involved in this case specifically excluded any coverage of nervous disorders without demonstrable organic disease. If we had accepted the interpretation of the policy riders insisted upon by appellant, the insured could have been limited as to certainty of coverage to his bones and muscles, and then only if there was no disturbance or complication involving a blood vessel, however minute, in supplying the bone or muscle.

JOHNNIE GILCHRIST *v.* STATE OF ARKANSAS

5212 409 S. W. 2d 329

Opinion delivered December 5, 1966
[Rehearing denied January 9, 1967.]

Harry C. Robinson, for appellant.

Bruce Bennett, Attorney General; *Fletcher Jackson,* Asst. Atty. General, for appellee.

GUY AMSLER, Justice. Appellant, Johnnie Gilchrist, was tried in the Circuit Court of Pulaski County, on a charge of murder in the first degree and convicted of murder in the second degree. The jury fixed his punishment at 21 years imprisonment in the State Penitentiary. Motion for a new trial was overruled and appeal was perfected in due time. The only point relied on is that "The court erred in refusing to charge the jury on the lesser offense of manslaughter."

The background facts as reflected by the proof may be briefly stated. Sometime during the early morning of August 21, 1965 (the exact time is uncertain because of conflicts in the evidence) appellant Johnnie Gilchrist and his brother Walter got into a "ruckus" at their mother's home on Raines Road outside the city limits of Little Rock. They were "quieted down" by other members of the family. Later the brothers went their separate ways on different missions and returned to their mother's around 9:00 a.m. During their absence from home Johnnie procured a pistol someplace and fetched it home with him. Johnnie was in the home of his sister and Walter (the deceased) was at his mother's house. The houses are some 100 to 150 feet apart. Walter had returned to his home with a nephew Leon Farr. When he entered the house his sister, Alice Gilchrist, warned him not to go out the back "door because Johnnie said he was going to kill him," but that he went anyway. She said Walter did not have a gun, and Leon Farr said he saw no gun.

There was no eye witness to the shooting other than appellant and his version is somewhat different. His testimony was that he told his niece that he was going to take the pistol back to his nephew's and when about to leave he saw Walter out in the back yard with a .22 rifle, and that his brother, the deceased, told him to come on out he (Walter) "was going to kill me." He

says that he then went back and told his niece (not corroborated by her) "that fool was standing out there with a gun," and while he talked with his niece a few minutes, "I figured he'd go and put it up," and then:

"Q. Okay. Now, what happened when you went out, or did you go out the door then?

A. Yes, I went out the back door.

Q. Okay, then what happened?

A. When I came out, I shot him, That's all I know what happened.

Q. How many shells did you fire?

A. Twice.

Q. You fired twice?

A. Yes, sir.

Q. How many times did your brother fire?

A. He didn't get a chance to fire. Not then he didn't. He had already shot before then, before I went in the house talking to her.

Q. How many times did he shoot?

A. He didn't shoot but one time.

Q. And you say he told you to come out of the house, that he was going to kill you?

A. That's right.

Q. And when you came out the door you had your mind made up that you were going to protect yourself?

A. That's right."

He further testified that "I felt like if I would shoot him in the leg or something to make him drop that

gun." Appellant then left and reported to the officers that he had shot his brother. He also delivered the pistol to the deputy sheriffs and they found four spent cartridges in it. He never reported to the officers that his brother had a gun at the time he shot the deceased.

The instructions which appellant contends should have been given read:

> "Manslaughter is the unlawful killing of a human being without malice, express or implied, and without deliberation.
>
> "Manslaughter must be voluntary upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible. That is voluntary manslaughter."

Three cases are cited in support of appellant's argument. *Collins* v. *State,* 102 Ark. 180, 143 S. W. 1075, may be distinguished on the facts. Collins and Jones were riding by Yarbrough's (the deceased) home in a buggy, at night, when one of them fired a pistol (apparently into the air). Yarbrough came from his house toward the buggy, with gun in hand and ordered the occupants of the buggy to halt. Both sides started firing and Yarbrough was killed. Collins was indicted for and convicted of murder. The trial court refused to instruct on voluntary manslaughter and we held this to be error. Justice Frauenthal wrote:

> "Both Jones and the defendant were surprised by the appearance of the deceased near the buggy and by his attack made with gun in hand, and, not knowing who he was, they feared either that they would be robbed by him or receive injury to their persons from him; and that by reason of this fear and surprise Jones fired at the deceased. This, in short, is the testimony of the defendant himself, which though contradicted in many material points by other evidence in the case, nevertheless presented

an issue which, under the law, he had a right to have submitted to and be determined by the jury upon proper instructions. It appears that the court instructed the jury relative to murder in the first and second degrees, but did not instruct them at all in reference to the crime of manslaughter or the punishment for that degree of homicide, although requested to do so by the defendant. The grade of a homicide may be reduced from murder to manslaughter by reason of a passion caused by a provocation apparently sufficient to make the passion irresistible. The passion may consist of anger or fear or terror. These are the causes from which the passion springs; and, whether induced by the one or other of these causes, it will reduce the grade of the homicide from murder to manslaughter. It is perfectly proper to show that in a given case the passion did exist for the reason that it was induced by anger suddenly aroused, or by surprise, or by fear, or by terror; and where there is any evidence tending to show that the defendant was guilty of a lower grade of homicide than murder, the trial judge should instruct the jury in reference thereto when requested by the defendant."

In the instant case we have a distinctly different set of facts. Appellant was not confronted with a "surprise" situation which might be calculated to create a sudden heat of passion, fear or terror. He seemingly was in a perfectly safe place—his sister's home. His conversation with his niece (which, according to the proof, may have lasted some 15 or more minutes) indicates neither fear nor terror and his act of deliberately walking out the back door into the very "mouth of the cannon" so to speak, does not indicate any great measure of fear on his part. If his brother, gun in hand, (as he says) was standing in the adjoining back yard some 50 to 100 feet away threatening to kill him his (appellant's) conduct (under his own testimony) may best be categorized as poor judgment or willfully intentional rather than charged to a sudden heat of pas-

sion, fear, surprise or terror. We do not consider the Collins case beneficial to appellant's contention.

Pickett v. *State,* 91 Ark. 570, 121 S. W. 732, is relied on. Henry and Wilson Pickett were indicted on charges of first degree murder for killing Charles Abbott and were convicted of second degree murder. The court refused an instruction on voluntary manslaughter and this was held to be error.

On the 8th day of December, 1908, Henry Pickett went to the store of Bunk Abbott and reported that he (Pickett) had a bale of cotton at the gin for which he wanted credit on his store account. Abbott told Pickett that he (Abbott) "would go down there and get the cotton." That evening about supper time Pickett was sitting on his front porch when Charles and Bunk Abbott drove up in a wagon. Justice Hart narrates Pickett's version of what happened:

> "and Mr. Abbott says: 'Henry, come out here and get in this wagon, and go back to town with me.' I said: 'Mr. Abbott, you have plenty of help without me.' He says: 'Damn that! This is your cotton, and I want you to go back to town and unload it.' I started to tell him something, and he said again: 'Come out here.' I started to go out there, and then concluded I had better stay where I was, and said to him that I had better stay where I was, as he did not look right. He says: 'You damned son of a bitch, come out of there!' And I told him I was not coming, and he said: 'If you don't come out of there, I am coming in there.' He said: 'You may think I have no right to come in there, but I will show you.' I said: 'I have got nothing to say about that.' He then pulled his gun out and started in. He got about half way between the gate and the doorsteps where I was sitting. I was still sitting there, and he had the gun in his hand. I did not think he was going to shoot me, and I just stayed there. I stayed there until he stepped up to me, and

> when he gets up to me he says: 'By God, you get up and come out of here.' I sat there just a second and then I gets up and whirls right quick in the house. He then shoots at me three or four times, maybe five, and then he started in the house. Mr. Bunk was running in this way shooting, and Mr. Charlie was shooting this way (indicating). My children was running around after me hallooing and screaming. And they were just shooting every way. . . . I ran to the corner where I generally kept my gun, and I did not find it, and I ran to the bed and found my gun where they had put it while they were cleaning up. I grabbed my gun, and began shooting at them. I did not have but one shell, and I shot it, and then I ran back and got my rifle. My brother did not shoot at all. He had nothing to do with the difficulty. I did not have any pistol that day; never owned one in my life. After the shooting I ran out of the back door and into the field where we saw Mr. Porter."

The third case offered by appellant as supporting his position is *Ringer* v. *State,* 74 Ark. 262, 85 S. W. 410. Ringer owned a country store in Yell County. On Christmas Day several persons gathered at the store for a "turkey shoot." York McCullom and his son John were there and John had an air gun. A shot from the air gun entered the store and when Ringer went out the front door to warn the boys he and John got into a fight. John cut Ringer in the back with a knife and chased him back into the store. Ringer thinking the boy was still in pursuit grabbed his Winchester rifle, wheeled and fired from the back of the store. York McCullom who was in the store during the altercation had started to walk out the door. Ringer's bullet struck him in the back and he died. Ringer was indicted and tried for the killing. The testimony was in conflict as to whether the homicide was intentional or an accident.

The trial court refused an instruction on "involuntary" manslaughter and we held this to be error.

It is readily apparent that neither of the foregoing cases presents such factual pictures as confronted the trial court in the instant prosecution. We think that they are distinguishable on either the facts or the law, if not both.

We have numerous cases holding that it is not error for the trial court to refuse an instruction on "lesser degrees" of an offense when the evidence does not justify doing so. *McGarrah* v. *State,* 217 Ark. 186, 229 S. W. 2d 665; *Washington* v. *State,* 181 Ark. 1011, 28 S. W. 2d 1055; *Allison* v. *State,* 74 Ark. 444, 86 S. W. 409.

Having concluded that the record reflects no proof that would require an instruction on voluntary manslaughter and no other error being urged the case is affirmed.

RALPH FULLER *v.* EUNICE FULLER

5-4039 408 S. W. 2d 884

Opinion delivered December 5, 1966

Laws & Schulze, for appellant.

Gordon & Gordon: By *Charles H. Eddy,* for appellee.

GUY AMSLER, Justice. This contested divorce suit resulted in denial of a divorce to either party. Appellee Eunice Fuller filed her complaint in the Chancery Court of Pope County on September 10, 1965, for a divorce on the grounds of indignities. Appellant Ralph Fuller, on October 6, 1965, counter-claimed for divorce alleging indignities. Appellant has had custody of the parties' three children since this litigation commenced, with visitation rights for appellee. Custody is not in issue here.

The chancellor heard testimony on January 6, and March 3, 1966, and refused to grant either party a divorce. An earlier order on custody, alimony and visitation rights was continued in force and both parties have appealed.

Appellant's evidence to support his petition for divorce consists primarily of appellee's alleged mistreatment of their children, and his intervention on their behalf. Appellee and their oldest daughter engaged in a rather violent hairpulling contest in the backyard, with a number of their neighbors looking on. Appellant broke this ruction up by slapping appellee a couple of times. There was some other evidence of mistreatment and disagreement.

Appellee admittedly is not in the best health. She suffered a brain concussion in an automobile accident in 1960, and had had major surgery a few months prior to that. Both parties testified that she at times required strong medication (demoral shots) to control her headaches. Appellee's principal testimony on appellant's alleged intolerable conduct was that he refused and neglected to pay their bills, so that she was harassed by bill collectors and was under much tension in trying to get appellant to pay the bills.

Appellee is now residing in Morrilton where she is in training for what appears to be very favorable employment so it may be that the chancellor discerns

some possibilities of a future reconciliation. Anywise he observed and heard the parties and witnesses and is in a better position to evaluate their testimony and determine what later action will best serve the interest of the parties than are we. The situation is admittedly an unfortunate one but where the evidence does not preponderate in favor of either party, we will not disturb the chancellor's decree. Appellant is to pay the costs of appeal.

Affirmed.

JAMES RICE, ALIAS JAMES ROBINSON *v.* STATE OF ARKANSAS

5215 408 S. W. 2d 902

Opinion delivered December 5, 1966

J. B. Milham, for appellant.

Bruce Bennett, Attorney General; *John T. Haskins,* Asst. Atty. Gen., for appellee.

HUGH M. BLAND, Justice. Appellant, James Rice, alias James Robinson, and one Stanley Robinson, were charged by information with forgery and uttering. The State alleged that they forged a check in the amount of Thirty-Eight Dollars and Twenty Cents ($38.20) on the J. O. Robinson Plumbing Company payable to Stanley Robinson and signed J. O. Robinson Plbg. This check was drawn on the Benton State Bank and the check was cashed at the Saline Hardware Company.

Stanley Robinson pleaded guilty to the charges of forgery and uttering and was sentenced to the State Penitentiary. Appellant was tried before a jury on March 7, 1966, found guilty and sentenced to three (3) years for forgery and three (3) years for uttering. Appellant brings this appeal urging ten (10) points for reversal as follows:

"POINT NO. 1. The verdict of the jury is contrary to the evidence, and the law.

POINT NO. 2. The judgment is contrary to both the law and the evidence.

POINT NO. 3. The verdict and judgment are excessive.

POINT NO. 4. The Prosecuting Attorney refused to file the alleged forged check with the Clerk of the Circuit Court so appellant could inspect same and prepare for trial as requested twice by appellant; that said check shows on its face that the 4 letters 'Plbg' were written on the check by some one besides appellant or the person who wrote the check. The Court erred in permitting the check to be introduced in evidence.

POINT NO. 5. The Court erred in permitting ap-

pellant to be brought into court handcuffed to Stanley Robinson who was brought from the State Penitentiary and who testified against appellant.

POINT NO. 6. The Court erred in permitting the Prosecuting Attorney to introduce the alleged forged check over defendant's objections.

POINT NO. 7. The Court erred in permitting State's witnesses to testify over defendant's objections that the check was charged to J. O. Robinson Plumbing account and then taken out.

POINT NO. 8. The Court erred in refusing to instruct the jury not to consider the testimony of Bill Ford, witness for State, upon the grounds that Ford did not handle the forged check and did not handle the books and was disqualified to testify as to what the records showed.

POINT NO. 9. The Court erred in giving the State's Instruction No. 1 over appellant's objections and exceptions, his specific objections.

POINT NO. 10. The Court erred in giving State's Instruction No. 5 over defendant's objections and exceptions."

It is not necessary to discuss appellant's third and fifth points as they were not raised in the motion for a new trial.

Points one and two challenge the sufficiency of the evidence to corroborate the accomplice, Stanley Robinson. We see no merit in this contention. Stanley Robinson testified that it was appellant's idea to get some money by writing checks; that they went to his house and appellant produced ten blank payroll checks of J. O. Robinson Plumbing Company. Appellant filled out one of these checks in the amount of $38.20 signed by J. O. Robinson Plbg. and payable to Stanley Robinson; that he (Stanley) took the check to Saline Hardware, endorsed and cashed it splitting the money

with appellant. Gerald Perry, clerk at Saline Hardware, corroborates Stanley Robinson's testimony about cashing this check and purchasing tools with part of it. Bill J. Ford, Vice President of the Benton State Bank, testified that the signature on the check did not match the signature card on file at the Bank. Sheriff Guy Grant testified that when he went to the Bank to investigate the check he immediately recognized appellant's signature on the check. [For his familiarity with the signature see *Rice* v. *State,* 240 Ark. 674, 401 S. W. 2d 562.] The Sheriff picked up appellant and he gave him a specimen of his handwriting by writing the mane "J. O. Robinson" ten times. This specimen was turned over to a Mr. Chandler at State Police Headquarters, (Chandler is a handwriting expert) and after comparison he testified that the specimen handwriting and the signature on the check matched. There is substantial corroborating evidence to connect appellant with the commission of the offense. *Lauderdale* v. *State,* 233 Ark. 96, 343 S. W. 2d 422 (1961).

We see no merit in appellant's fourth point for the reason that the Prosecuting Attorney, in response to a motion for a Bill of Particulars, made the check available for inspection. *Edens* v. *State,* 235 Ark. 996, 363 S. W. 2d 923.

Appellant's sixth point is in substance the same as his fourth point.

Points seven and eight are so related they can be discussed together. As we see it, the only contention here is that Bill J. Ford does not personally handle checks and bookkeeping. He is Vice President of the Bank and it is operated under his supervision. He was competent to testify as to the failure of the signature to match the signature card on file at the Bank. We see no merit in this point.

Appellant, for his ninth point, challenges the giving of State's Instruction No. 1 which is as follows:

> "You are instructed that the forgery of an instrument is one offense, the offering to pass it, knowing it to be forged, whether he, himself, forged it or not, is another offense, which is called uttering a forged instrument."

This instruction is based on Ark. Stat. Ann. § 41-1805 (Repl. 1964) and is quoted verbatim. The instruction correctly states the law. Forgery and uttering are separate and independent offenses. *Ball* v. *State,* 48 Ark. 94, 2 S. W. 462. Appellant does not argue or try to show what is wrong with Instruction No. 1. It is a correct definition of forgery and uttering. *Tarwater* v. *State,* 209 Ark. 687, 192 S. W. 2d 133 (1946).

Appellant also challenges the giving of State's Instruction No. 5 which is as follows:

> "There is another rule of evidence which applies to this case. Our statute provides that the jury cannot convict anyone charged with a felony on the uncorroborated evidence of an accomplice. By an accomplice is meant any person who had anything to do with the commission of the offense charged, and the evidence of any accomplice, uncorroborated, will not justify any jury in convicting a defendant, even though they believe it beyond a reasonable doubt.
>
> You will observe that the corroborating evidence of an accomplice must not only show the facts and circumstances of the case, but also show the defendant's connection with it. The jury must not make the mistake of thinking that the corroborating evidence itself should be sufficient to convince you of his guilt beyond a reaonsable doubt. The instruction tells you, first, that the evidence of an accomplice must be corroborated; and, second, that all the evidence in the case, taken together, should convince you of his guilt beyond a reasonable doubt before you can convict.
>
> The jury is instructed that if you find from the

evidence that the witness, Stanley Robinson, is an accomplice, because equally guilty with the defendant, if the defendant is guilty, then you are instructed that although you may believe the testimony of the witness Stanley Robinson, you would not convict the defendant on his testimony, unless you find that his testimony is corroborated by other testimony, either by direct or circumstantial evidence tending to connect him with the crime. This other evidence is not sufficient if it only shows the facts and circumstances that the offense was committed, but it must go further and show affirmatively that the defendant was connected with the crime and the commission of it.

This instruction does not mean to tell you that the corroborating evidence must of itself be sufficient to convince you of his guilt beyond a reasonable doubt, but it means that the evidence of Stanley Robinson, if an accomplice, must be corroborated and that all the evidence in the case taken together, must be sufficient to convince you of his guilt beyond a reasonable doubt, before you can convict him of anything."

This instruction is a correct statement of the law. Ark. Stat. Ann. § 43-2116 (Repl. 1964), *Lauderdale* v. *State, supra; Beasley* v. *State,* 219 Ark. 452, 242 S. W. 2d 961 (1951) and *Thompson* v. *State,* 207 Ark. 680, 182 S. W. 2d 386 (1944).

Appellant's main objection to this instruction is that he says the instruction should have told the jury that Stanley Robinson was an accomplice and not leave that issue to the jury. This is not the law and there was no reversible error if it were, in fact, submitted to the jury. *Hummel* v. *State,* 210 Ark. 471, 196 S. W. 2d 594 (1946), *Boyd* v. *State,* 215 Ark. 156, 219 S. W. 2d 623 (1949).

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

DAVID D. PANICK, EX'R *v.* DR. MAC MCLENDON

5-4030 409 S. W. 2d 497

Opinion delivered December 12, 1966
[Rehearing denied January 16, 1967.]

Catlett & Henderson, for appellant.

Daggett & Daggett, for appellee.

CARLETON HARRIS, Chief Justice. Sarah Panich, a resident of Marianna, Arkansas, died testate on March 8, 1965. Under the provisions of her will, all of her property was devised and bequeathed to Ike Panich and David D. Panich, who were named co-executors. The will was admitted to probate on March 17, 1965, the nominated co-executors being appointed co-executors of the estate. On September 7, 1965, Dr. Mac McLendon of Marianna, appellee herein, filed a claim against the estate in the amount of $1,350.00, the claim being set out in a statement entitled, "To Balance Account Rendered." Charges were shown in the amount of $150.00 per month from March, 1963, to December, 1963, both inclusive, and a like sum per month for December 1964, to February, 1965, both inclusive. The entire amount of the claim totaled $2,850.00, but credits were reflected

in the amount of $1,500.00, leaving a balance of $1,350.00. A motion was filed by the executor, David D. Panich, appellant herein,[1] to make the claim more definite and certain, and McLendon responded, setting out the basis for the amount sought, the answer reflecting the claim related to professional services rendered to Miss Panich. On hearing, the court allowed the claim, and from the judgment so entered, appellant brings this appeal. For reversal, it is first asserted that the trial court erroneously permitted appellee to change his cause of action, and it is then contended that the evidence was insufficient to establish the amount of the claim. We proceed to a discussion of these points in the order listed.

The first contention is based upon the fact that Dr. McLendon's claim was a statement of account setting forth only charges and credits, without giving the reason for the alleged indebtedness. Before the hearing commenced, counsel for the appellant stated to the court that appellant objected to the claim and any testimony that might be taken in support of it, because it did not comply with Ark. Stat. Ann. § 62-2603 (Supp. 1965), in that it did not describe the nature of the claim. Counsel asserted that "it might be for professional services rendered; it might be for medicines furnished or prescribed; it might be for a personal debt, or it might be for anything." He objected to hearing proof, stating, "So, if Your Honor please, the nature of the debt has not been stated." Appellant complains that the court permitted Dr. McLendon to establish the amount of his claim on a *quantum meruit* basis, and that he was not prepared to defend against this pleading, his understanding being that the claim was predicated upon an oral contract between appellee and Miss Panich as to the amount of the doctor's charges for services rendered.

We do not agree with appellant that error was com-

[1]The record does not reflect whether David D. Panich, subsequent to the issuance of letters testamentary, became sole executor of the estate, but he is the sole appellant.

mitted. This particular attack appears to be presented for the first time in this court, and there appears no objection during the trial in line with the present argument. Appellant's objection went only to the sufficiency of the claim itself (because the nature of the indebtedness was not stated in the original claim filed); however, the answer filed in response to appellant's motion to make more definite and certain, gave the information that the claim was for professional services, and the court exercised its discretion in permitting the amendment. This was done at the very outset of the trial, and before the introduction of any proof. Appellant did not seek a continuance, and permitted all six witnesses who testified for appellee to offer their evidence without objection. The evidence of the several doctors who testified related to the reasonableness of Dr. McLendon's charges on a *quantum meruit* basis. The court was entirely within its rights in permitting the amendment, and did not abuse its discretion. See, among many cases, *Missouri Pacific Transportation Company* v. *Brown* 193 Ark. 304, 99 S. W. 2d 245; *Missouri Pacific Transportation Company* v. *Williams,* 194 Ark. 852, 109 S. W. 2d 924; *Nance* v. *Eiland,* 213 Ark. 1019, 214 S. W. 2d 217. Also, the particular argument here offered, as previously stated, was not presented to the Probate Judge, and we have repeatedly held that a litigant cannot, on appeal, raise an issue for the first time in this court. *Angelletti* v. *Angelletti,* 209 Ark. 991, 193 S. W. 2d 330.

Nor do we agree that the evidence was insufficient to establish the claim. Dr. McLendon testified that his charges for house calls are $5.00 each, and that he was due, at the time of the trial, a balance of $1,350.00. He, of course, could not testify as to any contract with the deceased because of the provisions of schedule § 2 Arkansas Constitution of 1874. Mrs. McLendon, who at times works with her husband in his office, testified that Miss Panich called the doctor numerous times between March, 1963, and February, 1965. The witness said that Miss Panich required Dr. McLendon's services three or four times a day during the period of time mentioned, and that some of the visits made were at night.

Virginia Parnell, a practical nurse, employed by appellee during the period in question stated that she saw Sarah Panich every day, sometimes as much as three or four times per day; that she would take Miss Panich medicine; that on numerous occasions, "she let me give her shots."[2] Mrs. Parnell testified that Dr. McLendon would go to the home of this patient, upon request, five or six times a day.

Dr. Dwight W. Gray, of Marianna, testified that Miss Panich was his patient for three months during 1962, and he administered demerol to her for pain. The doctor said that he or his office nurse would visit her two or three times on some days. It was the opinion of the witness that a charge of $150.00 per month was a reasonable charge by a doctor who was called upon to render service to his patient three, four or five times per day. Dr. William C. Hayes testified that Miss Panich was a patient of his from 1946 until about 1960, and that when he last treated her, she required daily medication. He agreed with Dr. Gray that a charge of $150.00 per month would be a fair amount for the services that Dr. McLendon testified he rendered.

Appellant complains that there is no proof that there was an express or implied agreement that Miss Panich would pay for the services heretofore mentioned, but we think the proof warrants an inference that this was true. Certainly, there is no indication that Dr. McLendon was making these visits with no expectation of receiving remuneration. Let it be remembered that absolutely *no evidence* was offered to contradict the testimony heretofore referred to, so that the entire testimony, including Dr. McLendon's testimony, that he was due a balance of $1,350.00 is completely undisputed.

It is established that Miss Panich was in need of medical services several times per day, and this fact was

[2]Miss Panich was suffering from cancer of the lung, and also an arterial disease, which had affected her lower limbs, and prevented her from moving about, except on crutches.

testified to by Doctors Gray and Hayes, who treated this patient for some time before Dr. McLendon became the physician for Miss Panich. Dr. Hayes testified that, even in 1959 or 1960, when he last treated her, her condition required daily medication, and this, of course, was some period of time before Dr. McLendon entered the case. It would appear, under the evidence, that as her condition worsened, more medication, and more visits were required.

Appellant complains that the charges were made on a monthly basis, and insists that allowance of same is improper, because the exact number of visits, together with the charge for same, is not shown. The simple answer to this is that, under the evidence, appellant is in no position to complain, for the charges, based on specific visits to the home would have been far greater than the amount of the claim filed. The testimony reflected that the ordinary charge for a home visit by doctors in Marianna was $5.00 per visit, and simple mathematics establishes that, during this two-year period of time, if Dr. McLendon only made *one visit per day* the charges would amount to something over $150.00 per month. One call per day is an inappreciable number, as it relates to the overall number of visits testified about during the trial.

The court found that the claim fairly and justly represented the value of the services rendered, and we are unable to say that this finding was against the preponderance of the evidence.

Affirmed.

AMSLER, J., not participating.

GEORGE F. CARTER, TRUSTEE *v.* COOPER JACOWAY

5-4053 408 S. W. 2d 875

Opinion delivered December 12, 1966

Warren & Bullion, for appellant.

Spitzberg, Bonner, Mitchell & Hays, for appellee.

CARLETON HARRIS, Chief Justice. This is an appeal from a decree of the Pulaski Chancery Court (Second Division), wherein Cooper Jacoway, a Little Rock attorney, and appellee herein, was given judgment against George F. Carter, Trustee of the testamentary trust estate of E. L. Carter, deceased, in the amount of $9,411.31, together with all costs, and interest at the rate of 6% per annum from January 31, 1966, until paid. The pertinent facts are as follows:

E. L. Carter died testate in 1950, and, by his will, created a trust, naming his widow, and son, George

Carter, trustees, and naming George Carter and Mary Louise Carter Wallace, a daughter, as beneficiaries. Mrs. Carter subsequently died, and George Carter is the sole surviving trustee. Helen Carter was the wife of George Carter until their divorce, and George conveyed one-half of his interest in the trust estate to Helen, the result being that George Carter is the trustee of a trust estate in which he, his sister, Mary Louise Wallace, and his ex-wife, Helen Carter, are the beneficiaries.

In the latter part of 1962, the sister and ex-wife instituted suit in Pulaski Chancery Court against the trustee, charging him with mismanagement of the trust properties, with improper investments, breaches of his fiduciary duty, and with refusal to make records available to the beneficiaries; judgment was sought against him for approximately $33,000.00, and his removal as trustee was prayed. Carter then employed Jacoway to defend the suit, agreeing to pay an attorney's fee of $1,500.00, without regard to the outcome of the litigation, and the additional sum of $3,000.00 if Jacoway "were able to defend the suit successfully and to give the trustee final protection against the charges in the suit."

Subsequently, Carter decided that he would like to terminate the trust by disposing of the assets, distributing the proceeds, and obtaining his discharge as trustee. Jacoway was consulted with reference thereto, and the two men entered into an agreement, the terms of which were embodied in a letter from Carter to Jacoway, dated November 26, 1963. The principal property owned by the trust is a half interest in the Colburn Hotel, located in Denver, Colorado. The other half interest is owned by a Mrs. Evelyn Turner and her mother. Carter, as an individual, had an agreement with the Turners to receive a commission for selling the Turner interest in the hotel, the amount depending upon the sale price of the property. Carter agreed to pay Jacoway half of any net amounts that he might receive from the Turners for disposing of their interest. Because of the impor-

tance to this litigation of the letter of November 26, 1963, from Carter to Jacoway, heretofore referred to, same is herewith set out in full:

Dear Mr. Jacoway:

In view of the many elements involved, I think it is a good idea for us to have a memorandum concerning your employment in connection with the E. L. Carter Trust.

At the time that my sister, Mrs. Wallace, and my ex-wife, Helen Carter, brought suit against me in connection with my Trusteeship of the above Trust, I employed you to represent me as Trustee, and I agreed to pay you, as Trustee, a fee of $4,500.00 if you were able to defend the suit successfully and to give the Trustee final protection against the charges in the suit.

After that I asked you to represent me in the other matters connected with the Trust, including the disposition of the trust assets and the liquidation and termination of the Trust and my discharge as Trustee. It was and is my intention to sell the Colburn Hotel and when that is sold, together with the few remaining assets in Arkansas, I shall seek to have the Trust assets distributed and the Trust terminated. I shall want to receive an appropriate order of discharge that will protect me against any further claims that could be brought by the beneficiaries against me as Trustee. Of course, I will want you to represent me actively in all such matters. For those services I have agreed to pay you a reasonable fee and at this time I consider that a minimum fee for such services should be $10,000.00, in addition to the above. If any unusual services are required, or some now presently unexpected litigation not involving the matters in the first suit, should arise, I recognize that a reasonable additional fee will be in order, but I contemplate that the Trust should be wound up without further unusual services, other than as above contemplated.

In addition, I have agreed individually to pay you half of any net amounts, over and above expenses, that I may receive from Miss Evelyn Turner or her mother as an award or compensation for my services as an individual in selling their interest in the Colburn Hotel.

If any matters involving the Riceland Hotel should arise, and if I should find that I need your services in that connection, that work is outside anything contemplated above and will be determined upon an independent and separate basis.

Please know that I appreciate the efforts that you have made in my behalf in the past.

Very truly yours,
George F. Carter

The Colburn Hotel did not sell, and on April 2, 1964, Jacoway directed a letter to Carter stating, "Since the Hotel did not sell, I want you to treat this letter as my voluntary termination of the agreement so far as it related to any money that you, as an individual, might receive from the Turners or from the sale of their property. * * * This letter does not change or affect in any way, of course, the fees that we have agreed on to be paid to me for representing you as Trustee of the E. L. Carter Trust, and they will remain fixed as agreed." By summer of the same year, Carter had only paid, in addition to some expense money (about which there is no controversy), the total sum of $1,500.00 on Jacoway's fee, and Jacoway, testifying that he was disturbed because Carter was making no effort to sell the hotel,[1] talked to appellant on the telephone, and, during the conversation, said, "Why don't you pay me for services up to date, and get somebody else for whatever you need from here on out?" On December 7, Carter directed a letter to Jacoway asking that the latter send "a statement for your legal services to our

[1]In the meantime, Carter had remarried, and he and his new wife were living at the Colburn Hotel.

trust," but on December 16, Jacoway received the following telegram from Carter:

"PLEASE CONSIDER YOUR RELATIONSHIP AS ATTORNEY FOR THE ESTATE OF E L CARTER TERMINATED AS OF THIS DATE REASON FOR THIS IS THAT YOUR SERVICES ARE NO LONGER REQUIRED I HOPE THAT YOUR FEE FOR PAST SERVICES CAN BE SUCCESSFULLY LIQUIDATED AS SOON AS POSSIBLE."

This litigation really contains two phases, first, whether Jacoway is entitled to the $3,000.00 for defending the first suit filed by Carter's sister, and ex-wife, and second, whether Jacoway is due a fee, and if so, in what amount, for services contemplated in Paragraph 3 of Carter's letter of November 26, 1963, to Jacoway.

We will first discuss the $3,000.00 item. Carter's defense to this portion of the fee is that Jacoway did not defend the suit on the merits nor give him "final protection" against the charges made in the complaint. The record reflects that Jacoway held a number of conferences with his client, discussing the charges that had been brought, reviewing a settlement agreement that Carter had previously entered into with a sister, and reviewing the divorce proceedings with Helen Carter. The attorney testified to a number of conferences with Attorney Phillip Allen of Little Rock, who represented Mrs. Wallace and Mrs. Carter. A number of pleadings were filed, and the case was transferred from First Division Chancery Court to Second Division. A temporary injunction was modified so that Carter could continue as trustee, and a motion was filed by Jacoway to make the complaint more definite and certain; further, a settlement was discussed between Jacoway and Allen. However, no agreement could be reached, and sometime in March, 1963, Allen took a non-suit.

Let it first be said that there was, of course, nothing that Jacoway could do to prevent the non-suit being

taken. This was a matter entirely beyond his control. Allen testified that he dismissed the suit without prejudice, because he discovered that he could not obtain enough evidence to sustain the charges and allegations, and the attorney stated that if he refiled the complaint, it would not be on these same allegations.[2] Allen still represents Mrs. Wallace and Mrs. Carter, and appellee is of the view that Carter has received "final protection" from the charges in the Pulaski County complaint, since the suit was dismissed on March 7, 1963, and any attempt to reinstate those charges would likely be barred by laches or limitations. However, be that as it may, Jacoway testified that he told Carter repeatedly during 1963, and while the latter was still in Little Rock in 1964, that a "petition for instructions" should be filed, "that we ought to try to get him completely cleared not only on these charges but on everything past. That we ought to come in and set up what he had done and ask for the court's approval of it and I never could get him to do it. He did not want to come into court. He did not want to arouse sleeping dogs." We find no denial of this statement by Carter, but even so, the Chancellor is in a better position (than this court) to determine the truth of disputed statements. Jacoway denied that he was required to defend the case on the merits in order to earn the fee, and, of course, the letter, heretofore quoted, which sets out the agreement, makes no mention of that fact. Many suits are successfully defended without a trial being held, *i. e.*, they are frequently settled to the satisfaction of a defendant, or a suit is sometimes dismissed by a plaintiff simply because of a show of strength on the part of the defendant. We do not think the court erred in allowing the $3,000.00.

Jacoway, in his pleadings, sought recovery of the $10,000.00, mentioned in Paragraph 3 of the letter, but the court allowed the sum of $6,250.00 on a *quantum*

[2]A suit actually has been filed in Federal District Court in Denver, Colorado, but none of the charges, according to Allen, are based upon the same allegations that were contained in the complaint under discussion.

meruit basis, holding that this was the reasonable value of legal services rendered by the attorney to Carter, as trustee of the testamentary trust.[3]

Appellant seems to take the position that Jacoway was not entitled to the $10,000.00, or any part thereof, unless the hotel was sold. Of course, it is correct that it was contemplated that the $10,000.00 fee would not be paid until after the hotel was sold, but this was true only because of the fact that the trust estate could not be finally liquidated until after the sale of the hotel. This contention will subsequently be more fully discussed.

Jacoway, although he stated that he could not be exact because he did not always keep a record of time spent on Carter's business, testified to the approximate amount of time that he had spent representing the trust estate, and four Little Rock attorneys gave opinions as to the reasonable value of Jacoway's services, ranging from $6,500.00 to $7,500.00. Carter asserts that most of Jacoway's time was spent in efforts to sell the Colburn Hotel, which, according to Carter, involved no legal work, and for which Jacoway was to be paid by getting a part of the fee that he (Carter) would receive from the Turners for selling their interest.

The court did not set out the basis of the $6,250.00 allowed, but we do not agree that the record shows that Jacoway was acting as merely a "real estate broker," in the effort to sell the Denver property. The lawyer denied this statement, and he mentioned labors performed for the trust, in working out, from a legal standpoint, problems connected with the sale of the hotel. The letter (November 26, 1963) offers no suggestion that Carter's claim is correct, and the evidence further shows that Jacoway's expenses were to be paid for the two Denver trips (which would hardly seem to be in

[3]The court also rendered judgment in the amount of $161.30 for a balance due on expenses incurred in connection with the legal services.

line with Carter's contention). Appellant mentioned that he wanted Jacoway to go to Denver, because of the latter's experience in "sales and contracts." Mr. Carter classed this as the services of a "real estate salesman," but certainly the "contract" feature speaks more of legal services. Of course, it goes without saying that attorneys almost daily render services to their clients in connection with real estate sales, and this frequently includes being present at the sale itself.

It will be remembered that the letter of November 26, 1963, written by Carter, first sets out in Paragraph 2 the requirements to enable the $4,500.00 fee to be earned. In Paragraph 3 the requirements for the minimum fee of $10,000.00 are set out. *It is only after both of these matters are fully covered* that Carter, in his letter states:

"*In addition* [our emphasis,] I have agreed individually to pay you half of any net amounts * * * that I may receive from Miss Evelyn Turner or her mother * * * for my services * * * in selling their interest in the Colburn Hotel."

It seems very clear that the Turner fee (based on the sale of the Turner interest in the hotel) was to be in addition to the other amounts already mentioned, and, in fact, Carter subsequently (by letter of March 22, 1964), suggested that this arrangement (splitting of the Turner fee) be abrogated, and he said that he would pay a reasonable attorney's fee in lieu thereof. While this letter related to the individual agreement between the two, it is mentioned because it shows affirmative recognition of the fact that legal services had been rendered, which was subsequently denied by Carter. Ten days later, Jacoway responded to this letter by writing Carter:

"I want you to treat this letter as my voluntary termination of the agreement so far as it relates to any money that you, as an individual, might receive from

the Turners or from the sale of their property." . . .

He added:

"This letter does not affect in any way, of course, the fees that we have agreed on to be paid to me for representing you as Trustee of the E. L. Carter Trust, and they will remain fixed as agreed."

Carter approved the contents of the letter by signing his name beneath the words, "the above correctly sets forth my understanding of the agreement." The evidence quoted is rather persuasive to the effect that Jacoway was rendering legal services.

Carter's testimony is not at all clear in some instances. For example, he stated in his testimony that Jacoway never represented him as an attorney, or acted as an attorney for the estate after the non-suit was taken in the original lawsuit. This statement was reiterated several times, though subsequently Carter said that he did employ Jacoway to handle additional matters for the trust. Again, Carter stated that he was shocked when Jacoway called him over the phone wanting some money, because he (Carter) assumed that he did not owe Jacoway anything. Appellant stated that he had paid the $1,500.00 fee, and the hotel had not been sold, so he did not understand why he owed Jacoway more money. However, as already pointed out, he subsequently wrote Jacoway a letter telling appellee to send him a statement for legal services to the trust—and then—just a few days later—Carter sent the wire to Jacoway advising that the latter's services were no longer required as attorney for the estate, and mentioning that "I hope that your fee for past services can be successfully liquidated as soon as possible." So apparently, Carter, both from his letter and telegram, did recognize that Jacoway was due some additional fee.

Appellant, in his brief, states that "surely an attorney who tells his client to get another lawyer cannot

contend that he has been wrongfully discharged." We do not consider Jacoway's message to Carter to mean that he (Jacoway) was cancelling the contract between the two men. Certainly, a lawyer is entitled to request and receive some part of the fee which he feels to be due without such a request being taken as a withdrawal of representation. Though Carter wrote Jacoway to send a bill, setting out the work that had been done, in less than ten days thereafter, he sent the telegram terminating Jacoway's services. In plain everyday language—he fired him! This brings us to Carter's contention that, at any rate, Jacoway was not entitled to a further fee because the trust assets had not been distributed, the trust had not been terminated, and he (Carter) had not obtained an appropriate order of discharge.

Let it be remembered that the trust *could not* be terminated until the Colburn Hotel was disposed of, and Carter relies heavily upon that fact. The simple answer to appellant's argument is that, irrespective of when the hotel was, or is, sold, Jacoway would not, or will not, be able to render services to terminate the trust estate, for the reason that Carter ended the attorney's employment. Jacoway testified that he was ready and willing to carry out his part of the agreement at the time he received the notice of termination, but it is obvious that he was not given an opportunity to do so.[4] We held, as early as 1878, that a lawyer who is wrongfully discharged is entitled to the entire fee as fixed by the agreement, regardless of how much work has been performed. *Brodie, et al* v. *Watkins*, 33 Ark. 545. That holding has been reiterated several times.

Here, appellee was not awarded the full fee, but only a portion thereof on a *quantum meruit* basis. We are unable to say that the Chancellor's award was improper, or that his findings were against the preponderance of the evidence.

Affirmed.

[4]The other beneficiaries of the trust are not objecting to Jacoway's fees.

ARK. STATE HWY. COMM. *v.* DOYNE E. JERRY, ET AL

5-4048 408 S. W. 2d 864

Opinion delivered December 12, 1966

George O. Green and *Phil Stratton,* for appellant.

Mahony & Yocum, for appellee.

ED. F. MCFADDIN, Justice. The question in this case is the legal width of Highway No. 167 in front of the appellee's store. The Chancery Court held that the right of way was only 80 feet wide instead of the 120 feet, as urged by the appellant; and from that decree there is this appeal.

The appellant, Arkansas State Highway Commission, filed this suit seeking a mandatory injunction to compel the appellee, Doyne E. Jerry, to remove his gasoline pumps and a portion of the store building as encroachments on the right of way of Highway No. 167 in Union County. The appellant alleged that in 1934 the

County Court of Union County made an order describing the center line of the highway and fixing the right of way *to be* 60 *feet* on each side of the center line at the location here involved; and that the appellee had encroached on the said right of way.

The appellee offered two defenses to the complaint: (a) that there had been no notice given to the landowner in any way of the said 1934 Court order; and (b) that the County Court order of 1934 did not in fact make a right of way in front of the appellee's property any wider than the pre-existing 40 *foot* distance on each side of the center line.

The cause was heard *ore tenus* by the Chancery Court and resulted in a decree in favor of the appellee. The decree contains these findings, which fairly summarize the preponderance of the evidence on the matters mentioned:

> "1. An Order of the County Court of Union County, Arkansas, was entered on May 2, 1934, copy of which is attached to the Complaint, and appears as Matter No. 31-B on the County Court Records of Union County, Arkansas, asking for changes in whole or in part of State Highway No. 167. This Court Order purported to cover a distance of some 6,400 lineal feet on Highway 167 to the South of El Dorado, Arkansas. So far as the records in this case show, no notice was given to anyone of the entry of said Court Order. The burden of proof was on the plaintiff in this case to show that such notice was given and it has failed to sustain said burden of proof. . . . The State of Arkansas did not enter into possession of 60 feet of right-of-way to the left of the center line nor did it enter into possession of more than 40 feet to the left of the center line. . . . That according to the Stipulation of counsel for plaintiff and defendant the course of the road was not changed in front of the lands acquired by the defendant, Doyne E. Jerry, extending North from

said intersection and said road is presently located in exactly the same location that it was prior to the entry of said order in 1934 so that there was no notice by reason of change in the location of the road."

From the Chancery decree refusing the desired relief, the appellant prosecutes this appeal, urging two points:

"I. The trial court erred in finding appellees and their predecessors in title had no notice of the entry of the 1934 county court order.

"II. The trial court erred in finding that the 1934 county court order condemned only a 40-foot right of way left of the center line between Stations 232 plus 60 and Station 238, the end of the job."

Appellant's second point involves a dispute between the witnesses as to whether the 1934 County Court order actually had enough descriptive power to reach or involve the right of way in front of appellee's store building. Since we find the Chancery decree was correct on appellant's first point—*i. e.*, absence of notice—it becomes unnecessary for us to decide the second point.

In recent years we have had occasion to consider a large number of cases which involved County Court orders made under Act No. 611 of 1923 (as now found in Ark. Stat. Ann. § 76-917 [Repl. 1957]). Some of these cases are: *Miller County* v. *Beasley,* 203 Ark. 370, 156 S. W. 2d 791; *State Hwy. Comm.* v. *Holden,* 217 Ark. 466, 231 S. W. 2d 113; *Ark. Hwy. Comm.* v. *Dobbs,* 232 Ark. 541, 340 S. W. 2d 283; *Ark. Hwy. Comm.* v. *Cook,* 233 Ark. 534, 345 S. W. 2d 632; *Ark. Hwy. Comm.* v. *Anderson,* 234 Ark. 774, 354 S. W. 2d 554; *Ark. Hwy. Comm.* v. *Cook,* 236 Ark. 251, 365 S. W. 2d 463; *Ark. Hwy. Comm.* v. *Dean,* 236 Ark. 484, 367 S. W. 2d 107; and *Ark. Hwy. Comm.* v. *Scott,* 238 Ark. 883, 385 S. W. 2d 636.

We have repeatedly held that the burden is on the Highway Commission claiming under said County Court order to show that the affected landowner had notice of said County Court order; and that such notice could be established in any one of several ways, as by entry on the land under the authority of the order, or by the landowner filing a claim for right of way included in the said order, or by any act tantamount to a showing that the landowner knew of said order or had notice of facts which, if reasonably pursued, would have resulted in such notice. In the case at bar the appellant insists: that when the County Court order was made in 1934 the particular store building tract here involved (location in Section 23) was owned by a Mr. Smith, who also owned land in the adjoining Section 22; that a tract of Mr. Smith's land was taken in Section 22 for a borrow pit, the dirt from which was used to elevate the right of way; that even though Mr. Smith filed no claim against the County, still he knew of the borrow pit taking; and that such knowledge of the borrow pit taking put him on notice of the County Court order enlarging the right of way from 40 *feet* to 60 *feet* on either side of the center line in front of the store building here involved. Of course, notice to Mr. Smith, as the owner in 1934, would be notice to the appellee, who acquired title from Mr. Smith by subsequent mesne conveyances. Because of these facts the appellant insists that the Chancery decree should be reversed.

The answer to the appellant's argument on the notice question is found in the stipulation made by the Highway Commission in the Trial Court, and by the application of our cases to such stipulation. In the course of the trial below, the Commission made this stipulation: "The State stipulates that for the distance along Highway 167 that the roadway was not changed in 1934 along this 420 foot [strip] we claim . . . ." Thus there was no entry by the Highway Commission on the 20-foot strip here involved. The right of way remained the same. The fact that some other land was taken in another section for a borrow pit would not lead a prudent

person to suspect that the right of way was widened on the tract here involved. To show his own good faith in the matter, but not having the effect to bind the appellant, the appellee testified that before he enlarged his store building he checked what he thought were right of way signs—*i. e.*, utility poles, etc.—and these all indicated a right of way only 40 feet wide from the center line on his side of the highway.

The holding in *State Hwy. Comm.* v. *Dobbs*, 232 Ark. 541, 340 S. W. 2d 283, is ruling here. In that case there was a court order in 1939 widening the right of way in front of a store building in the town of Coal Hill, but there was no actual widening done by entry *at that place. At another place* a short distance away from the store building there was a widening, but not in front of the store building involved. That is exactly the situation in the case at bar; and the holding in the Dobbs case is ruling here. In addition to *Highway* v. *Dobbs, supra,* attention is also called to *Highway* v. *Anderson, supra,* and *Highway* v. *Cook, supra.* We conclude that the Chancery decree should be affirmed because of absence of notice to the landowner of the 1934 County Court order.

Affirmed.

George Rose Smith, J., concurs.

George Rose Smith, Justice, concurring. Counsel for both sides appear to have overlooked that part of Rule 9 (d) which provides that when a map, plat, or other exhibit must be examined for a clear understanding of the testimony, the burden is on the appellant either to attach a reproduction of the exhibit to his abstract or to obtain from the court a waiver of that requirement. Here the briefs of both parties repeatedly direct our attention to certain exhibits, but they have not been reproduced. I'm happy to see the case being decided on its merits, but in candor I must say that without the exhibits I found the testimony incomprehensible. Hence this concurrence.

HARVEY G. COMBS, RECEIVER FOR UNITED AUTOMOBILE INS. CO. *v.* J. R. HADDOCK

5-4060 408 S. W. 2d 861

Opinion delivered December 12, 1966

Nathan Gordon, for appellant.

C. Byron Smith, Jr. and *Wright, Lindsey & Jennings* (By *Phillip S. Anderson, Jr.*), for appellee.

ED. F. MCFADDIN, Justice. This appeal necessitates a study of certain statutory provisions in the Arkansas Insurance Code[1] concerning claims in the liquidation of a domestic insurance company.

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[1]The "Arkansas Insurance Code" is Act No. 148 of 1959, and may be found in Ark. Stat. Ann. § 66-2001 *et seq.* (Repl. 1966). The Act is not a "uniform code" act, although portions of the Arkansas Insurance Code contain provisions taken from the Uniform Insurers Liquidation Act. These provisions are referred to in § 658 of the Act No. 148. See Ark. Stat. Ann. § 66-4821 (Repl. 1966).

The United Automobile Insurance Company (formerly named Victor National Casualty Company) is is now being liquidated by the appellant as Insurance Commissioner of Arkansas, acting under the orders of the Circuit Court of Sebastian County. This appeal involves a claim which appellee, J. R. Haddock, alleges is entitled to priority in the distribution of the assets of the insurance company. The trial court—in which the receivership and liquidation proceedings are pending—held that the appellee's claim was entitled to the prayed priority;[2] and the Insurance Commissioner prosecutes this appeal, listing only one point:

> "The trial court erred in holding that the claimant, Haddock, is the owner of a special deposit claim, and entitled to payment in full of his claim from the special deposit prior to the payment of any other claims against the insurer."

The cause was tried on stipulated facts, which we copy practically *in toto*:

> "1. On October 31, 1963, J. R. Haddock recovered judgment in the Circuit Court of Pulaski County, Arkansas, in the amount of $8,118.90 against the Estate of Don W. Tubbs, deceased. Don W. Tubbs was insured by United Automobile Insurance Company (formerly Victor National Casualty Company) under a policy that required the insurance company to defend the suit against the estate of the decedent and to pay the judgment. The attorneys who provided the estate with a defense on behalf of the insurance company filed notice of appeal but a supersedeas bond was not filed and the appeal was never perfected.
>
> "2. The judgment against the Estate of Don W. Tubbs was not paid within thirty days of notice of

[2]The judgment here challenged recites: "That J. R. Haddock is entitled to payment of his claim in full before the claims of other creditors of the special deposit fund are paid; . . . ."

the judgment to the insurer, and suit was filed by Haddock against the insurance company on December 6, 1963, in the Circuit Court of Pulaski County. The agent for service for the insurance company did not answer, and, on January 2, 1964, judgment by default was entered against the insurance company in the total amount of $11,191.25, which figure included a 12% penalty, costs, and an attorney's fee.

"3. On January 13, 1964, Haddock caused a Writ of Garnishment to be issued to the Insurance Commissioner of Arkansas, which writ specifically sought proceeds in a special deposit fund required by Ark. Stat. Ann. § 66-2209 (b) (1963 Supp.). . . . The Insurance Commissioner answered the writ of garnishment by stating that he had a deposit of $50,000 in securities as required by law for the payment of claims against the insurance company. . . . On February 4, 1964, following a hearing that was attended by attorneys for Haddock and the Insurance Commissioner, the Pulaski Circuit Court entered judgment against the Insurance Commissioner on the writ of garnishment. The Commissioner was directed to give forty-five days' notice to the insurer as required by statute, and upon expiration of that time to sell a sufficient amount of the securities to discharge the judgment in favor of Haddock. . . . The judgment on the writ of garnishment was never satisfied by the Insurance Commissioner and no further action has been taken by the Insurance Commissioner (as garnishee or receiver), the claimant or the Court on the judgment on the writ of garnishment against the Insurance Commissioner.

"4. On March 5, 1964, the Insurance Commissioner instituted delinquency proceedings against the insurance company in the Circuit Court of Sebastian County."

Thus, the simple facts are that Haddock and Tubbs were in a traffic mishap in Pulaski County; that Tubbs was insured by the United Automobile Insurance Company; that Haddock recovered judgment against the es-

tate of Tubbs in Pulaski County; that the judgment was not paid; that Haddock then obtained judgment against the Insurance Company in the Circuit Court of Pulaski County as Tubbs' insurance carrier; that the judgment was not paid by the insurance company; that Haddock had garnishment issued against the Insurance Commissioner on January 13, 1964; that there was a judgment in the garnishment proceeding on February 4, 1964; and that the Insurance Commissioner caused the United Automobile Insurance Company to be placed in receivership by order of the Sebastian Circuit Court on March 5, 1964. The cardinal dates are these: (a) appellee had garnishment issued against the Commissioner on January 13, 1964; (b) the Insurance Commissioner had the United Automobile Insurance Company placed in the hands of the appellant as Receiver for liquidation on March 5, 1964.

The appellee insisted, and the Trial Court held, that when the appellee filed the writ of garnishment on January 13, 1964, such garnishment became a lien on the "special deposit" held by the Insurance Commissioner under the provisions of Ark. Stat. Ann. § 66-2209 (b) (Repl. 1966), the germane portions of which read: "(b) All insurers . . . shall deposit through the Commissioner . . . securities . . . having at all times a market value of not less than $50,000.00, conditioned for the payment of creditors of the insurer in this State and the prompt payment of all claims arising and accruing to any person in this State."

Appellee claims that the $50,000.00 mentioned in Ark. Stat. Ann. § 66-2209 (b), as above quoted, is a "special deposit" (Ark. Stat. Ann. § 66-4801 [Repl. 1966]) for the benefit of Arkansas people, and that when the garnishment was issued on the Insurance Commissioner on January 13, 1964, such garnishment created a lien in favor of the appellee under such lien cases as *St. L. SW. Ry.* v. *Vandenberg,* 91 Ark. 252, 120 S. W. 993. In this line of reasoning, as above sketched, the appellee insists, and the Trial Court held, that appellee was

entitled to the first and prior payment in full of his judgment of $11,191.25.

In opposition, the appellant points out that the appellee's garnishment lien was on January 13, 1964, and that the delinquency proceedings against the insurance company were instituted by appellant on March 5, 1964; and that Ark. Stat. Ann. § 66-4820—a part of the Arkansas Insurance Code—requiring liquidation of insurance companies, says in part: "Any lien obtained by any such action or proceeding within four months prior to the commencement of any such delinquency proceeding . . . shall be void as against any rights arising in such delinquency proceeding." On account of this quoted statute the appellant insisted—unsuccessfully in the Trial Court—that the appellee had only a general claim like any other creditor, since the lien on his garnishment was obtained within four months before the liquidation proceedings.

So much for the claims of the parties. We hold that there is a *middle ground* between the position of the appellant and that of the appellee; and we now hold in accordance with such "middle ground" position. The $50,000.00 was and is a special deposit "conditioned for payment of creditors of the insured in this State and the prompt payment of all claims arising and accruing to any person in this State"; and the appellee is entitled to participate in the special deposit. But the appellee is not entitled to be paid in full out of said $50,000.00 special deposit, to the prejudice of other Arkansas creditors. This is true because the lien of appellee's garnishment was obtained within four months of the commencement of the delinquency proceeding; and the statute (Ark. Stat. Ann. § 66-4820) provides that any lien obtained within four months "prior to the commencement of any such delinquency proceeding . . . shall be void as against any rights arising in such delinquency proceeding." One of the rights that arises in the delinquency proceeding is the right of Arkansas creditors to be paid from the $50,000.00 special deposit.

The $50,000.00 special deposit does not go into the general assets of the insurance company for the payment of creditors everywhere, but is held as a special deposit from which Arkansas creditors, including appellee, are entitled to be paid pro rata; and if appellee is not paid in full from the $50,000.00 special deposit, then for the unpaid balance, appellee will participate in the other assets of the corporation in the general liquidation, as provided by Ark. Stat. Ann. § 66-4819 (Repl. 1962).

The judgment of the Trial Court is reversed and the cause remanded for the entry of a judgment and for further proceedings in accordance with this opinion.

AMSLER and BLAND, JJ., not participating.

L. A. PHILLIPS *v.* STATE OF ARKANSAS

5238 408 S. W. 2d 883

Opinion delivered December 12, 1966

A. M. Coates and *J. Patrick Reilly,* for appellant.

Bruce Bennett, Attorney General; *Fletcher Jackson,* Asst. Atty. General; *James C. Wood,* Asst. Atty General, for appellee.

GEORGE ROSE SMITH, Justice. Charged with having murdered his wife, the appellant was found guilty of manslaughter and was sentenced to two years imprisonment. His principal contention is that the State's proof was not sufficient to support the verdict.

The State's evidence was entirely circumstantial. The accused, his wife, and their nineteen-year-old daughter Linda lived in two rooms at the back of a restaurant operated by the family in Helena. On Tuesday night, August 31, 1965, the parents slept in one room and Linda in the other. The next morning Mrs. Phillips did not awaken; she was unconscious and suffering convulsions. After some delay Phillips and his daughter succeeded in finding a doctor, who arranged for Mrs. Phillips's admission to a hospital. She died the following Sunday. Whether she ever regained consciousness was a disputed issue.

The State's proof consisted primarily of medical evidence derived from an autopsy. Mrs. Phillips's body was covered with many bruises, but the only one sufficiently serious to have led to her death was on the right side of her head. That bruise appeared to have been the result of a heavy blow inflicted by some blunt instrument. That blow brought about a massive cerebral hemorrhage, which unquestionably caused the woman's death.

There was abundant proof, not denied by Phillips himself, that for many years he and his wife had engaged in petty fights. As Linda put it, "There would be a lick or two pass about every day over a period of about ten years." There is no proof that Phillips had ever inflicted a serious injury upon his wife in the past. Some of the bruises disclosed by the autopsy were recent; others had been inflicted somewhat earlier.

Both Phillips and his daughter testified that some two weeks before the morning when Mrs. Phillips was found to be unconscious she had suffered a heavy fall

against a piece of concrete, injuring her head. They also testified that on the Sunday preceding the onset of her fatal illness she had fallen and struck her head against a shelf in the restaurant. The State offered no medical evidence to assist the jury in determining whether those earlier falls were capable of producing the hemorrhage that proved to be fatal.

In cases not dissimilar to this one we have held that when the State relies solely upon circumstantial evidence it must negate every other reasonable hypothesis of the cause of death. *Taylor* v. *State,* 211 Ark. 1014, 204 S. W. 2d 379 (1947); *Bowie* v. *State,* 185 Ark. 834, 49 S. W. 2d 1049, 83 A. L. R. 426 (1932). This case falls within the purview of those decisions. No effort was made by the prosecution to show that Mrs. Phillips's prior falls were too remote to have brought about the fatal hemorrhage. There is no intimation of what the blunt instrument might have been that was found to be the cause of death. There are so many deficiencies in the State's case that we are unwilling to sustain the conviction. Suspicion cannot be allowed to take the place of proof.

As a new trial is necessary we point out that the court properly refused to allow a witness to relate a statement assertedly made by Mrs. Phillips in an interval of consciousness shortly before her death. The statement, which tended to exculpate the accused, was not admissible either as a dying declaration or as a part of the res gestae.

Reversed and remanded for a new trial.

CITY OF OSCEOLA *v.* STELLA C. WHISTLE ET AL

5-4133 410 S. W. 2d 393

Opinion delivered December 12, 1966
[Rehearing denied February 6, 1967.]

Mitchell D. Moore and *Smith, Williams, Friday & Bowen* (By *Herschel H. Friday*), for appellant.

Marcus Evrard and *Oscar Fendler,* for appellee.

George Rose Smith, Justice. The single question here is whether the city of Osceola has the power to condemn land beyond its city limits as a right-of-way for an electric transmission line. The chancellor held that the power does not exist and accordingly enjoined the city from attempting to condemn the property of the plaintiffs, now the appellees.

All the facts were stipulated. For many years Osceola has owned and operated a producing and distributing electric system, furnishing electricity to its citizens and to others outside the city. In 1965 the city executed a contract by which it was to purchase electrical power from the Southwestern Power Administration, an agency of the federal government. The city has issued revenue bonds to pay for the construction of a new transmission line extending about fifty miles from Osceola to a point near Jonesboro, which is to be the place of delivery of the SPA power.

The proposed line will cross the plaintiffs' property, which lies outside the city limits of Osceola. The city failed in its efforts to purchase the needed right-of-way across the property and was about to file a condemnation proceeding when the plaintiffs brought these suits, consolidated below, to enjoin the city from instituting such a proceeding. The parties agree that a justiciable issue is presented.

There is no controversy about the abstract principles of law that govern a case of this kind. With respect to the powers of a municipality we quoted Judge Dillon's familiar recapitulation in *Cumnock* v. *City of Little Rock,* 154 Ark. 471, 243 S. W. 57, 25 A. L. R. 608 (1922): "It is a general and undisputed proposition of law that a municipal corporation possesses and can

exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation, not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied."

The rule of strict construction is especially applicable to statutes conferring the power of eminent domain, as the exercise of that power can entail harsh consequences to the landowner. "The authority for the taking of private property for public use should be clearly expressed and the statute strictly construed." *City of Little Rock* v. *Sawyer,* 228 Ark. 516, 309 S. W. 2d 30 (1958).

Here the city of Osceola first insists that by statute municipalities in Arkansas have expressly been given the power to condemn land outside the city limits as a right-of-way for electric transmission lines. Before examining the statutes that are cited we point out that in some instances the legislature has specifically authorized a city to condemn property outside its geographical limits. Such unmistakable delegations of power exist with reference to natural gas transmission lines, Ark. Stat. Ann. § 19-4813 (Repl. 1956), water supplies, § 35-902 (Repl. 1962), and public parks, § 35-901. We attach some significance to the fact that the legislature has seen fit in those instances to leave no doubt about its intention to permit the city to condemn property beyond its corporate limits.

There is no similar clarity of purpose in the statutes relied upon by the appellants. Counsel assert that an express delegation of the authority now claimed is to be found in any one of three sections of the compiled statutes. We are unable to agree with this contention.

First is Section 35-902, which was originally part of a comprehensive 1875 statute pertaining to municipalities. This is the language relied upon: "The right and power of eminent domain is hereby conferred upon municipal corporations to enter upon, take and condemn private property for the construction of wharves, levees, parks, squares, market places, or other lawful purposes." Construing the statute strictly, as we must, we cannot read into the phrase, "or other lawful purposes," the delegation of authority now contended for by the city. This sentence was added to the statute by Act 155 of 1935, which dealt primarily with municipal waterworks. In the 1935 act the legislature specifically provided that property for a waterworks might be condemned in a different county from that of the municipal corporation. Thus if there is any inference to be drawn from the 1935 amendment, it would be that the legislature meant for this extraterritorial authority to be limited to waterworks property.

Second is Section 19-2313, which is derived from the same 1875 statute. This section confers the power of eminent domain for the purpose, among other things, of lighting streets, alleys, public grounds, wharves, landing places, and market places. All these places are ordinarily within the city. Again construing the act strictly, we are not convinced that the legislature chose its language for the purpose of conferring the power now claimed by the city.

Third is Section 35-401. This was the first section of an 1895 act which, as we interpret it, dealt exclusively with waterworks. The act was amended in 1907. As we attribute significance to the amendment we are enclosing the amendatory language in brackets: "All municipal corporations in this State, and all corporations organized for the purpose of supplying any town, city or village in this State, or the inhabitants thereof with water, [or with electrical power, generated by water, for supplying such city, town or village, with such electricity as may be required for lighting same, operating ma-

chinery or running street cars, or other cars on tracks for public purposes only], are hereby authorized to exercise the power of eminent domain, to condemn, take and use private property for the use of such corporations when necessary or convenient to carry out the purposes and objects of said corporations.'' Section 6 of the original 1895 statute recognized the possibility that the land to be condemned might lie in more than one county.

Counsel for the appellant rely primarily upon the words that we have bracketed, which were added in 1907, as a basis for their contention that the city may condemn land outside its corporate limits to acquire electrical power generated by water, as the SPA power is said to be. We do not think the statute, strictly construed, to be susceptible of that interpretation. By the original act both municipal corporations and private corporations organized for the purpose of supplying cities with water were given the power of condemnation. The bracketed language that was added in 1907 was inserted in such a way as to be applicable only to the private corporations, not to the municipalities. The opening phrase in the amendatory language, ''or with electric power,'' makes a complete and intelligible sentence only if it refers back to corporations organized to supply a municipality or its inhabitants with such power. It is impossible to connect this newly added clause with the opening phrase in the original act, ''All municipal corporations . . .''

Thus we find no express statutory delegation of the power to condemn the right-of-way in question. Counsel for the appellant argue alternatively that the power exists under Judge Dillon's third category, as an essential and indispensable accessory to the city's express power to operate a municipally owned light plant. The trouble is, there is not a line of proof to support this contention. Whether it is necessary for the city to run a transmission line for a distance of forty-five miles for the acquisition of electric power is a fact question upon which the record is silent.

During the oral argument it was suggested by counsel for the city that, since the appellees were the plaintiffs in the case, they had the burden of proving that the construction of the proposed power line was *not* essential and indispensable to the operation of the municipal plant. This contention is not tenable. The plaintiffs made a prima facie case by showing that there was no express or implied statutory authority for the condemnation of their land. Seldom does the law require one to assume the burden of proving the negative. We regard the city's present contention as an affirmative defense peculiarly within its own knowledge and appropriately one upon which it had the burden of proof.

Affirmed.

McFaddin, J., dissents.

Ed. F. McFaddin, Justice, dissenting. I respectfully dissent from the Majority because I am firmly of the opinion that the decree should be reversed and we should decide that the City of Osceola has the power to condemn land beyond its city limits as a right of way for an electric transmission line.

At the outset I desire to mention that this case was tried on stipulated facts, and I copy certain pertinent paragraphs of the stipulation:

> "I. Osceola is a city of the First Class. It has owned and operated an electrical producing and distribution system for many years. Its electrical system has furnished electricity to citizens living within the City, as well as persons living beyond the City, as well as persons living beyond the city limits.[1]
>
> "II. In order to obtain electrical power, the City

[1]Ark. Stat. Ann. § 73-264 (Repl. 1962) allows municipalities, with the approval of the Public Service Commission, to extend service to the rural territories contiguous to the municipality.

of Osceola in 1965 entered into a contract with the Southwestern Power Administration.

"III. The City of Osceola, by Ordinance No. 574, has authorized the issuance of Electric Light and Power Revenue Bonds, and has issued such bonds, receiving the proceeds therefrom in the approximate amount of $1,600,000.00.

"IV. In order to obtain the electrical power under the said contract, the City of Osceola has determined that it will construct and operate a new electrical transmission line extending about fifty miles from Osceola across lands in Mississippi and Craighead Counties, Arkansas, to tie on to the source of power belonging to Southwestern Power Administration near Jonesboro, Arkansas. . . .

"IX. The sole question presented for determination is whether or not the City of Osceola, Arkansas, a city of the First Class, has the power under the Constitution and the laws of Arkansas to condemn land for a right-of-way across property owned by the plaintiffs and which is situated outside the city limits of Osceola, for use in the construction of an electrical transmission line from Osceola, Arkansas to a connecting point near Jonesboro, Arkansas, in order to fulfill the City's contract with Southwestern Power Administration to procure electrical power for the city and its inhabitants."

There are several reasons for my conclusions, but I will discuss only a few of them.

I.

Regardless of other provisions of the law, I am thoroughly convinced that Ark. Stat. Ann. § 35-401

(Repl. 1962) gives the City the power of eminent domain here sought. This section is Section 1 of Act No. 126 of 1895, as amended by Act No. 130 of 1907. Act No. 126 of 1895 was captioned, "An Act Authorizing Municipal Corporations And Other Corporations To Exercise Certain Privileges, And For Other Purposes." The Act consisted of a total of nine sections. The only section that has been amended is Section 1 of the Act, which, as amended, is now Ark. Stat. Ann. § 35-401. Sections 2 to 8 of the Act 126 of 1895 have remained unamended and are now found in Ark. Stat. Ann. §§ 35-402 to 35-408, inclusive.

It must be admitted that the Act No. 126 of 1895, as originally passed, was to give municipal corporations and other corporations engaged in supplying water, the power of eminent domain; and it was certainly intended by the Act No. 126 that this right of eminent domain would extend beyond the city limits of a municipality, because Section 6 of the Act, which is now Ark. Stat. Ann. § 35-406, states that if the property sought to be condemned is located in more than one county, then the jurisdiction for the condemnation proceeding will be in the county in which a part of the property may be located. Certainly, when the statute talked about condemnation proceeings in more than one county, it authorized condemnation proceedings for lands outside the city limits of the municipality. So if the City of Osceola had desired to condemn a right of way for water purposes under the Act No. 126 of 1895, it could certainly have exercised the power of eminent domain as to lands beyond its city limits.

Section 1 of Act No. 126 of 1895 was amended by Act No. 130 of 1907, and the caption of the Act 130 was: "An Act To Amend Section 2926 of Kirby's Digest." The Majority Opinion gives the original Section 1 of Act No. 126 and shows in brackets the amendatory language added by the Act No. 130 of 1907. I follow the same procedure, emphasizing the bracketed language:

"All municipal corporations in this State, and all

corporations organized for the purpose of supplying any town, city or village in this State, or the inhabitants thereof with water, [*or with electrical power generated by water, for supplying such city, town or village, with such electricity as may be required for lighting same, operating machinery or running street cars, or other cars on tracks for public purposes only,*] are hereby authorized to exercise the power of eminent domain, to condemn, take and use private property for the use of such corporations when necessary or convenient to carry out the purposes and objects of said corporations."

Now, let us consider what was the effect of the amendment of 1907. It was certainly to include the right of eminent domain for acquiring right of ways for *electrical power generated by water.* Was this right of eminent domain for electrical purposes limited to public service corporations, as distinct from municipalities? That seems to be the view of the Majority, because the opinion recites: "The bracketed language that was added in 1907 was inserted in such a way as to be applicable only to the private corporations, not to the municipalities."

I disagree with the quoted sentence. The original Act No. 126 of 1895 said: "All municipal corporations in this State, and all corporations organized for the purpose of supplying any town . . . with water . . . are hereby authorized . . ." The amendatory section, as found in Act No. 130 of 1907, says, "All municipal corporations in this State, and all corporations organized for the purpose of supplying any town, city or village in this State, or the inhabitants thereof, with water *or with electrical power generated by water* . . . are authorized . . ." Notice the plural—"are authorized"—such clearly refers to "*municipal corporations*" as well as "other corporations."

If the amendatory sentence referred only to public service corporations, as distinct from municipal corpo-

rations, then the original Act No. 126 of 1895 applied only to public service corporations, as distinct from municipal corporations. If that be true, then why were the words, "All municipal corporations," ever included in either of the Acts? Unless the words, "or with electrical power generated by water," apply to municipalities, then neither does the water provision apply to municipal corporations; and so the Act, insofar as regards municipal corporations, would read, "All municipal corporations . . . are hereby authorized to exercise the power of eminent domain . . . ."

I cannot see the force of the Majority's reasoning as regards Ark. Stat. Ann. § 35-401. To me, such section clearly means that when a municipal corporation is seeking to get electrical power generated by water, then it has the right of eminent domain; and, as previously mentioned, Ark. Stat. Ann. § 35-406 says the eminent domain proceedings may be in any county in which the land is sought to be condemned; and that clearly means outside the city limits of the municipality.

That the City of Osceola in this case is seeking to get "electrical power generated by water" cannot be successfully denied. We take judicial notice of the federal statutes, and so we know that the Southwestern Power Administration is a part of the Federal Power Administration. U.S.C.A. Title 16, § 825 S concerns sale of "electric power and energy generated at reservoir projects"; and the next section of the U. S. Code (§ 825 S. 1) concerns the sale of power by the Southwestern Power Administration; so we know that the Southwestern Power Administration has "electric power generated by water."[2]

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[2]On Page 267 of the United States Government Organization Manual of 1966-1967 there is this statement about the Southwestern Power Administration:

"CREATION AND AUTHORITY.—The Southwestern Power Administration was created by the Secretary of the Interior in 1943, to carry out the Secretary's responsibility for the sale and disposition of electric energy generated at certain projects constructed and

II.

In the two concluding paragraphs of the Majority Opinion there is contained the discussion that there is no evidence in this case that the obtaining of this power is "an essential and indispensable accessory to the city's express power to operate a municipally owned light plant." It was suggested in the oral argument that this point had not been developed because the single question was whether the City of Osceola has the power to exercise condemnation outside of its city limits. The Majority Opinion impliedly concedes that if the City had introduced evidence to show that the obtaining of this power was essential to the city's operation of the municipal plant, then such power of eminent domain would have existed. When the Majority Opinion makes this concession, it leads me to the conclusion that the Majority means that, under some circumstances, the City of Osceola would have the power of eminent domain outside of its city limits. And if the sole question in this case was (as stipulated) the power of Osceola to condemn, then this case should be further developed to see if the electrical power is *essential* in this case, because if it is es-

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operated by the Federal Government. The Administration carries out, with respect to specific projects, functions assigned to the Secretary by the Flood Control Act of 1944 (58 Stat. 890; 16 U.S.C. 825s).

"OBJECTIVES.—The Southwestern Power Administration transmits and disposes of the surplus electric power and energy generated at the Federal reservoir projects in such manner as to encourage their most widespread use. To accomplish this, the Administration sets the lowest possible rates to consumers, consistent with sound business principles, and gives preference in the sale of such power and energy to public bodies and cooperatives.

"ACTIVITIES.—The Administration is designated as the agency to market available surplus electric power and energy generated at the following multiple purpose reservoir projects of the Department of the Army: Beaver, Blakely Mountain, Broken Bow, Bull Shoals, Dardanelle, DeGray, Denison, Eufaula, Fort Gibson, Greers Ferry, Kaysinger Bluff, Keystone, Robert S. Kerr, Narrows, Norfork, Sam Rayburn, Stockton, Table Rock, Tenkiller Ferry, Ozark Lock and Dam, and Whitney."

A case discussing Southwestern Power Administration is: *Kansas City Power & Light Co.* v. *Douglas McKay, Secretary of Interior*, 225 F. 2d 924.

sential, then Osceola has the power of eminent domain here sought.

However, I think there is already evidence in this record that electrical energy is essential to the City. By the provisions of Stipulations 1 to 4, previously copied herein, it was agreed that Osceola has had a municipal electrical power system for many years, but it has now, by ordinance, authorized the issuance of $1,600,000.00 worth of bonds in order to obtain the electrical power here sought. Surely when the City Council adopted an ordinance that it would expend $1,600,000.00 to get this power from the Southwestern Power Administration, it is rather strong evidence that the City needed the power. I cannot imagine that the City of Osceola would be spending any such sum unless it was necessary; so I think the stipulated facts constitute the evidence that this electrical power is essential and indispensable to the operation of the municipal plant.

CONCLUSION

On the law, I maintain that Ark. Stat. Ann. § 35-401 gives Osceola the power of eminent domain here sought. On the facts, I maintain that the stipulation shows that this electrical power from the Southwestern Power Administration is essential and indispensable to the operation of the municipal plant. On either basis, I would reverse the Chancery Court.

There is one consoling thought for Osceola, and it is this: the Arkansas Legislature will be in session in a very short time, and may—and I predict will—give municipalities the same power of eminent domain that public service corporations already have.

W. G. SHOOK ET AL *v.* MRS. JACK KELLAR ET AL

5-4059 408 S. W. 2d 880

Opinion delivered December 12, 1966

Gordon & Gordon, for appellant.

Felver A. Rowell Jr., for appellee.

PAUL WARD, Justice. On May 17, 1965 Mrs. Jack Kellar and her fifteen year old daughter, Rita (appellees) were injured when the car in which they were riding was struck by a truck operated by William Shook and W. G. Shook (appellants). The collision resulted in severe damages to appellees.

A suit resulted in the following judgments against appellants: for injuries to Mrs. Kellar $5,200; for injuries to Rita Kellar $25,000, and; for medical expenses $1,300.

For a reversal appellants urge only one point:

"The verdicts in the amounts of $5,200 for Mrs. Kellar and $25,000 for Rita Kellar are excessive."

First, it is noted that there is no objection to the judgment for $1,300 for medical expenses for Rita and there is no question about negligence on the part of appellants. The only issue is whether the record discloses substantial evidence to support the jury's verdict for $5,200 and the verdict for $25,000.

Mrs. Kellar's testimony, in substance. As a result of the accident she was knocked unconscious for a short time; she was in the hospital from Tuesday (the day she was injured) until Friday morning; she received a sizeable cut on her right elbow; she says she had and still has pains in her back and neck; sometimes her head suddenly "jerks", and on one occasion it happened in church causing her to almost faint; she has headaches and dizzy spells at times; she is a schoolteacher, and had to miss nearly two weeks; she doesn't feel able to teach but can't afford to stop—when she arrives at home each day she has to go to bed; she needs to attend summer school but is unable to do so. Much of the above testimony was corroborated by her husband.

Dr. Dunaway, who treated Mrs. Kellar, testified in substance: he took seven stitches in treating the gash on her right elbow. After she left the hospital he saw her again in about two weeks; she was complaining about pains in her back and neck, and he gave her medicine to ease the pain and to help her sleep. He saw her about a week before the trial and she was still complaining of pains in her neck and back, and she appeared to be real uncomfortable because of pains in the region of the tail bone, and; she will continue to suffer.

We feel it would serve no useful purpose to refer to numerous decisions of this Court wherein we have both affirmed and reduced jury verdicts in cases similar to

this one. Such comparisons usually are not helpful. In the case of *Turchi* v. *Shepherd,* 230 Ark. 899, 327 S. W. 2d 553, we expressed this view in the following language:

> "A comparison of awards made in other cases is a most unsatisfactory method of determining a proper award in a particular case, not only because the degree of injury is rarely the same, but also because the dollar no longer has its prior value."

In cases of this nature we cannot formulate a better rule than the one set forth in *Missouri Pacific Transportation Company* v. *Simon,* 199 Ark. 289 (p. 300), 135 S. W. 2d 336, and repeated in *Arkansas Amusement Corporation* v. *Ward,* 204 Ark. 130 (p. 141), 161 S. W. 2d 178. It reads:

> "A verdict will be set aside by an appellate court as excessive where there is no evidence on which the amount allowed could properly have been awarded; where the verdict must of necessity be for a smaller sum than that awarded; where the testimony most favorable to the successful party will not sustain the inference of fact on which the damages are estimated; where the amount awarded is so excessive as to lead to the conclusion that the verdict was the result of passion, prejudice . . . or of some error or mistake of principle, or to warrant conclusion that the jury were not governed by the evidence."

Measured by the above rule, we cannot say the verdict of $5,200 is excessive.

Rita Kellar testified, in substance: she was fifteen years old at the time of the accident; she was knocked unconscious and didn't revive until she was being taken to the hospital where she remained three days; she was cut by glass from the broken windshield of the car in which she was riding; she received a long gash on the back of her head, also numerous cuts on her arm and

face; she had plastic surgery, is very nervous, and often has headaches. She was treated by Dr. Dunaway and Dr. Stuckey. She was corroborated by her mother who testified her daughter was very conscious of the scars on her arm and face, and will not wear sleeveless dresses.

Dr. Stuckey treated the scars on Rita's face and arms with plastic surgery. He testified, in substance: There were three lacerations on her face and many lacerations (about 15) on her arm; the scars on her face were on the cheek and near one eye; there will always be visible scars on her face, and they will need revision later; the scars on the face run vertically which means they are harder to erase or conceal. There were so many scars on the arm he did not attempt to count them; Rita is very self-conscious of the scars, she is nervous, has headaches, and is on edge all the time; she has been taking a bottle of aspirins a day for sometime.

Again applying the rule previously set forth above we are unwilling to say the verdict of $25,000 is not supported by substantial evidence.

The decisions we have reached above are, of course, accompanied by some degree of doubt and uncertainty. We cannot know for a certainty that the pains, nervousness and embarrassment revealed by the testimony are real or fanciful, or whether they will shortly diminish or continue to increase as the years go by, but we do know the jurors were in a better position than we are to judge these matters.

Therefore, since the record contains substantial evidence to sustain the verdicts we are unwilling to say they are excessive.

WORTH INS. CO. *v.* MRS. TOMMY PATCHING AND HELENA NATIONAL BANK

5-4003 410 S. W. 2d 125

Opinion delivered December 12, 1966
[Rehearing denied January 30, 1967.]

N. M. Norton, for appellant.

David Solomon, for appellee.

OSRO COBB, Justice. On September 2, 1964 appellant wrote and delivered its policy of insurance, including coverage of claims for collision damages, upon an automobile owned by appellee Mrs. Tommy Patching, and financed by appellee Helena State National Bank. On November 12, 1964 appellant elected to cancel the policy. Appellant allowed a credit for the unearned premium in its settlement of accounts for November with its general agent, Kidder Insurance Company, Inc. of Fort Smith. Instead of remitting the premium refund to appellees, Kidder Insurance Company, Inc. remitted to an insurance agent, John Coates, who did not pay over the cancellation premium refund to appellees until August, 1965. In the meantime, on June 19, 1965, the insured car was involved in a collision, being damaged in the amount of $1,325.00, for which claim was asserted and suit subsequently filed.

Appellant answered claiming delivery of the policy

to John Coates in the capacity as agent for appellees; that the policy had been cancelled and was not in effect, and that notice of loss was not given pursuant to the terms of the policy.

Appellant moved for leave to file a cross-complaint against its general agent Kidder Insurance Company, Inc. praying judgment against the cross-defendant for any amount for which appellant be found liable to appellees. Appellees resisted the motion to bring in additional parties. We quote from appellees' responsive pleading:

> "That the subject matter of this action is in contract and the statutes of the State of Arkansas do not permit Third Party pleadings such as are being sought in this case. Petitioners state that their allegations are that they entered into a contract with the Defendant and are not a part of any contract or action between the Defendant and any of its agents or contractees."
>
> "WHEREFORE, Plaintiffs pray that the motion for permission to file a cross complaint in this cause be denied, and for such further relief as they might be entitled in the premises."

Following hearing the Court denied appellant's motion for leave to file the cross-complaint. It is from this action that the appeal has been prosecuted.

Neither party has raised the question as to whether the order of the trial court is appealable. This question is jurisdictional and we reach it on our own motion in disposing of this case.

Under the statute we are limited to reviewing final judgment and decrees. Ark. Stat. Ann. § 27-2101 (Repl. 1962).

In *Piercy* v. *Baldwin,* 205 Ark. 413, 168 S. W. 2d 1110 (1943), we said:

"* * * The order from which this appeal comes is in no sense a final order, from which an appeal may be prosecuted. In effect, the order continues the cause during the military service of appellee, Luther Baldwin, and for three months thereafter. The cause has not been tried on its merits, but is still pending. In *Harlow* v. *Mason,* 117 Ark. 360, 174 S. W. 1163, this court quoting from an earlier case, said: '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. *Bank of the State* v. *Bates,* 10 Ark. 631; *Campbell* v. *Sneed,* 5 Ark. 399' ".

In *McPherson* v. *Consolidated Casualty Company,* 105 Ark. 324, 151 S. W. 283 (1912), we said:

"Cases can not be tried by piecemeal, and one can not delay the final adjudication of a cause by appealing from the separate orders of the court as the cause progresses. When a final order or judgment has been entered in the court below determining the relative rights and liabilities of the respective parties, an appeal may be taken, but not before * * *."

For analogous reasoning, see *Searcy* v. *Cooper,* 239 Ark. 280, 388 S. W. 2d 918 (1965); *Arkansas State Highway Commission* v. *W. C. Kesner, et ux,* 239 Ark. 270, 388 S. W. 2d 905 (1965).

We have concluded that the order of the trial court, here on review, is not appealable.

The appeal is dismissed.

HELEN LORETTA MCINTYRE *v.* LEON BENNETT MCINTYRE

5-4051 410 S. W. 2d 117

Opinion delivered December 12, 1966
[Per Curiam order denying rehearing January 23, 1967, p. 835.]

Neva B. Talley, for appellant.

Fulk, Wood, Lovett, Parham & Mayes, for appellee.

OSRO COBB, Justice. On April 24, 1962, appellant was granted a decree of absolute divorce from appellee. Appellant was awarded custody of the children and was given an allowance of $20.00 per week for their support. Appellant waived any claim to alimony. The decree of divorce incorporated therein the terms of an oral property settlement agreement of the parties.

On November 5, 1965, appellee filed a petition for an order directing appellant to convey to appellee all of her interest in certain real estate held by the parties by the entirety at the time of the decree of divorce.

On November 12, 1965, appellant filed a detailed

response to appellee's petition, claiming an undivided one-half interest in the real estate and agreeing to the sale of same provided she be allowed to receive one-half of the proceeds from such sale.

Both parties testified at the hearing, which was held on January 12, 1966. On March 23, 1966, approximately four years after the original decree of divorce, the Chancellor entered a supplemental decree ordering and directing appellant to execute and deliver to appellee a quitclaim deed as to her interest in the real estate held by the entirety, and appellant was directed to comply with the order within thirty days of the entry of the decree. From this decree comes this appeal.

We quote the pertinent provisions of the original decree containing a property settlement agreement between the parties:

> "That the defendant owns the following property: one 1960 Ford Falcon automobile; various household furniture and appliance; thirty-nine (39) shares of American Telephone and Telegraph stock and realty described as a forty acre farm and dwelling home, said legal description being: NE¼ NW¼ Sec. 23 Twp. 3 N., Range 16 W, Pulaski County, Arkansas.
>
> "That the parties hereto have agreed to the following property settlement: That the plaintiff is to receive the 1962 Ford Falcon automobile on which there remains an unpaid mortgage. The plaintiff (appellant) is to make payments on the car note for the months of April, May and June, 1962, and thereafter the defendant is to make the monthly payments until said car note shall have been paid in full. The defendant (appellee) is to receive the 1960 Ford Falcon automobile. The plaintiff is to receive the thirty-nine shares of American Telephone and Telegraph stock on which there is a remaining balance owed and the defendant has

agreed to pay this balance by July, 1962. The plaintiff is to receive all furniture and appliances and that the *plaintiff shall remain in possession of the realty described in enumerated paragraph VI above until the balance due on the American Telephone and Telegraph shares of stock has been paid in full, or until the realty is sold, whichever occurs first.* * * *'' (Emphasis ours)

We now quote the pertinent provisions of the supplemental decree:

''1. A decree was entered on April 24, 1962, under which a divorce was granted to the plaintiff, and in which the court found that parties hereto had entered into a property settlement agreement. 'Said decree recites that defendant owned certain personal property together with a 40-acre farm and dwelling house described as: The NE¼ NW¼ Sec 23, T3N R16W, Pulaski County, Arkansas. By the terms of said decree the court retained jurisdiction for the purpose of enforcing the equitable rights of the parties hereto.

''2. 'The court finds said decree erroneously recited the sole ownership of said real estate as being in the defendant, *when in fact the title thereto had been vested in said husband and wife jointly as an estate by the entirety.* (Emphasis ours)

''3. 'The court further finds that under said property settlement agreement the defendant, in consideration of the transfer of certain personal property to the plaintiff, was to become the sole owner of said real estate free and clear of any and all claims thereto on the part of the plaintiff, and that plaintiff undertook to and obligated herself by the terms of said agreement to convey to the defendant by appropriate means all of her right, title and interest in and to said real estate.

"4. 'The court finds that the defendant fully discharged his obligations to the plaintiff under said property settlement agreement by delivering to her all the property described therein which was to be received by her in accordance with the agreement.

"5. 'The court finds that the plaintiff has failed to convey her interest in said real estate to the defendant in accordance with the property settlement agreement, but is in fact now asserting in this action that she is still an owner with respect to said property by virtue of the deed which originally created the estate by entirety.

" 'It is therefore by the court considered, ordered, adjudged and decreed that Helen Loretta McIntyre execute and deliver to Leon Bennett McIntyre a quitclaim deed conveying to the said Leon Bennett McIntyre the NE¼ NW¼ Sec. 23, T3N, R16W, Pulaski County, Arkansas, and that she perform said act within 30 days from the date of this decree' ".

The language of the original decree provided no dispositive action as to the real estate here at issue. It did place appellant in possession of the real estate pending sale. The supplemental decree substantially added to and reformed the original decree in that it ordered appellant to quitclaim all of her interest to appellee in the realty which was held by the entirety.

We have examined the evidence in this case to determine whether the Chancellor was in fact authorized, under such evidence and our general rules applicable to reformation of contractual agreements, to enter the supplemental decree stripping appellant of her interest in the real estate.

We have consistently held that reformation of a contractual agreement will not be granted except upon clear, unequivocal and decisive evidence. *Realty Invest-*

ment Company v. *Higgins,* 192 Ark. 423, 91 S. W. 2d 1030 (1936). In *Corey* v. *The Mercantile Insurance Company of America,* 205 Ark. 546, 169 S. W. 2d 655 (1943), we quoted the applicable rule with approval, as follows:

> "To entitle a party to reform a written instrument upon the grounds of mistake, it is essential that the mistake be mutual and common to both parties; in other words, it must be found from the testimony that the instrument as written does not express the contract of either of the parties. It is also necessary to prove such mutual mistake by testimony which is clear and decisive before a court of equity will add to or change by reformation the solemn terms of a written instrument."

Appellant brought the original suit and the court decreed that she had just cause for a dissolution of the bonds of matrimony, and that appellee was guilty of such indignities as to render her condition in life intolerable. Appellant was given custody of the children and an allowance of $20.00 per week for child support. It is significant, in reviewing the property settlement, that appellant waived any claim to alimony.

We are thus presented with a situation where this appellant, the injured party below, and who had waived any claim to alimony, was given possession of the home place, the real estate, in the original decree and, some four years later, she is ordered by a supplemental decree to execute and deliver to appellee her quitclaim deed to her interest in th real estate held by the parties by the entirety. In *Carr* v. *Carr,* 226 Ark. 355, 289 S. W. 2d 899 (1956), we said:

> "The couple's home was owned as a tenancy by the entirety and was correctly ordered sold, the proceeds to be divided equally."

The Carr case, *supra,* is bottomed upon a specific statute. Ark. Stat. Ann. § 34-1215 (Repl. 1962).

The real estate held by the entirety represented approximately three-fourths of the total value of the community estate of the parties at the time of divorce. Appellant, who had waived her claims to alimony, adamantly insisted in her testimony that she had never agreed to also renounce her established interest in the real estate. We view her testimony as both clear and reasonable. After examining all of the testimony upon de novo review, we have concluded that the evidence is neither clear nor convincing as to any intent of the parties litigant to agree to such an obviously inequitable result as that requiring appellant to surrender to appellee all of her rights in the real property held by the entirety.

We have further concluded that equity requires that appellant's claim to her interest by the entirety in the real estate be confirmed and that upon sale of the property, appellant shall receive one-half of the net proceeds of such sale. Furthermore, as provided in the original decree, appellant's possession of the property may not be disturbed prior to sale.

The supplemental decree of March 23, 1966 is reversed and vacated as to all matters, except the finding that the realty was held by the parties by the entirety, and it is ordered that a corrective decree be entered not inconsistent with this opinion. It is so ordered.

Reversed and remanded with directions.

[Per Curiam order denying petition for rehearing delivered January 23, 1967, p. 835.]

LEON ASHWORTH ET UX *v.* H. C. HANKINS ET UX

5-4077 408 S. W. 2d 871

Opinion delivered December 12, 1966

Murphy & Burch, for appellant.

Putman, Davis & Bassett, for appellee.

OSRO COBB, Justice. On October 18, 1962 appellants brought an equity action against appellees for specific performance of a contract for the sale of certain real property. Both parties resided in Washington County where the subject property was situated. A lis pendens was duly filed by appellants on October 18, 1962.

At trial on March 29, 1963, the Court sustained a demurrer to plaintiffs' evidence and a decree was entered for defendants (appellees here). An appeal was perfected.

Thereafter, on May 24, 1963, while the case was on

appeal, appellees executed and delivered for a valuable consideration a deed to the property to one Ollie Tackett. This deed was duly recorded on May 29, 1963.

On November 30, 1964, this Court reversed and remanded the cause, holding that appellants had made a prima facie case for specific performance. *Ashworth* v. *Hankins,* 238 Ark. 745, 384 S. W. 2d 254 (1964).

After remand, appellees filed a motion to dismiss appellants' complaint for want of equity jurisdiction. The motion stated that appellants no longer owned the subject property; that there was no longer any basis for equity jurisdiction, and that plaintiffs' complaint should be dismissed without prejudice.

Plaintiffs' response was that a lis pendens had been filed; that any grantee of the subject matter took the property with notice and subject to the ultimate outcome of the case, and that the Chancery Court had jurisdiction to either cancel and set aside the deed executed by the defendants or, in the alternative, to award plaintiffs damages.

For reversal appellants contend that the Chancery Court erred in granting appellees' motion to dismiss.

It is appellants' position that the Chancery Court (1) had jurisdiction to grant specific performance of the contract and (2) had jurisdiction in the alternative to award appellants damages.

Appellants urge that the lis pendens, filed pursuant to Ark. Stat. Ann. § 27-501 (Repl. 1962), put the subsequent purchaser on notice and therefore the property was conveyed subject to the outcome of this suit, including appellate review.

In the case of *Mitchell & Shaw* v. *The Federal Land Bank of St. Louis, Mo.,* 206 Ark. 253, 174 S. W. 2d 671 (1943), where a lis pendens was filed, we quoted with approval from 38 C. J. 4 as follows:

"One who acquires from a party an interest in property which is at that time involved in a litigation in a court having jurisdiction of the subject-matter and of the person of the one from whom the interest is acquired, takes subject to the rights of the parties to the litigation as finally determined by the judgment or decree, and is as conclusively bound by the results of the litigation as if he had been a party thereto from the outset."

The applicable lis pendens statute, Ark. Stat. Ann. § 27-501, *supra,* states as follows:

"27-501. Notice-Contents-Recording-Effect. — To render the filing of any suit at law or in equity affecting the title or any lien on real estate or personal property constructive notice to a bona fide purchaser or mortgagee of any such real estate or personal property, it shall be necessary for the plaintiff or any one of the plaintiffs, if there be more than one plaintiff, or their attorneys or agents to file for record with the recorder of deeds of the county in which the property to be affected by such constructive notice is situated a notice of the pendency of such suit, setting forth the title of the cause and the general object thereof, * * *."

Therefore, the purpose of a lis pendens is to put bona fide purchasers or mortgagees upon notice that the title to certain real or personal property is being litigated. See 54 C. J. S. 571, from which we quote:

"It is commonly stated that the doctrine of lis pendens is based on considerations of public policy and convenience, which forbid a litigant to give rights to others, pending the litigation, so as to affect the proceedings of the court then progressing to enforce those rights, the rule being necessary to the administration of justice in order that decisions in pending suits may be binding and may be given full effect, by keeping the subject matter in contro-

versy within the power of the court until final adjudication, that there may be an end to litigation, and to preserve the property that the purpose of the pending suit may not be defeated by successive alienations and transfers of title."

Litigation is obviously not completed until appellate review is had in cases where appeals are perfected. We therefore hold, and possibly for the first time on this precise point, that the statutory effect of a lis pendens follows the litigation to its conclusion.

We are supported in this rule by case authorities from other jurisdictions. We quote from *Stuart, et al* v. *Coleman,* 188 P. 1063 (1920) Okla.:

"Where the law gives a right of review to an appellate court, all persons are necessarily charged with notice thereof, and it would seem reasonable to hold that the operation of lis pendens ought to be adequate to give a litigant protection until he can pursue all the remedies to which he is entitled in the action, and therefore, though a judgment or degree final in form has been entered, the cause ought still to be deemed pending while the right to prosecute it further by appeal remains.

"It is also contended that the lis pendens does not apply because the supersedeas bond was not given within the time fixed by the district court of Osage County to stay execution. We do not think there is any merit in this contention. In *McClung, et al* v. *Hohl,* 10 Kan. App. 93, 61 Pac. 507, the Supreme Court of Kansas held that the application of the lis pendens statute did not depend upon the filing of a supersedeas bond or other bond, and this court, in *State ex rel. Mose* v. *District Court of Marshall County,* 46 Okla. 654, 149 Pac. 240, held that the right of appeal does not depend upon the giving of a supersedeas bond, as the only object and effect of such bond is to stay execution. * * *."

See also *Patterson, et al* v. *Old Dominion Trust Co.,* 149 Va. 597, 140 S. E. 810 (1927); also *Hart* v. *Pharaoh,* 359 P. 2d 1074 (1961) Okla.

In this case, there was no decree other than of dismissal and no execution could issue. Indeed there would have been no yardstick by which the penal sum of a supersedeas bond could be computed. We find no merit in appellees' contention as to the necessity of a supersedeas bond to preserve appellants' rights as to the property pending appellate review.

Appellants also contend that the chancery court had jurisdiction of the case to determine the alternative issue of damages. We agree. In *McMillan Feeder Finance Corporation* v. *Stephens,* 240 Ark. 167, 398 S. W. 2d 535 (1966), we reiterated the rule that where an equity court takes jurisdiction of a case involving enforcement of a contract, it does so as to all matters in controversy and may allow damages. See also *Askew* v. *Murdock Acceptance Corporation,* 225 Ark. 68, 279 S. W. 2d 557 (1955).

We quote from *Corbin on Contracts,* Vol. 5A § 1161:

> "Independently of codes of procedure and other statutes, it became generally established in the United States that a bill for specific performance would be retained for the assessment of damages, in lieu of the remedy asked, if the bill stated a case that was proper for equity jurisdiction and the only reason for refusal of the decree asked was because performance had become impossible or for some reason inequitable after the filing of the bill or if it had been so prior to the filing of the bill by reason of facts unknown to the plaintiff. The impossibility that has arisen may be due to the wrongful act of the defendant himself, as by making a conveyance to an innocent purchaser for value, but the rule is not restricted to such cases."

See also *Grummel* v. *Hollenstein,* 90 Ariz. 356, 367 P. 2d 960 (1962).

It is now the duty of the trial court to proceed to hearing on appellants' action for specific performance and if the Court finds that appellants are entitled to such relief but that specific performance is not possible, then it is the duty of the equity court to assess damages, if any may be shown by appellants, as a result of the breach of contract.

The case is reversed and remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

VIRGINIA AUSTIN v. KENNETH AUSTIN

5-4074 409 S. W. 2d 833

Opinion delivered December 12, 1966
[Rehearing denied January 23, 1967.]

[redacted]

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

Putman, Davis & Bassett, for appellee.

GUY AMSLER, Justice. This appeal involves an unusual factual situation and a unique legal question. Appellant Virginia Austin and appellee Kenneth Austin were husband and wife up to some date (not disclosed by the record) prior to August 19, 1964. On that date, in a suit by Virginia Austin against Kenneth Austin, the Superior Court of Los Angeles County, California, entered an order awarding custody of their three minor children to Kenneth Austin with visitation privileges to the mother. Virginia Austin apparently left California and established residence in Fayetteville, Arkansas, while appellee remained in California with his new wife and the children.

In 1965, Virginia, through some method, not revealed by the record, had the minor son, Wendell, with her in Fayetteville, Arkansas, and refused to relinquish custody to her former husband. On August 4, 1965, Kenneth Austin filed a petition for a writ of Habeas Corpus in the Circuit Court of Washington County, Arkansas, (Fayetteville) seeking to have Wendell returned to him. On the same day the Circuit Court, following a hearing, ordered Virginia to turn the child over to Kenneth and required the father to post one thousand dollars in cash to assure the appearance in court of the father and son (on two weeks notice) for further proceedings. Both parties and their attorneys were present at the hearing.

On the following day (August 5th) Virginia Austin filed a petition in this court (Case No. 5-3746) seeking a temporary stay of the Circuit Court order. On the same day this court "stayed" the Circuit Court order,

gave Virginia three days to file defense pleading to the petition for writ of Habeas Corpus in Washington County, directed that Wendell (the minor) be immediately returned to his mother and that the Circuit Court transfer the cause to the Chancery Court of Washington County and further "The Washington Chancery Court as soon as possible will have a full hearing, make up a complete record in the case, and enter its considered order regarding the custody of Wendell Austin, a minor, with full right of review by this Court on the part of any dissatisfied party." The order of this court was filed with the Circuit Clerk of Washington County on August 6, 1965.

On August 5, 1965, Kenneth Austin, after the minor was returned to his mother, made the following notation (by his attorney) on the record of the petition for writ of Habeas Corpus:

> "Petitioner (Kenneth Austin) dismisses the above petition without prejudice and withdraws his appearance.
>
> Kenneth Austin
> /s/ by Sidney P. Davis, his attorney"

On the same day, according to the evidence, the Circuit Judge noted on his docket sheet "Dismissed at request of plaintiff."

On August 6, 1965, Virginia filed in the Circuit Court a pleading titled "Answer." In reality the pleading is an answer and counterclaim in that it seeks affirmative relief. Allegations are that appellee is not a fit person to have custody of Wendell but that appellant is and that appellee is delinquent in support payments under the California judgment. Prayer is for custody of the child, a money judgment, and attorney's fees. Attached to this pleading is a certificate of service showing that a copy was mailed to the attorney who filed and dismissed the petition for Habeas Corpus for appellee.

On August 10, 1965, the Circuit Court (pursuant to the order of this court entered on August 5th) transferred the case to the Chancery Court of Washington County.

On April 18, 1966, appellee "appeared especially" in the Chancery Court and filed a motion to quash the purported "service of process" alleging "inter alia" that there had been no service on him; that no summons was ever issued or served and that the Chancery Court was without jurisdiction.

On the 19th day of April, 1966, the chancellor, over the objections of appellant, granted the motion and this appeal followed.

We have detailed the dates of events somewhat at length in order that what we conceive to be the law may be understandably applied to the factual situation.

In the Habeas Corpus proceedings Kenneth Austin dismissed his petition before any defensive pleading had been filed by appellant. He had this right under Ark. Stat. Ann. § 27-1406 (Repl. 1962).

A somewhat similar situation was before us in *Norton* v. *Hutchins, Chancellor,* 196 Ark. 856, 120 S. W. 2d 358, and we there said:

> "As we understand the law a plaintiff has the right to dismiss any suit he has brought either by application to the court or by application to the clerk in vacation to dismiss same. If before he dismisses same a set off or counter-claim has been filed the dismissal will not prevent the defendant from trying the issues rendered in the cross-complaint or counter-claim. It is undisputed that after bringing her suit in Texas she dismissed her suits in Arkansas before the chancery clerk in vacation. Final judgments or decrees had not been rendered in the Arkansas cases at the time she dismissed

> them. She had the absolute right, therefore, to dismiss them as no cross-complaint or counter-claim had been filed in any of the proceedings."

In connection with the case at bar we should perhaps inquire into the status of the parties in the Habeas Corpus suit in Circuit Court after the petition was dismissed. We find no Arkansas case directly on point but 27 Corpus Juris Secundum under "Dismissal and Nonsuit" § 39 states the general rule as follows:

> "Unless defendant has interposed a claim for affirmative relief, a voluntary nonsuit, dismissal, or discontinuance is a final termination of the action, and there remains no cause pending in which a third person may be permitted to intervene, or in which defendant may thereafter file an answer or plea. In the absence of circumstances working an estoppel, a dismissal or nonsuit leaves the situation as though no suit had ever been brought, and it has the effect of an absolute withdrawal of the claim and leaves defendant as though he had never been a party. It carries down with it previous proceedings and orders in the action, and all pleadings, both of plaintiff and of defendant, and all issues, with respect to plaintiff's claim."

In stating the rule 24 Am Jur 2d page 61 uses almost the identical wording and both texts cite numerous authorities from other jurisdictions. We have found no case stating a contrary view.

But, says appellant, appellee is in court by virtue of the aforementioned order of this court entered on August 5, 1965. A sufficient answer to that contention is that appellee was never before this court. On petition of appellant this court conducted a "unilateral" hearing and entered an order directed solely to the "Circuit Court of Washington County" and not to appellee. Neither appellee nor his attorney appeared at the hearing before us and his statutory privilege of dismissing

his petition in the Washington Circuit Court was neither at issue nor adjudicated.

If the general rule is applied the Circuit Court order of August 10, 1965, transferring the cause to Chancery Court was a nullity. This is true because when the appellee (Kenneth Austin) dismissed his petition for Habeas Corpus, before appellant lodged her plea for affirmative aid, the litigation ended. It is of course understandable that the Circuit Court, when confronted with an unanticipated occurrence, acted with commendable cooperation and ordered the transfer.

If strict rules of procedure were followed we should probably dismiss the appeal. However, the same results are obtained by affirming the action of the chancellor and this is accordingly done.

WARD, J., dissenting.

PAUL WARD, Justice, dissenting. It is my opinion that the Circuit Court had no jurisdiction to dismiss appellee's petition for a writ of Habeas Corpus under the facts in this case.

(a) On August 4, 1965, the Circuit Judge made an order which in part reads:

> ". . . that Virginia Austin be and is given 24 hours or until 2:00 p.m., August 5, 1965, to apply to the Supreme Court of Arkansas for a writ of Prohibition. . ."

Appellee was unquestionably aware of this order.

(b) Appellant did so apply to this Court on the morning of August 5, 1965, and on the same day we entered an order which reads:

> "This cause is remanded to the Circuit Court of Washington County, Arkansas, with directions to

transfer the entire cause to the Chancery Court of Washington County; and Virginia Austin is given three days to file defensive pleadings to the writ of *Habeas Corpus.*"

As is shown hereafter, this order was brought to the attention of the Clerk of the Circuit Court, the attorney for appellee, and the Circuit Judge on August 5, 1965. This is shown by the testimony of appellee's attorney at pages 40-41 of the record. There it is shown that all the above mentioned parties were in the Clerk's office when the contents of our order was made known to them.

(c) On the occasion above mentioned (after the contents of our order was made known, and before 2:00 p.m. of that day) appellee was allowed to dismiss his petition.

It is my position that, in view of the above facts, the Circuit Court had no power or jurisdiction to do anything except to transfer the cause to Chancery Court in accordance with our specific order. Until our order was made known to the Circuit Court, jurisdiction of the cause was in this Court. The learned Chancery Judge was aware of this fact and found that the cause was "remanded to the Circuit Court and immediately upon that remand the Circuit Court became invested with *full and complete jurisdiction of the cause.*"

I disagree with the Chancellor as to the words emphasized above. It is my opinion that the Circuit Court was invested only with the power which our order gave him—to transfer the cause to Chancery Court.

It follows from what has been said that appellee was a party to the Chancery proceeding and it was not necessary to give him further notice.

Therefore I would reverse the decree of the Chancery Court.

PAT TITSWORTH ET AL *v.* HON. MELVIN E. MAYFIELD, JUDGE

5-4112 409 S. W. 2d 500

Opinion delivered December 12, 1966
[Rehearing denied January 16, 1967.]

Clifton Bond, for appellant.

Brown, Compton & Prewett, for appellee.

GUY AMSLER, Justice. A local option election was held in Calhoun County, Arkansas, on November 3, 1964, and the certified vote showed 1,118 for and 1,128 against the manufacture and sale of intoxicating liquors.

A petition contesting results of the election was filed in the County Court of Calhoun County on November 17, 1964, by Jack Ethridge, et al (contestants). A response to the contest petition was filed on November 27, 1964, by Pat Titsworth, et al (contestees below and petitioners in this court). An amendment to petition for contest was filed on November 27, 1964, and response to the amendment was filed on December 11, 1964.

On August 6, 1965, following a hearing, the County Court entered its order declaring the results of the election to be in accord with the above figures on votes cast.

On February 2, 1966, the contestants, by their attorney, filed a "Notice of Appeal," "Designation of Record," and "Bond for Costs," as provided by Ark. Stat. Ann. § 27-2106.1 (Repl. 1962), for appeals from the Circuit, Chancery and Probate Courts to the Supreme Court of Arkansas.

The contestants did not file a prayer for appeal to the Circuit Court of Calhoun County from the order of the County Court as required by Ark. Stat. Ann. § 27-2001 (Supp. 1965). Nor did they file an affidavit stating that the appeal was being taken because the appellants verily believed that they were aggrieved, and not taken for vexation or delay, but that justice might be done them. No order of the County Court of Calhoun County or of the Circuit Clerk of Calhoun County as required by law was entered within six months of the entry of the order appealed from granting the contestants an appeal to the Circuit Court.

On March 30, 1966, the contestees, Pat Titsworth, et al, filed their motion to "dismiss appeal" in the County Court; on April 6, 1966, the contestants, Jack Ethridge, et al, filed their response to motion to "dismiss appeal," and on the same date the County Court entered its order providing, "That Contestants substantially complied with appeal procedure, that in order, for a determination to be made of all issues in this cause by a court of record and of competent jurisdiction the record in this cause should be transferred to the Circuit Court of Calhoun County, Arkansas." The Court directed the County Clerk to transfer the entire record in the cause, including the motion to dismiss the appeal and the response thereto, to the Circuit Court, and to obtain the receipt of the Circuit Clerk for said proceedings.

On April 8, 1966, the contestees, Pat Titsworth, et al, (petitioners here) filed their motion to dismiss appeal in the Circuit Court objecting to the jurisdiction of the Circuit Court "to hear and determine said

election contest appeal.'' On May 6, 1966, the contestants filed their response to the motion to dismiss appeal in the Circuit Court, and a hearing on the motion was held in the Circuit Court on July 8, 1966. On July 12, 1966, affidavit and prayer for appeal from the County Court order of August 6, 1965, was filed in the Circuit Court, pursuant to an order of that court. On July 14, 1966, the Circuit Court entered its order overruling the motion to dismiss appeal and this petition for writ of prohibition followed.

Petitioners here contend that the respondent, trial court, is without jurisdiction and should be prohibited from hearing the appeal from the County Court because contestants (below) failed to perfect an appeal from the County Court order within the time and in the manner required by Ark. Stat. Ann. § 27-2001, *supra.*

Contestants do not contend that the requirements of the statute governing appeals from the County Court were complied with. They say however that there was ''substantial compliance'' and further maintain that their transgressions and tardiness should be forgiven because the disability of their attorney (not their counsel now) produced an unavoidable casualty for which they should not be held responsible.

The case presents a legal rather than a factual question hence we are in a position to dispose of the litigation through prohibition. *Norton* v. *Hutchins, Chancellor,* 196 Ark. 856, 120 S. W. 2d 358; *Murry* v. *Maner,* 230 Ark. 132, 320 S. W. 2d 940 (1959).

Even if it be conceded that contestants' attorney was incapacitated they would still be confronted with an insurmountable jurisdictional barrier. Bearing in mind that no affidavit for appeal was ever filed in the ''County Court,'' where the contest originated and that an order of the County Court attempting to grant an appeal was not entered until April 6, 1966 (some

sixty days beyond the six months allowed by statute for appeals from the County Court), we need only review a few of our prior decisions to determine the result of this controversy.

In the early case of *Speed* v. *Fry,* 95 Ark. 148, 128 S. W. 854, this court dealt with a statute regulating appeals from the probate court which required an order granting the appeal. Justice Hart authored the opinion and wrote:

> "The record shows that J. C. Speed filed an affidavit and prayer for appeal in the usual form to the circuit court, but it does not show that the probate court made an order granting the appeal. This was necessary in order to give the circuit court jurisdiction....
>
> "This court has held that the appellee may waive the want of an affidavit for appeal in the circuit court by failing to move to dismiss.... The reason is that the affidavit and prayer for appeal is a regulation for the sole benefit of the appellee. But the order of the probate court granting the appeal is a prerequisite to the right of the circuit court to exercise jurisdiction, and for that reason can not be waived."

Justice Wood in *Tuggle* v. *Tribble*, 173 Ark. 392, 292 S. W. 1020, dealt with the law on appeals from the County Court with this language:

> "Under the above statute, and our decisions, it is essential to the jurisdiction of the circuit court that an appeal be granted by the county court or by the clerk of the circuit court, and it is error for the county court to make an order granting the appeal until the party aggrieved shall have filed with the clerk of the county court an affidavit as prescribed in the statute. The statute contemplates that the affidavit and prayer for ap-

peal shall be filed in advance of any order made by the court or the clerk, as the case may be, in order that the court or the clerk, before ordering the appeal, may have an opportunity to ascertain whether or not the affidavit complies with the statute. The filing of an affidavit under the statute above is not jurisdictional, because it may be waived in the circuit court, and is waived, where the party against whom the appeal is sought does not, in the circuit court *in limine*, move to dismiss the appeal before taking any substantive or affirmative steps in the cause." See also *Mississippi County* v. *Moore,* 126 Ark. 211, 190 S. W. 110 (1916); *Woollard* v. *Circuit Court of Crittenden County*, 222 Ark. 287, 258 S. W. 2d 886 (1953).

Vesting of jurisdiction in the Circuit Court in this cause would necessitate our overruling a long line of decisions which we decline to do. The Circuit Court is without jurisdiction and the petition for writ of prohibition is granted.

Opinion delivered December 12, 1966

[Supplemental opinion on rehearing delivered February 27, 1967, 242 Ark. 43.]

R. L. Wommack and *Sam Montgomery,* for appellant.

Bruce Bennett Attorney General; *H. Clay Robinson,* Asst. Atty. General, for appellee.

HUGH M. BLAND, Justice. The appellant was charged by information with the crime of false pretense [Ark. Stat. Ann. § 41-1901 (Repl. 1964)]. Omitting the formal parts, the information is as follows:

"The said Wilburn Davis and Robert E. Butler in said Washington County, State of Arkansas, on or about the 3rd day of March, 1965, did unlaw-

fully and feloniously obtain a check in the sum of $1,000.00 for an insurance premium payment from Mrs. H. Scott-Tucker by falsely, fraudulently, feloniously and designedly stating to Mrs. H. Scott-Tucker that they were authorized and licensed agents for the Southern Union Life Insurance Company of Little Rock, Arkansas, and that an insurance policy would be issued to her by the Southern Union Life Insurance Company of Little Rock, Arkansas; that the said Wilburn Davis and Robert E. Butler then and there well knowing that their statements were false and were made with a felonious and fraudulent intent to cheat and defraud the said Mrs. H. Scott-Tucker out of the said $1,000.00, and that the said Mrs. H. Scott-Tucker relied upon, believed and acted upon said false representations aforesaid, and she was then and there fraudulently and feloniously deprived of her said property by the said Wilburn Davis and Robert E. Butler, which property was in the value of $1,000.00."

The cause came on for trial on the 27th day of October, 1965. The codefendant, Robert Butler, was not tried but testified as a state's witness. Appellant was found guilty and his punishment was fixed at three years in prison.

Following his conviction, appellant filed a motion for An Arrest of Judgment and subsequently a motion for a new trial. Both motions were overruled and this appeal followed.

Appellant claimed that he was appointed as a field representative of Williams Insurance Agency who had a general agent's contract with the Southern Union Life Insurance Company to sell hospitalization insurance. On or about the 3rd of March, 1965, appellant and Butler went to the home of Mrs. Scott-Tucker near Lincoln, Arkansas. Butler gave his brief case containing brochures, applications, receipts and other in-

surance information to Davis and remained in the car while Davis went into the home of Mrs. Scott-Tucker. Appellant represented to Mrs. Scott-Tucker that he was representing Southern Union Life Insurance Company, obtained from her her policy and he copied certain information from the policy onto an application for insurance. He represented himself to her as being Bill Williams and advised her that Southern Union Life Insurance Company was building a huge rest home at Fayetteville, Arkansas and as soon as they got the rest of the money the building would begin. He further represented to Mrs. Scott-Tucker that it would take a thousand dollars for the premium and that she would receive services in the rest home for the rest of her life. Mrs. Scott-Tucker gave him her check book and he wrote out a check in the sum of $1,000.00 payable to Southern Union Life Insurance Agency which was endorsed and cashed by Butler. $250.00 of this money was given to Bill Williams as the net to the company. The commission, being 75 percent or $750.00, was divided between appellant and Butler. After Mrs. Scott-Tucker demanded that her money be returned, a Mr. Ludlow returned $250.00 and then another $100.00 was returned to her through Mr. Ted Coxsey. The balance of the $1,000.00 has not been returned.

For reversal the appellant sets out seven separate points with three subsections under the first point. We believe that we can summarize the contentions of the appellant without unduly lengthening this opinion. His main contentions, and the only ones that are briefed, are that the information is insufficient to support the charge of false pretense; there is a material variance between the allegation in the information and the state's proof; there is no substantial evidence of intent to defraud; the court erred in overruling motion for arrest of judgment; the court committed prejudicial error by its comments to appellant's counsel and to the witness, J. C. Kelly; that the court erred in permitting evidence of other fraud committed by the

appellant; and the court erred in refusing appellant's requested instructions No. 4 and No. 8. We will not attempt to discuss these under each separate head.

SUFFICIENCY OF INFORMATION. The only effort on behalf of appellant to challenge the information in this case was by a motion for arrest of judgment filed after conviction. The Arkansas Statute establishing the crime of false pretense [§ 41-1901] does not apply to a false statement concerning a future event. *Conner* v. *State,* 137 Ark. 123, 206 S. W. 747 (1918). The information contains one factual allegation of a promise to perform an act in the future, *i. e.,* the allegation that the appellant promised that the insurance company would issue an insurance policy but the basic false statement allegation in the information is that the appellant pretended to be an insurance agent of the Southern Union Life Insurance Company of Little Rock, Arkansas when in fact he was not. That statement is of a present fact and not a future event and, consequently, constitutes the crime of false pretense. The Supreme Court of Kansas had this situation before them in *State* v. *Handke,* 340 P. 2d 877 (Kan. 1959). In that case the defendant was in the house-building business and represented to the Pankeys that he was building certain houses at that time and that he would take their money ($3,000.00) and purchase materials with which to build them a house as soon as he could get the material together. The information so charged. The court held that even though the defendant may have made false representations as to future promises or events, he would not be relieved if he also made false representations as to existing or past acts. Representations as to future events may be considered along with existing or past facts and it is not necessary to prove that all representations alleged were actually made or that they were all false.

In *State* v. *Smith,* 324 S. W. 2d 702 (Mo. 1959) the substance of the false representations charged in the indictment was that the defendant represented to Mrs.

Smith that the electrical wires and system of her house were defective and that her house was in danger of burning down unless she did something about it and that he had attached a list of materials in performance of work he did. The court stated that the rule is that where an information charges several false pretenses, evidence of one false pretense constituted in law an offense and will support a conviction. "There need be only one false pretense, and though several such pretenses are set out in an indictment, yet if any one of them is proved, being such as truly amount in law to a false pretense, the indictment is sustained."

The trial court specifically instructed the jury that false statements, to constitute the crime of false pretense, are required to be of past or existing facts and not future facts or events. [Instructions 4, 5 and 6.] We see no merit in appellant's contention that the information is insufficient.

MATERIAL VARIANCE IN PROOF AND INFORMATION. A fatal variance is a failure to prove material allegations contained in the information. In other words, it is a failure of proof. *Clemons* v. *State,* 150 Ark. 425, 234 S. W. 475 (1921). In this case there is no substantial variance in the proof and the information. The allegation that the insurance company would construct a rest home would not properly charge a false pretense because it concerned a future event. In *Kerby* v. *State,* 233 Ark. 8, 342 S. W. 2d 412 (1961) the appellant maintained that his conviction should be reversed because the court had permitted the prosecution to present testimony concerning misrepresentations of future events. The court ruled:

> "The appellant's second contention is that the court erred in permitting the prosecution to prove Kerby's misrepresentations about matters relating solely to the future, such as the statement that the stock would increase in value within a year. It is conceded that the record contains sufficient evidence of

misstatements of existing facts to support a conviction, but the appellant insists that the references to future events should have been excluded altogether.

This contention is not sound. It is true that misrepresentations relating solely to the future do not constitute an offense. *Conner* v. *State,* 137 Ark. 123, 206 S. W. 747. It does not follow, however, that such proof must be excluded from the jury's consideration if it is otherwise relevant. Here the testimony was relevant, as it assisted the jury in understanding all the circumstances surrounding the sale of the stock. As we said in *Baker* v. *State,* 4 Ark. 56: 'All the authorities concur, that the intention and design of the party are best explained by a complete view of every part of his conduct at the time, and not merely from the proof of a single and isolated act or declaration.' In its charge to the jury the court adequately protected Kerby's rights by an instruction which explained that the false representations 'must be representations of the existence of some fact or facts.' "

So, we see no merit in this contention.

We see no merit in appellant's contention that there is no substantial evidence of intent to defraud. This is a matter for the jury to consider under proper instruction. Even if the entire sum of money had been returned, it would only be a factor in the determination of whether or not there was an intent to defraud at the time he received the money from Mrs. Scott-Tucker. There is ample testimony in the record that the appellant made the false statement that he was an agent of the insurance company and would have an insurance policy containing rest home benefits issued to Mrs. Scott-Tucker, all of which was introduced. There is substantial evidence to support the conviction. Certainly Mrs. Scott-Tucker would not have delivered $1,000.00 to the appellant for an insurance policy if he had not stated that he was an authorized agent of the company that was going to issue the policy.

We see no merit in appellant's contention that the court committed prejudicial error by its comments to appellant's counsel and to the witness, Kelly. In *Tuttle* v. *State,* 83 Ark. 379, 104 S. W. 135, the court said to counsel:

> "You can reduce them to writing hereafter and not take up the time of the court. Your exceptions are noted. This is not a backwoods justice-of-the-peace court, and I will not take up the time of the court with such questions."

In this case it developed that Mr. Sam Montgomery, an attorney for the appellant, had talked to Mrs. Scott-Tucker during the noon recess and on cross-examination was asking her about the conversation and the court said:

> "I don't know what you were doing talking to the State's witness, during the noon hour. Did you have Mr. Coxsey's permission— .* * * You are supposed to ask the other side's permission. You should tell the other side if you are going to talk to their witnesses.
>
> MR. MONTGOMERY: I presumed he saw me there and I didn't know there was any rules.
>
> THE COURT: I don't know anything about this procedure, but that is the customary procedure in this area. If you are going to talk to their witnesses and they don't object, why, you can go ahead."

While interrogating the witness Kelly he was asked what he knew about the transaction and his answer was: "If I can ever get a chance to talk, yes."

> "THE COURT: Now, young man, I'm running this Court and don't you ever say that again. The Court will make the rulings and you will abide by them.

> Don't you pop off about my rulings, do you hear me, sir?"

We do not think these remarks by the court were prejudicial or affected the verdict of the jury in any way. In *Tuttle* v. *State, supra,* the court said:

> "There is a reciprocal duty between court and counsel to treat each other with fairness, courtesy and consideration. And this duty is not less upon the court than it is upon counsel."

The colloquy between the court and counsel and the witness, Kelly, is not in accord with orderly trial procedures, but we do not believe it was prejudicial. We are convinced that the verdict of the jury was responsive to the evidence and was uninfluenced by any remarks of the court.

The appellant complains of the instructions of the court. We have carefully examined these instructions and find no error. The instructions fairly state the law and in our opinion are more favorable to the appellant than to the state.

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

[Supplemental opinion on rehearing delivered February 27, 1967, 242 Ark. 43.]

CITY OF HELENA ET AL *v.* JOHN H. BARROW ET UX

5-4067 408 S. W. 2d 867

Opinion delivered December 12, 1966

W. G. Dinning Jr. and *David Solomon,* for appellant.

Daggett & Daggett and *John L. Anderson,* for appellee.

HUGH M. BLAND, Justice. This is an appeal from the Phillips Chancery Court overturning the Helena City Council's refusal to rezone the lots of the appellees from Residential District B to Commercial District C. The property involved is the home of appellees' located on the northwest corner of the intersection of Perry and Columbia Streets in Helena. Perry Street runs east and west as does Porter Street; Columbia Street runs north and south.

In 1957, after public hearings by the Helena Planning Commission and City Council, a zoning ordinance was adopted and this established four districts: Residential A, Residential B—Multiple Family Dwellings,

Commercial C and Industrial D. The dividing line between the B Residential and C Commercial Districts runs westward in the middle of Perry Street in front of appellees' property to the alley in the middle of the block and then turns south away from appellees' property down the alley.

The entire north side of Perry Street, about four blocks in depth northward and beginning two blocks east of appellees' property and westward for several miles, is residential. In the half block immediately across from appellees' property is located a Kroger Store and the other half of the block, being the west half, is residential. In the west half of the block east of the Kroger Store and south of Perry Street are residences and on the east half of this block is the First Baptist Church. On the corner of the block south of Perry Street and a block west of appellees' home is a doctor's office which was in existence at the time of the adoption of the ordinance and another proposed doctor's office is on the west end of this block. The rest of this block contains residences. On the south side of Perry Street west of this last mentioned block nothing exists but residences except for several non-conforming uses sev-blocks west which were in existence at the time the zoning ordinance was adopted.

Perry Street from the point in front of appellees' property for some distance is one way for westbound traffic and this is Highway No. 49 which feeds or receives the traffic from the one-way street.

Appellees, in 1963, attempted to have their home rezoned Commercial since they had given an option to sell to D-X Sunray for the erection of a filling station. This was rejected by the Planning Commission and City Council. Then in January, 1965, appellees again petitioned the Planning Commission that their lot be changed to C Commercial. This application was rejected by the Planning Commission as being spot zoning. At the same meeting the Planning Commission recommend-

ed a larger area be made commercial which would include appellees' property and 32 other lots. This larger area would run east and west 132 feet north of Perry Street to Poplar Street, then go a quarter block south of Porter Street and east one and one-half blocks to the alley parallel to Columbia Street, the present west boundary of the Commercial zone. Doctor Barrow presented the recommendation of the larger area to the Council and did not pursue his own request for his individual lot to be rezoned Commercial and which had been rejected.

After a public hearing and a joint meeting with the Planning Commission, the City Council rejected the recommendation of the Planning Commission and refused to rezone the larger area as Commercial.

The parties are not in dispute as to the facts. After the last refusal appellees filed this suit against the City of Helena and the other property owners were allowed to intervene. The cause was heard by the court on September 28 and 29, 1965, and concluded on October 20, 1965. On February 3, 1966 the chancellor rendered a lengthy opinion, made extensive findings and held the action of the City Council to be arbitrary and unlawful in refusing to rezone appellees' property to C Commercial. From this decree appellant and intervenors bring this appeal relying solely on one point:

> "The Chancellor's findings are contrary to the preponderance of the evidence, and the actions of the City Council of Helena were not arbitrary and unlawful."

Dr. John Barrow testified, in substance: Since I bought the property the Commercial Zone has been placed to the Alley west of Columbia Street,—the Mississippi River Bridge had not been built. At the time I bought my home the Arkansas Grain Corporation, Arkansas Power & Light Company Plant, Arkansas Chemical Plant had not been built and Perry Street was

a two-way street. The Kroger Super Market had not been built, nor had the M-C Drug Store. The Shell Station had not been built, and the Texaco Station had not been built along Columbia Street. The Federal Building had not been built nor had the First Federal Savings and Loan Building. Dr. Berger had not built his clinic at Beech and Perry Streets. The traffic passing by my house seemed to have increased a great deal, and this is objectionable since there is a stop light at the corner and the heavy trucks have to shift gears, which causes a vibration as well as noise day and night. Oil trucks seem to make more noise. The Kroger Store has created more traffic and activity in front of my house, and they load and unload trucks early in the morning, which is noisy. The new Shell Station is one block south of my house. There has been a gradual encroachment of more buildings, businesses, traffic and litter by my house, and there are hitchhikers because of the stop light. It is not desirable for my family and me to occupy it as a home. There has been considerable change in my community since I bought it, as it is changing from a good residential area to one more suitable for commercial property, and I feel that my house has no value as residential property any more. There are hitchhikers on the corner, and since I am out at night, I am apprehensive about my wife and children living there, and more apprehensive than when I bought the home.

Jerdy Lambert Jr. testified, in substance: Since its organization in 1955, I have been Secretary of the Helena Planning Commission and keep its records. [Witness then detailed the efforts of Dr. Barrow to have his property rezoned.] I have been in the real estate business since I have been out of service in 1952 and handled all types of property, but in the past five years have handled more rural property. From my knowledge and experience I believe that the use to which the Barrow property could best be put was commercial. I personally wouldn't want to live there. I don't think that it is resalable as residential property,

as it is on U. S. 49 with lots of heavy trucks going past. The trend of commercial growth is west because of the geography of the community. The River is on the East and the North is a substantial residential area. The South is largely industrial. I have not examined the Barrow property and would hesitate to put a value on it as residential property, but in my opinion it is not desirable as residential property. Traffic is a factor in Dr. Barrow's property not being suitable as residential. Other factors are its proximity to Kroger's and this is one of the main streets leading out of town. These are all the factors affecting my opinion. From Perry to Walker Street and College to Franklin surrounding the north of the Barrow property there are nothing but residences or multiple dwellings, and no businesses. These residences are good. In my opinion the rezoning of Dr. Barrow's property will not affect adversely these residences any more than the present Kroger Store does.

Joe C. Brady testified, in substance: I am Manager of the Helena Cotton Oil Company and Delta Fertilizer Company. These businesses are on the south side of town, off of Highway No. 49. Helena Cotton Oil Company processes cotton seed, and it is the largest mill in Arkansas. In the 1964-65 season we processed 88,000 tons of cotton seed, which comes to our mill mostly by trucks, but some by rail. Of these, 22,750 tons came from below Helena, which would not come by Dr. Barrow's property, and 2,198 tons by rail, which would not, but the balance of 63,000 tons would have come within a block of his house. The loads would average 11.8 tons per truck, and would be of all types of vehicles from 5 ton loads to as large as 22 ton loads. To leave Helena these trucks would go out Perry Street past Dr. Barrow's property. In 1954 we processed 57,000 tons.

C. V. Barnes testified, in substance: I am a Realtor living in Little Rock, Arkansas, and am a real estate consultant and a certified real estate appraiser and belong to a number of Associations connected with my profession. I examined the records of the Helena Planning

Commission and have gone over the areas involved. I obtained maps and familiarized myself with Dr. Barrow's property, and I am thoroughly familiar with Helena and the surrounding territory. In my opinion as Helena grows, the commercial growth will continue and extend many blocks past the present approximate limit of the commercial area, which would be either Beech or Poplar Streets. The trend is for commercial growth of a community to follow the communities general growth, which Helena has been required to do by topography and other factors. In this the residential area growth grows first and then follows the commercial area. In my opinion the Barrow property is located in a transitional neighborhood, which is one which formerly had a residential character, but because of the development in the community has reached commercial character. In my opinion if the community is going to continue to grow and keep up with the times, the Barrow property and that surrounding it should be rezoned commercial uses, and not to rezone the Barrow property is not based on sound planning principals. If the proposed line of zoning is adopted to the rear of the Barrow property and a filling station was placed on the Barrow property, I do not think that it would have too much effect on the residences to the north end of that half block because of the buffer value of the vacant lot in between. Spot zoning is zoning of an area as an island. If the Barrow lot is zoned commercial, this would not be spot zoning since it isn't an island, but would be an extension to the currently existing zoning area. I think that growth would follow as the Barrow property is rezoned for commercial purposes. In my opinion there is a commercial need for the future growth of the community to rezone the Barrow property, and there would be no detriment to the property owners immediately north of the area.

A number of residents of the neighborhood testified in opposition to the rezoning. F. L. Thompson, who lives just west of Dr. Barrow's property in one of the historic old homes of Helena, objected strenuously that it would increase traffic and noise. Clancy King, who lives

in Waverly Woods, Mrs. Retta G. Solomon who lives at 726 Columbia Street, Mrs. Henry H. Rightor who lives at 720 Beech Street, Mrs. H. M. Houston who lives at 715 Beech Street, Reverend H. H. Rightor Jr. who lives at Owing Mills, Maryland but owns property just north of Dr. Barrow, objected to the rezoning. O. D. Butterick, who lives at 623 Beech Street with his wife, objects to rezoning Dr. Barrow's property since it would decrease the value of his property.

The members of the Planning Commission testified that they rejected the rezoning because they believed it to be spot zoning.

In a case of this kind the chancellor should sustain the city's action unless he finds it to be arbitrary. No matter which way the chancellor decides the question, we reverse his decree only if we find it to be against the preponderance of the evidence. *City of Little Rock* v. *Garner,* 235 Ark. 362, 360 S. W. 2d 116 (1962).

The evidence clearly establishes that Dr. Barrow's property is on the periphery of an established business district. The testimony is that the commercial growth of the city is now and inevitably will in the future be westwardly. The city administrative authorities have recognized this by granting petitions for commercial use of property in the residential area in the vicinity of the Barrow property, *i. e.*, the Etoch and Coolidge lots and the Bell lot. They also proposed a plan to rezone a larger area, including the Barrow property.

In the landmark case of *City of Little Rock* v. *Pfeifer,* 169 Ark. 1027, 277 S. W. 883, we held:

> "* * * As the size of the business district grows, it ceases to be a residence district to that extent within the purview of the zoning ordinance, and 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 rights of owners of property adjacent thereto cannot be restricted, so as to prevent them from using it as business property. It is the contention of the protestants that residence property adjacent to a business district becomes, on that account, less desirable for residence use. Conceding this to be true, and it is undoubtedly true, in a sense, that property thus located is not as desirable as residence property, it demonstrates the right of owners of borderline property between residence and business district to use their property for either purpose. In other words, if it become less desirable for residence property because of its proximity to the business district, they have the legal right, without interference, to use it for business purposes."

This is the rule of law governing this case and has been cited and reaffirmed in the following cases: *McKinney* v. *City of Little Rock,* 201 Ark. 618, 146 S. W. 2d 167; *City of Little Rock* v. *Bentley,* 204 Ark. 727, 165 S. W. 2d 890; *City of Blytheville* v. *Lewis,* 218 Ark. 83, 234 S. W. 2d 374; *City of Little Rock* v. *Joyner,* 212 Ark. 508, 206 S. W. 2d 446 and *City of Little Rock* v. *Garner, supra.* The above cases have similar fact situations and are analogous with the facts in the case at bar.

In *City of Little Rock* v. *Faith Evangelical Lutheran Church,* 241 Ark. 187, opinion delivered October 17, 1966, it was said:

"It is not likely, in any rezoning case, that a solution could be reached which would afford complete equity and satisfaction to all parties. As in other matters, the welfare of all concerned must be taken into consideration. We stated in *Downs* v. *City of Little Rock,* 240 Ark. 623, 401 S. W. 2d 210: 'The composition of the entire area must be taken into consideration, and it is undisputed that both the area to the west of Beechwood for several blocks, and the area north of Markham and Beechwood for a similar distance are completely residential. The

benefit to a few individuals cannot be allowed to override the best interests of the residents of the overall area. The Planning Commission has apparently spent long hours in rezoning property in the city of Little Rock with the view of establishing a long-range program, one that will best fit the needs of an expanding city in future years.' "

After all, the chancellor had the opportunity to hear and observe the witnesses and was in a better position to evaluate their testimony than we are.

From a review of the entire record in this case we cannot say that the decree of the chancery court is against the preponderance of the evidence. The decree is, therefore, affirmed.

Affirmed.

GEORGE ROSE SMITH, J., concurring.

GEORGE ROSE SMITH, Justice, concurring. I am compelled to concur in the result for precisely the same reason that I have stated in *Arkansas State Highway Commission* v. *Jerry*, also decided today.

ORDER PER CURIAM

[Original opinion delivered October 31, 1966, p. 300.]

ED. F. MCFADDIN, Justice, (dissenting in part.) On October 31, 1966, this Court delivered a unanimous Opinion affirming the judgment of conviction of the Trial Court in this case. In due time a petition for rehearing was filed, which, in the alternate, prayed for permission to proceed under Criminal Procedure Rule No. 1. The per curiam of this Court this day delivered denies a rehearing in the case. I agree with the Majority in denying the rehearing.

The said per curiam, however, contains this language: "Permission is granted to appellant to file a petition in the Trial Court under Criminal Procedure Rule No. 1 for hearing on the question only of suppression of the evidence of Mary Louise Roberts and Linda Ford . . . . The hearing and all proceedings thereafter shall be conducted in accordance with Criminal Procedure Rule No. 1." I see no reason whatsoever for allowing any proceeding in the Trial Court under Criminal Procedure Rule No. 1, and it is from that portion of the per curiam that I dissent.

This Criminal Procedure Rule No. 1 was promulgated by this Court on October 18, 1965, and Paragraphs A and B of that rule read:

"(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."

It is because of the above quoted portions of Criminal Procedure Rule No. 1 that the Majority is now allowing the appellant to proceed in the Trial Court "on the question only of suppression of evidence of Mary Louise Roberts and Linda Ford . . ." I see no justification for allowing any further proceedings in the Trial Court in this case; and I now state some of the reasons for my said conclusions:

I.

In the first trial of Walker, both Mary Louise Roberts and Linda Ford were witnesses and testified, and their testimony was duly preserved. We reversed the first conviction of Walker and sent the case back for a new trial (see *Walker v. State,* 239 Ark. 172, 388 S. W. 2d 13); and Walker was retried in 1965. The trial commenced on November 29, 1965, and continued until December 3, 1965. In the course of the trial the State offered the testimony that Mary Louise Roberts and Linda Ford had given in the first trial (Tr. 575-620). The Court allowed this former testimony to be read, after due foundation had been made. Here is the foundation:

(a) The said witnesses were called.

(b) It was shown that subpoenas had been issued for them (Tr. 536).

(c) Before the Court would allow the former testimony to be read there were proceedings in chambers (Tr. 537-572).

(d) Dennis L. Jones, an officer, detailed how he tried to locate Mary Louise Roberts and Linda Ford to serve the subpoenas on them.

(e) Chief Ray Vick testified as to his efforts to locate the witnesses.

(f) Chief R. E. Brians testified as to efforts to locate the witnesses.

After all of the above, the Court ruled (Tr. 557): "I think you have made sufficient proof to comply with the statute. I think you have made sufficient search, but I would rather have the girls here." So the testimony was read to the jury that was given at the former trial by the witnesses, Mary Louise Roberts and Linda Ford. It was the claim of the appellant (defendant below) at the time that the witnesses could be found, The attorney

for the defendant told the Court (Tr. 550): "Judge, they can be seen and found. Linda can be seen at Summerfield and Martin's Cafe. Her correct address Mrs. Oliver will not give us. That is her mother. But she is definitely here in town and I will prove she has been seen almost daily and almost nightly. She frequents one of those places."

After the Court allowed the testimony to be read, the attorney for the appellant asked time to get witnesses to offer proof to show that the two missing witnesses were in the jurisdiction of the Court and reasonably available for service. The Court said (Tr. 558): "You should have your witnesses here"; to which the attorney for the defendant responded: "I didn't know they were going to do this this soon." The Court then said to counsel: "Do you know where they are, where they can be located? If you do, tell the Court," to which counsel for appellant replied: "I can prove that nearly every night that one of these places I have told you about, that they can be seen almost nightly. The exact home address, I do not know, but I can prove that they frequent these clubs, and Martin's Cafe and Summerfield's Cafe, in particular, and also Jobe's Cafe in North Little Rock."

Now all of this admission of evidence and conversation as above recited transpired on Wednesday, December 1st, because on Tr. p. 654 the record recites that at 4:40 p.m. Wednesday, December 1st, the Court recessed until 9:30 a.m. Thursday, December 2nd, at which time the State resumed offering its evidence in chief. The record does not show that the appellant had ever served any subpoena on either of these witnesses or sought an attachment to have them brought to Court. If the attorney for the appellant knew where either of these witnesses could be found, he had only to obtain a subpoena or an attachment, and have the officer go to the place at the time that the appellant's attorney said they would be there. There is nothing in the record to show that the appellant did any of this.

Further detailing, at 9:30 Thursday, December 2nd, the State resumed offering its evidence in chief (Tr. 655); at 12:30 noon, December 2nd, the Court recessed until 1:30 (Tr. 749), at which time the State resumed offering its evidence in chief. The State rested its case at 3:15 p.m. on December 2nd (Tr. 826); and the Court then recessed until 9:30 a.m. Friday, December 3rd, at which time the Court reconvened and five pages of the transcript are consumed with motions made by the defendant (Tr. 827-832). The witnesses for the defendant testified (Tr. 832-878). There were the instructions, the argument, and the verdict returned on December 3, 1965 (Tr. 36).

Thus, the appellant had from some time in the morning of December 1st until December 3rd to obtain a subpoena or an attachment to have these witnesses brought into Court; and there is nothing in the record to show that any such was done or attempted. Rather, in Assignment No. 13 in the motion for new trial (Tr. 40), the appellant complains that the testimony of these witnesses should not have been introduced.

My first point is that the appellant showed absolutely no diligence to get these witnesses and, in the absence of diligence, he would not be entitled to a new trial; and if not entitled to a new trial, certainly he should not be entitled to proceed under Criminal Procedure Rule No.1.

II.

My second reason relates to delay. After our Opinion in this case on October 31, 1966, the appellant filed a petition for rehearing and, in the alternate, prayed for right to proceed under Criminal Procedure Rule No. 1. Here is what the appellant's pleading says:

> "In the alternative and should this Honorable Court deny appellant's petition for rehearing and the relief herein sought, the appellant respectfully moves the court for permission to proceed under Criminal Procedure Rule No. 1 so that he can

collaterally attack his sentence, which is invalid by reason of the deliberate suppression of evidence by the prosecution and the agencies of state government. In support of said alternative petition, as an exhibit thereto, and as a part hereof as though set out word for word and line for line herein, is the affidavit in deposition form of the witness Mary Louise Roberts, which affidavit constitutes newly discovered evidence and further proof positive that the State has, did, and still is unlawfully suppressing evidence favorable to the accused so as to entitle the appellant to a hearing in the trial court or a proper tribunal on a motion to vacate the sentence based on the issue of suppression of evidence; that said unlawful suppression of evidence by the prosecution and agencies of government in threatening, intimidating, and by coercion rendering unavailable testimony of a material witness constitutes a denial of due process, and deprived the appellant of a fair and impartial trial in violation of his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. This newly discovered evidence was not available to the appellant at or during the course of the trial."

To support the statements above copied, the appellant filed in this Court on November 10, 1966, a 35-page question and answer statement of Mary Louise Roberts which was taken on July 11, 1966 between 4:30 p.m. and 5:20 p.m. in the office of the appellant's counsel. Besides the stenographer and the Notary Public, there were present at the giving of said statement the attorneys for the appellant and R. Eugene Bailey, as representing the witness, Mary Louise Roberts. The appellant had all this information on July 11, 1966, but never mentioned it to this Court until after our decision on October 31, 1966. He thus kept his "ace in the hole" until after we had affirmed the conviction and then belatedly attempts to assert some claimed right under Criminal Procedure Rule No. 1. He says that it was "newly discovered evidence." As previously shown, he exercised no diligence to get

this evidence and should not now prevail in this belated effort, after he had chanced the result of his appeal without telling the Court of what he had. This is my second reason for voting to refuse the appellant any right to proceed under Criminal Procedure Rule No. 1.

III.

The third and final reason for my dissent relates to the effect of the delayed recantation. We do not know what Linda Ford would say if she were now called; but the witness Mary Louise Roberts, in the statement of July 11, 1966, attempted to recant her testimony given in the first trial, in that she gave a version of matters entirely different from that to which she testified in the first trial. In her statement of July 11, 1966, she also said that she would have been at the second trial and would have testified if the officers had not kept her away from the trial. It seems ridiculous to me to expect this Court to believe any such statement when three officers of the law testified that they were trying to find the girl, and the appellant never had a subpoena or attachment issued for her. She was under oath in court when she testified in the first trial. What happened to her in the meantime, we do not know; but because this recanting witness had the effrontery to testify that officers kept her away from the second trial, this Court is now willing to have the Trial Court hold a hearing to see whether such statement is true. If the Trial Court should find the statement to be true, would there have to be a new trial of the whole case? And on such new trial would her recanted testimony be used against her original testimony? And suppose she should recant again, where would justice be?

We have repeatedly held that the recantation of a witness does not require the granting of a new trial. The matter still rests within the sound discretion of the Court. *Little v. State,* 161 Ark. 245, 255 S. W. 892; *Clayton v. State,* 186 Ark. 713, 55 S. W. 2d 88; *Sutton v. State,* 197 Ark. 686, 122 S. W. 2d 617; *Puterbaugh v. State,* 217 Ark. 686, 232 S. W. 2d 984; and *Hicks v. State,* 219 Ark. 528, 243 S. W. 2d 372. We have also held that after

the lapse of the term a recantation cannot be used as the basis of a new trial. *Satterwhite v. State,* 149 Ark. 147, 231 S. W. 886; and *State v. Martineau,* 149 Ark. 237, 232 S. W. 609.

I do not understand that Criminal Procedure Rule No. 1 changes our holdings in these regards. That rule applies only under the four sub-lettered sections of Paragraph (A) of the rule, as previously quoted. Since after the lapse of the term the recantation could not be used as the basis of a motion for new trial, the sentence of conviction in this case is not subject to collateral attack under our Criminal Procedure Rule No. 1. Yet the Majority is now allowing this *ex parte* question and answer statement of Mary Louise Roberts, given on July 11, 1966, to be used as a basis for requiring the Trial Court to have a hearing under Criminal Procedure Rule No. 1. I maintain that we should not allow the appellant to toy with the courts in any such manner. I would deny all right to proceed under Criminal Procedure Rule No. 1; and of course, I would deny any rehearing in this case.

Criminal Procedure Rule No. 1 was promulgated because of some decisions of the United States Supreme Court which have allowed convicted persons to have a further effort to escape conviction. The rule is generally applied to benighted defendants who, without the advice of counsel, were either interrogated or pleaded guilty. Neither of these situations applies here. The appellant was ably represented and, after a full five-day trial below and exhaustive briefs and oral argument on appeal, he now seeks to claim some asserted right under Criminal Procedure Rule No. 1 in an effort to obtain a third trial. I do not understand that Criminal Procedure Rule No. 1 applies in a case like this.

So, for each and all of the reasons herein stated, I respectfully dissent from that part of the per curiam order that allows any procedure under Criminal Procedure Rule No. 1 in this case; and I am authorized to state that Justice Bland joins in this dissent.

Opinion delivered December 19, 1966

[Rehearing denied January 23, 1967.]

Harry C. Robinson, for appellant.

Joseph C. Kemp and *Perry V. Whitmore,* for appellee.

CARLETON HARRIS, Chief Justice. Appellant, James Lloyd Bostic, was convicted in the Municipal Court of the City of Little Rock on March 17, 1966, of the offense of keeping a gambling device. He was fined $50.00 and costs, and the alleged gambling machine was ordered destroyed. Bostic appealed from the conviction to the Circuit Court of Pulaski County, Arkansas, and, on trial by the jury, was convicted and fined $200.00. From the judgment so entered, appellant brings this appeal.

For reversal, appellant relies upon two points, first, that the trial court committed prejudicial error by informing the jury that Bostic had been convicted

of the charge in the Municipal Court, and second, that the section under which appellant was convicted, Ark. Stat. Ann. § 41-2003 (1947), does not, in defining gambling devices, include the machine possessed by Bostic. We proceed to a discussion of each point in the order listed.

In acquainting the jury with the nature of the case, the judge of the Circuit Court said:

"This is Case No. 65656, *City of Little Rock* v. *James Lloyd Bostic.* The charge is keeping a gambling device. This defendant was convicted in the lower court and he has appealed, which he has a right to do, and, of course, as he stands before you he is innocent until the City convinces you of his guilt beyond a reasonable doubt. That's all I know about the case. I don't know anything about the facts because all that comes over to me is this appeal transcript."

Appellant objected to this statement by the court, and upon being overruled, noted his exceptions. It is argued that appeal cases are tried anew, in the same manner as if no judgment had ever been rendered, and that the trial court committed reversible error by informing the jury that Bostic had been convicted in the Municipal Court; that "the jury's knowledge of lower court conviction would prejudice them in their consideration of the case." We do not agree.

In *Stanley* v. *State*, 174 Ark. 743, 297 S. W. 826, error was asserted because the trial court permitted the prosecuting attorney, in his opening statement, to mention that the defendant, who was charged with manslaughter, had been previously convicted of the offense about a year prior thereto, but the case had been reversed by the Supreme Court. We held that where the record showed this to be true, there was no error.

Of course, the trial court, in its remarks, gave no opinion as to the guilt or innocence of the accused, and

it is that type of comment, *i.e.*, upon the weight of the evidence which this court has held to be improper and prejudicial. *Hearn* v. *State*, 211 Ark. 233, 200 S. W. 2d 513, and cases cited therein. Here, the court very clearly told the jury that the defendant stood before them innocent until they were convinced of his guilt beyond a reasonable doubt. We see no possible way that prejudice could have resulted.

The proof on the part of the city reflected that Bostic operated a cafe, in which there was a pinball machine. Free games could be accumulated on the machine, and Bostic was observed paying off persons for these games. A button would then be pressed on the bottom of the maching for the purpose of "running off" the games. A witness testified that he won games on three occasions, eighty the first time, two hundred the second time, and five hundred on the third occasion, and was paid by Bostic at the rate of a nickel per game.

Appellant argues that the pertinent statute (41-2003) specifies certain gambling devices, the keeping of which constitutes the offense of keeping a gambling device, but that the pinball machine, here involved, is not included among the prohibited machines. We find no merit in appellant's contention.

It is true that Act 137 of 1933, as amended by Act 201 of 1939, Ark. Stat. Ann. § 84-2611 (Repl. 1960), provides that the anti-gambling statutes (including what is presently § 41-2003) "shall not be expanded to include a free amusement feature such as the privilege of playing additional free games if certain score is made on a pinball table and on any other amusement game described in this section." Thus, merely setting up a machine that gives free games is not a violation of § 41-2003, but there are additional facts in this case, which bring it within the provisions of that stutute, *viz*, that the free games won on the machine were converted to cash by the proprietor's paying off these games in money. When this was done, the machine clear-

ly became a gaming device, and appellant was subject to the penalty of the law.

In *Albright* v. *Muncrief,* 206 Ark. 319, 176 S. W. 2d 426, we held that teletype machines, operated for the purpose of securing information as to horseracing at different tracks in the United States, the information received then being transmitted to other places in the city where gambling was carried on, became gambling devices within the meaning of our statutes. Of course, a teletype machine is not a gambling device, *per se*, but it was the use employed which brought the machines within the prohibitory statute. In that case, we said:

"It seems to us that the evil effects flowing from the use of instrumentalities designed for lawful use, when put to an unlawful use, would be just as great as when such machines were designed for unlawful purposes. Our lawmakers have gone far in their attempt to suppress the gambling evil and in so doing have given our enforcement officers authority to destroy the tools by the use of which gambling is carried on."

Under our law, and the facts shown, the jury was justified in finding Bostic guilty of the offense charged.

Affirmed.

WILLIAM H. MOORE *v.* ALMA M. MOORE

5-4046 409 S. W. 2d 830

Opinion delivered December 19, 1966

[Rehearing denied January 23, 1967]

Clayton N. Little of Little & Enfield, for appellant.

Putman, Davis & Bassett, for appellee.

CARLETON HARRIS, Chief Justice. Appellant, William H. Moore, instituted suit for divorce against the appellee, Alma M. Moore, alleging general indignities on the part of the appellee. Mrs. Moore filed a general denial, and counter-claimed, seeking a divorce on the grounds of general indignities and habitual drunkenness. Both parites sought a division of property rights. The case proceeded to trial, and at the conclusion thereof, the court found that each had established grounds for divorce with sufficient corroboration, but the complaint and counter-claim were both dismissed on grounds of recrimination. The court then found that the alternative prayer of appellee for separate maintenance should be granted, that appellant should not be required to make

any monthly support payments to her, but that Mrs. Moore should be entitled to the use and possession of the home owned by the parties near St. Paul, Arkansas, including the personal property located therein; further, that she should be required to account to appellant for one-half of any rents and profits derived from the operation of any profit-producing activities conducted on the property after the deduction of expenses, including mortgage payments, taxes, and insurance. From the decree so entered, appellant brings this appeal.

For reversal, it is first asserted that the trial court erred in permitting the appellee to amend her pleadings on the day of trial to pray for separate maintenance. We do not agree that this constituted error. Under our holdings, permitting amendments lies generally within the discretion of the court, and we will not disturb unless that discretion has been abused. In *Austin* v. *Dermott Canning Company,* 182 Ark. 1128, 34 S.W. 2d 773, quoting from an earlier case, we said that the granting of amendments "is to some extent a matter of discretion with the trial court, when the amendment does not change substantially the claim or defense, and this court will not disturb a ruling of the trial court in the exercise of that discretion when it clearly appears to have been observed."

Here, the amendment was filed before any testimony was ever taken, and really did not change the nature of the case, *i.e.,* the same proof was offered for the separate maintenance count as for the absolute divorce. Of course, if appellant thought that new issues were being presented, he could have made a motion for continuance, but this was not done.

It is next asserted that the court erred in refusing to grant appellant a divorce, and that this action was clearly against the preponderance of the evidence. Appellant's proof reflected that appellee had told persons that she had found her husband having relations with the cattle in the barn. The sheriff of Madison County

testified that Mrs. Moore had, on one occasion, sworn out an insanity warrant for appellant, and that he took Mr. Moore to a physician for examination. Following the examination, the doctor released appellant, and he was then released by the sheriff. Appellant asserts that these actions on the part of Mrs. Moore constituted indignities rendering his condition in life intolerable, and he also testified that she nagged him, called him names, and frequently accused him of being crazy. Relative to her charge of habitual drunkenness, he stated, "I never touched it during the week because you couldn't, but on weekends I used to have a few beers * * * just on weekends." He said he had "but very little" whiskey and wine. The witness stated that he had slapped his wife two or three times, but only after she had slapped him several times, and accused him of bothering the cattle.

Appellee testified that her husband would come in drunk, and on one occasion threatened her life with a butcher knife in his hand, struck her on many occasions, and had purchased large quantities of whiskey, wine and beer. "He drank so much wine, and he drank the beer, and he drank the whiskey, too, oh, that whiskey. He has drunk enough to float any boat." She contended that the allegations about her husband's indecent conduct were true, and she said that she told this to the neighbors. Wiley Harriman, a witness on her behalf, stated that he had seen appellant when he was drinking, though not drunk, and had smelled alcohol on him, and that on one occasion, Moore did state to him that his (Moore's) wife was a mean woman. Mrs. May Davis testified that she had seen marks of physical violence on Mrs. Moore, consisting of severe bruises, "black and blue," and one of appellant's witnesses stated on cross-examination that Moore called her on one occasion at her home about midnight to see if appellee was at her house, and made the statement that he was through with his wife, that she was just using him, and that he would not take her as a wife for a thousand dollars.

Appellant states that the court was incorrect in its

conclusion that the appellee established grounds for divorce, and it is his view that, at any rate, he and his witnesses made out a much stronger case for divorce than did appellee. Accordingly, appellant asserts that the Chancellor's conclusion that the divorce should be denied because of recrimination is against the preponderance of the evidence. It is his contention that the evidence is not evenly balanced, and that we should, on trying the case *de novo,* hold that appellant is entitled to the divorce.

Of course, whether the testimony was evenly balanced depends in large measure on just what facts appellant and his witnesses presented that the court believed, and likewise, the facts presented by appellee and her witnesses that the court believed. There was corroboration to some degree of most of the charges made, except the charge of reprehensible and degrading conduct attributed to the appellant by appellee, heretofore mentioned. The very nature of these alleged acts are such that corroboration of what appellee said she viewed would be difficult. We, of course, have no idea as to what the Chancellor believed—or disbelieved. From reading the transcript, one thing appears to be rather definitely established, *viz,* that neither party was entirely innocent. At least, we cannot say that the Chancellor's findings to that effect were against the preponderance of the evidence.

We have upheld the denial of divorces on grounds of recrimination. See *Martin* v. *Martin,* 225 Ark. 677, 284 S. W. 2d 647, and *Narisi* v. *Narisi,* 229 Ark. 1059, 320 S. W. 2d 757, and cases cited therein. In *Widders* v. *Widders,* 207 Ark. 596, 182 S. W. 2d 209, the reason for the rule was stated by this court in quoting the words of Lord Ardmillan, found in Bishop on Marriage, Divorce and Separation (Vol. 2, Page 165) as follows:

" * * * I think that there enters inherently and deeply into the contract of marriage an obligation before God and man that the contract shall be faithfully

kept by both of the contracting parties. Divorce is in my opinion a remedy provided for the innocent party, and is not intended for cases in which both parties are guilty."

We find no error in the court's refusal to grant either party a divorce.

The parties, during the period when they were living together, raised broilers for the Brown Hatchery, on a guaranteed per pound basis of $.05. Some of these chickens were being processed at the time the divorce action commenced. The court granted appellee the right to possession of the property, but required that she account to appellant for one-half of the profit of any business venture conducted thereon. It is contended that the court erred in granting her possession of the premises. This home is held as an estate by the entirety, and appellant asserts that each has the right to share the property. It is stated in the brief, "Appellant has a perfect right to return to the home and live there with appellee." Under the testimony heretofore set out, we think it apparent that it would be next to impossible for these people to live under the same roof; in fact, under such conditions, violence might well occur (indeed, the testimony reflects that it has already occurred). There was certainly no point in leaving the property vacant, and the court entered an equitable order in requiring that any profits be divided on an equal basis. There was authority to render this ruling. See *Cassell* v. *Cassell,* 211 Ark. 489, 200 S.W. 2d 965. In that case, we pointed out that the the decree as to the homestead and its contents did not amount to an order of permanent distribution, and vested no title in the wife. The same, of course, is true here, and, under the circumstances, we think the order was entirely appropriate.

Finding no reversible error, the decree is affirmed.

MRS. ELEANOR CRUCE, GDN. *v.* ARK. STATE HOSPITAL
5-4068 409 S. W. 2d 342
Opinion delivered December 19, 1966

James A. Ross and *James A. Ross Jr.*, for appellant.

Clifton Bond and *Pope, Pratt, Shamburger, Buffalo & Ryan*, for appellee.

CARLETON HARRIS, Chief Justice. This appeal relates to the validity of claims filed by the Arkansas State Hospital against the estate of Mrs. Hattie Martin. incompetent. Corporal Alex Martin, a native of Drew County, Arkansas, was serving with the armed forces when the Japanese invasion of the Philippine Islands occurred. Martin was captured in the islands by the Japanese, and died in a prison camp on November 22,

1942. He was the son of D. G. Martin, who died about 1930, and Mrs. Hattie Martin, who is an incompetent ward at the Arkansas State Hospital, having been confined there since about 1933. Corporal Martin was unmarried, had no children, and was survived by the mother and one brother, Elgin, a resident of Drew County. Several persons have served as guardians for Mrs. Martin, and the current guardian, Mrs. Eleanor Cruce, was appointed on June 16, 1958. In 1962, appellant's attorney, James Ross, undertook the recovery of monies believed to have been deposited by Alex Martin at the Albuquerque National Bank in Albuquerque, New Mexico. After correspondence and the filing of necessary papers, Mrs. Cruce, as guardian of Mrs. Martin, was forwarded a check in the sum of $1,450.00, representing the bank account of Alex Martin. In 1963, the guardian applied to the Veterans Administration for benefits that might be due by reason of Corporal Martin's military service, and awards were subsequently made as hereinafter set out.

In 1942, Public Law 667 of the 77th Congress, 56 Stat. 657 was passed, amending the National Service Life Insurance Act (NSLIA) as follows:

"(B) Any person in the active service who on or after December 7, 1941, and prior to April 20, 1942, has been or shall be captured, besieged, or otherwise isolated by the forces of an enemy of the United States for a period of at least thirty consecutive days and extending beyond April 19, 1942, and at the time of such capture, siege or isolation by the enemy did not have in force insurance in the aggregate amount of at least $5,000 under the War Risk Insurance Act, as amended, the World War Veterans' Act, as amended, or this Act, shall be deemed to have applied for and to have been granted, effective as of the date of such capture, siege, or isolation, National Service Life Insurance in an amount which together with any such insurance then in force shall aggregate $5,000 of insurance, and such insurance shall remain in force and premiums on such insurance shall

be waived during the period while such person remains so captured, besieged, or isolated, and for six months thereafter:"

Under the present provisions of the NSLIA[1] Mrs. Cruce, as guardian of Mrs. Martin, received in August, 1964, the sum of $7,347.15 from the Veterans Administration. This lump sum payment was made to take care of all back payments due under Public Law 667, and represented the sum of $28.15 per month from the date of the death of Corporal Martin.[2] An award was also made by the Veterans Administration to Mrs. Martin of $75.00 per month, because she was a dependent of the deceased veteran, and the monthly payments under this award commenced on March 1, 1964.

In the meantime, the Arkansas State Hospital had started, on September 25, 1955, filing claims with the guardian of the estate of Hattie Martin for maintenance. On this date claims were filed for maintenance at the rate of $50.00 per month from September 1, 1955, to March 1, 1958, for a total of $1,500.00, and at the rate of $90.00 per month from March 1, 1958, to September 1, 1958, for the sum of $540.00, or a total claim of $2,040.00. A second claim was filed against the estate at the rate of $90.00 per month from September 1, 1958, to January 1, 1963, for a sum of $4,590.00, and a third claim was filed covering the period from January 1, 1963, to January 1, 1965, in the amount of $2,160.00. The total bill claimed against the estate is $8,790.00. After several separate hearings, the court held that the estate was liable to the hospital for claims filed from March 1, 1958, and allowed amounts totaling $6,750.00. From the judgment so entered, appellant brings this appeal. Appellee cross-appeals from the court's failure to allow the full amount sought. Several points are urged by appel-

[1] 72 Stat. 1151 (1958), 38 U. S. C. § 716 (1964).

[2] The guardian for Mrs. Martin selected an optional settlement which guaranteed the amount of $28.15 monthly for a minimum period of ten years, and further provided that that sum would be paid for the remainder of Mrs. Martin's life.

lant for reversal, and we proceed to discuss these alleged errors, though not necessarily in the order listed.

It is asserted that the hospital claim is barred by the statute of limitations, but we have held to the contrary. See *Alcorn* v. *Arkansas State Hospital*, 236 Ark. 665, 367 S. W. 2d 737. It is further contended that appellee did not comply with Ark. Stat. Ann. § 59-230 (1947). Pertinent portions of that section provide as follows:

"If any patient admitted to the State Hospital be found, upon examination, to possess an estate, over and above all indebtedness, more than sufficient for the support of his or her dependents, his or her natural or legally appointed guardian shall pay out of such estate into the office of the business manager of the State Hospital, in advance, an amount equal to one [1] month's maintenance, at a rate to be fixed by the Board of Control [State Hospital Board] from time to time on the basis of maintenance costs, and in addition, shall supply the patient with sufficient and suitable clothing, and shall remove said patient when so required and notified by the Superintendent. If the patient remains in the State Hospital more than one [1] month, such payments shall be made, monthly in advance, for the whole period during which the patient remains in the State Hospital. If the patient has no such estate of his own, then his obligation shall exist against any person who is legally bound to support such patient. * * *

"The business manager, following the admission of a patient into the State Hospital, shall make an investigation to determine the extent of the estate, if any, owned by the incompetent patient, and whether he has a duly appointed and acting guardian to protect his property and his property interest. The business manager shall also make an investigation to determine whether the patient has any relative or relatives legally responsible for the payment of maintenance, and shall ascertain the financial condition of such relative or rela-

tives to determine whether in each case such relative or relatives are in fact financially able to pay such charges. All reports in connection with such investigations, together with the findings of the business manager, shall be kept in the Business Office and may be inspected by interested relatives, their agents, or representatives at any time upon application."

Appellant cites the case of *Arkansas State Hospital* v. *Kestle*, 236 Ark. 5, 364 S. W. 2d 804, in support of her argument that an investigation is required prior to any liability. That case, as well as *Alcorn* v. *Arkansas State Hospital, supra,* only dealt with procedure where a patient had no estate of his own, and recovery was sought against persons having the legal obligation of support. The section seems to primarily relate to the duty of the business manager of the hospital to make an investigation as a matter of determining if the patient is able to pay for his or her maintenance in advance. Of course, the requirement that reports in connection with investigations be filed in the business office for the inspection of interested relatives is for the benefit of a guardian or person responsible for the maintenance of the patient who might dispute that the estate (or relative) had sufficient monies to provide maintenance for the patient. The report would enable such a person to determine where the hospital received its information, and to point out any discrepancies or errors in the report. In the case before us, though filing claims, the State Hospital never made any effort to enforce payment against either the estate or relative, so no one has been prejudiced by the failure to file reports back in the 1950's. Undoubtedly, the business manager of the hospital did not push the matter of enforcement during that period, because he knew the estate did not possess the requisite amount of funds. For that matter, an investigation was conducted in 1958, for a letter appears in the record wherein the hospital inquired of the guardian of Mrs. Martin, as to the financial status of the estate. The statute referred to, of course, does not negate the liability of the estate. It might also be mentioned that, fol-

lowing our holding in *Arkansas State Hospital* v. *Kestle, supra,* the General Assembly of the State of Arkansas enacted Act No. 266 of the Acts of 1963 [Ark. Stat. Ann. § 59-230.2 (Supp. 1965)], which appears to have nullified at least a part of that opinion. We find no merit in this contention.

The main issue is whether the money received under the NSLIA is exempt from seizure under judicial process by reason of our own statute, Ark. Stat. Ann. § 30-208 (Repl. 1962), the pertinent portions of which provide as follows:

"All moneys paid or payable to any resident of this state as the insured or beneficiary designated under any insurance policy or policies providing for the payment of life, sick, accident and/or disability benefits shall be exempt from liability or seizure under judicial process of any court, and shall not be subjected to the payment of any debt by contract or otherwise by any writ, order, judgment, or decree of any court * * *."

Appellant asserts that the money obtained under the NSLIA is exempt from claim or debt, because it is derived from insurance, while appellee just as stoutly contends that the proceeds were not paid under an "insurance policy" as defined by § 30-208. At the time the state statute was enacted (1933), the NSLIA was not in existence. Counsel for each side present excellent briefs, but state that they have found no cases relating to the federal act which discuss the question here presented.

Appellee, in its brief, discusses the various meanings of the word "insurance." Among others, it mentions that found in 44 C. J. S., Section 25, Page 484:

"Life insurance is a mutual agreement by which one party agrees to pay a given sum on the happening of a particular event contingent on the duration of human life, in consideration of the payment of a smaller sum

immediately, or in periodical payments by the other party. * * * ''

Appellee emphasizes that a policy of insurance is a written agreement between two parties whereby the insurer agrees that, on the payment of premiums by the insured, the insurer will pay a certain sum upon the happening of a certain event. It is pointed out that National Service Life Insurance embodies all the characteristics of commercial life insurance, *i. e.*, a serviceman makes an application designating the amount of insurance and the beneficiary; the application is processed and approved; a certificate of insurance is issued; and a stipulated premium is paid each month by the serviceman. Appellee states:

''In the instant case Corporal Alex Martin, deceased, never made a written application for National Service Life Insurance, there was never an agreement between him and the United States, whereby the Government agreed for a stipulated premium to pay a certain sum in the event of the serviceman's death and a policy or certificate of insurance was never issued by the United States.

It is merely provided that under Public Law 667 of the 77th Congress, that as between the Government, the serviceman and the statutory beneficiaries (after the death of the serviceman) there was in existence a statutory contract of insurance termed 'National Service Life Insurance,' upon which the beneficiary could maintain a claim against the Government in the event of the death of the serviceman.''

We do not agree with this contention. While, as stated, no cases have been mentioned to us (and we have found none), which relate to an interpretation of the point involved in the federal statute, here discussed, there are decisions relating to a somewhat similar act. A statute was passed in 1917, relative to persons serving in World War I. This act, known as the War Risk In-

surance Act, contained a section (Section 401, 40 Stat. 409) providing "automatic" insurance, said section reading in part, as follows:

"Any person in the active service on or after the sixth day of April, 1917, who, while in such service and before the expiration of one hundred and twenty days from and after such publication, becomes or has become totally and permanently disabled or dies, or has died, without having applied for insurance, shall be deemed to have applied for and to have been granted insurance * * *."

The federal courts were asked several times to determine whether this World War I automatic insurance was an insurance contract. In *United States* v. *Jackson,* 89 F. 2d 572, (Fourth Circuit) the court stated:

"The basic contention * * * with regard to the first point is that the automatic insurance provided by the War Risk Insurance Act was a gratuitous death or disability allowance and not a contract. It is pointed out that the insured paid no premiums and received no written certificate or policy of insurance, and hence it is said that the provisions of the act come within the scope of Section 17 of the Economy Act, which repealed 'all public laws granting medical or hospital treatment, domicillary care, compensation and other allowances, pension, disability allowance, or retirement pay to veterans and the dependents of veterans of the * * * World War.' "

Further:

"It is obvious that Congress chose to consider the induction of the soldier into the service and his disability or death within 120 days thereafter as equivalent to an application for and a grant of insurance, so that a contract of insurance of equal validity to those for which applications should be made would come into existence; and since Congress accepted the military service as the basis of the contract, it is of no moment that no written document was issued to the soldiers * * *."

Likewise, in *Cunningham* v. *United States,* 67 F. 2d 714 (1933), the Federal Circuit Court of Appeals said of automatic insurance:

"* * * It is true that the grant is a gratuity in the sense that no premium is exacted of the soldier whose case it fits; but this is the only sense in which it is true. What is granted is a contract of insurance, having in all other respects than the requirement of premiums the same incidents, entitling the holder to the same rights and remedies, and governed by the same rules as contracts of insurance issued on applications and with the payment of premiums. The place where the language is found, the fact that it is an integral part of the act granting war risk insurance, the language itself 'any person * * * shall be deemed to have applied for and to have been granted insurance,' under the plainest principles of statutory construction compels this conclusion. Any other would do the greatest violence to the act. Indeed, the matter is so plain that the suability of these contracts has been assumed without question. [Citing cases.]"

Similar decisions could also be cited. These holdings are quite persuasive in the instant litigation, for it is apparent that the pertinent sections in the two acts were enacted for the same purpose, *i.e.*, the protection of the individual in the armed forces (and his family) who never had an opportunity to apply for service life insurance. In the case before us, the act repeatedly terms the coverage, here under discussion, "insurance," provides for a waiver under certain conditions (as in many insurance policies), gives an option for manner of payment preferred, and actual payments to the beneficiary are made as under an insurance policy. We hold that the coverage afforded Corporal Alex Martin was insurance.

In addition to the aforementioned argument, appellee argues that, even though the money paid to the guardian be held to have been derived from insurance, still such proceeds are not exempt from the hospital's

claim (as appellant contends) by virtue of Section 30-208 of our statutes. The basis of this argument is that Mrs. Martin's debt to the hospital is not a "debt by contract or otherwise;" rather, it is contended that the debt is based upon statute, and is therefore simply a statutory claim. It is not necessary that we discuss whether Mrs. Martin's maintenance by the hospital is based upon a contract, for we are firmly convinced that the words "or otherwise" exempt the insurance money from the claim. In *Ponder* v. *Jefferson Standard Life Insurance Company*, 194 Ark. 829, 109 S. W. 2d 946, in referring to the statute under discussion, we said:

"The statute exempts from seizure under judicial process 'any debt by contract or otherwise.' *This language exempts all debts of whatever nature and in whatsoever manner incurred.* (Emphasis supplied)"

However, we do not agree with appellant that all payments received from the federal government by the guardian of Mrs. Martin are exempt from the claim for maintenance by the State Hospital. Here, we have reference to the $75.00 per month benefit awarded Mrs. Martin as a dependent of Corporal Alex Martin.[3] The pertinent statute is 72 Stat. 1229 (1958), 38 U. S. C. § 3101 (1964), which provides that:

"* * * (a) Payments of benefits due or to become due under any law administered by the Veterans' Administration shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. * * *

We agree with the Drew County Probate Court that

[3]The exact authority for this award is not shown in the transcript or briefs, but same was apparently made under 72 Stat. 1122 (1958), 38 U. S. C. §§ 321-322 (1964), which includes a dependent parent.

the position of the Wisconsin Supreme Court in the case of *In re Bemowski's Guardianship*, 3 Wis. 2d 133, 88 N. W. 2d 22 (1958) is sound and logical, and we adopt that court's view.

From that opinion:

"We will first consider the effect of the federal exemption statute independently of our own state exemption statute. Said sec. 454a, Title 38 [now 38 U. S. C. § 3101], at the times material to this appeal, provided in part as follows:

" 'Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.'

"In *Lawrence* v. *Shaw,* 1937, 300 U. S. 245, 57 S. Ct. 443, 81 L. Ed. 623, 108 A. L. R. 1102, the United States Supreme Court considered the application of the exemption provided in sec. 454a to pension benefits of a veteran, which benefits were attempted to be subjected to tax. In the opinion of the court, Chief Justice Hughes made this significant statement (300 U. S. at page 250, 57 S. Ct. at page 445):

" 'These payments are intended primarily for the maintenance and support of the veteran.' * * *

"Therefore, in interpreting sec. 454a, the question is whether Congress intended to classify the state as a '*creditor*' within the terms of such statute. The courts of California, Michigan and New York in a number of well reasoned opinions have held that Congress did not intend to classify states, which have provided support in state institutions to incompetent veterans under guardianship as '*creditors*' * * * [*Cases cited*]

"We adopt the reasoning of the Michigan court so well stated by Mr. Chief Justice Wiest in In re Lewis' Estate, supra, as follows (287 Mich. at page 186, 187, 283 N. W. at page 24):

" 'We are not here concerned with actions by creditors seeking to turn the pension to satisfaction of their demands, but only with the question of reimbursement of the state for care and maintenance. Certainly the pension protective law does not intend the fund for the welfare of the beneficiary and then, under restrictions thereof, after receipt by the beneficiary, prevent employment thereof for care and support of the pensioner. * * *

" 'The state, under humanitarian legislation, has assumed the care and maintenance of the insane pension beneficiary and, by statute, has provided means and measures for reimbursement and we do not think that, under such circumstances, Congress intended to consider the state in the class of barred creditors. The exemption in the pension law serves its purpose in holding that in the hands of the guardian and under order of the court, of which the beneficiary is a ward, the money is not exempt from employment in reimbursing the state, under statutory provisions, for the expense of care and maintenance of the ward.' "

We hold that these funds are not exempt from the claims of the State Hospital.

As to the cross-appeal, our holding under Point One settles that issue. We have said that the statute of limitations does not run against these claims, and we have shown why Ark. Stat. Ann. § 59-230 (1947) is not applicable to the situation here presented. We think the court erred in refusing to allow the claim from September 1, 1955, to September 1, 1958, in the amount of $2,040.00.

Summarizing, we hold that the court erred in find-

ing that the monies received under Public Law 667 of the 77th Congress did not constitute proceeds from insurance; further, we hold that the court erred in not granting the State Hospital claim from September 1, 1955, to September 1, 1958. Because of these errors, the cause is remanded to the Drew Probate Court with directions to enter an order not inconsistent with this opinion. In all other respects, the judgment is affirmed.

ANDREW J. WALKER ET UX *v.* GEORGE WILLIS DIBBLE ET UX

5-4026 409 S.W. 2d 333

Opinion delivered December 19, 1966

Garner & Parker, for appellants.

Chester P. Leonard, for appellees.

ED. F. MCFADDIN, Justice. This case results from a real estate transaction between the parties. Appellants, Mr. and Mrs. Walker, owned a farm or ranch of approximately 1,025 acres in Washington County. Some time in October 1963 they agreed to sell the property to

the appellees, Mr. and Mrs. Dibble, with possession to be delivered on January 1, 1964. After the Dibbles took possession they filed this suit against the Walkers to recover for waste committed by the Walkers in allowing timber to be cut from the land after the execution of the sales contract and before delivery of possession. Trial in the Chancery Court resulted in a decree in favor of the Dibbles for $5,000.00; and the Walkers bring this appeal, urging three points, which we will consider in the order listed:

> "I. The Chancery Court does not have jurisdiction of this case.
>
> "II. Appellees did not testify as to any injury or damage to them.
>
> "III. The judgment of $5,000.00 is excessive and not supported by the evidence."

I. *Equity Jurisdiction.* The Dibbles first filed actions in the law court, claiming damages. When demurrers were sustained to the complaints, the Dibbles then amended to allege that, after a binding sales contract had been signed by the Walkers, and pending the delivery of the deed and payment, the Walkers committed *waste* by allowing timber to be cut from the land. On this theory the Dibbles moved that the cause be transferred to the Chancery Court, which was done, over the objections of the Walkers, who now urge a lack of equity jurisdiction.

There are at least two answers to appellants' position. When the cause reached chancery, the Walkers filed no motion to retransfer to law: instead, they filed answer and proceeded to trial in equity. Our cases hold that any objection to trial in equity is waived by failure to move to retransfer to law. *Hemphill* v. *Lewis,* 174 Ark. 224, 294 S. W. 1010; *Aetna Cas. & Surety Co.* v. *State,* 174 Ark. 988, 298 S. W. 501; and *Gray* v. *Brewer,* 177 Ark. 486, 9 S.W. 2d 81. Furthermore, and at all

events, the equity court had jurisdiction to try the case. The quotation later to be made in this opinion from *Newman* v. *Mountain Park Land Co.,* 85 Ark. 208, 107 S.W. 391, is a direct holding on this point. So we find no merit in appellants' first point.

II. *Sufficiency Of The Evidence.* The appellants insist that since the Dibbles failed to testify they should therefore lose their case. But if the Dibbles made their case by other witnesses they may still recover; and this necessitates a brief review of the evidence.

The Dibbles, who live in Phoenix, Arizona, went to Fayetteville to see about buying some land. A real estate agent, Mr. Gibson, showed them the Walker farm. Later, the Walkers listed the farm with Gibson as their agent for sale, and the Walkers signed a contract of sale dated October 28, 1963, which Gibson took to Arizona, and which the Dibbles signed on or about October 29th. The total sale price was to be $75,000.00 to be handled by (a) the assumption of an existing mortgage, (b) the execution of a second mortgage to the Walkers, and (c) a payment of the cash balance in excess of $17,000.00. When Mr. Dibble signed the contract of purchase on or about October 29th, he deposited $7500.00 earnest money with Gibson, who was the agent of the Walkers, and who promptly notified the Walkers that he had the money. The contract provided: "Deed shall be delivered on or before January 1, 1964." So from the date of the signing of the contract by both parties and the deposit of the money, there was a binding contract.

Before January 1, 1964 the Dibbles executed all the papers required of them and paid the cash balance. The warranty deed from the Walkers to the Dibbles, dated December 19, 1963, and acknowledged the same day, was delivered to the Dibbles on December 31, 1963. Thereafter it was learned by the Dibbles that in November and December 1963 the Walkers had sold timber from the land to a Mr. Evans, who testified that he cut 122 trees from the land, being 38 oak trees, 44 soft wood

trees, and 40 walnut trees. It is for this cutting of the timber that the Dibbles filed this suit on the theory of waste.

The case of *Newman* v. *Mountain Park Land Co.,* 85 Ark. 208, 107 S.W. 391, is full authority to support a recovery by the Dibbles. In that case Newman had contracted to buy lands from the Mountain Park Land Company and after the execution of a binding contract, and before Newman obtained deed and possession, the Mountain Park Land Company sold timber from the lands. This Court held that Newman had a cause of action against the Mountain Park Land Company. Mr. Justice Battle, writing for a unanimous Court, reviewed numerous holdings and text writers and covered every facet in that case, as well as in the case at bar. We quote:

" 'Where a vendor sells lands, takes the notes of the vendee for the purchase money, and executes to him a bond for title, the effect of the contract in equity is to create a mortgage in favor of the vendor upon the land to secure the purchase money, subject to all the essential incidents of a mortgage.' (*Smith* v. *Robinson,* 13 Ark. 533; *Harris* v. *King,* 16 Ark. 126; *Strauss* v. *White,* 66 Ark. 167.) If he (vendor) be in possession of the land, he 'must not make other than ordinary use of the land, and he will be enjoined from committing waste, such as cutting trees, carrying or removing soil.' 6 Pomeroy's Equity Jurisprudence, § 857. Mr. Pomeroy says: 'Vendor may be liable for deterioration. This rule is well stated by Lord Coleridge: "During the interval prior to completion the vendor in possession is a trustee for the purchaser, and as such has duties to perform towards him not exactly the same as in the case of other trustees, but certain duties, one of which is to use reasonable care to preserve the property in a reasonable state of preservation, and so far as may be, as it was when the contract was made"; or as Lord Kay expressed it, "to take reasonable care that the property is not deteriorated in the interval before completion." ' 6 Pomeroy's Equity Jurisprudence, § 858.

"The rule in this case is correctly stated in the syllabus of *Worrall* v. *Munn,* 53 N. Y. 185, as follows: 'Where waste has been committed by a vendor of land, pending a contract of purchase, by cutting down and carrying away timber, or by removing other valuable materials belonging to the freehold, the diminution in the value of the land is not the exclusive measure of damages. In equity everything forming a part of the inheritance belongs to the vendee from the date of the contract, and the rights and liabilities of the parties will be adjusted upon that assumption, and the vendee is entitled to recover the value of the materials so removed.' This right is based upon the contract of the vendor with the vendee. 2 Warvell on Vendors (2 Ed.), §§ 956, 957.

"In taking the deed from the vendor the appellant did not waive damages. The complaint fails to show anything in his acceptance of the deed to the land from the vendor inconsistent with his claim for damages. Appellant alleges that the trees and timber were cut and removed without his knowledge or consent. He is not estopped from claiming the damages. He is entitled to the land and the timber, and there is nothing inconsistent in his claiming both. There was nothing to indicate an intention to surrender or abandon either at any time; and there was no consideration upon which to base a waiver."

The cited case is full authority for recovery by the Dibbles in the case at bar, and their evidence parallels that offered in the cited case.

III. *The Amount Of The Recovery.* There was substantial testimony that the lands the Dibbles purchased were worth $5000.00 less because of the waste committed by the Walkers. Just because the Walkers sold the timber for a small amount of money does not necessarily determine the measure of damages. In *Newman* v. *Mountain Park Land Co., supra,* Mr. Justice Battle said, ". . . the diminution of the value of the land is not the exclusive measure of damages." Thus, the

diminution in value of the land has been recognized as a measure of damages.

Affirmed.

CHIRD BOBBITT *v.* W. L. BRADFORD ET UX

5-4054 409 S.W. 2d 339

Opinion delivered December 19, 1966

John M. Lofton Jr., for appellant.

Gordon & Gordon, for appellees.

ED. F. MCFADDIN, Justice. This is an appeal from the order of the Circuit Court granting a new trial (Ark. Stat. Ann. § 27-2102 [Repl. 1962], as amended by Act No. 547 of 1963).

Appellees, Mr. and Mrs. Bradford, filed this action against appellant, Chird Bobbitt, for damages alleged to have resulted from his negligence in a traffic mishap. Trial to a jury resulted in a verdict for Mrs. Bradford for $3,000.00 and for Mr. Bradford for $100.00 The Bradfords filed a motion for new trial, which the Court granted. Appellant resisted the motion for new trial and has appealed from the order granting it, urging one point:

"The Circuit Court erred in setting aside the verdicts of the jury and in granting a new trial."

We find no reversible error committed by the Trial Court in granting the new trial in this case. Ark. Stat. Ann. § 27-1901 (Repl. 1962) authorizes the Trial Court to grant a new trial for any of eight grounds. The fifth and sixth of these grounds are:

"Fifth. Error in the assessment of the amount of recovery, whether too large or too small, where the action is upon a contract or for the injury or detention of property.

"Sixth. The verdict or decision is not sustained by sufficient evidence, or is contrary to law."

In the case at bar, in granting the new trial the Court said: "It is the opinion of the Court that the verdict of the jury is against the weight of the evidence and that a new trial should be granted."

Appellant cites us to such cases as *Smith* v. *Arkansas Power & Light Co.*, 191 Ark. 389, 86 S. W. 2d 411; and *McAdams* v. *Stephens*, 240 Ark. 258, 399 S. W. 2d 504. These cases hold that where substantial damages are awarded, a judgment will not be reversed because of inadequacy of the damages unless there be some other error committed by the jury in measuring the damages. These cases are not applicable to the situation in the case now before us because (a) no judgment was entered on the jury verdict; and (b) even if there had been a judgment entered on the jury verdict, the Trial Court had inherent power during the term to set aside its own judgment. *Union Saw Mill* v. *Langley,* 188 Ark. 316, 66 S. W. 2d 300; *Hill* v. *Wilson,* 216 Ark. 179, 224 S. W. 2d 797; *Big Rock Co* v. *Hoffman*, 223 Ark. 342, 344 S. W. 2d 585.

In the recent case of *Beeler* v. *Walters*, 241 Ark. (adv. sh) 358, 407 S. W. 2d 739, we had occasion

to consider the action of the Trial Court in setting aside a jury verdict, and we there said:

> "In a case of this kind we sustain the trial court's order unless the verdict is so clearly supported by the preponderance of the evidence as to indicate abuse of discretion on the part of the trial judge. *Koonce* v. *Owens,* 236 Ark. 379, 366 S. W. 2d 196 (1963). In this instance we find no abuse of discretion."

The language just quoted is ruling here.

Affirmed.

JOHN E. WILLIAMS *v.* JAMES E. DAVIDSON, ETC.

5-4033 409 S.W. 2d 311

Opinion delivered December 19, 1966

Wright, Lindsey & Jennings, for appellant.

Johnston & Martin, for appellees.

GEORGE ROSE SMITH, Justice. This is an action

brought by the appellee, individually and as next friend, to recover damages for injuries sustained when his ten-year-old son Bobby was struck in the eye by a pellet fired from a BB gun. The plaintiff's theory is that the defendant, John E. Williams, was negligent in failing to supervise and control his own ten-year-old son David, who owned the gun, and his eleven-year-old daughter Libby, who was holding the weapon when the accident happened. The jury returned verdicts for the plaintiff totaling $12,500. The appellant's only contention here is that he was entitled to a directed verdict.

There is hardly any dispute about the facts. Williams owned a 32-unit motel, where his family had living quarters. David, since the time he was eight, had owned three or four BB guns. About two months before the incident now in question there had been a complaint by a motel guest about David's handling of such a gun. According to this guest, David and another boy were bouncing BB's off ice that had formed on the motel swimming pool. One pellet hit the guest; others hit windows, breaking one of them. Upon receiving that complaint Williams instructed his son to put the gun away and not to take it out on the motel premises. Thereafter the gun and the BB's were kept in a clothes closet. There is no evidence that David had disobeyed his father's instructions before the night when Bobby was hurt.

On that night the Davidsons were visiting the Williamses at the motel. (Mrs. Davidson and Mrs. Williams are sisters.) The accident happened at about ten o'clock. Earlier that evening the two boys had tried to take the gun out, but Mrs. Williams saw them with the weapon and made them put it back. Later on, however, they succeeded in getting the gun and taking it outside, where all three children took turns in target practice. At the moment of the accident Bobby, thinking it to be his turn, was reaching for the gun. Libby, who was holding it, pulled it back to keep Bobby from getting it. The gun went off accidentally and struck Bobby in the right

eye, causing a permanent partial loss of vision. The court's instructions, which are not questioned, included AMI 606, explaining a parent's duty to exercise reasonable means to control his child. *Bieker* v. *Owens*, 234 Ark. 97, 350 S.W. 2d 522 (1961).

There is, of course, no contention that Williams is liable for the conduct of his children merely because he is their father. Instead, the appellee insists that Williams was himself at fault in keeping both the gun and the ammunition in a place readily accessible to the children, after having notice of David's earlier carelessness. Counsel invoke the principle, announced by many authorities, that a person may be held responsible for harm resulting from his negligence in allowing a young or inexperienced child to get possession of a firearm such as a shotgun or .22 rifle.

Counsel for the appellant, though conceding the force of that principle of law, insist that a BB gun or an air rifle is merely a toy comparable to a pocketknife, a bow and arrow set, or a baseball bat, all of which may be used in such a way as to inflict serious injuries. Specifically, four cases are cited in support of the appellant's position. We have examined those cases, and many others, but they do not convince us that the appellant was entitled to a directed verdict.

The first case relied upon by the appellant is an 1891 decision, *Chaddock* v. *Plummer,* 88 Mich. 225, 50 N.W. 135, 14 L.R.A. 675, 26 Am. St. Rep. 283. On its facts that case has no resemblance to this one. There the defendant had given an air-gun to his son, but neither had anything to do with the injury to the plaintiff. The defendant's wife, who was not a party to the case, let another child, who seems to have come to the house to deliver vegetables, borrow the gun. It was this second child who fired the shot that injured the plaintiff.

The *Chaddock* decision, handed down seventy-five years ago, was effectively circumscribed by a 1966 Michi-

gan decision, *Whalen* v. *Bennett,* 4 Mich. App. 81, 143 N.W. 2d 797. There, much as in the case at bar, the defendant's eight-and nine-year-old sons had taken BB guns from an unlocked rack without parental permission. While they were playing with two other boys of about their age the gun was discharged while in the hands of the third boy, and the fourth was hurt. The trial court, relying upon the *Chaddock* case, entered a summary judgment for the defendant, but the Court of Appeals (an intermediate court) reversed that judgment, distinguishing the *Chaddock* opinion and holding that there was an issue of fact for the jury. The *Whalen* case is perhaps more similar to the present case than any other one we have found.

The appellant next cites *Harris* v. *Cameron,* 81 Wis. 239, 51 N. W. 437, decided in 1892. There the court described an air-gun as a toy, likening it, as we have already indicated, to a pocketknife, a bow and arrow set, and a baseball bat. We disagree with that reasoning. Those other toys are capable of inflicting serious injury when they are *intentionally* used for that purpose. It goes without saying that whenever children play together it is a practical impossibility for their parents to deny them access to objects that may be used to inflict intentional harm. The significant difference here is that an air rifle may cause serious accidental injury as well as serious intentional injury. It is more comparable to a firearm than to a harmless toy.

Moreover, the *Harris* case, like the *Chaddock* case in Michigan, cannot be regarded as the law today. In *Gerlat* v. *Christianson*, 13 Wis. 2d 31, 108 N. W. 2d 194 (1961), in a case not materially different from that now before us, the court upheld a verdict for the plaintiff, holding that it was for the jury to say whether the defendant father was negligent in allowing his son to have access to an air rifle. In distinguishing the *Harris* case the court said: "The only question involved in that case was whether the purchase and presentation of an air gun by the father to his son constituted negligence."

The court also observed that the classification of an air gun as a toy had been changed by statute.

The third case relied upon is *Capps* v. *Carpenter,* 129 Kan. 462, 283 Pac. 655 (1930). There the court did say that a BB gun is not a dangerous agency, but that statement was qualified by this language later in the opinion: "When a chattel is itself a dangerous thing, probable harm from its use is foreseeable, and precaution must be taken accordingly. When probability of harm depends upon the immaturity, incompetence, inexperience, recklessness, or ferociousness of the person to whom a chattel is given for use, quite a different issue is presented. The person receiving the chattel is the dangerous agncy." Upon that basis the court concluded that there was a jury question as to the defendant's liability for having allowed his eight-year-old son to have a BB gun, upon proof that the child was cruel and savage toward other children. It will be seen from the paragraph we have quoted that the court would have taken the same position if, as here, the child had been reckless.

Fourth, counsel cite *Lane* v. *Chatham,* 251 N. C. 400, III S. E. 2d 598 (1959), but again the only comfort afforded to the appellant is the court's statement that an air rifle is not a dangerous instrumentality *per se.* The court in fact sustained a verdict against the child's mother on the ground that she, "after learning of Raymond's misuse of his air rifle, breached her legal duty by failing to exercise reasonable care to prohibit, restrict or supervise Raymond's further use thereof." Furthermore, there is much practical sense in these sentences from Justice Higgins's concurring opinion: "I concur in the opinion. However, court decisions that air rifles are not *per se* dangerous weapons are as out of date as the horse and buggy. Marvelous advances have been made both in the precision and power of pneumatic arms. Sporting magazines on practically every newstand carry stories and advertisements of air rifles capable of driving a lead slug through a three-quarter-

inch pine board. It is time for the courts to find out what the public, or at least those interested in such matters, has known for some time—that a well manufactured air rifle is now not only a dangerous, but a deadly weapon.''

We do not mean that the appellant's contention is without support in the cases. There are undoubtedly a few courts that would approve a directed verdict in a case such as this one. See, for instance, *Norlin* v. *Connolly,* 336 Mass. 553, 146 N. E. 2d 663 (1957). But we think the better-reasoned cases, and especially the more recent ones, support the view that the proof in the case at hand raised a question of fact for the jury. In at least two cases an air rifle has been found to be a dangerous instrumentality. *Phillips* v. *D'Amico,* 21 So. 2d 748 (La. App., 1945); *Archibald* v. *Jewell,* 70 Pa. Super. 247 (1918). We do not feel called upon to say that no jury should be permitted to reach that conclusion.

In the present case the appellant, with knowledge that his son had misused a BB gun in the past, left the weapon and the ammunition in an unlocked closet. His conduct may be contrasted with that of the father in *Tatum* v. *Lance,* 238 Miss. 156, 117 So. 2d 795 (1960), who won a directed verdict upon proof that he had hidden the BB's for his son's gun under some clothes in an upstairs dresser drawer, where the child found them only by searching the house in his parents' absence. We conclude that the trial court was right in letting the case go to the jury.

Affirmed.

BALE CHEVROLET CO. ET AL *v.* LOUIE ARMSTRONG

5-4075 409 S.W. 2d 328

Opinion delivered December 19, 1966

Barber, Henry, Thurman, McCaskill & Amsler, for appellants.

Cockrill, Laser, McGehee, Sharp & Boswell, for appellee.

GEORGE ROSE SMITH, Justice. This is another in a series of recent workmen's compensation cases involving heart attacks. Here the commission's award of compensation was approved by the circuit court. The principal question on appeal is whether there is any substantial evidence to support the commission's finding that the connection between the claimant's work and his heart attack was causal rather than casual.

Armstrong was a used-car salesman. While he was at work on July 29, 1964, he suffered a heart attack.

After a period of hospitalization and bed rest he was able, by late November, to resume work for a few hours a day. Though remaining under a doctor's care Armstrong continued to increase his workday until his employer discharged him on January 14, for asserted misconduct. The next day his doctor found, during a regularly scheduled visit, that Armstrong's condition was decidedly worse. Total disability unquestionably existed when the case was heard a few months later by the referee.

Both of the doctors who actually treated Armstrong were of the opinion that his work contributed to the heart attack. Their case histories showed that for two days before the attack occurred Armstrong had suffered chest pains which they considered to be indicative of the onset of the attack. It was their conclusion that his continuing at work during those two days contributed to the myocardial infarction that occurred. The appellants' medical witnesses, who did not treat the patient, were of the opposite opinion.

On the face of it, the testimony of the claimant's attending physicians is substantial proof supporting the award. *Rebsamen West* v. *Bailey,* 239 Ark. 1100, 396 S. W. 2d 822 (1965). The appellants insist, however, that the doctors' opinions rest entirely upon the case history of earlier chest pains and that the accuracy of that case history (obtained, of course, from the patient) is completely destroyed by this excerpt from the early part of Armstrong's direct examination:

> "Q. Now, prior to this time [July 29, 1964], had you had any indications of a heart condition? Did you have any change or any symptoms of a heart condition?
>
> "A. If I did, I didn't know it."

The answer to this argument is that we must resolve all doubts in favor of the commission's decision. The commission could fairly have concluded that the

doctors recognized the chest pains to be symptomatic of a heart condition even though Armstrong, in his own words, "didn't know it."

There is one other point in the case. When Armstrong's attack occurred on July 29, 1964, his employer's insurance carrier was United States Fidelity & Guaranty Company. On the following January 1 the employer placed its insurance with another company. The U.S. F. & G., still insisting that the attack of July 29 was not caused by Armstrong's employment, suggests that the claimant's disability should be attributed to the emotional stress of his discharge on January 14, so that the second insurance carrier would be liable. Inasmuch as the commission properly found that the July attack was the cause of disability, this argument is without merit. The original carrier continues to be liable despite the change in coverage. *Moss* v. *El Dorado Drilling Co.*, 237 Ark. 80, 371 S. W. 2d 528 (1963).

Affirmed.

COBB and AMSLER, JJ., not participating.

ST. L. SW. RY. CO. *v.* FRANCES W. FARRELL, ADM'X.

5-4184 409 S.W. 2d 341

Opinion delivered December 19, 1966

J. C. Deacon, for appellant.

Shaver & Shaver, for appellee.

George Rose Smith, Justice. In this action for wrongful death the appellee recovered judgment for $70,000. The appellant filed its notice of appeal, but the record was refused by the clerk of this court, who thought that the notice of appeal had been filed too late. Under Supreme Court Rule 5 the appellant filed the present motion for a rule to require the clerk to docket the case. The motion involves a new procedural statute, which we have not had occasion to construe. Act 123 of 1963; Ark. Stat. Ann. § § 27-2106.3 to 27-2106.6 (Supp. 1965). We have concluded that an opinion might be helpful to the bar.

Act 123 was evidently intended to remedy an awkward situation created by Act 555 of 1953. Act 555 provided that in civil cases no motion for a new trial should be necessary, § 27-2127.5 (Repl. 1962), and that the notice of appeal should be filed within thirty days after the entry of the judgment or decree. Section 27-2106.1. However, motions for a new trial were not abolished. Experience under Act 555 disclosed this difficulty: Not infrequently the losing party might think that he had a sound reason for asking the trial judge to grant a new trial. Nevertheless, he had to file his notice of appeal within thirty days. Often that interval was not sufficient for a motion for a new trial to be prepared, briefed, and acted upon; so that procedure had to be abandoned.

Act 123 remedied that defect in Act 555. The new statute applies not only to motions for a new trial but also to other specified post-judgment proceedings. We shall not try to set forth all the provisions of Act 123. For the purposes of this case all that we need to do is

to show that the applicable provisions of the act were complied with.

Section 1 of Act 123 requires that any motion for a new trial be filed within the time provided by law. That time is ordinarily a period of fifteen days after the rendition of the verdict. Section 27-1904. Here the verdict was returned on April 20, 1966, and the motion for a new trial was filed on May 5; so it was timely.

Next, Section 2 of Act 123 requires the party to present the motion to the trial court within thirty days after its filing. If the matter cannot be heard within that period of thirty days the party must, within that period, request the court either to take the motion under advisement or set a definite date for the motion to be heard. If neither of those steps is taken within the thirty days it shall be deemed that the motion has been finally disposed of at the expiration of the thirty days, and the time for filing a notice of appeal begins to run.

Here counsel for the appellant tracked the statute to the letter. The motion for a new trial was promptly presented to Judge Light. On May 7 Judge Light informed counsel by letter that he could set the motion for a hearing in May. He suggested instead that the matter be submitted on written briefs.

On May 25, still within thirty days after the filing of the motion, the appellant's attorney took the precaution of asking Judge Light to send him a letter stating that he had taken the matter under advisement. This request was wise; for, to avoid the uncertainties of oral testimony, it is evidently desirable that a docket entry, order, or other written, dated record be made at this point. On May 27 Judge Light wrote counsel that he had taken the motion under advisement.

Section 2 of Act 123 also provides that where the motion is taken under advisement or set for a hearing, the motion shall not be deemed to have been disposed of

until the court enters its order granting or denying the motion. When such an order is entered any party desiring to appeal shall then have ten days in which to file his notice of appeal. Here Judge Light denied the motion for a new trial on June 28, and the appellant filed a timely notice of appeal on July 2.

It may be added that counsel for the appellant not only kept Mr. Shaver, the opposing attorney, informed of every step that was taken but also requested him to express any disagreement he might have with the procedure being followed. Mr. Shaver, in the best tradition of the bar, not only made no objection but generously stated that he thought the procedure being followed was correct. In that same spirit he has not resisted the present motion for a rule on the clerk.

The requested rule is granted, the parties' time for filing briefs to run from today.

DOYLE H. STONE ET UX *v.* ELMER J. HALLIBURTON

5-4017 409 S.W. 2d 829

Opinion delivered December 19, 1966

[Rehearing denied January 23, 1967.]

Moses, McClellan, Arnold, Owen & McDermott: By *James R. Howard,* for appellants.

Charles L. Carpenter, for appellee.

Osro Cobb, Justice. This appeal involves adjacent owners of suburban residential properties in Pulaski County, the dispute arising from the erection of a fence which closed appellants' driveway.

The law question raised is as to the propriety of the Chancellor in sustaining a demurrer to appellants' evidence and in dismissing appellants' complaint.

The facts at issue relate to the establishment by appellants and their predecessors in title of a prescriptive right of use of a driveway which runs for approximately twenty feet across the land of appellee in order to reach what is known as "Redding Lane", which is surfaced with asphalt.

Two knowledgeable witnesses, A. M. Duncan and Mrs. Bessie Turley, testified that the driveway had been used by them and the general public, without obstruction or interference, since 1952. The driveway was open to use when appellants purchased their property in 1962. In June of 1965, appellee erected a fence across the driveway and appellants immediately thereafter instituted this action in Chancery Court for relief.

We have concluded that the evidence of appellants was sufficient to make a prima facie case as to their claims as to an established prescriptive right of use of the driveway as situated, and that the trial court erred in sustaining the demurrer to the sufficiency of appellants' evidence. Moreover, appellee offered no proof on his own behalf, nor did his counsel indicate to the trial court at the conclusion of appellants' evidence that ap-

pellee rested. If this had been done, the trial court would have been required to weigh the evidence and make findings thereon binding as as to all parties. Since this did not occur, the rule announced in *Werbe, et al* v. *Holt,* 217 Ark. 198, 229 S. W. 2d 225 (1950) is applicable and requires us to reverse and remand the case for further proceedings.

Reversed and remanded for further proceedings.

MARSHALL HODGE *v.* VILLA HODGE

5-4073 409 S.W. 2d 316

Opinion delivered December 19, 1966

Fred A. Newth, for appellant.

No brief, for appellee.

OSRO COBB, JUSTICE. This appeal involves supplemental proceedings following a decree of divorce.

Appellant petitioned for a reduction in alimony payments to appellee and for other relief, based upon an alleged change in his earnings.

The trial court sustained a demurrer to appellant's evidence and dismissed the case. From this action appellant has prosecuted an appeal.

Appellee was granted a divorce from appellant in 1964. The decree was not made a part of the record but the testimony and comments of the Court during the hearing indicate that a property settlement may have been incorporated into the decree.

We have many times held that when a property settlement is embraced in a decree of divorce, including an award of alimony, that the Court is powerless to change the alimony award irrespective of changes in the economic situation of the parties. *Bachus* v. *Bachus,* 216 Ark. 802, 227 S.W. 2d 439 (1950).

Appellant and his 19-year-old daughter, who lives with him, were the only witnesses to testify. Appellant testified that he had earned nothing in 1966. On cross-examination he admitted that his rent for living quarters was $65.00 per month; that his groceries were $20.00 per week or $90.00 per month; that he and his daughter had traded in a 1963 Mercury for a 1965 Mustang sports car; that the payment on the Mustang was $65.80 per month; that appellee had advanced to him $1,000.00 of her own funds for use in purchasing a filling station business; that in the decree of divorce a lien in said amount was fixed for the benefit of appellee; that notwithstanding the terms of the decree, which were well known to appellant, he sold the business and paid appellee nothing from the proceeds; that he is in arrears in his alimony payments in an undisclosed amount.

The daughter of appellant on cross-examination testified that appellant was working regularly and he had told her he was making $60.00 a week. The daughter

received a nominal allotment from her husband, who was in service overseas.

No substantial evidence was given relating to appellee's economic situation as of the time of hearing. From the verified pleadings on behalf of appellee, it appears her income was less than at the time of divorce.

Had appellee's attorney rested at the conclusion of appellant's testimony and before the making of the motion to dismiss, the trial court would have been required to weigh the evidence and make findings binding upon both parties. However, this did not occur. The case, therefore, is controlled by *Werbe, et al* v. *Holt,* 217 Ark. 198, 229 S. W. 2d 225 (1950), from which we do not recede.

We are, therefore, compelled to reverse this case for further proceedings. This will afford the trial court an opportunity to examine the decree of divorce to ascertain whether it included a property settlement. It will also provide the trial court an opportunity to fix and assess an appropriate fee for counsel for appellee for services rendered.

Reversed and remanded.

JAMES W. MILLER, D/B/A A. & A. CONST. CO.
v. JOHN T. GARNER ET UX

5-4035 409 S.W. 2d 336

Opinion delivered December 19, 1966

Harper, Harper, Young & Durden, for appellant.

Robinson & Rogers, for appellees.

GUY AMSLER, JUSTICE. Appellees John T. Garner and his wife granted the City of Fort Smith a right-of-way easement for a water line across a small portion of their property in Crawford County, Arkansas, in 1964. Appellant James W. Miller, d/b/a A & A Construction Company was the subcontractor who excavated the ditches and laid the line across the Garner property. Appellant used dynamite and ammonium nitrate in loosening up the shale and granite while digging the ditches. Appellees contend that the blasting damaged their home and filed suit for $9,500.00 against appellant (and the contractor) in Crawford Circuit Court. The Court dismissed the case against the principal contractor and there was no appeal from this action.

The jury returned a verdict for damages in the

sum of $4,950.00, on which judgment was entered and this appeal followed.

For reversal, appellant urges two points: (1) there was no substantial evidence to support the jury's verdict; and (2) the court erred in permitting the jury to complete its verdict in open court and that the court's action constituted an invasion of the province of the jury.

A brief review of the evidence indicates that point one is not well taken. Appellee John T. Garner testified that there were no cracks in his house prior to the blasting and that numerous imperfections appeared while the work was in progress, some 80 feet from his house. He complained to those in charge and was given assurances that if damage was done it would be taken care of.

The stone mason, carpenter and building contractor who inspected the house for appellees found cracks (some of them as wide as a pencil) and all three were of the opinion that the imperfections were not due to the foundation settling. Witnesses for both sides pretty well agreed that cracks in houses, due to settlement, usually occur during the first year after a structure is erected. Appellant's witnesses found some defects but were of the opinion that they "could" have resulted from causes other than the blasting.

On the question of damages the jury accepted the lowest estimate ($4,950.00) given by a witness for appellees (the man who built the house). His testimony was not as detailed as might be desired but we are unwilling to say that it is not of a substantial nature. Another qualified witness estimated the damages at $5,000.00 to $6,000.00.

The evidence as a whole was sufficient to carry the case to the jury and that being true we follow our long established rule of not overturning a jury verdict that

is based on substantial evidence. *Duty* v. *Gunter,* 231 Ark. 585, 331 S. W. 2d 111; *Williams* v. *Cooper,* 224 Ark. 317, 273 S. W. 2d 15.

Point two is bottomed on these happenings: The jury brought in a verdict that read: "We, the Jury, find for the plaintiffs." Then this colloquy between the court and jury occurred:

> "THE COURT: But you haven't fixed any amount.
>
> FOREMAN: They said the amount that they asked for.
>
> THE COURT: Now, did they say the amount asked for or the amount that was testified to?
>
> JUROR: $4,950.00.
>
> THE COURT: Is that the amount you agreed on?
>
> FOREMAN: It is, Your Honor.
>
> THE COURT: Was the verdict unanimous?
>
> THE FOREMAN: It was."

The Judge then amended the verdict to show $4,-950.00 as plaintiffs' damages and discharged the jury.

After the jury had departed the defendant made the following motion:

> "The defendants move that the Court at this time declare the same to have been a mistrial, for the reason that the Jury was properly instructed as to the form of the verdict and was instructed prior to their retirement to the jury room for deliberation that if they did, in fact, find for Plaintiffs on the issues in this case, that they should fix the sum or

> amount which would be required to reasonably repair the damages to Plaintiffs' property. They failed to insert in the verdict such amount and only upon prompting by the Court upon the effect of the verdict, the Foreman stated that it was the intent of the Jury to find for the plaintiffs in the full amount sued for. Whereupon, the Court asked the Foreman, Mr. Sam Turner, if it was intended that the jury was to find for the full amount sued for or the amount that had been testified to, and in response, the foreman, Mr. Sam Turner, said that it was the amount testified, being $4,950.00, which was the testimony of one of the Plaintiffs' witnesses, Willie Wikman. Whereupon, the Court inquired of the entire panel assembled before the bench whether that was the amount to which they had agreed. They nodded their assent and following which the Court inserted in the verdict, the phrase 'the sum of $4,950.00.' "

Appellant contends, *inter alia,* that the jury should have been sent back for further deliberation on the amount of damages. Perhaps no one would gainsay that such is the more appropriate and acceptable practice. Had timely request been made of the capable trial judge he doubtless would have followed the customary procedure and had the jury retire for further consultation regarding the amount to be awarded.

The truth is that the verdict as to damages is an accurate expression of the jury's finding and is not an expression of the judge's views. In *Fitzhugh* v. *Elliott,* 237 Ark. 88, 371 S. W. 2d 533, we used a quotation from 53 Am. Jur., Trial, § 1094 that is pertinent here.

> "While the practice of amending verdicts in matters of form is one of long standing, based on principles of the soundest public policy in the furtherance of justice, it is strictly limited to cases where the jury have expressed their meaning in an informal manner. The court has no power to supply

substantial omissions, and the amendment in all cases must be such as to make the verdict conform to the real intent of the jury. The judge cannot, under the guise of amending the verdict, invade the province of the jury or substitute his verdict for theirs. After the amendment the verdict must be not what the judge thinks it ought to have been, but what the jury intended it to be. Their actual intent, and not his notion of what they ought to have intended, is the thing to be expressed and worked out by the amendment."

Some of our cases (which are readily distinguishable) dealing with questions of a related nature are: *Womack* v. *Brickell,* 232 Ark. 385, 337 S. W. 2d 655; *Rice & Holiman* v. *Henderson,* 183 Ark. 355, 35 S. W. 2d 1016; *Beckley* v. *Miller,* 96 Ark. 379, 131 S. W. 876; and *International Harvester Co.* v. *Land,* 234 Ark. 682, 354 S. W. 2d 13.

Neal et al v. *Peevey,* 39 Ark. 337, is a case of ancient origin which we consider decisive here. Peevey sued Neal and Miller for false imprisonment. The jury brought in a verdict which read, "We, the jury, find for the plaintiff, and assess the damages at $87.50 each. Joseph Savage, Foreman."

We quote from the opinion:

"The court informed the jury that their verdict was not in proper form, and that whatever damages they found should be against both of the defendants jointly. Thereupon, the jury unanimously consented that the verdict should be modified so as to assess the damages at $175 against both defendants, and the modification was made by the court by erasure and interlineation, so as to make the verdict read as follows: 'We, the jury, find for the plaintiff, and assess the damages at $175.

'Joseph Savage, Foreman.'

"And, after reading the verdict as modified, the court asked the jury if that was their verdict, to which each juror answered in the affirmative. But the foreman did not sign the verdict after it was modified."

This action of the trial court was one of the alleged errors contained in the motion for a new trial. This court, in affirming, held that, "It is the right and duty of the trial court to see that the verdict is formal, and to amend it if it incorrectly expresses the intention of the jury."

From what has been said it follows that this case is affirmed.

JOHN HENRY DOKES AND SYLVIA DOKES *v.* STATE

5224 409 S.W. 2d 827

Opinion delivered December 19, 1966

[Rehearing denied January 23, 1967.]

Delector Tiller, John W. Walker, Jack Greenberg, James M. Nabrit III, and *Michael Meltsner,* for appellants.

Bruce Bennett, Attorney General; *James C. Wood,* Asst. Atty. Gen., for appellee.

HUGH M. BLAND, JUSTICE. The appellants are husband and wife and live in an apartment at 287 Granite Mountain Circle in the Booker Home Project.

On the night of January 30, 1965 at about 11 o'clock p.m., Officer Jim Harris of the Little Rock Police Department, who was also employed as night watchman for the Little Rock Housing Authority, observed an unusual amount of traffic entering the Booker Home Project. Several of these automobiles first went to the liquor store across the street and the occupants made purchases. At his request, Officers Parsley and Terry came to the Project. As the three officers approached the apartment where all of the cars had congregated, two men and a lady came from the apartment. The officers identified themselves and Sylvia Dokes, one of these persons, invited them to the apartment. Upon entering the apartment, the officers observed several people in the living room, kitchen and storage room. In all three of these areas there were beer cans and mixed drinks. There were twenty-two people in the apartment, some were adults, some were minors, the youngest being a girl aged fourteen. Officer Parsley testified that this minor, aged fourteen, had the smell of liquor on her breath; Janet Kirspel, aged nineteen, had a mixed drink in her hand which was later claimed by Sylvia Dokes as her drink. Other adults in the party admitted to the officers that they had been drinking. The officers did not have a search warrant and did not have a warrant of arrest.

All twenty-two persons were taken to the Police Sta-

tion and the adults were charged with Contributory Delinquency and the minors with possession of intoxicating beverages.

Appellants, after pleading not guilty to the charges against them, were tried in the Municipal Court of Little Rock on May 4, 1965, found guilty and fined $25.00 plus $10.50 costs each. An appeal was perfected by appellants to the Circuit Court of Pulaski County where they filed a motion to dismiss the information and to suppress the evidence. These motions were overruled by th Circuit Court. Trial was held on April 8, 1966 before a jury; both defendants were found guilty and a fine fixed at $200.00 each. Appellants filed a motion for new trial which was overruled and an appeal was perfected to this court.

An examination of the motion for new trial and the points relied upon for reversal reveals only two points that can be considered by this court: (1) The search was unreasonable and in violation of the Constitution of Arkansas, Art. 2, §15, and in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States, (2) the State failed to prove the necessary facts to sustain the conviction for contributory delinquency.

The defendants did not challenge or put in issue the sufficiency of the evidence.

Was the appellants' constitutional protection against unreasonable search violated by the officers? The officers, after identifying themselves as officers, were invited into the apartment by Sylvia Dokes, one of the appellants herein. No demand was ever made by her on the officers for a search warrant but the evidence clearly disclosed that she waived the right to a search warrant. *Williams* v. *State,* 237 Ark. 569, 375 S.W. 2d 375 (1964), quotes from 79 C.J.S. Searches and Seizures § 62, p. 816 et seq., which contains a discussion of waiver and consent and the holdings from the various juris-

dictions, including the United States Supreme Court, are summarized as follows:

> "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." [Also see 47 Am. Jur., Searches and Seizures, p. 547, § 71.]

We see no merit in appellants' contention that there was an unlawful search.

As to appellants' second contention, the State proved there was a congregation of adults and minors in appellants' apartment where intoxicating liquor was served. The statute on contributory delinquency, Ark. Stat. Ann. § 45-239 (Repl. 1964) provides that:

> "Any person who shall, by any act, cause, encourage or contribute to the dependency or delinquency of a child * * * or who shall, for any cause, be responsible therefor, shall be guilty of a misdemeanor ***."

Appellants contend that it was necessary for the State to prove that the minors in question were, in fact, delinquents before appellants could be found guilty of contributing to their delinquency. In *Williams* v. *City of Malvern*, 222 Ark. 432, 261 S.W. 2d 6, we held that a person may be found guilty of contributing to the delinquency of a minor, under our statute, by acts which

directly tend to cause delinquency, whether that condition actually results or not. This follows the majority view as it was said in 4 Arkansas Law Review, p. 478:

> "* * * The essence of the majority view is that requiring the child to have been a delinquent at the time the acts were committed or to be one as a consequence thereof would not be consonant with the beneficent purpose of the legislature, *viz.,* to stamp out juvenile delinquency at its roots."

We are committed to the rule that it is only necessary for the State to prove a condition or circumstances existing that would tend to cause, encourage or contribute to the delinquency of a child. The State met that burden and the conviction is well supported by the evidence.

All of the other points for reversal were not brought into the motion for a new trial and cannot be considered for the first time on appeal to this court. *Watkins* v. *State,* 222 Ark. 444, 261 S.W. 2d 274; *Hardin* v. *State,* 225 Ark. 602, 284 S.W. 2d 111.

Finding no error, the judgment of conviction is affirmed.

BONNIE HUNTER *v.* JAMES E. DIXON ET AL

5-4002 410 S.W. 2d 389

Opinion delivered December 19, 1966

[Rehearing denied February 6, 1967]

Roy Mitchell, for appellant.

E. C. Thacker and *Wood, Chesnutt & Smith* and *Michael B. Heindl,* for appellees.

HUGH M. BLAND, JUSTICE. This is a suit to quiet title to 79.36 acres of land in Garland County Arkansas. At the time this suit was commenced (October 12, 1964) record title to the property was in James E. Dixon and Shirley Dixon (appellees herein) by virtue of warranty deeds from Esther DePencier, Curtis Tarring Gardner, and M. G. DePencier, surviving husband of Mildred S. Gardner, deceased. (M. G. DePencier and Curtis Tarring Gardner being the only heirs at law of Mildred S. Gardner, deceased.)

In September of 1959 appellant was convicted of second degree murder and by opinion of this court dated May 30, 1960, *Connelly* v. *State,* 232 Ark. 297, 335 S. W. 2d 723, the judgment and conviction was reversed and remanded. On February 19, 1960 appellant, using the name of her sister, Gwen Combs, entered into a handwritten sales agreement with Esther M. DePencier, agent for M. G. DePencier, administrator for Mildred S. Gardner estate, wherein she agreed to purchase subject property for $8,500.00, with a down payment of $500.00 and the balance to be paid at the rate of $50.00 per month. On February 27, 1960 she entered into a typed sales agreement with the same party for subject lands but this agreement showed the purchaser to be Royce L. Nichols, her brother. She admitted signing Gwen Combs' name to the first agreement and Royce L. Nichols' to the second agreement. She was using their names to avoid action of her creditors in civil suits then pending.

In September of 1960 she was retried in Garland Circuit Court and convicted of manslaughter. This conviction was affirmed by this court on September 18, 1961, *Connelly* v. *State,* 234 Ark. 143, 350 S. W. 2d 298. (In both criminal cases she was tried under the name of Connelly.) In the case affirmed she received a three year sentence but after conviction she decided to become a fugitive from justice and left the state November 29, 1961. She was apprehended in Virginia and returned to Arkansas about March 15, 1962 to serve her three-year sentence. She was paroled on September 6, 1963.

Appellant made the monthly payments of $50.00 for a period of five months in the name of her brother, Royce L. Nichols. Just prior to leaving Hot Springs late in November 1961, the appellant confided in her brother, Royce L. Nichols, that she had placed the sales contract in his name and he moved to the farm property. The contract papers and receipts were kept by appellant's 18-year-old daughter, Bonnie Jo Connelly.

On September 28, 1960 appellant prepared an as-

signment of the sales agreement from Royce L. Nichols to Gwen Combs, forging the signatures of both parties. Through November 23, 1961 appellant made the monthly payments in the name of Gwen Combs. From that time until January 29, 1962 these payments were not made as appellant was a fugitive from justice and had no contact with her relatives.

In January 1962 the contract installment payments were in arrears. Bonnie Jo Connelly unsuccessfully tried to raise the money to pay them. She contacted both her aunt, Gwen Combs, and her uncle, Royce L. Nichols, without success and finally wrote the DePenciers in January 1962 under the name "Gwen" stating that she was unable to keep up the payments and that she would let the property go back.

Upon learning of this delinquency in payments, Royce L. Nichols called Mr. DePencier and asked for additional time to pay the back installments but could not get the money, so he set about to sell the equity. A day or so prior to January 29, 1962 he contacted appellee, James Dixon, showed him the farm, informed him of the financial problem and sold him the equity in the farm for $500.00 less $150.00 to pay the three delinquent installments. Dixon assumed the balance of the contract indebtedness of about $7,800.00. After receiving the $500.00, less $150.00 for the delinquent payments, Nichols gave Bonnie Jo Connelly $150.00, kept $200.00 and left the state.

On January 29, 1962 Royce L. Nichols assigned the sales agreement for purchase of the property in question to appellee, Dixon, who took possession of the property on that date. Appellee Dixon refinanced the loan on the property in question and paid appellee DePencier in full. On November 29, 1963 appellee DePencier executed and delivered to appellee Dixon a warranty deed to the property in question.

After the property was sold to the Dixons, appel-

lant's daughter took the furniture out of the house and had it sold at auction.

Appellant claims the value of certain timber cut from the premises but the record shows that the timber was cut after the appellees had title and this claim is without merit.

After parole, appellant returned to the property and a dispute arose between her and the appellees as to title to the property. As a result, this suit was filed. After a lengthy hearing, the chancellor quieted title to the property in appellees, James E. Dixon and Shirley Dixon, subject to the mortgage of Arkansas First National Bank of Hot Springs, dismissed the cross complant and amendments of appellant, and dismissed the third party cross complaint against the third party defendants, the DePenciers.

From this decree the appellant prosecutes this appeal and for reversal relies on seven points as follows:

"1. The trial court erred in confirming the title to land in question in appellees, James E. Dixon and Shirley Dixon, his wife.

2. The trial court erred in dismissing cross complaint of appellant, Bonnie Hunter, against appellees, James E. Dixon and Shirley Dixon, his wife.

3. The trial court erred in dismissing third party complaint of appellant, Bonnie Hunter, against third party defendants, M. G. DePencier and Esther M. DePencier.

4. The trial court erred in not cancelling the following deeds, warranty deed from M. G. DePencier and Esther DePencier, dated November 29, 1963, to James E. Dixon and Shirley Dixon, his wife, recorded in Book 546, at page 117, warranty deed from Curtis Tarring Gardner to James E. Dixon

and Shirley Dixon, his wife, dated November 5, 1963, and recorded in Book 546 at page 115 and warranty deed from Esther DePencier to James E. Dixon and Shirley Dixon, his wife, dated November 29, 1963, and recorded in Book 546 at page 113, and vesting title in appellant, Bonnie Hunter, subject to mortgage held by Arkansas First National Bank of Hot Springs.

5. The trial court erred in not finding that the appellant, Bonnie Hunter, using the name Gwen Combs, was the legal and lawful purchaser of the lands in question under a valid sales contract from M. G. DePencier, as Administrator of the Estate of Mildred S. Gardner DePencier, deceased, dated February 27, 1960, using the name of Royce L. Nichols, as purchaser and transferred back to Gwen Combs, this being ratified and accepted by M. G. DePencier.

6. The trial court erred in not rendering judgment for appellant, Bonnie Hunter, on her cross complaint against James E. Dixon and Shirley Dixon, his wife, for timber wrongfully cut from said lands.

7. The trial court erred in admitting into evidence as Exhibit 6, copy of letter dated January 22, 1961, claimed by appellee, M. G. DePencier to have been written and mailed to Gwen Combs."

We see no merit in any of the contentions made by appellant. The appellees were purchasers in good faith for a valuable consideration of the subject property and the burden of showing that the purchase was made with notice of material defects was on appellant. *Scott* v. *Carnes,* 183 Ark. 650, 37 S. W. 2d 876; *Smith* v. *Olin Industries,* 224 Ark. 606, 275 S. W. 2d 439. This burden was not discharged by appellant.

When a person embarks on a course of conduct tending to mislead others, he does so at his peril. When ap-

pellant, seeking to avoid, hinder and delay her creditors, had the contract of sale drawn showing the purchaser as Gwen Combs, then as Royce L. Nichols, she gave them unlimited authority to do as they saw fit. 24 Am. Jur., § 119, p. 268, states:

> "Property Purchased by Debtor in Name of Another.—The majority rule is that the courts will not aid one who has purchased property and caused the title thereto to be transferred to another, for the purpose of hindering, delaying or defrauding his creditors. As bearing on the right of the fraudulent purchaser to equitable relief, it has been held that there is no inherent difference between the act of a debtor conveying his property to another without consideration and that of a purchaser causing the title to the property purchased to be placed in the name of another, where the object of such transfers is to hinder, delay, or defraud creditors."

Appellant refused to accept the three-year sentence of the jury and mandate of this court and fled the State of Arkansas instead of turning herself over to the prison authorities, thereby becoming a fugitive from justice for over three and one-half months. This particular act was most vital in effecting the default and loss of the subject property into the hands of her brother and daughter because she was unable to contact anyone during this period for fear of their becoming an accessory in her problems with the law. We feel that she realized this at the time she was leaving and, accordingly, we feel that she gave her brother, Royce L. Nichols, and her daughter, Bonnie Jo Connelly, the right and authority to deal with the contract and the property as they deemed fit and to her best interests.

In view of our ultimate conclusion, we feel it would unduly prolong this opinion to go into the question of laches, equitable estoppel and violations of equitable maxims such as, "He who comes into equity must come with clean hands."

The chancellor resolved the issues in favor of appellees, James E. and Shirley Dixon The trial was long and tedious with conflicting evidence and disputed facts. This court has held in a long line of cases that while chancery cases are tried *de novo* in this court, a decree of the chancery court will not be reversed where there is a disputed question of fact unless the findings are clearly against the preponderance of the evidence. *Little* v. *Holt,* 229 Ark. 627, 318 S. W. 2d 157; *Stricklen* v. *Mitchell,* 234 Ark. 31, 350 S. W. 2d 319; *Arkansas State Board of Pharmacy* v. *Fey,* 235 Ark. 319, 357 S. W. 2d 658, and many other cases set out in West's Arkansas Digest, Vol. 2-A, Appeal and Error, § 895 (2) pages 255-259 and § 1009 (1) pages 424-427.

The findings of the chancellor in this case are clearly in accord with and not against the preponderance of the evidence.

The decree of the chancery court is affirmed.

BILLY REEDER *v.* WESTERN FIRE INS. CO. ET AL

5-4065 410 S.W. 2d 122

Opinion delivered January 9, 1967

Garner & Parker, for appellant.

Wayland A. Parker and *Warner, Warner, Ragon & Smith,* for appellees.

CARLETON HARRIS, Chief Justice. This is an action, instituted by appellant, Billy Reeder, against nine insurance companies, to recover on policies as a result of a fire which occurred at the Stardust Club near Fort Smith, Arkansas. The contents of the building, including furniture, fixtures, equipment, supplies, improvements, etc., were insured in the amount of $18,500.00. Appellees, the nine insurance companies, answered, denying each material allegation, and pleading further, *inter alia,* that appellant should not recover for the reason that he had failed to comply with the provisions of the several policies of insurance, in that he had not filed a proof of loss within sixty days as provided by each policy. The cause proceeded to trial before a jury, and at the conclusion of appellant's evidence, appellees moved for a directed verdict in their favor; the motion was granted, and the jury was instructed to return its verdict for the defendants. From the judgment so entered, appellant brings this appeal.

It is admitted that appellant did not file a proof of loss with the appellee companies, but Reeder's contention is that appellees waived this requirement. The question therefore, presently before the court, is whether there was sufficient evidence of waiver offered by appellant to present a jury question.

As will be subsequently pointed out, there was evidently a suspicion that arson had been committed when the fire occurred, and, in fact, on the next day, Reeder and employees were called to the Prosecuting Attorney's office to answer questions concerning the fire; thereafter, appellant was charged with arson, and on August 23 and 24, 1965, was tried for this offense in the Fort Smith District of the Sebastian County Circuit Court. The trial resulted in an acquittal.

It should be remembered that on appeal, in passing on the question of the correctness of the trial court's action in directing a verdict, we must take that view of evidence most favorable to the party against whom the verdict is directed.

As stated in *Barrentine* v. *The Henry Wrape Company,* 120 Ark. 206, 179 S. W. 328:

"In determining on appeal the correctness of the trial court's action in directing a verdict for either party, the rule is to take that view of evidence that is most favorable to the party against whom the verdict is directed, and where there is any evidence tending to establish an issue in favor of the party against whom the verdict is directed, it is error to take the case from the jury. [Citing cases]"

Without discussing all of the testimony, we will mention two instances that, taken together with findings at the pre-trial conference, precluded the court from properly directing a verdict. Reeder testified that he was notified of the fire about 6:30 or 7:00 o'clock on the morning after it occurred; that he immediately went to the premises, arriving there about 7:30, and that Robert Smith, an insurance adjuster, was already there, together with the State Police. Later in the day he returned, and Smith was also present at that time. From appellant's testimony:

"Well, Mr. Smith was out there then so we walked back in to the kitchen and I had one of those big meat boxes that was a freezer on one side and just a regular icebox on the other side so I opened it up to examine the meat and I could see that it was still frozen so I told him 'lets inventory this out and maybe I can save some of it.' And he said 'No, you just lock it up, everything is just a total loss.'

"Q. And that was Robert Smith the adjuster for the insurance company?

"A. Right."

The court had previously, in its pre-trial order of March 4, 1966, found:

"* * * It is conceded that Robert D. Smith is the Manager of the local branch office of General Adjustment Bureau. It is conceded that Smith was the adjuster for the defendant companies. The existence of an agency relationship between Mr. Smith and the defendant insurance companies does not appear to be in doubt, but the question of whether or not his conduct would operate as a waiver is reserved."

Likewise, Earl Flaherty, appellant's uncle, testified that, upon hearing about the fire, he went to the scene and saw Kit Barton, who was an insurance agent selling policies for the insurance firm of Sagely, Bennett, and Barton, and who had sold some of the insurance to Reeder. According to Flaherty, he was discussing the fire with Barton, and the latter said, "Well, he had just gutted it." Flaherty then stated that they walked into the kitchen, and he (Flaherty) said that it did not look too bad in there, and Barton replied, "No, he didn't start it here in the kitchen where they ususally start them;" that when Flaherty asked if he should "stay around and see that nothing was bothered or destroyed," "No, it was totaled out," subsequently explaining to Flaherty that he meant that there was a total loss. The witness stated that Burton did not say who he was referring to as "he," but when Flaherty mentioned that Reeder was his nephew, Barton "just turned around and started out the door." It is emphasized by appellees that, according to Flaherty's testimony, Barton never did state to whom "he" referred, but we think, under all the evidence, it could properly be considered that the reference was to Reeder. The pretrial order finds that Barton "is an agent selling policies for the insurance firm of Sagely, Bennett & Barton asserts that Mr. Barton cannot waive a proof of loss and on which policies the suit is brought. The defendant

for his company. The defendant acknowledges, however, that if a proof of loss had been submitted it properly could have been submitted to Mr. Barton. The court stated that, under these circumstances, his authority to waive a proof of loss would be considered as established, although a ruling on whether or not his alleged conduct amounted to a waiver was not resolved." It is our opinion that these findings, along with the testimony, particularly that of Smith, "*Everything* is just a total loss," presents the question of whether there was a waiver.

In addition, a rather pertinent finding is made in Paragraph 12 of the pre-trial order. It sets out that appellant concedes that he did not file a proof of loss, and then states, "The defendant does concede that a notice of loss was given." The record does not reflect how, or when, the notice of loss was given, but certainly, upon notice, the usual practice of an insurance company is to furnish proof of loss forms. In *American Fidelity Fire Insurance Company* v. *Winfield,* 225 Ark. 139, 279 S. W. 2d 836, the testimony reflected that appellee's landlord wrote to the insurance company, advising that appellee's automobile had been destroyed by fire. The company denied receiving such a letter, but this court held that the landlord's testimony that he properly mailed the letter, together with the presumption that it was received by the addressee, constituted substantial evidence to sustain the court's finding that notice was in fact received by the company. This court then said:

"It being determined that the company received notice of the loss, the next question that arises is: Did the insurance company's failure to acknowledge receipt of the notice of loss relieve the policyholder from furnishing proof of loss within the 60-day period provided by the policy?"

In answering this question in the affirmative, we quoted from Appleman's *Insurance Law and Practice,* Volume 5, § 3633:

"* * * 'It has been stated that unless there is a

bona fide attempt by the company to adjust a loss, there is a refusal to pay. Therefore, the mere effect of silence or inaction might be sufficient to excuse compliance.' ''

Further:

''In *Ward* v. *Pacific Fire Insurance Company,* 115 S. C. 53, 104 S. W. 316, it is said: 'While there was no express or unequivocal denial of liability during the period of time prescribed in the policy within which proofs of loss were to be and might have been furnished, yet defendant's silence, in the light of facts and circumstances, clearly warranted the inference that liability was and would be denied, as it was in fact denied, and plaintiff was warranted in so believing and in acting accordingly. . . . The company received the notice of loss in due time, and, in fairness, it should have notified plaintiff that he must furnish proofs of loss, as required by the policy, if it intended to pay the loss.' ''

Here, there is a finding that a notice of loss was given.

For the reasons herein stated, we think there was a jury question as to waiver, and the judgment is accordingly reversed and the cause remanded for further proceedings not inconsistent with this opinion.

CARL A. ZAJAC *v.* GEORGE HARRIS

5-4070 410 S. W. 2d 593

Opinion delivered January 9, 1967
[Rehearing denied February 13, 1967.]

Loftin, Herrod & Cole, for appellant.

Willis V. Lewis, for appellee.

GEORGE ROSE SMITH, Justice. The appellee, George Harris, brought this suit to compel the appellant, Carl A. Zajac, to account for the profits and assets of a partnership that assertedly existed between the parties for some two years. Zajac denied that a partnership existed, insisting that Harris was merely an employee in a business owned by Zajac. The chancellor concluded that Harris had met the burden of proving the partnership relationship. The court accordingly referred the case to a master for a statement of the partnership accounts. The essential question here is whether the chancellor's

recognition of the partnership is against the weight of the evidence.

At first blush the testimony appears to be in such hopeless conflict that the controlling issue at the trial must have been one of credibility. Upon reflection, however, we arrive at a somewhat different view of the case. The business association that is known in the law as a partnership is not one that can be defined with precision. To the contrary, a partnership is a contractual relationship that may vary, in form and substance, in an almost infinite variety of ways. The draftsmen of the controlling statute, the Uniform Partnership Act, tacitly acknowledged that fact by stating only in the most general language an assortment of rules that are to be considered in determining whether a partnership exists. Ark. Stat. Ann. § 65-107 (Repl. 1966).

In the case at bar there is the additional consideration that these two laymen went into business together without consulting a lawyer or attempting to put their agreement into writing. It is apparent from the testimony that neither man had any conscious or deliberate intention of entering into a particular legal relationship. When the testimony is viewed in this light the conflicts are not so sharp as they might otherwise appear to be. Our problem is that of determining from the record as a whole whether the association they agreed upon was a partnership or an employer-employee relationship.

Before the two men became business associates Zajac had conducted a combination garage-and-salvage company, filling station, and grocery store in the Marche community in Pulaski county. This dispute relates only to the salvage branch of the enterprise.

In the salvage operation now in controversy the parties bought wrecked automobiles from insurance companies and either rebuilt them for resale or cannibalized them by reusing or reselling the parts. Harris, the plaintiff, testified that he and Zajac agreed to go

into business together, splitting the profits equally—except that Harris was to receive one fourth of the proceeds from any parts sold by him. Harris borrowed $9,000 from a bank, upon the security of property that he owned, and placed the money in a bank account that he used in buying cars for the firm. The profits were divided from time to time as the cars were resold, so that Harris's capital was used and reused. He identified checks totaling more than $73,000 that he signed in making purchases for the business.

Zajac, by contrast, took the position that Harris was merely an employee working for a commission of one half the profits realized from cars that Harris himself had bought. Zajac denied that he had ever agreed that Harris would spend his own money in buying cars. "I told him, when you go out there, when you bid on a car, make a note that I will pay for it." We have no doubt, however, that Harris *did* use his own money in the venture and that Zajac knew that such expenditures were being made.

Counsel for Zajac put much stress upon their client's controlling voice in the management of the business. Zajac and his wife and their accountant had charge of the books and records. No partnership income tax return was ever filed. Harris was ostensibly treated as an employee, in that federal withholding and Social Security taxes were paid upon his share of the profits. The firm also carried workmen's compensation insurance for Harris's protection. In our opinion, however, any inferences that might ordinarily be drawn from these bookkeeping entries are effectively rebutted by the undisputed fact that Harris, apart from being able to sign his name, was unable to read or write. There is no reason to believe that he appreciated the significance of the accounting practices now relied upon by Zajac. They were unilateral.

We attach much weight to Zajac's candid admissions, elicited by the chancellor's questions, that Zajac

paid Harris one half of the profits derived from cars that Zajac bought with his own money and sold by his own efforts. Zajac has insisted from the outset that Harris was working upon a commission basis, but that view cannot be reconciled with Harris's admitted right to receive his share of the profits derived from business conducted by Zajac alone.

There is no real dispute between the parties about the governing principles of law. The ultimate question is whether the two men intended to become partners, as that term is used in the law. *Brandenburg* v. *Brandenburg*, 234 Ark. 1117, 356 S. W. 2d 625 (1962). Harris's receipt of a share of the net profits is prima facie evidence that he was a partner, unless the money was paid to him as wages. Ark. Stat. Ann. § 65-107. Unlike the fact situation in *Morrow* v. *McCaa Chevrolet Co.*, 231 Ark. 497, 330 S. W. 2d 722 (1960), Harris's position does not rest upon the bare fact that he received a share of the profits. He invested, as we have seen, substantial sums of his own money in the acquisition of cars for the firm. Zajac concedes that Harris was entitled to a share of the profits from transactions that Harris certainly did not handle on a commission basis. When the testimony is reconciled, as we have attempted to do, it does not appear that the chancellor was wrong in deciding that a partnership existed.

Affirmed.

BYRD, J., not participating.

RAYMOND B. ALEXANDER *v.* MARY LEE ALEXANDER

5-4072 410 S. W. 2d 136

Opinion delivered January 9, 1967

Edgar R. Thompson, for appellant.

W. J. Walker, for appellee.

PAUL WARD, Justice. Involved here is a property settlement incident to a divorce decree.

Raymond B. Alexander (appellant) and Mary Lee Alexander (appellee) were married in 1936 and lived together until Dcember 3, 1961 when appellant left. They quit living together as man and wife on August 18, 1962.

Pleadings.

On November 5, 1962 appellee filed a suit for separate maintenance and a property settlement. Appellant filed a general denial, containing allegations that appellee withdrew $1,234.60 from their account before filing her complaint and that appellee was gainfully employed. Later appellant filed a cross-complaint alleging that appellee treated him with indignities, that she abandoned him, that they had been separated more than three years,

and that she was able to work but refused to do so. He also asked that temporary maintenance (previously granted) be reduced and that he be given a divorce. Then, in an amended complaint, appellee prayed for an absolute decree of divorce, possession of the home and a division of real and personal property.

After extensive hearings over a period of several months the court, on December 16, 1965, entered, in substance, the following decree: (a) appellee was granted an absolute divorce; (b) appellee was given possession of their home with the provision that she be responsible for payment of all taxes, insurance and maintenance expenses thereon; (c) all transfers of stock in Alexander, Inc. (a corporation organized by appellant) made by appellant to his son, Ray, after August 18, 1962 were set aside as being fraudulent transfers; (d) appellant was ordered to transfer to appellee 17,905 shares of stock in said corporation, being one-third of the 53,710 shares owned by him on August 18, 1962; (e) appellee was ordered to give appellant one-half of $375 worth of government bonds held by her (the parties having agreed on a division of two parcels of real property), and; (f) appellant was ordered to pay appellee $100 per month as alimony. The trial court retained jurisdiction of the cause to enforce and protect the rights of the parties.

For a reversal appellant relies on only three points: *One,* the court erred in cancelling the stock (in Alexander, Inc.) which appellant had transferred to his son; *Two,* it was error to allow appellee alimony, and; *Three,* it was error not to require appellee to account for money she had used for certain joint accounts.

One. We agree with appellant that it was error to cancel the stock transfers because the son was not made a party to the litigation. See: *City of Bentonville* v. *Browne,* 108 Ark. 306 (p. 311), 158 S. W. 161, and *Bryan* v. *Akers,* 177 Ark. 681 (p. 682), 7 S. W. 2d 325. We also agree with appellant's statement that it was not neces-

sary to cancel the stock held by the son because appellant "was left with adequate stock to make the transfer [to appellee] without setting aside the transfer to the son of the parties hereto". It appears likely that the trial court meant to cancel only such transfers as was ncessary to protect appellee, but the decree is modified as indicated.

Two. We do not agree with appellant's contention that it was error to allow alimony to appellee.

In the case of *Lewis* v. *Lewis,* 202 Ark. 740, 151 S. W. 2d 998 there appears this statement.

> "This court has many times announced the rule that in fixing the amount of alimony to be awarded a wide discretion rests with the trial court and unless there appears to be a clear abuse in the exercise of this discretion it will not be disturbed by this court."

In that case we also pointed out that consideration should be given to the ability of the husband to pay and the station in life of the parties. To the same effect see: *Foster* v. *Foster,* 216 Ark. 76, 224 S. W. 2d 47 and *Harbour* v. *Harbour,* 230 Ark. 627, 324 S. W. 2d 115. We may also add that, in fixing the amount of alimony, the financial needs of the wife should not be overlooked. When the testimony in this case is weighed in the light of the above rules we are unable to say the trial court abused its sound discretion in allowing the amount of alimony above mentioned. The record reveals that appellant and his son had withdrawn in excess of $25,000 from the corporation in less than a year, not counting an expensive boat bought for them or the corporation; that he draws an annual salary in excess of $5,000 not counting an expense account, and; that he owns real estate of undisclosed value.

The record also discloses that appellee was earning $88.42 per month at the time of the divorce; that the house in which she lives is in need of extensive repairs

and that she is not able to work regularly because of bad health, being afflicted with bronchitis and chronic kidney and bladder trouble. She testified that she needed approximately $250 per month for living expenses.

Three. Finally, appellant contends the court "erred in declining to require appellee to deduct, from her portion of the marriage estate, the sums which she had withdrawn from the estate personally".

We find no merit, and no reversible error, in this contention. The record discloses there was a deposit in the name of appellant or appellee in the sum of $1,234 which appellee withdrew because (she testified) she needed the money for living expenses due to the fact that appellant failed to pay support money as had been previously ordered by the court. The above money, according to appellee, was deposited in the Union National Bank and used as mentioned above. It appears that appellee in 1962 earned $1,100 which she deposited in another building and loan association, which, of course, was her own money.

It must be presumed that the trial court, took into consideration the above facts, together with appellee's health and inability to work regularly, in making the proper settlement, and we are unwilling to say there was any abuse of discretion.

The decree, as modified, is therefore affirmed. Appellant is ordered to pay all costs incident to this appeal including a fee for appellee's attorney in the sum of $200.

Modified and affirmed.

BYRD, J., dissents.

JAMES W. MOORE *v.* STATE

5239 410 S. W. 2d 399

Opinion delivered January 9, 1967
[Rehearing denied February 6, 1967.]

W. M. Herndon, for appellant.

Bruce Bennett, Attorney General; *Fletcher Jackson,* Asst. Atty. Gen., for appellee.

LYLE BROWN, Justice. Appellant James W. Moore was convicted of possessing stolen goods and sentenced to one year. His appeal is grounded principally upon the contention that in-custody interrogation violated his constitutional rights. He cites *Miranda* v. *Arizona,* 384 U. S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966), and *Johnson et al.* v. *New Jersey,* 384 U. S. 719, 16 L. Ed. 2d 882, 86 S. Ct. 1772 (1966).

Shortly after midnight, December 18, 1963, appellant's parked car was spotted in a wooded area by two North Little Rock patrolmen. The car was kept under surveillance; and when Moore pulled out the police followed. During a chase for a considerable distance at varying high rates of speed, a box was thrown from the passenger side of the Moore car and in clear view of the pursuing officers. Within a matter of minutes Moore was apprehended and charged with driving while intoxicated.

The police immediately returned to the point where they saw the box thrown and found it contained several hundred silver dollars. Moore was jailed at approximately 1:00 a.m. Although the immediate charge was DWI, the evidence reflects no intoxication of any substantial degree. At approximately 8:30 a.m. that same morning Sergeant W. A. Tudor of the State Police, Criminal Investigation Division, entered Moore's cell on the ground floor for the purpose of questioning him. The chronology of their conversation is important and unfortunately not crystal clear. But a close study of the record leads to the conclusion it was in the following order:

Tudor first inquired of Moore whether he had talked to a lawyer and was told that Attorney Tom Ridgeway was on his way to the jail to talk to Moore. (Appellant contends that "at this very moment the interrogation or questioning should have ceased.")

Tudor then testified: "I told him that I wanted to talk with him briefly where he got this money and before I had a chance to advise him of his rights, he said he didn't steal the money." At this point Tudor told Moore that "he had a right to remain silent" and that he would make a record of their conversation for use in court. He also said Moore's lawyer "was on the way over." Moore then told Tudor the money was delivered to him by a man he refused to identify; that he knew it was stolen

and threw it out of the car because "he didn't want to get caught with it."

The foregoing is from the testimony of Sergeant Tudor in chambers. Moore there testified that he made only one statement. ". . . I just told him flat—I said, 'I havn't stolen no money, or anything, and I am not going to make any kind of a statement to you.' "

It should also be noted that the circumstances surrounding this short interrogation are far different from those in *Miranda* and *Johnson.* Sergeant Tudor and appellant Moore were well acquainted and on friendly terms. No threats, promises, etc., are indicated. Moore was far from being unintelligent.

The prerequisites for in-custody interrogation set out in detail in *Miranda* are not controlling in this case. The decision in that case was rendered June 13, 1966. Appellant's trial began May 20, 1966. The rules in *Miranda* are not applicable to cases which started before June 13. *Johnson,* cited by appellant, so holds, as well as our case of *Stewart* v. *State,* 241 Ark. 4, 406 S. W. 2d 313 (September 12, 1966).

The controlling case is *Escobedo* v. *Illinois,* 378 U. S. 478, 12 L. Ed. 2d 977, 84 S. Ct. 1758 (1964). Escobedo was denied the opportunity to consult with his lawyer and was not effectively warned of his right to remain silent. Such is not the case here. Based on substantial evidence the trial court found Moore had been timely advised of his right to remain silent. Furthermore, while advising Moore of his rights, it was suggested to him that "his lawyer was on his way." The inquisitor—not the accused as in *Escobedo*—is the one who broached the subject of an attorney, and we find it was clearly understandable to a man of appellant's intelligence that Sergeant Tudor was saying that Moore might not desire to talk to him until his attorney arrived. Moore, instead of indicating he wanted to first talk with an at-

torney, proceeded to voluntarily give his explanation of his possession of the stolen money.

The contention that the evidence is not sufficient to sustain the jury verdict is without merit, as is revealed by the summary recitation of the evidence. Absent his admission to Sergeant Tudor, appellant was placed in possession of property recently taken in the burglary of a home in Oklahoma. Under all the circumstances in evidence, the jury could well have reasoned that appellant had criminal knowledge. No explanation of such possession was offered the jury by appellant. *Fields* v. *State,* 219 Ark. 373, 242 S. W. 2d 639 (1951), and numerous other cases, hold that possession of recently stolen property, if unexplained to the satisfaction of the jury, is sufficient to sustain a conviction.

Affirmed.

ARVIN SMITH ET AL *v.* STATE

5227 410 S. W. 2d 126

Opinion delivered January 9, 1967

Danuser & Huckaba, for appellants.

Bruce Bennett, Attorney General; *Fletcher Jackson,* Asst. Atty. Gen., for appellee.

JOHN A. FOGLEMAN, Justice. Appellants were convicted of the crime of grand larceny of three hogs belonging to Billy Gene Owens in the Circuit Court of Marion County on the 16th day of April, 1966, and sentenced to one year in the penitentiary, with a recommendation that the sentence be suspended upon restitution in the amount of $500.00 and payment of court costs.

Appellants assert twelve points for reversal, some of which are interrelated. We find one of these points to justify a reversal. This is because of instructions given by the circuit judge relating to recommendations of clemency and suspension of sentence in response to inquiries by the jury. The case was closed and the jury instructed. After deliberation for a time, the jury returned to the courtroom and asked: "If we give these boys a prison sentence, can we suspend the sentence—a suspended sentence?". After advising the jury that it had the right to recommend a suspended sentence if they wished to do so, the trial judge said:

> "I would have to tell you that under the law the Court is not bound exclusively or conclusively by the recommendations but I will tell you that I would certainly give grave consideration to any recommendation of the jury."

The foreman of the jury then inquired whether compensation to the boy for his hogs entered into this. After advising the jury that there was no way the jury or the court could require this, the judge added:

> "I might explain to you, however, that that could be made a condition of the recommendation for leniency. In other words, the recommendation could provide for restitution as a condition of your recommendation, if you wish to make it so."

The foreman then asked: "What about the Court costs?", to which the court replied that the law provided that defendants should be responsible for the court costs if they are financially able to pay, in case of conviction. He further advised that in order to avoid any misunderstanding, in case of a conviction and suspension of sentence, if there was a sentence, one of the conditions the court would have to make would be payment of court costs.

The jury then retired, after which defendants' at torney objected to the remarks of the trial judge that the court would give grave consideration to the recom mendations of the jury, contending that, in effect, the statements indicated that the court might suspend the sentence and that this might cause the jury to convict when they might otherwise not do so, but no objection was made to any other remarks.

Later the jury again returned to the courtroom and inquired about the acceptability of a form of verdict finding appellants guilty of grand larceny but fixing "O years" punishment, with an appendage after the foreman's signature adding "$500.00 for payment of

hogs to Billy Gene Owens plus Court costs." The trial judge properly advised that this would not be compliance with the law for the reason that the minimum penalty was one year, but added:

> "Of course, you can consider this answer in connection with the answer the Court gave you a while ago to the other inquiry, you can consider these two answers together."

After the court properly refused to permit appellants' attorney to make an offer to the court in the presence of the jury, objection was made to the remarks of the trial judge as an invitation to the jury to convict the appellants and make a recommendation of a suspended sentence.

After a motion for a mistrial on other grounds, the trial judge again advised the jury:

> "The jury is the sole judge of the facts in this case and it is in your hands to determine the guilt or innocence of these defendants, and to make any recommendations which you see fit to make."

Thereafter the trial judge told the jury that he was not bound by the recommendations, but when advised by the foreman that this was holding up the jury, replied:

> "Yes, the only thing I know is the jury is not willing to trust the Court."

The appellants, after first moving for a mistrial, then objected to the trial judge's remarks and moved for a mistrial. Later the jury returned its verdict resulting in the judgment from which this appeal is taken.

This court has always zealously guarded against the possibility that any remark of the trial judge might influence a jury's verdict. The statement of a trial judge relating to the transfer of a minor convicted of feloni-

ous homicide to the reform school was held improper, even though the trial judge advised the jury that this should not influence the jury one way or the other in determining guilt or innocence. *Pittman* v. *State,* 84 Ark. 292, 105 S. W. 874. A similar instruction about the committing of women to a state farm for women has been held prejudicial for the reason that it might have influenced the jury in returning a verdict of guilty. *Mitchell* v. *State,* 155 Ark. 413, 244 S. W. 443; *Snyder* v. *State,* 155 Ark. 479, 244 S. W. 746.

While convictions have been sustained by this court where trial judges have given similar instructions to the jury because no objection was made at the time the statements were made, [See *Pendleton* v. *State,* 211 Ark. 1054, 204 S. W. 2d 559; *Filtingberger* v. *State,* 216 Ark. 754, 227 S. W. 2d 443; *Andrews* v. *State,* 225 Ark. 353 282 S. W. 2d 592] this court has held that no statement should be made by the court that might tend to lead the jury to believe a suspended sentence would be granted if requested. In the *Andrews* case this court held that statements to the jury that the trial judge believed he had thus far followed jury recommendations of clemency and that he would be glad, if they so desired, to receive such a recommendation were objectionable. Statements made by the trial judge in the present case would seem to tend even more to indicate that he would suspend a sentence based on restitution and payment of court costs if recommended.

A very similar statement by a trial judge, after instructing the jury at some length upon the right of the court to suspend the sentence in case of a verdict of guilty, that "you may safely trust to the court the right performance of whatever duty and responsibility is imposed by the legislature upon that officer, and you will make no mistake in such assumption," was held in *Bryant* v. *State,* 205 Ind. 372, 186 N. E. 322, to seem to be designed to lure or wheedle the jury past the obstacle of and to disarm the jurors of any doubts or hesitancy occasioned by the severity of the penalty in-

volved. We are aware of and accept the statement of the trial judge that his remark about the lack of trust in the court by the jury was a facetious one and made as the jurors started to file out of the room. On the other hand, we must recognize that facetious remarks by the judge presiding over the trial are not always so taken by hearers and where the liberty of accused persons is at stake the making of such remarks is to be discouraged. Facetious or not, the words of the trial judge in the background of previous statements on the subject were prejudicial to the defendants, even if heard by only part of the jurors.

Objection was also made by appellants to the trial judge's permitting the sheriff to select two jurors of his choice from the special panel of 25 provided by the jury commissioners, the regular panel having been exhausted. While this probably was not reversible error because the only objection made was that the sheriff was prejudiced because he was a prosecuting witness, and because the record does not show that defendants had exhausted their peremptory challenges when the two additional jurors were summoned or whether these jurors actually served, we deem this objection to be of sufficient importance to be considered.

The mere fact that the sheriff is a witness in the case is not necessarily an indication that he is prejudiced against a defendant and does not disqualify him from serving in the absence of a showing of actual prejudice. *Hudspeth* v. *State,* 188 Ark. 323, 67 S. W. 2d 191; *Huen* v. *State,* 196 Ark. 22, 115 S. W. 2d 860; *Ashcraft* v. *State,* 208 Ark. 1089, 189 S. W. 2d 374. No such showing was made.

Where it is not shown that appellants had exhausted their peremptory challenges and were thereby compelled to accept any juror who was not qualified and impartial, they are not in a position to complain of the method that was used. *Rogers* v. *State,* 133 Ark. 85, 201 S. W. 845; *Brock* v. *State,* 237 Ark. 73, 371 S. W. 2d 539.

Nevertheless, in the *Brock* case this court expressed its disapproval of a procedure whereby persons to be served from such a special panel were selected by the trial judge without regard to numerical order and for reasons known only to the judge himself. We hold that the language of Ark. Stat. Ann. § 39-220 (Repl. 1962) providing that "said list to be drawn in lieu of summoning bystanders" can only be construed to require that the names of those to be served be drawn by lot, as in the case of a drawn jury.

In view of the above, many of the points relied on by appellants become moot; others we deem worthy of some mention, though not well taken.

Appellants sought to avoid the effect of decisions in *Bailey* v. *State,* 215 Ark. 53, 219 S. W. 2d 424 and *Black* v. *State,* 215 Ark. 618, 222 S. W. 2d 816 (Cert. denied 338 U. S. 956, 94 L. Ed. 590, 70 Sup. Ct. 490) that failure of jury commissioners to include women on the lists of those to be summoned for jury duty is consistent with the public policy of our state and not violative of the "due process" or "equal protection" clauses of the Fourteenth Amendment to the Constitution of the United States. It is the holding in these cases that one who contends that his rights under this amendment are violated must show something more. This appellants did not attempt to do and it is difficult for us to perceive how they could. They contend that the rule announced was inapplicable because in the trial of grand larceny cases women jurors would not likely be subjected to foul language, consideration of indecent conduct, the use of filthy or loathsome words, references to intimate sex relationships and the like. They overlook the fact that jury lists are selected well in advance of court sessions without regard to the types of cases which might be heard at the time of service. Other reasons for the policy of our state in this regard would include the fact that in some trials the jurors are kept together, and that facilities for jurors of both sexes under such circumstances would in most of our counties be unavailable.

Likewise we find no merit in the contention that error was committed by the court in admitting certain testimony regarding admissions made by three of the appellants to State Police Investigator Rife and Sheriff Hickey on the basis that appellants were not advised that if they lacked money to hire a lawyer, the court would appoint one for them. Apparently they seek to come within the rule announced in *Miranda* v. *State of Arizona,* 384 U. S. 436, 16 L. Ed. 2d 694, 86 Sup. Ct. 1902, overlooking the fact that the Supreme Court of the United States has held that this decision was not applicable to cases in which trial began before the date of the decision, June 13, 1966. *Johnson* v. *New Jersey,* 384 U. S. 719, 16 L. Ed. 882, 86 Sup. Ct. 1772.

Nor were these appellants deprived of any constitutional rights under the standards set out in *Escobedo* v. *Illinois*, 378 U. S. 478, 12 L. Ed. 977, 84 Sup. Ct. 1758. Unlike Escobedo, these appellants were not in custody when the statements were made and none of them requested, or was denied, the opportunity to consult with a lawyer. On the contrary, the officers testified that each was advised of this and other constitutional rights. Testimony was heard in the absence of the jury and the court found that the statements were admissible. The objection of appellants, based on the failure of the judge to examine Sheriff Hickey, one of the officers present, on this point before Sergeant Rife, the other officer testifying, was not well taken because they did not seek to interrogate Sheriff Hickey until after the trial judge had heard the testimony presented by both sides and announced his ruling. We do not deem it necessary that the trial judge hear the testimony of every person present at the time a statement is made in order to determine admissibility of that statement. Nor do we deem it necessary that every witness who may testify about the making of statements by accused persons be examined by the court in the absence of the jury before testifying, once the voluntariness of the statement has been determined. Nor were they in the position of the appellant in *Smith* v. *State,* 240 Ark. 726, 401

S. W. 2d 749, who, after being advised of his rights, was held in jail over five months following preliminary hearing when he was told that he was in bad trouble, that he would have to come up with the pistol (apparently a murder weapon) and that he was a prime suspect. Yet no steps having been taken to provide him with counsel, he made admissions of guilt this court held inadmissible.

The testimony of Sergeant Rife about the circumstances surrounding the making of the statements was substantial evidence to support the trial court's finding that the statements were voluntary (See *Mullins* v. *State*, 20 Ark. 608, 401 S. W. 2d 9.) and that there was an intelligent waiver of the right to counsel as was the case in *Cox* v. *State,* 240 Ark. 911, 405 S. W. 2d 937.

Appellants also objected to examination of Sergeant Rife and Sheriff Hickey by the trial judge in the presence of the jury as to possible threats or promises made to these three defendants. They fail to show how they were prejudiced by this action and, no objection having been made to the examination of Sheriff Hickey, review by this court is precluded. *Adams* v. *State,* 235 Ark. 1057, 160 S. W. 2d 42; *Fields* v. *State,* 203 Ark. 986, 363 S. W. 2d 905; *Graves & Parham* v. *State,* 236 Ark. 936, 370 S. W. 2d 806; *Crabtree* v. *State,* 238 Ark. 358, 381 S. W. 2d 729.

Nor do we see how the examination of Sergeant Rife by the court resulted in any prejudice. The questions as to lack of promises or threats objected to were no more leading than those approved by this court in *New v. State,* 99 Ark. 142, 137 S. W. 564, where the judge asked whether certain parties seemed to be angry or offended or insulted. In that case, as in *Clubb* v. *State,* 230 Ark. 688, 326 S. W. 2d 816, the propriety of a trial judge's asking questions during examination of a witness calculated to elicit the truth concerning the subject matter was recognized.

Appellants also contended that the court should have directed a verdict of not guilty because: (1) The incriminating statements of appellants were obtained upon the understanding that the officers were only interested in securing the return of the meat of the hogs and in bringing about a settlement of a dispute between appellants and the owner of the hogs, (2) as to Burris because of there being no incriminating statement by him in evidence and no evidence other than the taking of the hogs and the return of some meat by him, and (3) because of improper questions asked by the prosecuting attorney.

We do not find evidence in the record to sustain the first of these grounds. All the testimony admitted about a "settlement" related to approaches or effort by appellants, their families, or their attorneys. Only one of appellants testified that the officers said they did not want to embarrass him or his family, they just wanted to get the meat back. This falls far short of showing that the incriminating statements of the three appellants should be excluded or a verdict directed.

As to Burris, the determination of the sufficiency of the evidence at the conclusion of the state's testimony is rendered unnecessary for he introducede vidence and testified himself, thus waiving that motion for a directed verdict. *Reeves* v. *State,* 222 Ark. 77, 257 S. W. 2d 278. His own testimony shows that he was present and participating in the shooting of the three hogs; that after leaving, the appellants decided to come back to get the hogs if they had not been claimed by anyone; that he helped cut up, load and divide the meat at a time late enough in the evening that lights were required; that he first denied to the officers having any knowledge of the meat; that he and some of the other boys tried to make a settlement with the owner of the hogs, and that he returned some of the meat to Sheriff Hickey.

Only one of the allegedly improper questions of the prosecuting attorney was objected to and that objection was sustained. We find his contention without merit.

It would unduly extend this already lengthy opinion to discuss other points raised by appellants. It is sufficient to say that all have been examined and found to be without merit or rendered immaterial by this decision.

Reversed and remanded for a new trial.

JAMES E. TREVATHAN ET AL *v.* RINGGOLD-NOLAND FOUNDATION ET AL

5-4020 410 S. W. 2d 132

Opinion delivered January 9, 1967

Erwin & Bengel, for appellants.

Murphy & Arnold, for appellees.

J. FRED JONES, Justice. This suit involves the disposition of the assets of a charitable corporation under the *cy pres* doctrine. The directors of the corporation filed petition in Chancery seeking authority to sell the corporate property and to apply the proceeds to the erection

of an addition to a public library not previously contemplated. Some of the original donors and incorporators filed a response opposing the sale and proposed use of the funds. The trial court, in applying the *cy pres* doctrine, permitted the sale and authorized the use of the funds in the construction of an addition to the library, and respondents have appealed.

In 1944 one hundred thirty individuals and business firms in Batesville, Arkansas and vicinity, raised $3,834.00 in individual cash donations ranging in amounts from fifty cents to $100.00, and on March 9, 1944, the Ringgold-Noland homestead in the city of Batesville was purchased for $3,000.00 and title was taken in the name of one of the donors, as trustee.

In June 1945, the Ringgold-Noland Foundation (hereinafter referred to as Foundation) was organized as a charitable corporate entity, with three of the named appellants and four of the appellee directors among the original incorporators of the foundation.

Since the intent and purposes of the original 130 donors are important to this litigation and since their intent and purpose in making their donations are reflected only in the constitution of the foundation subsequently incorporated by fourteen of the original donors, the entire constitution of the Foundation is set out here as follows:

"We, whose names are annexed, desiring to form an association, for the purpose of reconstructing and preserving one of the ancient landmarks of this city, and the state to provide a place for preserving any and all ancient and historical data and mementos that will show our appreciation for the sacrifices and devotion of our forefathers to their country, and to the coming generation the spirit and sentiment of their fathers and mothers, and their reverence for their forefathers, and to provide rest rooms, probably a library, and such other items and things as will serve the town, county and state,

do pledge ourselves to be governed by the following constitution:

1. The name of said center shall be "Ringgold-Noland Foundation."

2. It shall be governed and controlled by a Board of Directors, consisting of five, to be selected at a mass meeting of the signers and contributors to said property.

3. The Board of Directors shall select one of their number as president, one as vice president and one as secretary and treasurer.

4. The support and maintenance of said Foundation shall be provided for by this Board of Directors."

After the property was purchased and the Foundation was formed, apparently no further action was taken by the donors or the incorporators of the Foundation during the next twelve years except that a roof was put on the building between 1945 and 1957 and a fence was erected around the property by the Lions Club. Some interest was shown in the restoration project by the Lions Club and the Independence County Historical Society, but no positive effort to restore the building was made.

In April 1957, the Batesville Chamber of Commerce indicated an interest in purchasing some of the property for an industrial site, and some of the original incorporators of the Foundation called a meeting of the original donors for the purpose of electing a Board of Directors and for the purpose of discussing the sale of some of the property to the Chamber of Commerce for an industrial site.

The first meeting of the Board of Directors was held on April 30, 1957, and the Chairman and Secretary

were authorized and ordered to offer a part of the property to the Chamber of Commerce for $6,000.00, but at a meeting held on May 22, 1957, the Board of Directors agreed to take no further action relative to the sale "with the view of possible interest in a restoration project."

On May 23, 1957, the title to the property was transferred by Mrs. C. G. Hinkle, Trustee, to the Foundation and $494.41 was turned over to the Foundation.

Some interest in the restoration project was revived from time to time between 1945 and 1965 during which time the market value of the property continued to increase, but interest in the restoration project did not. In the meantime, the walls of the building has fallen down and most of the brick had been used in the erection of a Chamber of Commerce building. By 1965 nothing was left of the Ringgold-Noland home except the foundation of the original structure.

On December 3, 1965, the directors of the Foundation filed their petition in the Independence County Chancery Court praying authority to sell the trust property under terms and conditions set by the Court, and for authority to apply the proceeds to the building of an addition to the Independence County library at its present location on Broad Street in Batesville, the addition to be used for purposes consistent with, and in conformity to, the constitution of the Foundation.

The trial court set the petition for hearing on January 11, 1965, and directed that notice of the hearing be sent to all known donors and that notice be published in the Batesville Guard for four consecutive weeks. Notice was published and sent as directed by the Court, and response was timely filed by appellants on behalf of themselves and other donors, praying that the petition be denied and that the Board of Directors of the Foundation be instructed to carry out the original intent and purposes of the original donors and the Foun-

dation itself, or that the directors be required to resign and permit another Board to be elected. Respondents prayed that in the event of sale, the proceeds be distributed among the original donors, their heirs, successors and assigns.

While this matter was pending in the trial court, the Batesville Chamber of Commerce proposed to build a youth center with the proceeds from the sale of the property, and the Independence County Library filed a "Statement of Position and Request of Independence Library Board" proposing to use the estimated $15,000.00 proceeds from the sale of the property, to be matched by a like amount of Federal funds, in building a new addition to the Independence County library at its present location, said addition to be named "The Ringgold-Noland Memorial Room" and to be used primarily to emphasize the early local and state history, and to house valuable historical documents.

On January 14, 1966, the trial court entered its decree holding that restoration of the Ringgold-Noland building would be wholly impractical; that the contributions of the original donors were gifts to the Foundation and a refund would be next to impossible. Holding that the cy pres doctrine applied to the facts in this case, the trial court entered its decree for the sale of the property and directed that the funds be turned over to the Independence County Library Board.

The intervenors on appeal to this Court have set out nine points on which they rely for reversal. Points (1), (2), (3), (4), (5), and (6) have to do with evidence pertaining to proposed uses of the property if it is not restored to its original state, and we find no merit in assignment of error on points (7) and (8).

We agree with the trial court that the *cy pres* doctrine is applicable in this case, and we hold that the evidence as to the possible use of the funds and property that would most nearly carry out the purpose and in-

tentions of the donors was not only admissible but was necessary to an equitable and proper disposition of the problem in this case.

Appellants say that the controlling question under the *cy pres* doctrine is the intention of the donors and its possibility of performance and they argue that from pictures of the Ringgold-Noland home still in existence, it is still possible to reconstruct the building on its old foundation.

In the case of *Slade* v. *Gammill,* 226 Ark. 244, 289 S. W. 2d 176, in affirming a decree of the trial court under the *cy pres* doctrine, this court quoted with approval from volume 2, A, Section 431 Bogert, on The Law of Trusts and Trustees as follows: * * * "the *cy pres* doctrine is '. . . the principle that equity will, when a charity originally or later becomes impossible or impracticable of fulfillment, substitute another charitable object which is believed to approach the original purpose as closely as possible. It is the theory that equity has the power to mould the charitable trust to meet emergencies.' " Appellees correctly interpret our holdings in the case of *McCarroll* v. *Grand Lodge I.O.O.F.,* 154 Ark. 376, 243 S. W. and *Burel* v. *Grand Lodge I.O.O.F.,* 163 Ark. 131, 259 S. W. 369.

We view the situation here as we did in the case of the *State National Bank of Texarkana* v. *Bann,* 202 Ark. 850, 153 S. W. 2d 158.

The case involved a charitable trust provided in a will for the establishment and operation of a Charity Hospital. The hospital was purchased and was operated for a time under lease. When the lease expired, the trustees were permitted by the trial court to sell the property and donate the proceeds to the Sisters of Charity. In affirming the trial court in that case, we said:

"We cannot cause this trust to be executed in the precise manner contemplated by the testator, but we can apply the trust fund to another charity as nearly as possible like that mentioned in the will. The Trustees are men of high standing and business ability. They say they cannot longer operate the present hospital with the funds in hand." * * * "Appellees own no property except that here involved, the outmoded hospital, and about $1,500.00 cash in bank. They have no income except the $1,800.00 per year rent from appellant. It is not difficult to see the impracticability, if not impossibility, of continuing to operate a charity hospital."

Appellants in the case at bar estimate that the property could be restored for between $20,000.00 and $25,000.00. It must be remembered, however, that the trustees of the Foundation are not only charged in their constitution with reconstructing and preserving one of the ancient landmarks of the City of Batesville and the State, but are likewise charged with the responsibility of providing a place for preserving ancient and historical data and mementos, and they are specifically charged with providing the support and maintenance of the Foundation.

We find that the decree of the trial court is not against the preponderence of the evidence in this case and the decree is therefore affirmed.

Affirmed.

BROWN, J., dissents.

ARK. STATE HWY. COMM. *v* A. L. YOUNG

5-4049 410 S. W. 2d 120

Opinion delivered January 9, 1967

George O. Green and *Don Langston,* for appellant

Floyd G. Rogers, for appellee.

CONLEY BYRD, Justice. This appeal is brought by the Arkansas State Highway Commission from a jury award in an eminent domain proceeding in favor of the property owner, A. L. Young. In addition to questioning the sufficiency of the evidence, the Highway Commission alleges that the trial court committed error in overruling its motion to strike from the jury panel for cause the wife of an expert witness used by the landowner. We hold that the evidence was sufficient to sustain the verdict, but that the trial court committed error in refusing to strike from the jury panel for cause a wife of one of the witnesses on value.

The record shows that twenty veniremen had been summoned for the jury panel, one of whom was Mrs. Catherine Ragge. The Highway Commission, before the jury was sworn, pointed out to the court that Ken Ragge, the husband of juror Catherine Ragge, was go-

ing to testify on behalf of the landowner with respect to values and moved that Mrs. Ragge be struck from the jury for cause. Mrs. Ragge stated that she had not discussed the matter before the court with her husband and that she would not believe him above any other witness in the case. Following the interrogation the trial court refused to excuse Mrs. Ragge for cause.

Since the Highway Commission exhausted all of its peremptory challenges under Ark. Stat. Ann. § 39-229 (Repl. 1962), one of which was used to strike Mrs. Ragge, it is in a position to complain of any error of the trial court in refusing to strike a juror for cause. *Collins* v. *State,* 102 Ark. 180, 143 S. W. 2d 1075 (1912).

Our statutory law disqualifies jurors who are related to either party or his attorney within the fourth degree of consanguinity or affinity, but makes no reference to jurors related to witnesses. In the cases before this court the relation of a juror to a witness has usually arisen or been brought to the attention of the court after the jurors were selected and the trial started, *Jones* v. *State,* 230 Ark. 18, 320 S. W. 2d 645 (1959), or the matters to which the witness (relative) testified were uncontroverted matters such as occurred in *Arnold* v. *State,* 150 Ark. 27, 233 S. W. 818 (1921).

When one uses the polestar that "justice ought not only to be fair, but appear to be fair," logic points to an abuse of discretion by the trial court. The facts in this case show that Mr. Ragge, a professional appraiser, testified that the damages to the property owner as a result of the eminent domain proceeding amounted to $70,700.00, while the witnesses for the Highway Commission testified that the damages did not exceed $23,100.00. It does not stretch the imagination to say that the very presence of a witness' close relative on the jury would tend to inhibit the frank discussion necessary in a jury room for arriving at an impartial verdict—for what prudent banker or merchant on the jury, who was inclined to believe the witnesses for the Highway Com-

mission, would care to criticize Mrs. Ragge's husband to her face?

Consequently we hold that where, as here, a close relative is a witness to a controverted issue in the case and the matter is brought to the attention of the trial court before the jury is sworn, it is an abuse of discretion for a trial court to refuse to strike a relative from the jury for cause. See Ark. Stat. Ann. § 39-115 (Repl. 1962) and *Ark. State Highway Comm.* v. *Bryant,* 233 Ark. 841, 349 S. W. 2d 349 (1961), where the matter is not brought to the attention of the court before the jury is sworn.

In view of the fact that the sufficiency of the evidence to sustain the verdict will likely be an issue on retrial, we point out that we have reviewed the testimony of the witness called by the property owner and find that it is supported by sufficient related facts and opinions to have a fair and reasonable basis to sustain the verdict.

For the error above set out the matter is reversed and remanded for a new trial.

LUCILLE BLYTHE *v.* LIBBY JO FIELDS BLYTHE

5-4057 410 S. W. 2d 379

Opinion delivered January 16, 1967

Johnston & Martin, for appellant.

Gordon & Gordon, for appellee.

GEORGE ROSE SMITH, Justice. James A. Blythe was married three times. After his death in 1965 his first wife, the appellant Lucille Blythe, asserted that she and James were never divorced. On that basis she claimed dower and allowances as his lawful widow. *Evatt* v. *Miller,* 114 Ark. 84, 169 S. W. 817, L.R.A. 1916C, 759 (1914). The probate judge rejected that claim, finding that James's third wife, the appellee Libby Jo Fields Blythe, was his lawful widow.

Under our law the presumption in favor of the validity of a marriage is so strong that one who attacks a subsequent marriage on the ground now asserted has the difficult burden of proving the negative; that is, that

no divorce was in fact obtained by either party to the earlier marriage. *Estes* v. *Merrill,* 121 Ark. 361, 181 S. W. 136 (1915). The controlling issue here is the admissibility of certain documentary evidence offered by Lucille in her effort to prove that she and James were never divorced.

Lucille proved by James's brother that after James abandoned her in 1930 he lived in three states: Oregon, California, and Arkansas. At the trial Lucille offered statements executed by the circuit clerks (or similar officers) for all the counties in those states, attesting the absence of any divorce proceedings between James and Lucille Blythe. In substance each officer states that he is the custodian of the divorce records for the county and that there is no record of such a divorce proceeding between February 16, 1927 (the date of James's marriage to Lucille), and September 25, 1965 (the date of James's death). In the probate court those statements were held to be inadmissible.

In the absence of statute a party cannot prove by a public officer's certificate that a certain public record does not exist, because such a statement is testimony that should be subject to cross examination. *Pekin Cooperage Co.* v. *State,* 197 Ark. 341, 122 S. W. 2d 468 (1938). The appellant contends, however, that the rule has been changed by the Uniform Interstate and International Procedure Act. Ark. Stat. Ann., Title 27, Ch. 25 (Supp. 1965).

We agree that the statute changed the common law rule, but we are of the opinion that the statements offered in the court below did not meet the requirements of the Uniform Act. Specifically, we think that each statement should have been accompanied by a certificate executed by a second designated officer, certifying that the first officer was the custodian of the county divorce records. This, as we construe the Act, is the effect of Paragraphs A and D of § 27-2505, which we quote in part:

"A. Domestic record. An official record kept within . . . any state, . . . or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof, or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied by a certifcate that the officer has the custody. The certificate may be made by a judge of a court of record having jurisdiction in the governmental unit in which the record is kept, authenticated by the seal of the court, or by any public officer having a seal of office and having official duties in the governmental unit in which the record is kept, authenticated by the seal of his office.

"B. Foreign record. [Not pertinent].

"C. Alternative method for certain domestic and foreign records. [Not pertinent].

"D. Lack of record. A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in this section in the case of a domestic record, . . . is admissible as evidence that the records contain no such record or entry."

Here the clerks' statements were offered under Paragraph D, to prove the lack of a record. That paragraph requires that the statement be authenticated as provided by Paragraph A, governing proof of domestic records. Paragraph A directs that the custodian's statement be accompanied by the certificate of a second officer, verifying the fact that the first officer is the custodian. There can be no sound reason for supposing that the legislature intended to require the accompanying certificate when the custodian is attesting the existence of an entry but not to require it when he is attesting its non-existence.

If there were any doubt about the point it would be set at rest by Rule 44 of the Federal Rules of Civil Procedure, after which the Uniform Act was patterned. Subsection (a) of that Rule is similar to Paragraph A of our statute. It applies to domestic records and requires the accompanying certificate of a second officer. Subsection (b), governing the proof of the lack of a record, follows immediately after Subsection (a) and expressly requires that the custodian's written statement that no record is found to exist be "accompanied by a certificate as above provided." In place of the clause just quoted the Uniform Act substitutes a different clause, "authenticated as provided in this section in the case of a domestic record," but the draftsmen's intent is clearly the same in both instances. The change in the wording of the Uniform Act, as compared with Rule 44, evidently came about by reason of the insertion of Paragraphs B and C in the statute, compelling the draftsmen to rephrase the cross reference to avoid ambiguity.

We conclude that the trial court was right in its ruling that the clerks' statements were not admissible in evidence. Without those statements the appellant's proof falls short of showing that James Blythe did not obtain a divorce before his marriage to the appellee.

Affirmed.

CITY OF SPRINGDALE, ARK. *v.* SAM WEATHERS ET UX

5-4047 410 S. W. 2d 754

Opinion delivered January 16, 1967
[Rehearing denied February 20, 1967.]

Little & Enfield and *Crouch, Blair & Cypert,* for appellant.

Putman, Davis & Bassett, for appellee.

PAUL WARD, Justice. This litigation concerns damages to a dairy farm caused by the discharge of sewage

from a disposal plant owned by the City of Springdale. The sewage polluted Spring Creek which ran through appellees' farm, allegedly causing permanent damage to its use as a dairy farm.

On December 30, 1963 appellees, Mr. and Mrs. Sam Weathers, filed suit against appellant, City of Springdale, asking for damages in the sum of $175,000. On December 15, 1965, after a lengthy trial to a jury, judgment was entered against appellant and in favor of appellees in the amount of $38,000, and this appeal by appellant follows. Pertinent testimony will be referred to hereafter in the assignments of error. For a reversal appellant relies on the following points:

1.

The court erred in failing to direct a verdict in favor of the defendant on the grounds that the plaintiff's cause of action is barred by the statute of limitations.

2.

There was no substantial evidence upon which to base a finding of damage, and the award of damages was grossly excessive.

3.

The court erred in failing to give an instruction on temporary damages as requested by the defendant.

4.

The court erred in allowing hearsay evidence into testimony, to the prejudice of defendant.

1. After an examination of the pertinent legal issues and testimony involved we have concluded no reversible error is shown under this point.

It is apparently agreed by both parties that the three years statute is applicable here. There is, however, a sharp conflict in opinion over when the statute begins to run. Generally speaking, it is the contention of ap-

pellant that the statute begins to run "upon the construction of the nuisance", quoting from the case of *St. Louis Iron Mountain & Southern Railway Company* v. *Anderson,* 62 Ark. 360, 35 S. W. 791. Again, appellant says "the injury dates from the construction of a permanent sewage disposal structure", citing *Sewer Improvement District No.* 1 *of the City of Wynne* v. *Fiscus,* 128 Ark. 250, 193 S. W. 521, and *International Shoe Company* v. *Gibbs,* 183 Ark. 512, 36 S. W. 2d 961. It is then pointed out by appellant that the record shows, among other things, that: The City had a disposal plant in 1937 by which Spring Creek was polluted in some degree; appellants bought part of their land in 1946 and the rest of it in 1959; appellees received from the State Health Department a permit to operate a Grade A Dairy in 1957; City built a new disposal plant in 1964 (after this suit was filed) to correct the trouble; appellees had to quit irrigating their land with water from Spring Creek because of pollution of the water, and; during all periods above mentioned the creek was being noticeably polluted. It is, therefore, earnestly insisted by appellant that since appellees were aware of the above factual situation their cause of action arose more than three years before suit was filed by appellee in December 1963.

In our opinion the rule applicable to the facts in this case relative to when the statute began to run is the one set out in *Sunray DX Oil Co.* v. *Thurman,* 238 Ark. 789, 384 S. W. 2d 482 and *Nance* v. *Cook,* 240 Ark. 336, 399 S. W. 2d 262. In the *Sunray* case we approved the following statement:

> " 'It seems well settled that in an action for damages for permanent injury to real estate caused by continuing salt water pollution the limitation begins to run at the time when it becomes obvious that a permanent injury has been suffered.' "

We infer appellant contends that the rule announced in the above cited cases is not applicable here because

they deal with damage by salt water and not by sewage. Such distinction is not supported by sound reasoning or by our decisions. The nature of damage to land is so similar in both instances, that, we think, the same rule should be followed in attempting to determine the time when the permanent injury occurred. In the *Nance* case we approved the same statement copied above.

There are, therefore, two fact questions for the jury to decide; (a) whether the damage was permanent, and (b) if so, when did it become, or should have become, obvious to appellees. Both of these fact questions were presented to the jury on separate interrogatories. The jury found from the evidence that the farm had been permanently damaged and that it became obvious to appellees in the year 1963.

It would serve no useful purpose, we think, to detail all the testimony relative to the above mentioned questions since we have carefully read the same and find substantial evidence to support the findings of the jury. It suffices to point out that there was testimony showing the contamination began (in a slight degree) in 1937; that it continued to increase until 1961 when the City agreed to stop it after appellees had spent thousands of dollars on improvements to make a Grade A dairy farm; that the contaminations continued until appellees were informed by the State Health Department to stop or materially curtail such operations on December 9, 1963.

2. We also are convinced there is substantial evidence in the record to sustain the jury's finding that appellees' farm was damaged to the extent of $38,000. It is properly conceded by both parties that the amount of damages is the difference between the value of the farm before and after the damage.

In substance, Mr. Weathers testified: I bought an irrigation system to use water from Spring Creek; in

1952 I built a Grade A. Dairy barn in order to be able to run a Grade A. Dairy farm; in 1957 I built a bottling plant to pasteurize and homogenize the milk, all in compliance with the rules and regulations of the State Health Department, and I have made other improvements; at times the odor from the creek was unbearable; I received a letter from Dr. Dick (director of the milk division of the Arkansas State Health Department) cutting me off from my land so I could no longer carry on a Grade A Dairy operation, and; in my opinion the value of my land as a Grade A Dairy was $170,000 and is now worth about $70,000. Mr. Emmory Grose, a real estate appraiser living in Fayetteville with eight years experience as an appraiser for the Federal Housing Administration, testified that the market value of appellees' farm was worth $140,000 before the damage but that it is now worth only $66,000. Appellant objects to the testimony of Mr. Weathers on the ground that he gave no basis for the values he fixed, but we held in the case of *Housing Authority of the City of Searcy* v. *Angel,* 239 Ark. 224, 388 S. W. 2d 394, that a property owner who had lived on a piece of property for a long time "is 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 sustained". Also, we think Mr. Weathers did give some very good reasons to explain the extent of his damage.

3. We fail to see any error in the trial court's refusal to give appellant's instruction on temporary damages. In the first place, appellees' suit was based solely on permanent damages, and appellant's answer on this point was a general denial. In the second place, the jury's verdict excludes any possibility of temporary damages. Also, appellant cites the *Anderson* case, supra (and other cases), to show that a damage of this nature is permanent and not temporary.

4. When Mr. Weathers was recalled as a witness

he was asked about certain instructions he had received from Mr. Dick (Director in the State Board of Health).

Q. "Did you ask him (Dick) whether or not you could raise feed and feed it to your cattle down there?"

A. "Yes . . . ."

Q. "What did he tell you?"

A. "He said I could not do it."

Q. "What about pasturing your cattle down there that were dry?"

A. "I couldn't do that either."

The above was objected to as hearsay evidence.

For several reasons, we are of the opinion that no reversible error was committed by the trial court in admitting this testimony.

In the first place the testimony was cumulative, it already having been established that appellees could not operate a Grade A. Dairy because of the permanent injury to his farm. It could only tend to prove appellees might use some of the land for general farm purposes —a fact which had been admitted by appellee. Also, Dr. Dick testified that he had visited the farm twice and had told Mr. Weathers that the existing condition was "a violation of the Grade A regulations", and that his "permit" would be cancelled. In addition to the above we feel that, under the facts revealed by the testimony in the record, the testimony elicited from Weathers relative to his conversation with Dr. Dick was not for the purpose of proving any material issue in the case but merely to show Weathers had received certain instructions from Dr. Dick (a public official) which he was compelled to follow if he continued to run the dairy. In the case of *Motors Insurance Corporation* v. *Lopez,* 217 Ark. 203, 229 S. W. 2d 228, where a similar issue was raised, we find this statement:

> "A statement made out of court is not hearsay if it is given in evidence for the purpose merely of proving that the statement was made, provided that purpose be otherwise relevant in the case at trial."

Undoubtedly it was relevant here for appellees to show what instructions he had received from the State Health Department.

If, therefore, this testimony was admissible for one purpose but not admissible for another it was incumbent upon appellant to request the court to so instruct the jury. A general objection to the testimony was not sufficient. See: *Bodcaw Lumber Co.* v. *Ford,* 82 Ark. 555, 102 S. W. 896; *Sterling Stores, Inc.* v. *Martin,* 238 Ark. 1041, 386 S. W. 2d 711, and; *Finley* v. *Smith,* 240 Ark. 323, 399 S. W. 2d 271. Appellant made no such request in this case.

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

Affirmed.

BROWN, FOGLEMAN & JONES, JJ., dissent.

JOHN A. FOGLEMAN, Justice, dissenting. While the cases cited by the majority to support their position as to the time of accrual of the cause of action in a case such as this are in tort, based on negligence, I concur in their position as to the beginning of the running of the statute of limitations, *i. e.,* at the time when it can be ascertained with reasonable certainty that pollution of the stream will result in a nuisance of a permanent and continuous character, as this indicates an intention to take a permanent right to so pollute the stream. See *McLaughlin* v. *City of Hope,* 107 Ark. 442, 155 S. W. 910; *El Dorado* v. *Scruggs,* 113 Ark. 239, 168 S. W. 846; *Sewer Improvement District No.* 1 *of Wynne* v. *Fiscus,* 128 Ark. 250, 193 S. W. 521.

I see no reason why the same rules governing the accrual of the cause of action for permanent damage applied in tort actions should not also be applied when the permanent damage to the realty is the result of the exercise of the power of eminent domain. Cases decided by this court in which damages were sought by reason of eminent domain have been cited as authority in opinions on appeals where recovery was asked because of permanent damage for tortious action polluting a stream. See, for example, *International Shoe Company* v. *Gibbs,* 183 Ark. 512, 36 S. W. 2d 961.

It is true that the cause of action sometimes accrues when a sewer plant is constructed, as when the design and construction is of such type or nature as to make permanent damage to the land of a lower riparian owner inevitable, as in the *McLaughlin* and *El Dorado* cases. But in this case there is substantial evidence to indicate that, in 1937, when this stream was first used as an outlet, no one would have foreseen any pollution or permanent damage to lower riparian owners and an action by the then owners of the Weathers lands would seem to have been, even in retrospect, inevitably unsuccessful. There is substantial evidence in this record from which the jury might have found that appellees' right to compensation accrued within three years prior to the date of taking, but there is no substantial evidence to support the finding that the "permanent damaging" was in 1963. This record clearly shows that the permanent damage from which the intention to take is inferred was sometime in the period from 1953 to 1962. In considering this facet of the case it must be remembered that the action of the Fluid Milk Control Division of the State Board of Health in December of 1963 does not in any way indicate that this was the date of "taking". This is simply the time when the Director of that division discovered the situation. The resulting action closing the Grade A operation was not the exercise of the power of eminent domain by the city, nor was it evidence thereof, but it was the exercise of the police power of

the State of Arkansas. It must also be remembered that Dr. Dick, the Director of the Division, would not have permitted this dairy operation at any time when the discharge from the Springdale sewer system ran into Spring Creek, regardless of the efficiency of the plant and its operation and regardless of the purity of the water in the stream.

A brief review of the testimony will illustrate the reason for my dissent from the holding of the majority. Appellee Sam Weathers testified in part, in substance:

> There was no obnoxious odor and nothing to alert me of the receiving of sewerage when I acquired the first part of the property in 1946. In 1951 I began to use the water for irrigation and my dairy cattle used the creek for water. In 1953 the condition of Spring Creek began to change with the first thing we noticed being an odor and an off color. The pollution worsened constantly until I began to notice dead fish about two years later. When it first started we had about two months in the Fall at the lowest flow and the rest of the year was comparatively clean. The period during which the contamination was obvious began to increase until *in about* 1961 *when we filed our injunction against the City of Springdale it was a twelve-month situation.* The odor from my house was unbearable and the cows quit drinking from the stream and they wouldn't even cross it without forcing them. I couldn't irrigate from the stream beginning in 1959 because it was so badly polluted. I did make complaints to the City of Springdale in 1952 or 1953 and in the middle nineteen fifties. They did build a new plant in 1957 and after that I filed an injunction suit which ended in a consent decree. It was as bad after they built the new plant as it was before. Under the conditions that prevailed in my dairy in the years 1962 and 1963, I was not getting maximum utility out of my cows and equipment. The situation got worse

and reached its culmination in 1961 when I sought the aid of an attorney.

While there was other testimony, none of it supports the jury finding as to the year 1963, even though it is true that one Jack Benton, called by appellees, testified that Mayor Davis of Springdale told him the city had been ordered by the Health Department to buy four miles of land down the creek, and that they had made a deal in February of 1963. This was hearsay admitted over the objection of appellant. He also said that the stream was unusable for him from 1956 on, and the condition on the Sam Weathers property was the same as on his. Mayor Davis did state that the Benton land was acquired and that the Health Department had required the city to buy lands one and one-quarter miles downstream for the sole purpose of additional oxidation ponds.

The finding of the jury was based upon an instruction of the court to the effect that permanent damage occurred when the contamination and pollution existed to the extent of denying the landowners the use of the lands for which they were intended and adapted, over the objection of the appellant. The court then submitted an interrogatory to the jury asking them to find the year in which the city permanently damaged the land. I feel that this instruction was inherently erroneous in that the permanent damage occurred when it could have been ascertained with reasonable certainty that there would be contamination and pollution which would result in a nuisance of a permanent and continuous character such as would deny the landowner the use of the lands for which they were adapted so as to affect the market value thereof.

In all other respects I concur with the majority. While appellant did not specifically list the lack of substantial evidence to support the 1963 "date of taking" as a point to be relied upon in its original brief, it did list the failure of the trial court to direct a verdict, urg-

ing that there was no substantial evidence to support a finding of a date of taking at any time within three years next preceding the filing of the complaint. Appellant then specifically argues the objection to the instruction on the "date of taking".

Although the pleadings were not before the jury, it is not insignificant that in response to a motion to make the complaint more definite and certain, appellant alleged a date of taking in October, 1961. A second amendment to the complaint might be construed to allege a date of taking in 1954.

While it could be urged, with some justification, that there is still substantial evidence that the permanent damage occurred at some other time within three years next preceding the filing of the complaint, still this question was not submitted to the jury. Its finding as to the year the permanent damage occurred, based on the erroneous instruction, makes the conclusion that the jury based its finding on the action taken by Dr. Dick, rather than on the acts of appellant, inescapable.

I, therefore, respectfully dissent from the holding of the majority and I would reverse and remand for a new trial.

I am authorizd to state that Justice Brown joins in this dissent.

ARK. STATE HWY. COMM. *v.* JAMES H. SARGENT ET UX

5-4085 410 S. W. 2d 381

Opinion delivered January 16, 1967

George O. Green and *Don Langston,* for appellant.

Robinson & Rogers and *Hardin, Barton, Hardin & Jesson*; By: *Robert T. Dawson,* for appellee.

JOHN A. FOGLEMAN, Justice. On May 25, 1965, the State Highway Commission took from appellees 5.92

acres of an L-shaped tract of land at Alma near both Highways 64 and 71 for construction of a part of Interstate Highway No. 40. On December 15, 1965, a jury awarded the landowners $31,500.00 as just compensation. Appellant has appealed from the judgment of the jury verdict on the ground that there is no substantial evidence to support the verdict which it contends is grossly excessive. The argument is based largely upon the contention that there was no basis, or an improper one, for the testimony of witnesses as to values of the land.

A review of some of the rules followed by this court in such cases will indicate our reasons for affirming the judgment of the lower court.

1. The question of the sufficiency of the evidence, in cases in which the challenge is that the verdict is excessive in that there is no substantial evidence to support it because there is no fair and reasonable basis for the opinions of witnesses who testify as to value, is one of law. *Arkansas State Highway Commission* v. *Dupree,* 228 Ark. 1032, 311 S. W. 2d 791; *Arkansas State Highway Commission* v. *Carder,* 228 Ark. 8, 305 S. W. 2d 330.

2. In making such a determination this court must review the testimony in the light most favorable to appellees and indulge all reasonable inferences in favor of the judgment. *Arkansas State Highway Commission* v. *Carder, supra.*

3. If there is any substantial evidence to support the verdict it cannot be disturbed. *Arkansas State Highway Commission* v. *Addy,* 231 Ark. 381, 329 S. W. 2d 535; *Arkansas State Highway Commission* v. *Dupree, supra.*

4. (a) The credibility of witnesses who testify concerning damages is a matter for determination by the jury.

(b) The jury has great latitude in considering the testimony as to damages.

(c) It is no ground for reversal that the verdict might appear to us to be contrary to the preponderance of the evidence.

(d) A verdict will not be set aside as excessive unless it is so excessive as to indicate passion, prejudice, or an incorrect appreciation of the law applicable to the case, even though the award may appear liberal. *Arkansas State Highway Commission* v. *Kennedy,* 233 Ark. 844, 349 S. W. 2d 132; *Arkansas State Highway Commission* v. *Carder, supra; Arkansas State Highway Commission* v. *Addy, supra.*

5. The correct measure of market value in these cases is the market value at the time of the taking for all purposes, comprehending its availability for any use to which it is plainly adapted, as well as the most valuable purpose for which it can be used and will bring the most in the market. *Fort Smith and Van Buren Bridge District* v. *Scott,* 103 Ark. 405, 147 S. W 440; *Arkansas State Highway Commission* v. *Brewer,* 240 Ark. 390, 400 S. W. 2d 276.

6. (a) On direct examination a witness testifying about values should not be allowed to repeat hearsay statements made by others or to testify about mere offers or other matters inadmissible under the rules of evidence.

(b) If cross-examination demonstrates that a witness has no reasonable basis whatever for his opinion, his testimony should be stricken.

(c) If cross-examination shows that the witness has a weak or questionable basis for his opinion, that fact has a bearing upon the weight to be given his testimony.

(d) The cross-examining attorney, however, is not entitled to embark upon a fishing expedition with immunity from any unfavorable information he may elicit. He acts at his peril in putting a question that may evoke an answer damaging to his case. *Arkansas State Highway Commission* v. *Russell,* 240 Ark. 21, 398 S. W. 2d 201.

7. (a) A witness who does not express an opinion as to the value of the property may not testify about the sale of property in the same area without any evidence being offered to show a comparison or similarity between the properties.

(b) There is no error in admitting testimony of witnesses who state values on undeveloped, unsubdivided lands, on a raw acreage instead of a per lot basis. *Arkansas State Highway Commission* v. *Witowski,* 236 Ark. 66, 364 S. W. 2d 309.

8. A landowner who shows that he is intimately familiar with the property is competent to state his opinion as to the value of the land (even where he admits on cross-examination that he took into consideration an otherwise inadmissible offer to purchase part of it). *Arkansas State Highway Commission* v. *Russell, supra.*

Viewed in the light most favorable to appellees, as we must do, 5.92 acres of land were taken from a tract of land containing approximately 12 acres with a frontage of 132 feet on Ray Lane, a blacktop street, located approximately one-quarter of a mile from Highway No. 64 [from which it was accessible by way of Rudy (Maple Shade) Road and a street] and less than an eighth of a mile from Highway No. 71. The original tract was accessible from the north by Fine Springs Road and a street. On this land was located a frame dwelling house consisting of seven rooms and a bath which cost $10,-400.00 when built about 1948 or 1949, a barn (with gas

and water), an outbuilding, tool shed, and a pond. The topography was rolling and there was some low land but it was not too low for a house. Room for a road leading to the rear of the tract had been left on the frontage and the power line easement across a part of the property could also be utilized for a road. The owners had gas, water and electricity and all utilities are available. The highest and best use of the property was for residential lots. It was the best property for that purpose in Alma because all expansion was going that way. It was right in the center of the city where there is a lot of development and where property is in demand. The tract was about three and one-half blocks from the school, a distance more desirable than just across the street from it. It was across the street from one tract from which residential lots had been sold and within four blocks of another.

The taking of this right-of-way left about one and one-half acres on the north side in a triangle coming to a point and about five acres on the south side, to neither of which was there any access and for which there was no potential market save the possibility of sale to an adjoining owner.

The value of the tract before the taking was in a range from $31,500.00 to $37,500.00 and the value after the taking ranged from $600.00 to $1,800.00. (Appellant's witnesses fixed the value of the remainder at $2,000.00.)

Witnesses testifying as to values were:

James H. Sargent—the owner, a life-long resident of the county who had lived on the property since 1948 or 1949 in a dwelling house built by him.

Jay Neal—who lived three and one-half to four miles from the property with which he had been familiar for sixty years; who deals in real estate and had done appraisal work for appellant on lands between Van Buren and Alma.

Mack Bolding—in the farming and real estate business, who had lived in Alma off and on all his life, only one and one-quarter miles from the property in question for fourteen years, and who had been familiar with it for twenty-five or thirty years; who had been a licensed real estate broker since 1962; who had bought and sold lands near Alma and throughout Crawford County.

Bobby Gelly—who had lived in Crawford County all his life; had been a licensed real estate broker for nine years which followed ten years in the building business; who had made appraisals for numerous individuals, banks and different agencies and had done appraisals on a government housing project; and who had taken a course in appraisal work at Southern Methodist University.

All of these witnesses expressed their familiarity with fair market values of real estate in the vicinity. Their qualifications were such as to permit them to express opinions as to the fair market value of the Sargent property before and after the taking. This court has many times held that the owner of real property was qualified to express an opinion as to its value when his familiarity with the property was shown. If the testimony of these witnesses had any reasonable basis, however weak and questionable it may have seemed, the jury might well have accepted their valuations and it cannot be said that the verdict is excessive, being well within the range of damages testified to by witnesses for appellees.

The only real question raised by appellant is the contention that appellees and their witnesses based their value opinions upon the sale price of lots from properties that had been subdivided.

In explaining on cross-examination that he did not base his opinion on the lot sales, witness Bolding said that appellees' property could have been platted into

about three lots per acre, but none of the witnesses based his value opinion upon any number of lots that could be sold by the Sargents. It is true that most of the witnesses stated on cross-examination that they had taken into consideration the prices at which residential lots in the vicinity of the Sargent property were selling. Some of these lots were from the Young tract just across the street and others were from the Littlefield tract three and one-half or four blocks away. The sale prices mentioned were from $1,750.00 to $2,000.00 per lot. While no one other than Bolding testified as to the number of lots that could be platted on appellees' tract, the per acre average values, exclusive of improvements, given by their witnesses ranged from $2,000.00 to $2,-500.00. As witness Bolding pointed out on cross-examination, if the value opinion had been based on the sale of these lots it would have been a lot higher. This witness never stated that he based his opinion on these lot sales, although he admitted, on cross-examination, that one of the properties was somewhat comparable to the Sargent property. His testimony alone would have constituted substantial testimony upon which the jury verdict might have been based. However, the testimony of witnesses Neal and Gelly was not rendered without any reasonable basis merely because on cross-examination appellant's counsel elicited from them answers that they based value figures partially on what lots were selling for in the area.

On the question of sufficiency of the evidence, appellant relies principally upon the holding that the statement of a conclusion as to market values by a witness does not necessarily mean that the evidence given by him is substantial when he has not given a satisfactory explanation of how he arrived at the conclusion. *Arkansas State Highway Commission* v. *Byars,* 221 Ark. 845, 256 S. W. 2d 738. The situation here is quite different from the *Byars* case where the opinion indicates that no basis whatever was given by the value witnesses for their opinions of market values before and

after taking, even to the extent that in valuing farm lands not shown to be suitable for any purpose except the production of livestock and hay, not a single witness gave any testimony whatever as to the number of livestock it would support or the amount of feed that could be grown thereon.

Here the witnesses gave a reasonable basis for their opinions and while appellant may have raised questions on cross-examination relating to the credibility of the witnesses and the weight to be given to their testimony; these matters were exclusively for determination by the jury which found against the contentions of appellee in that regard.

The situation is also different in this case from that in *Arkansas State Highway Commission* v. *Witowski,* 236 Ark. 66, 364 S. W 2d 309, where the judgment was reversed because a witness who did not express an opinion as to the value of the property involved, testified only as to the sale of property in the same area without any evidence being offered to show a comparison or similarity between the properties. In this case the court found no error in the testimony of witnesses that they considered the value of other lots in the area when the values were given on a raw acreage and not a per lot basis.

The situation in this case is very different from that which prevailed in *Arkansas State Highway Commission* v. *Watkins,* 229 Ark. 27, 313 S. W. 2d 86, cited by appellant. Here no plat was introduced showing how the property might be subdivided and there were numerous factors brought out to show the difference in this property and property that had been subdivided and sold (such as the existence of a power line easement across part of the property, accessibility to paved streets, the necessity for laying out streets, conditions as to utilities, topography, relative locations with reference to school, etc.,) from which a fair and equitable

comparison and adjustment could be made.

In considering testimony based on comparable sales, it must be remembered that no two tracts of real estate are identical. Reasonable latitude must be allowed in evaluating sales and adjusting or compensating for differences in similar lands. It would not be reasonable to suppose that residential development in the immediate vicinity of a tract of land would have no bearing on the market value thereof, or that one making a study of values of the tract would give no consideration whatever to the sale of such lots, the prices they would bring and the similarities and dissimilarities of the respective tracts.

The judgment, under the rules above stated, must be affirmed.

BILLY SCOTT *v.* STATE

5222 410 S. W. 2d 401

Opinion delivered January 16, 1967

Gerald T. Ridgeway, for appellant.

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

J. Fred Jones, Justice. This case involves a petition for habeas corpus filed in Pulaski County Circuit Court by an inmate of the Arkansas penitentiary without assistance of an attorney of record. The petition was denied by the Circuit Court and petitioner has appealed.

Petitioner, Billy Scott, was arrested in Pulaski County on or about March 26, 1964, and on April 3, 1964, he was charged on information filed by the prosecuting attorney, with the crime of assault with intent to kill. On June 1, 1964, he entered a plea of not guilty in the Pulaski County Circuit Court and the case was passed to the September setting on motion of the defendant. On December 7, 1964, counsel for the defendant was appointed by the Court and the case was set for jury trial on January 18, 1965. When the case came on for trial on January 18, 1965, the defendant advised the Court that his counsel was not properly representing him, and at defendant's request, his counsel was discharged by the Court and the case was passed to the February setting to be re-set for trial. On January 19, 1965, the defendant was charged with assault with intent to rob instead of assault with intent to kill, and the charge of

assault with intent to kill was *nolle prosequi* by the prosecuting attorney and dismissed by the trial court.

On February 1, 1965, the defendant entered a plea of not guilty to the charge of assault with intent to rob, a new attorney was appointed for him, and the case was set for jury trial on April 6, 1965. On April 6, 1965, the defendant was tried to a jury who returned a verdict of guilty with punishment to be fixed by the Court. The defendant was committed to jail in lieu of $5,000.00 bond, and on April 12, 1965, he was sentenced to five years in the state penitentiary where he is now serving that sentence.

On November 17, 1965, the defendant filed his petition in the Pulaski County Circuit Court for a writ of habeas corpus alleging that he is being illegally held in the Arkansas penitentiary against his will in direct violation of his constitutional rights as guaranteed to him by the due process clause of Amendment 14 of the United States Constitution.

Petitioner enumerates many assignments of alleged violations of his constitutional rights in numbered paragraphs some of which, as abbreviated, allege the following:

1. That the warrant for arrest on the charge of assault with intent to kill was improper and illegal because there was no evidence to support the charge.

2. That he was denied a proper hearing on this charge and requested dismissal of his attorney for refusal to properly represent him.

3. That the "warrant was dismissed" by the Pulaski County Circuit Court.

4. That as a result of "the same warrant which

was dismissed" another warrant was read to him charging him with assault with intent to rob.

5. That there was no evidence advanced at a hearing or at his trial to show cause for a warrant to be issued charging robbery or attempt to rob. That the warrant was improper, illegal, unconstitutional, and its issuance constituted an unlawful act against him by the Pulaski County Court officials.

6. That after the warrant was read to him on January 19, 1965, he was "denied the right to have an attorney and a proper hearing before a proper judge until on or about the first day of February 1965; "a period of more than ten days," all in violation of his constitutional rights under the decisions of the United States Supreme Court in the cases of *Mallory* v. *U. S.*, 354 U. S. 449, 77 S. Ct. 1356 (1957), and *Escobedo* v. *Illinois*, 378 U. S. 478, 84 S. Ct. 1758 (1964).

7. That the warrant and bill of information is illegal and unconstitutional because there was no evidence to verify the alleged crime and under Amendment 4 of the United States Constitution "no warrants shall be issued except on probable cause."

8. That it was the lawful duty of the presiding judge at the trial on April 6, 1965, to dismiss the charge of attempting to rob.

In the petition for a writ of habeas corpus the petitioner then prayed for the appointment of attorney to represent him at the hearing on his petition for habeas corpus.

Hearing on the petition was set for January 13, 1966, and an attorney was again appointed to represent the petitioner. On January 13, 1966, the hearing on the petition was continued and on May 5, 1966, the petition was set for hearing on May 9, 1966.

On April 29, 1966, the defendant presented a petition for habeas corpus to the United States District Court, Eastern District of Arkansas, Pine Bluff Division, complaining that the Circuit Court had not granted him a speedy hearing on his petition then pending in that Court, and that the attorney appoined to represent him in that Court was not representing him properly. The petition was dismissed without prejudice in the Federal Court for failure to exhaust State remedies.

On May 9, 1966, a hearing on the petition was conducted by the Pulaski County Circuit Court at which time the petitioner appeared with his counsel and testified in his own behalf in support of his petition. The petition was denied and petitioner appealed to this Court.

We have examined the record in this case, including each assignment contained in appellant's petition, and dispose of the first five assignments together.

The warrants in this case were issued on information filed by the prosecuting attorney in lieu of grand jury indictment under Amendment 21 of the Arkansas Constitution, and we reaffirm our decisions in the cases of *Penton* v. *State,* 194 Ark. 503, 109 S. W. 2d 131 (1937); *Payne* v. *State,* 226 Ark. 910, 295 S. W. 2d 312, and *Deckard* v. *State,* 241 Ark. 504, and we again hold that an examination and commitment by a magistrate is not required when a person is arrested on a warrant issued on a grand jury indictment or information filed by the prosecuting attorney, and certainly appellant's constitutional rights were not violated in the *nolle prosequi* by the prosecuting attorney on the charge of assault with intent to kill and the dismissal of that charge by the trial court.

The petitioner in this case, as any other individual, is entitled to all the rights, privileges, immunities, and protection afforded under the constitutions of the Unit-

ed States and State of Arkansas, but our constitutions are not only designed to protect the rights of individuals charged with the commission of crime; they are also designed to protect the rights of individuals who have never been charged with the commission of crime.

In petitioner's assignment six, he apparently misconstrued the decisions of the U. S. Supreme Court in *Mallory* v. *United States,* 354 U. S. 449, and *Escobedo* v. *Illinois,* 378 U. S. 478. In the *Escobedo* case, the petitioner was arrested without a warrant, taken to police headquarters with his arms handcuffed behind him and placed under interrogation by the police officers. The petitioner, as well as his regularly retained attorney, made several requests and attempts to confer with each other while both were in the same building where petitioner was being held prisoner, but the lawyer was denied access to his client, and the client was told that his lawyer did not want to talk to him. After persistent questioning without advising the petitioner of his legal rights, damaging statements were obtained from the petitioner *which were used in evidence against him at his trial.*

In the case before us, the petitioner was not only permitted to see an attorney, the Court appointed one for him. The trial court not only appointed an attorney for the petitioner, it discharged the attorney and passed the case at petitioner's request and appointed another attorney who represented petitioner at his jury trial.

In the *Mallory* case supra, the petitioner was arrested before indictment and apparently without a warrant, and after considerable interrogration by arresting officers, and without advising him that he had a right to remain silent, and a right to the benefit of counsel, a confession was obtained from him and *then* he was arraigned before a magistrate and his *confession was used against him at his trial* which resulted in his conviction.

In the case before us, no confession or other evidence procured from, or furnished by, the petitioner is involved. He has had the benefit of three Court appointed attorneys in this case. He obtained the discharge of one of his attorneys because his case was not being handled to his satisfaction, and he threatened to have another one discharged for the same reason.

The decisions in the *Mallory* and *Escobedo* cases are not mere pass keys from the Arkansas, or any other, penitentiary. They are new indictments of the age old system known as "third degree" in the interrogation of suspects in criminal cases, and neither case guarantees the accused that his case will be tried within ten days or within any other specified time.

We see no need to prolong this opinion further. The petitioner in this case was awarded more than was guaranteed to him under the constitutions of the United States and the State of Arkansas.

Finding no error in the trial court's denial of the petition for a writ of habeas corpus, the order of the trial court is hereby affirmed and the petition is denied and dismissed.

Affirmed.

5225 410 S. W. 2d 387

Opinion delivered January 16, 1967

No brief for appellant.

Bruce Bennett, Attorney General; *Fletcher Jackson,* Asst. Atty. Gen., for appellee.

CONLEY BYRD, Justice. This appeal is brought by George Thomas Burt from an order revoking his suspended sentence on a conviction of burglary and grand larceny. Appellant has not filed a brief. Appellee has supplied the court with an abstract and a brief.

In his motion for new trial the appellant, in addition to objecting to the sufficiency of the evidence, alleges that the trial court should never have required him to leave the state of Arkansas; that the revocation was based on incompetent evidence, a letter from the Chicago Parole Office; and that the trial court erred in ordering a hearing when appellant had not violated the conditions of the suspended sentence save and except returning to the jurisdiction of the court.

The record shows that appellant received a five-year sentence on March 19, 1964, four years of which was suspended by the court upon the following conditions:

> "Four (4) of the five years are suspended provided the defendant conducts himself properly. That is the condition upon which the 4 years are suspended; that is the defendant, George Thomas Burt, must maintain a reputation of good behaviour for the five years."

On August 18, 1965, the appellant was brought before the court and a hearing was held to revoke his sentence. The docket notation at that time was as follows:

> "Court finds that the first year of dfts sentence expired 3-19-65; that defendant's conduct and regularity of work have not been satisfactory. Dft has opportunity of regular employment in Chicago. Need for change of environment recognized. If within 10 days dft. removes to Chicago and enters regular employment, dft will be placed under supervision Ill. parole authorities; otherwise he will be returned to this court for further action."

The hearing which resulted in the order from which this appeal was taken was held on March 25, 1966. It was there shown that appellant did go to Chicago following the August, 1965 hearing, that he did not secure regular employment, and that he shortly returned to his mother's home in Magnolia. While in Chicago, appellant did not report to the parole authorities and depended on his mother to report his return to Arkansas. The testimony shows that appellant learned that a warrant was out for his arrest; that he observed the officers at his mother's house looking for him, but did not come forward; that on another occasion he was seen at the

hospital by a state trooper who was a patient, but that he eluded the officers who came looking for him; and that, when he was arrested, he had dyed his hair. After appellant's arrest, he discussed with the state trooper the meeting in the hospital and informed him that he would have resisted arrest by the trooper. Appellant also asked the trooper to tell a Magnolia policeman that appellant was going to give the policeman a whipping when he got out of jail.

There was other testimony that appellant frequented an all-night cafe in Magnolia as late as three or four o'clock in the morning.

The trial court, in revoking appellant's suspended sentence, found that he had a sullen disposition with actions of assault toward an officer and that he evaded the execution of the warrant for his arrest.

Under the record here made, we hold that the trial court did not abuse its discretion in revoking the suspended sentence. We have many times held that sufficiency of the evidence to sustain an order of revocation of a suspended sentence is a matter addressing itself to the trial court. *Calloway* v. *State,* 201 Ark. 542, 145 S. W. 2d 353 (1940).

The allegation that appellant was required to leave the state of Arkansas in August of 1965 is not supported by the record. On the contrary, the record shows that the trial court was not satisfied with appellant's conduct. The court was apparently trying to help appellant by placing him under the supervision of parole authorities of Illinois, in accordance with the Interstate Probation and Parole Compact, since it found that a change of environment was needed to rehabilitate appellant.

Appellant's contention that the order of the trial court was based upon incompetent evidence is not sustained by the record. The record shows the trial court

held that the letter from the Chicago Parole Office, to which appellant objected, could not be used toward proof of the charge against appellant.

The last contention, that the court erred in ordering a revocation hearing before there had been a violation by appellant of his suspended sentence, is evidently aimed at the portion of the court's finding that appellant evaded the execution of the warrant for his arrest. Any right which appellant may have had to complain about this issue certainly passed out of the picture as a result of his conduct in evading the officers and his indicated attitude of assault upon the city officer. Therefore we hold it to be without merit.

For the reasons stated, the judgment is affirmed.

BROWN, J., disqualified and not participating.

ROBERT O. JUSTICE *v.* ARCH CAMPBELL

5-4220 410 S. W. 2d 601

Opinion delivered January 19, 1967

Dale Price and *Fletcher Jackson,* for appellant.

Langston & Langston and *Sloan & Ragsdale,* for appellee.

LYLE BROWN, Justice. Robert O. Justice filed this suit in the Pulaski Circuit Court seeking to debar the defendant, Arch Campbell, from the office of County Judge. Campbell responded and asked the Court to confirm his title to the office. Campbell prevailed, and Justice appeals.

The case was submitted on stipulation, and the facts agreed upon which are now pertinent may be summarized as follows:

1. R. A. (Arch) Campbell duly assumed the office of County Judge on January 1, 1965, which term of office would normally have expired on January 1, 1967.

2. Tom Gulley was elected to the office of County Judge at the General Election on November 8, 1966, for a two-year term beginning January 1, 1967. Mr. Gulley died November 24, 1966.

3. Arch Campbell claims the office by virtue of Art. 19, § 5 of the Constitution of Arkansas, which reads as follows: "All officers shall continue in office after the expiration of their official terms until their successors are elected and qualified."

4. Robert O. Justice was appointed and commissioned by the Governor on January 1, 1967, and took the oath of office on that date. Justice claims title to the office by virue of that appointment. The Governor acted under the provisions of Ark. Stat. Ann. § 12-113 (Repl. 1956): "When a person elected to an office (and) shall by reason of death, or for any other cause, fail to qualify, the office shall be deemed vacant and shall be filled as provided by the Constitution and statutes of the State. [Acts 1929, No. 311, . . .]"

Another provision of the Constitution—Amendment 29, Section 1 (1938)—is brought into the case by appel-

lant. That section is as follows: "Vacancies in the office of United States Senator and in all elective state, district, circuit, county, and township offices, except those of Lieutenant Governor, Member of the General Assembly, and Representative in the Congress of the United States, shall be filled by appointment by the Governor."

We find no conflict in these Constitutional provisions. At first blush, the wording in Amendment 29, "vacancies . . . shall be filled by . . . the Governor . . .," would seem to sustain the position of Robert O. Justice. Any such impression has clearly been dispelled by the legal authorities immediately cited *infra.*

In *State* v. *Green and Rock,* 206 Ark. 361, 175 S W. 2d 575 (1943), in referring to Amendment 29, Section 1, this Court said: "The words 'vacancies in the office of' as there used refer to offices which on account of death, resignation, removal or abandonment of the previous holder thereof, or for some other cause, have in fact no incumbent."

An incumbent of an office is one who is in present possession of an office; one who is legally authorized to discharge the duties of that office. *Hilliard* v. *Park,* 212 Tenn. 588, 370 S. W. 2d 829; *People* v. *Rapsey,* 16 Cal. 2d 636, 107 P. 2d 388; *State* v. *Blakemore,* 104 Mo. 340, 15 S. W. 960.

Judge Campbell's position is correct, and in conformity with the provisions of the Constitution of Arkansas. It is not difficult to harmonize the two sections cited, and it is our duty to give effect to both provisions. Our holding is further strengthened by the rule in a majority of the jurisdictions. Quoting from 74 A.L.R. 486:

> "II. Majority Rule. (a) Rule stated. In a majority of jurisdictions the rule obtains that the death or disability of an officer elect before qualifying does not create a vacancy in the office which may be

filled by the appointing power, since he never occupied the office, and that under the provision that an incumbent shall hold his office until his successor is elected and qualified, the prior incumbent is entitled to continue in the office until the election and qualification of his successor."

Summarizing, when Amendment 29, Section 1, directs that certain enumerated vacancies shall be filled by appointment by the Governor, it means that when an office holder in present possession of an office and legally authorized to discharge the duties of that office, dies, resigns, is removed, or abandons the office, a vacancy is created.

In *Rice* v. *Palmer,* 78 Ark. 432, 96 S. W. 396 (1906), this Court had before it two questions:

1. Whether Amendment No. 3 to the Constitution authorizing appointments to fill vacancies by the Governor was legally adopted; and

2. Whether Palmer, the incumbent Clerk, should hold over or relinquish the office to an appointee of the Governor.

Mr. Maroney was elected, but died before he could legally take office, just as in the case before us.

The Majority Opinion did not reach Point Two, because it held that the amendment was not adopted. Justice Riddick, in a concurring opinion, and joined by Justice Wood, took the position that the amendment had been adopted, and proceeded to Point Two. Of course, the concurring opinion is not a precedent. However the following statement, supported by cited authorities, is significant:

"A vacancy in an office may be caused by the death, resignation or removal of the official holding the office, or by the creation of a new office. *Smith* v. *Askew,* 48 Ark. 89. 'As a general rule, there is a

vacancy in office whenever there is no incumbent to discharge the duties of the office, that is, whenever the office is empty or unfilled; but as long as there is any one authorized to discharge the duties of the office, the office is not to be deemed vacant so as to authorize the exercise of the power to fill vacancies in office.' 23 Am. & Eng. Enc. Law (2 Ed.), 348, 349; *State* v. *Harrison,* 113 Ind. 434, 3 Am. St. Rep. 663; *People* v. *Edwards,* 93 Cal. 157; *Baxter* v. *Latimer,* 116 Mich. 356."

Ark. Stat. Ann. § 12-113 is in conflict with the Constitution, wherein it attempts to declare an office vacant because of the failure of one elected to the office to qualify. The Constitution, Art. 19, § 5, declares in substance that in that event the office is not in fact vacant —it is filled by the incumbent until his successor is elected and qualified.

Appellant advances this argument:

"Statutes declaring what shall constitute a vacancy in public office have arisen in two Arkansas cases. They are *Boyett* v. *Cowling,* 78 Ark. 494, 94 S. W. 682 (1906); and *Townley* v. *Hartsfield,* 113 Ark. 253, 168 S. W. 140 (1914). In both cases the Supreme Court of Arkansas gave effect to the statutes involved and found that there was a vacancy in office created by the statute involved. Both cases are very much in point."

With this statement we cannot agree. In the Boyett case the incumbent was re-elected but failed to apply for his commission and pay the fee therefor within sixty days. The Governor took the position that the office was vacant and appointed Cowling. This Court rejected Cowling's title to the office, holding that Boyett was the holdover Assessor, leaving him in office until a legally elected successor qualified.

Now as to the Townley case, there the incumbent road overseer was re-elected, but died before a new

term was to begin. The then County Judge appointed Townley. A new County Judge came in office and appointed Hartsfield for the new term for which the deceased road overseer was elected. This Court sustained Hartsfield's appointment. However, it was pointed out that the office of Road Overseer was created by statute "and it may be filled by election or appointment just as the statute may prescribe." The Legislature provided by local legislation for selection of road overseers by appointment in some Counties, and by election in others. In those Counties where they were to be elected, the statute reserved the power of appointment in the County Court in instances where one was elected and failed to qualify. So, in Townley we are dealing with an office which was a creature of the Legislature, and could, in fact, be abolished by the Legislature.

Appellant cites a number of statutory provisions which declare a vacancy in a State or County office when one elected to office fails to make bond when required, fails to obtain a commission, etc. The logical interpretation of these statutes in the face of the Constitution, Art. 19, § 5, is that the newly elected official failing to qualify as required by statute, is deemed to have forfeited his right to the office. Such a situation calls for action on the part of the Governor not inconsistent with the provisions of the Constitution and laws in harmony therewith, to cause the approaching vacancy in the new term to be filled.

Under the facts in the case at bar we hold that there was no vacancy in the office of Pulaski County Judge on January 1, 1967; that the power of appointment prescribed in Ark. Stat. Ann. § 12-113 is therefore not applicable in such a situation; and that Arch Campbell is authorized to hold the office until his successor is elected and qualified, as prescribed by Art. 19, § 5, of the Constitution. We are further of the opinion that this Constitutional provision contemplates the filling of the new term by election. The phrase, "until their successors are elected and qualified," is susceptible to

no other reasonable implication but that the office be filled by a vote of the people. There are numerous instances in which legislation is appropriately enacted to implement the requirements of the Constitution.

Affirmed.

OCIE RUTH DAME SPRUILL *v.* LAFAYETTE L. SPRUILL, ADMR.

5-4076 410 S. W. 2d 606

Opinion delivered January 23, 1967

Henry & Henry, for appellant.

Clark, Clark & Clark, for appellee.

CARLETON HARRIS, Chief Justice. This appeal relates to a divorce decree. Ocie Ruth Dame Spruill, ap-

pellant herein, instituted suit for divorce, alleging indignities against her husband, Lafayette J. Spruill,[1] who will at times hereafter, for convenience, be referred to as appellee. Mrs. Spruill sought possession of the home located on Lake Conway, the title being in her name. Mr. Spruill filed a general denial and a cross-complaint, asserting that he should be granted an absolute divorce from appellant on grounds of indignities. He also prayed that he be awarded an interest in the property because of the improvements which he had placed thereon, and he sought a lien to the extent of his interest. On trial, the court granted a divorce to Mr. Spruill, and ordered the property sold. It was found that Mrs. Spruill had expended the sum of $2,068.46 in partial payment for the construction of the residence plus $500.00 for the lot on which the house was placed, and which had been purchased by appellant prior to the marriage. The court further held that Mr. Spruill had, subsequent to the marriage, expended the sum of $2,795.48 on the construction of the residence, and granted him a lien in this amount, subordinate however to the interest ($2,568.46) of Mrs. Spruill. After payment of these amounts and costs, any remaining money was to be paid to appellant. From the decree so entered, Mrs. Spruill brings this appeal. For reversal, it is first asserted that the court erred in denying appellant an absolute divorce, and in granting same to Mr. Spruill. It is then contended that any money expended by appellee in improving the property was intended as a gift from him to his wife, and the Chancellor's findings are contrary to the law.

Pertinent background facts developed by the evidence are as follows:

The parties were married on March 3, 1964, at Enid, Oklahoma, Mr. Spruill being 67 years of age, and Mrs. Spruill being 60 years of age. No children were born to them, but both had children by previous marriages. At

[1]Subsequent to the entry of the decree, Mr. Spruill died, and the cause was revived in the name of Lafayette L. Spruill, as ancillary administrator of the estate of Lafayette J. Spruill, deceased.

the time of this marriage, Mr. Spruill, together with his son, owned a home in Tonkawa, Oklahoma. Spruill had been an oil field worker for Shell Oil Company, but had retired in 1957, because of a heart condition. According to appellee's testimony, his wife was dissatisfied while living in Tonkawa, and she urged that a home be built on Lake Conway in Faulkner County, Arkansas, where she owned a lot. Mrs. Spruill's version was that her husband wanted to move to that location so he could fish. The property in Oklahoma was sold, and the parties came to Faulkner County, Mr. Spruill depositing over $3,300.00 in the First National Bank of Conway. A shell home was constructed upon the land owned by appellant, Mrs. Spruill testifying that she owned property in North Little Rock, which was mortgaged to obtain a loan to help pay amounts due on the shell home contract. It is established that both parties furnished substantially the amount of monies for construction of the house as found by the Chancellor.

Under her first point, appellant calls attention to the fact that in rendering his findings, the Chancellor stated that he granted a divorce to Mr. Spruill, "not so much in an attempt to find fault, but if a divorce were granted the other way, it would be necessary that a dower award be made under the statute." It is urged that the Chancellor should have made a definite finding relative to the party at fault, and appellant contends that the evidence reflects that the divorce was occasioned by Mr. Spruill's conduct. We do not agree that appellant's argument contains merit. Let it be remembered that, irrespective of the reason given by the trial court as a basis for its decision, we will not reverse though the reason be erroneous, if the decision reached by the trial court is correct. *Reamey* v. *Watt,* 240 Ark. 893, 403 S. W. 2d 102; *Southern Farm Bureaw Casualty Insurance Company* v. *Reed,* 231 Ark. 759, 332 S. W. 2d 615, and cases cited therein. We think, and find, that the evidence preponderates heavily in favor of appellee, relative to which party was entitled to the divorce. Mrs. Spruill testified that her husband constantly cursed her, would

get angry, stay up all night, and sleep all day; that he would view television until midnight, turning the volume up so high that she could not sleep. Also, she stated that he would stay away from home all day, but would not allow her to drive either a car or a truck that they owned. Mrs. Nancy Pitts of Little Rock, appellant's daughter-in-law, testified in behalf of Mrs. Spruill, but it is admitted that her corroboration was slight.

Mr. Spruill testified that he prepared his own breakfast because his wife would not get up and fix it, and that she did not prepare more than six evening meals during the time of their marriage.[2] He also complained that she constantly cursed him, and this testimony was verified by the neighbors. Joe Dunbar stated that he heard appellant curse appellee about three times per week (while they were in the yard), and that Mr. Spruill would "turn around and walk away." He also testified that he heard Mrs. Spruill threaten her husband by stating that she would take a butcher knife and "cut his belly open;" in addition, that he heard a threat to shoot appellee with a gun. Mrs. Dunbar testified that she also overheard Mrs. Spruill curse her husband, and likewise was aware of the threat to cut him open; further, "Most every time I was out there working in my garden I'd hear her. And I'd hear her from the house too." The witness said that she never did hear appellee raise his voice. Christina Ryan, another neighbor, stated that appellant had told her that she wished her husband would "drop dead," this desire being more vigorously expressed by adding a vile epithet. We reiterate that the Chancellor's action in granting the divorce to Mrs. Spruill was supported by the preponderance of the testimony.

[2]The charge of failing to prepare meals was, to some extent, admitted by appellant. From her testimony: "I was tired. And he come in about 2:30 [P.M.] from town with this stuff and all I could see he got mad about, he come in, brought this stuff in and I was laying on the divan in the living room and he came in and went to cussing me. Cuss words why didn't I have dinner on the table. And I told him why you are on a diet and your stuff is all in there. Cottage cheese and juices is what you are supposed to eat and I had a sandwich."

Appellant contends that any monies expended by Mr. Spruill in improving appellant's property amounted to a gift to her from him, and that, under our cases, the court erred in granting him a judgment, and lien on the property, for the amounts he had expended. It is true that we have held that, where a husband advances money to improve his wife's property, or where property is purchased by a husband and placed in the name of a wife, there is a presumption that a gift was intended. See among other cases, *Fine* v. *Fine,* 209 Ark. 754, 192 S. W. 2d 212, and *Wood* v. *Wood,* 100 Ark. 370, 140 S. W. 2d 275. However, the presumption is rebuttable, and in fact, this court seems to have recognized in 1956, that the aforesaid rule, when strictly applied, frequently brings about a result that is harsh and inequitable. In *Stephens* v. *Stephens,* 226 Ark. 219, 288 S. W. 2d 957, the husband and wife of middle age (Mrs. Stephens having children by a prior marriage), who had been married in Illinois, made a trip to Baxter County, Arkansas, and purchased one tract of land as an estate by the entirety. Another tract was placed in the name of Mrs. Stephens, though Mr. Stephens furnished some part of the purchase price. Subsequently, the parties moved to Arkansas, where they intended to build a home on the tract purchased as an estate by the entirety; however, they changed their plans, sold that property, and built the home on the tract which was held in the name of the wife only. Both parties contributed financially to the construction of the house. After building the home, the parties realized that, in the event of Mrs. Stephens' death, difficulties could arise between the husband and the children of Mrs. Stephens, and a joint will was executed wherein each left to the other a life estate in any property owned, with the remainder going to the children of Mrs. Stephens. They also agreed that they would not revoke or cancel the will, but would keep it in force. Later, Mrs. Stephens instituted suit for divorce, and, though not denying that Mr. Stephens had contributed substantial amounts to the construction of the home, contended (for the same reason argued in the case before us) that he had no interest in the property. The Chan-

cellor granted Mrs. Stephens the divorce, but decreed that the property should be sold, and the proceeds divided. On appeal to this court, we said:

"The chancellor's decree, providing for a sale of the property and a division of the proceeds, is in accordance with the principles of equity and good conscience. In effect, Mr. Stephens was given a lien. He has reached the age of retirement and only has a small pension of $101.55 a month. He invested his life's savings in the home; he and Mrs. Stephens agreed in writing that the property had been acquired and improved by their joint efforts. It would be unthinkable to say, in the circumstances existing here, that Mr. Stephens has no interest in the home."

We then quoted an earlier case stating, "It does not comport with reason that one would denude himself of all his earnings during a long period of years without making some provision for his old age." Here, Mr. Spruill was a retired employee of Shell Oil Company, receiving a pension from that company, Social Security, and a Veterans Administration pension.[3] He, together with his son, owned the property in Tonkawa, Oklahoma. According to appellee's testimony (which the Chancellor evidently believed),[4] Mrs. Spruill was not happy there,

[3]Spruill testified that, upon being divorced, this particular payment, amounting to $80.00 per month, would cease.

[4]This is not difficult to understand, since Mrs. Spruill made several conflicting statements. For instance, she testified that she had been married twice previously, and flatly stated there had been no other marriages; subsequently, however, she admitted two other marriages, testifying, as to one, that she didn't forget it, but just didn't want to tell about it. On another occasion, she stated that she had $102.00 in the bank (at the time of the trial), but later said that she had about $2,000.00 in a Louisiana bank, which was deposited in her daughter's name. Also, she denied that she met Mr. Spruill through a lonely hearts club, and stated that she had never written him as "Dear Club Friend." However, appellee offered a letter in evidence purportedly written by appellant, wherein she referred to him as "Dear Club Friend;" a statement also appears in the letter. "There is one thing wrong. The club give you my name as Ruby Dame. It is Ruth Dame. Not Ruby."

cried and complained, and asked him to sell the Oklahoma property, and build a home on Lake Conway. It is true that in the Stephens case, the parties, subsequent to the construction, recognized in writing that the home had been acquired through their joint efforts. In the instant case, Mrs. Spruill, in open court, likewise recognized that her husband had contributed the approximate amount claimed for the construction of the home. Appellee, in his brief, makes two observations that we think are somewhat significant. The first is that the house was not built on the wife's property for the purpose of fulfilling a marital obligation to provide a home for Mrs. Spruill, for appellee was already providing a home in Oklahoma; the move to this state was simply an effort to please his wife. In the next place, it is pointed out that title was not placed in appellant at the direction of appellee, but rather, Mrs. Spruill already owned the property at the time of the transactions involved; in other words, appellee took no affirmative action to place the title in his wife, although in *Stephens* this was done.

Here, under the evidence, as in that case, "the Chancellor's decree, providing for a sale of the property and a division of the proceeds, is in accordance with the principles of equity and good conscience." This was appellant's fifth marriage, and a second for Mr. Spruill, the marriage coming late in life. The parties only lived together for 18 months. Appellee had sold his home that he owned with his son, and, after depositing something over $3,300.00 in the Conway Bank, proceeded to contribute the amount, heretofore mentioned, to the new home, making one payment of $2,500.00 within a week after his deposit was made. Here, undoubtedly, the greater part of his savings was expended for construction of this house.

There is no error in the decree.

Affirmed.

FOGLEMAN, J. dissents.

JOHN A. FOGLEMAN, Justice, dissenting. I concur with the majority opinion in affirming the chancellor insofar as granting the divorce to Mr. Spruill is concerned. But I must respectfully dissent from the affirmance of the trial court's holding with reference to the real estate involved. It seems to me that the court is abandoning a rule followed by it for over eighty years, and upon which courts and the bar have relied for all that time.

In *Ward* v. *The Estate of Ward,* 36 Ark. 586, decided in 1880, it was held that the law would not imply a promise on the part of the wife to repay advances made by her husband in improving her real property, it being presumed that they were gifts.

In *Hamby* v. *Brooks,* 86 Ark. 448, 111 S. W. 277, decided June 1, 1908, it was held that no presumption would be raised in such circumstances that a husband intended to create a trust in his own favor.

In cases where the advances were by purchase of land by the husband, with conveyance made to the wife, it was held that in order to overcome the presumption of a gift and impress a trust in favor of the husband, the evidence must be clear and convincing and so positive as to leave no doubt of the fact. *Hall* v. *Cox,* 104 Ark. 303, 149 S. W. 80; *Wood* v. *Wood,* 100 Ark. 370, 140 S. W. 275; *Carpenter* v. *Gibson,* 104 Ark. 32, 148 S. W. 508; *Wood* v. *Wood,* 116 Ark. 142, 172 S. W. 860; *Parks* v. *Parks,* 207 Ark. 720, 182 S. W. 2d 470.

It is true that it has been held that such a presumption is rebuttable by preponderating evidence of antecedent or contemporaneous declarations and matters showing that the wife took as trustee and not beneficially, if they are fairly connected with the transaction, or are facts which existed so soon thereafter as to form part of the transaction. *Della* v. *Della,* 98 Ark. 540, 136 S. W. 927; *Poole* v. *Oliver,* 89 Ark. 578, 117 S. W. 747; *Johnson* v. *Johnson,* 115 Ark. 416, 171 S. W. 475; *Parks* v. *Parks, supra.*

The presumption that the making of improvements by a husband on his wife's lands is a gift to her is recognized in later cases. See, for example, *Aycock* v. *Bottoms*, 201 Ark. 104, 144 S. W. 2d 43.

This court has heretofore, under these circumstances, refused to impress a trust on land in favor of a husband. *O'Hair* v. *O'Hair,* 76 Ark. 389, 88 S. W. 945. This is essential to the award of a lien on the wife's property as was done by the chancellor below.

These principles were all reviewed and applied in *Fine* v. *Fine,* 209 Ark. 754, 192 S. W. 2d 212, when that part of the decree of the trial court awarding the husband judgment for expenditures made in improvements on the wife's property was reversed by this court. The circumstances in that case would seem to me to present stronger equities in favor of the husband than are found here. There the husband had received serious and permanent injuries, incapacitating him. The greater portion of $1,130.00 deposited in the wife's bank account by him from a recovery of compensation for his injuries —the exact amount of his accident insurance—was expended in improving his wife's property. The husband claimed that he had entered into a partnership agreement with his wife whereby *they* would construct some rent houses on *her* property in order to have an income to live on in *their* old age. The wife claimed a gift to her. This court found the testimony in conflict and the evidence short of the "clear and convincing" effect the law requires. This case was cited as authority in *Smith* v. *Smith,* 227 Ark. 26, 295 S. W. 2d 790, where a chancellor's award of a judgment and lien in favor of a husband for such expenditures was reversed. Its holding has not at any time been overruled or modified.

The actions of Spruill here are no different from those of the husband in *Simpson* v. *Thayer,* 214 Ark. 566, 217 S. W. 2d 354. Dr. Simpson had made substantial improvements and paid taxes on property previously purchased by him, deeds for which had been taken in the

wife's name. In an action by which the heirs sought to have the title divested from the wife, this court said that these expenditures were all referable to his natural desire to care for and manage his wife's property.

I have found no evidence whatever in this record to make it appear that Spruill had any desire whatever to do anything except provide a home for his wife, however unsatisfactory she may have turned out to be. I cannot find any testimony that would show anything upon which the husband's actions were based other than a request by an unhappy Mrs. Spruill that the parties came to Arkansas because she didn't want to live with him in Oklahoma. This, to me, falls far short of the "clear and convincing" evidence heretofore required.

The majority opinion does not in any way distinguish this case from *Fine* v. *Fine,* 209 Ark. 754, 192 S. W. 2d 212. The fact that Spruill took no affirmative action to place the title to the lot in the wife is no distinction. Neither did Fine. Nor did Smith in *Smith* v. *Smith,* 227 Ark. 26, 295 S. W. 2d 790.

The majority find support for the decree of the chancellor in *Stephens* v. *Stephens,* 226 Ark. 219, 288 S. W. 2d 957, in which this court did not even pretend to overrule any of the principles theretofore followed, hereinabove set out and so well reviewed in *Fine* v. *Fine, supra.* But many distinctions can be found between that case and this. There the realty was *acquired* by the joint efforts of the parties and the husband made the down payment. He invested his entire life savings. After the construction of the home the parties realized that the title, being in the wife's name, would not pass after her death as they desired, so they made a joint will, each leaving the other a life estate in any property owned and entered into a contract to keep the will in force. This court found evidence to rebut the presumption of gift in the will and contract. Nothing of that sort exists here. On the contrary, it appears that Mrs. Spruill has a crippled leg and is unable to work, a condition

that existed at the time of the marriage; that she only has an income of $50.00 per month from a rental house in North Little Rock from which she must pay real estate taxes, insurance and upkeep and $20.00 per month on a mortgage to secure a loan of $1,100.00 for the house built on the property in question.

"Rules of property" have always been highly regarded by this court and it has been said that the overruling of such rules should rarely be done and, when done, it is with a great deal of trepidation. *Gibson* v. *Talley,* 206 Ark. 1, 174 S. W. 2d 551. In the cited case this court approved the following definition of a rule of property given in 54 C.J. 1110:

> "A settled legal principle governing the ownership and devolution of property; the decisions of the highest court of a state when they relate to and settle some principle of local law directly applicable to title. In the plural, those rules governing the descent, transfer, or sale of property, and the rules which affect the title and possession thereto."

The principles reviewed in *Fine* v. *Fine,* 209 Ark. 754, 192 S. W. 2d 212, seem to fit this definition well. If they are not actually "rules of property", they are virtually such. Although we should approach their overuling with trepidation, it would be far better if we would overrule them rather than abandon them.

For the reasons stated above, I respectfully dissent from the majority opinion.

Opinion delivered January 23, 1967

Jack Holt Jr., for appellant.

Bruce Bennett, Attorney General; *Fletcher Jackson,* Asst. Atty. Gen., for appellee.

GEORGE ROSE SMITH, Justice. In the court below a jury found the appellant guilty of assault with intent to kill and fixed his punishment at five years imprisonment. Here the appellant questions the sufficiency of the evidence and the trial court's ruling upon a point of evidence.

The proof is sufficient to support the verdict. On the day of the offense the appellant, who was traveling on foot in Little Rock, engaged in what should have been a trivial dispute with a motorist about which one should precede the other in crossing an intersection, each insisting that the other should go first. John Haydon, the motorist, finally drove past Fair and heard him use the words, "Blow your head off." Haydon stopped at a friend's house only two doors from the intersection.

A neighbor crossed the street to tell Haydon that Fair had a gun. Haydon informed the police of the incident.

Officer Bridges responded to Haydon's call and found the accused about two blocks down the street. When the officer approached Fair and attempted to question him, Fair unbuckled the holster of his pistol, started to draw the weapon, and said, "I'm going to blow your head off." Officer Bridges, after a struggle, succeeded in wresting the gun away from Fair. Bridges placed Fair under arrest and took him to police headquarters, where Fair tried to seize another officer's pistol, saying that he was going to get another gun and do a better job of it.

With respect to the sufficiency of the evidence the case is controlled by our holding in *Johnson* v. *State,* 132 Ark. 128, 200 S. W. 982 (1918). There, upon facts similar to this appellant's encounter with Officer Bridges, we held that the act of drawing a pistol, if accompanied by a threat to use it, constitutes an assault with intent to kill. The turning point, we said, is whether the overt act is merely in preparation for an assault or is actually part of an assault. In the case at bar the jury were justified by the testimony in finding that Fair's attempt to draw his pisol, together with his threatening language, constituted an assault with intent to kill Officer Bridges.

The challenged ruling upon a point of evidence occurred during the State's cross examination of Fair's sister. The deputy prosecuting attorney asked this witness where Fair had been in 1947. The witness answered, "He was in the state penitentiary in 1947, I believe." Defense counsel objected. The court sustained the objection and admonished the jury to disregard the witness's statement. It is now insisted that a mistrial should have been declared.

We do not approve such tactics on the part of the prosecution. Fair's earlier confinement was wholly in-

admissible and should not have been mentioned in the presence of the jury. Nevethheless the trial judge did not commit an error, for he sustained the objection to the statement and instructed the jury not to consider it. Counsel for the accused was apparently satisfied with the court's ruling, for he did not press the matter by asking for a mistrial. In the circumstances the point now asserted was not preserved for review on appeal. *Stockton* v. *State,* 239 Ark. 228, 388 S. W. 2d 382 (1965).

Affirmed.

DR. FRANK C. SMITH ET UX *v.* UNION NATIONAL BANK OF LITTLE ROCK

5-4093 410 S. W. 2d 599

Opinion delivered January 23, 1967

Fred A. Newth Jr., for appellant.

W. P. Hamilton Jr. of *Chowning, Mitchell, Hamilton & Burrow,* for appellee.

GEORGE ROSE SMITH, Justice. This appeal is a sequel to an earlier one. In 1962 the appellants, Dr. Smith and his wife, conveyed property to the appellee bank upon an irrevocable trust under which the income was to be paid to the Smiths for life and thereafter to other bene- cancellation of the trust on the ground that it was void- able for want of mental capacity on their part. The trial court set the trust aside, but that ruling was reversed on appeal. *Union Nat'l Bank* v. *Smith,* 240 Ark. 354, 400 S. W. 2d 652 (1966).

Thereafter the bank as trustee filed the present petition, asking the chancery court to fix a fee, to be paid from the trust property, for the services of its attorneys in defending the validity of the trust. The chancellor ficiaries. Two years later the Smiths brought a suit for they wanted to file a petition to make the bank's petition more definite and certain and that Mr. Hardin, the Smiths' original attorney, had engaged Mr. Newth as co-counsel only a few days earlier. The chancellor denied the request for a continuance.

We find no abuse of the court's conceded discretion in the matter. We do not see how a petition for the determination and allowance of an attorney's fee could be made much more definite or certain. That was apparently the view of the appellants' lawyers, for they filed a response resisting the petition on its merits. The trus- granted the relief sought, allowing a fee of $3,500. The appellants urge three unrelated points for a reversal of the decree.

First, it is contended that on the day of trial the appellants were entitled to a continuance. Their counsel had filed a response to the trustee's petition, contesting the liability of the trust estate for the requested fee and affirmatively seeking an increase in the trust income payments to the Smiths. The case was set for trial on May 13, 1966. On that day the trustee appeared with its witnesses, ready for trial. The Smiths' attorneys made an oral motion for a continuance, saying that

tee came to court with its witnesses, prepared for trial. The court was ready to hear the case. The reasons underlying the request for a delay not only were insubstantial but also were of such a nature that they might with diligence have been asserted before the day of trial. The chancellor acted well within the limits of his discretion in proceeding with the hearing.

Secondly, the appellants suggest that the trial court was without jurisdiction for the reason that the mandate of this court, reversing the original decree, had not been filed when the present petition was heard. The mandate, however, is merely evidence of the trial court's reacquisition of jurisdiction, and the filing of that evidence may be waived. *Bertig Bros.* v. *Independent Gin Co.,* 147 Ark. 581, 228 S. W. 392 (1921). In the case at bar the chancellor observed at the outset of the hearing that the mandate had not been filed. Neither side expressed any objection to going ahead with the trial in the face of that deficiency. Had there been any protest about the absence of the mandate the irregularity could have been quickly corrected by a routine application to the clerk of this court. It is not our practice to reverse the action of the trial court when a party fails to object to a procedural defect that could have been readily supplied had the point been raised seasonably. *Degen* v. *Acme Brick Co.,* 228 Ark. 1054, 312 S. W. 2d 194 (1958). We hold that the filing of the mandate was waived.

Thirdly, the appellants maintain that the trustee's attorneys lost their right to be paid from the trust estate by failing to request their fee when the case was in this court upon the first appeal. Not so. When a party's attorney's fee is to be paid by his adversary, as in a divorce case or an action against an insurance company, we customarily fix the fee for services in this court. We are familiar with the legal services rendered on appeal and are in a better position than the trial court to fix a fair fee.

That is not the situation here. The trustee seeks to

pay its own attorney, not that of its adversary. It might have paid its counsel merely upon the submission of their bill for services. Instead, to give the beneficiaries an opportunity to be heard, the trustee chose the alternative course of asking the chancellor to determine the allowance. Evidence was heard—a procedure not available when the request is addressed to us. The beneficiaries were afforded their day in court. We find no want of jurisdiction in the trial court to handle the matter in a manner manifestly fair to all concerned.

Affirmed.

CITY OF FT. SMITH *v.* CHARLES C. ANDERSON, ET UX

5-4097 410 S. W. 2d 597

Opinion delivered January 23, 1967

Daily & Woods, for appellant.

Garner & Parker, for appellee.

PAUL WARD, Justice. Mr. and Mrs. Anderson (appellees) filed a complaint in circuit court against the City of Fort Smith (appellant) to recover damages to their

home and furniture caused by a seepage or overflow of sewage. Appellant entered a general denial and, after a trial, the jury returned a verdict in favor of appellees in the amount of $3,000, hence this appeal.

The facts here stated are not in dispute. In 1963 appellant enacted ordinance no. 2431 for the purpose of rehabilitating its existing sewer system, and to finance the cost from the proceeds of sewer revenue bonds in approximately the sum of $6,500,000. The proposed project was carried out promptly.

Appellees bought and occupied a home on North "T" Street which was within the area of the completed sewer system. On December 16, 1964 their house and furniture were extensively damaged by sewage which covered the floor of the house. Appellant was notified, the cause of the sewage overflow was promptly eliminated and there has been no reoccurrence of sewage trouble since.

The extent of the damage is immaterial in view of the conclusion hereafter announced.

1. Appellant, in this case, was acting in a governmental capacity and could not, therefore, be sued in tort. In the case of *Kirksey* v. *City of Fort Smith,* 227 Ark. 630, 300 S. W. 2d 257 we said:

> ". . . a city in the operation of waterworks, electric light plants, sewer system, etc. was engaged in governmental functions, and not liable in damages for negligence of its officers."

To the same effect see: *Jones* v. *Sewer Improvement District of Rogers,* 119 Ark. 166, 177 S. W. 888, and *Cabbiness* v. *City of North Little Rock,* 228 Ark. 356, 307 S. W. 2d 529.

2. However, appellees, in their complaint, alleged: that the ordinance obligated them "to pay for sewer

service" which "created a contractual obligation or quasi contractual obligation on the part of the City to properly maintain the sewer system . . .", but that "said City refused to make corrections in said sewer system . . . .", and; that appellant thereby breached its contract and created a *nuisance* to the "damage" of appellees.

(a) There is no substantial evidence to prove a contract. At page 112 of the transcript appellees "admitted that there is no contract between the City and the Andersons other than this ordinance". We have carefully examined the ordinance (as abstracted by appellees) and find only one mention of a contract which reads "that by contract special rates can be established", referring to charges for sewer services to be paid by appellees.

(b) Neither is there any substantial evidence in the record to show a *nuisance* was created by any defect in the sewer system; and certainly there is no substantial evidence that a *permanent nuisance* was created.

Even though it be conceded, for the purpose of this opinion, that the evidence does show a *temporary nuisance* was created, appellees would not be entitled to the relief granted by the jury. Our decisions appear to be unanimous in holding that appellees' only remedy for relief would be to require the City to abate the *temporary nuisance.*

In the case of *St. Francis Drainage District* v. *Austin,* 227 Ark. 167, (pp 172-173) 296 S. W. 2d 668, we approved this statement:

> "If, when and after the plant has been completed, it is so maintained or operated as to become a nuisance, relief must be obtained by suit to abate the nuisance."

In *Jones* v. *Sewer Improvement Dist. No.* 3 *of Rogers, supra,* this Court said:

"As we have already seen, this Court has uniformly held that neither municipal corporations nor local improvement districts nor their officers may be sued at law or tort; but it does not follow that in a proper case they may not be enjoined from creating a nuisance or be required to abate one already created by them."

It follows, from what we have said above, that the judgment of the trial court must be reversed, and it is so ordered.

P. A. RUSSELL *v.* SOUTH ARKANSAS OIL COMPANY

5-4084 410 S. W. 2d 865

Opinion delivered January 23, 1967
[Rehearing denied February 27, 1967.]

Gaughan & Laney, for appellant.

Spencer & Spencer and *Don Gillaspie,* for appellee.

LYLE BROWN, Justice. This litigation stems from the cancellation of a ten-year lease held by South Arkansas Oil Company on a filling station site. The lease would not normally expire until August 24, 1967. In May 1965 South Arkansas Oil Company filed suit alleging breach of the lease by the defendant, P. A. Russell, and seeking damages. Russell averred that the Oil Company had in fact breached the lease and prayed for damages. The Chancellor declared that the lease was voided by the ac-

tions of the lessor, Russell, as of August 1, 1964. Damages were denied either party, and P. A. Russell appeals. The principal issue is the determination of which party breached the lease and the date of the breach.

Russell owned the filling station site and improvements thereon in Camden, and in August 1957 executed a ten-year lease to W. R. McHaney. Appellee, South Arkansas Oil Company, shortly took over the lease by assignment from McHaney. The lease rental to Russell was based on gallonage sales, but with a minimum payment of $1,200.00 annually, payable $100.00 monthly. The station was equipped with tanks, pumps, signs, etc., belonging to the Oil Company and stocked with its products. The venture was apparently never profitable. Several operators conducted the business over the years, but the rentals to Russell never exceeded the minimum of $100.00 monthly.

In 1962 the Oil Company and Russell entered into an oral agreement under which Russell became the station operator. The operating agreement was admittedly vague but apparently the Oil Company was to continue to honor lease payments and pay the utilities, whereas Russell would market their products. This arrangement began on a temporary basis, the principal purpose being to keep the station open until the Oil Company could find a suitable operator.

According to the executive officer of the Oil Company, Russell's operation was not profitable to the company. Wadsworth, the Oil Company executive, testified that in 1963 he sent two different individuals to Russell to take over the operation and Russell refused to give possession; that in April 1964 he wrote Russell to either pay the utilities or close the station; that a similar written demand was made in June; that in July 1964 Wadsworth went to the station and personally demanded possession and it was refused; that a few days later he wrote Russell to "... deliver the keys to such station to us as soon as possible and vacate the premises. In

the event you are still in the station on August 1, 1964 . . . then we will consider that you are voluntarily voiding our lease with you."

This demand brought no response and, according to Wadsworth, he made the last lease payment of $100.00 to cover July rent. He directed that utility bills no longer be billed to the Oil Company. In December 1964 a Mr. Pate was operating the station and marketing a competitor's product. Pate had bought Russell's stock.

The only further contact of appellee Oil Company with this station (according to its executive officer) was in regard to its equipment. He allegedly contacted the jobber whose products were there merchandised concerning rent for the Oil Company's equipment. No agreement was reached. This was in December 1964. Then in January 1965 the Oil Company removed its equipment.

It would serve no useful purpose to recount the testimony of Russell. Suffice it to say that he disagreed with the Oil Company's witness concerning Russell's refusal to give possession. In view of Wadsworth's testimony we cannot say the findings of the Chancellor that Russell breached the lease are against the preponderance of the evidence.

The only other witness offered to sustain Russell's contention that he did not breach the lease was James Anderson, a liquor store operator at Cullendale. His testimony tends to support Russell's theory that the Oil Company was exercising control over the property *after* August 1, 1964. Anderson testified that in late August or early September he contacted Russell about renting the station; that he made an oral agreement with Wadsworth to rent it and paid him $100.00; that he posted $100.00 good faith money with Russell to assure the latter he would buy his stock when he took over; that within a matter of weeks he gave up the idea and did not seek to reclaim the two payments.

The action of Wadsworth with respect to accepting the payment from Anderson is difficult to reconcile with his contention that the lease terminated the previous August. However, his company still had substantial equipment on the premises; they were anxious to see an operator installed who would market their products instead of those of a competitor; and Wadsworth said he explained to Anderson that the Oil Company no longer held a lease. Furthermore, it must be remembered that Russell refused the payment. The Chancellor concluded that this transaction was not an act of dominion or control over the premises by Wadsworth, and we are unable to say his finding on this point was against the preponderance of the evidence.

Russell's claim for damages alleged to have been committed by the Oil Company in removing the underground tanks, pumps, etc., was likewise rejected by the Chancellor. Here again the testimony was conflicting.

This is one of those cases of conflicting testimony and circumstances. Absent the findings of the Chancellor, it would be most difficult to decide on the cold record. But, as so ably stated by Justice McFaddin in the case of *Orrell* v. *E. Barton & Co.,* 240 Ark. 211, 398 S. W. 2d 685 (1966):

> "The Trial Court had the opportunity to observe the witnesses' demeanor, appearance, mannerisms, candor or lack of candor, and consequently was in a much better position than is this Court, which sees only the typewritten page, to judge the credibility of the witnesses and the weight to be given the testimony of each."

The decree of the Chancery Court is affirmed.

BYRD, J. dissents.

CONLEY BYRD, Justice, dissenting. The parties agree that after August, 1964, Mr. Anderson wanted to obtain

a lease upon the service station involved and that he contacted Mr. Wadsworth, an officer of appellee and paid him $100 for a month-to-month lease on the premises. The testimony of Mr. Wadsworth is that he accepted the $100 and tendered same to Mr. Russell, the appellant, less certain utility expenses which Mr. Wadsworth had earlier claimed he was entitled to withhold at the time he had the utilities cut off. The facts also show that Mr. Wadsworth did not attempt to remove the equipment until after he was informed of the provision in the lease that the equipment automatically belonged to appellant if appellee abandoned the lease, and then not until he saw his competitor's gasoline being sold through his tanks by Mr. Pate.

In view of the fact that Mr. Wadsworth wrote appellant on April 13, 1964, that the service station lease was an unprofitable venture from which he would like to be released, I cannot regard his conduct in accepting the rental check from Mr. Anderson as anything but an act of dominion over the premises at that time. Mr. Wadsworth's explanation that he intended to lease only his equipment to Mr. Anderson does not comport with his conduct in accepting $100 rent and forwarding same to appellant. Furthermore, Mr. Anderson testified positively that he rented the premises from Mr. Wadsworth.

Therefore, I dissent from the affirmance of the trial court's finding that appellant terminated the lease on August 1, 1964.

F. E. McCray et al *v.* Lyle B. Marshall et ux

5-4063 410 S. W. 2d 595

Opinion delivered January 23, 1967

E. L. Schieffler, for appellant.

Hall, Purcell, Boswell & Tucker, for appellee.

Conley Byrd, Justice. Involved in this appeal is the title to 2.4 acres of land described as "all of the E½ of NW¼ NE¼ Sec. 3, T-2-S, R-15-W, lying West of Old Hwy. No. 70." The trial court quieted title to the 2.4 acres in appellees, Mr. and Mrs. Lyle B. Marshall, as the owners by adverse posession. For reversal the appellants, who are the heirs at law of Mr. and Mrs. W. N. McCray and are the record title holders, relied upon the following points:

1. Appellees did not come into equity with clean hands.

2. The record shows that appellees were not claiming hostile to the whole world because they permitted a house to be built on the area by Ouletta Enterprises without objection.

3. Appellees were holding same by mistake.

4. The trial court erred in admitting a photograph.

The record shows that the appellants' decedents acquired title to the lands in question by deeds in 1914 and 1918. Mr. and Mrs. W. N. McCray died while appellants were in their teens, over forty-five years ago. Appellants testified that they visited the lands from time to time and that same had never been fenced. Mr. Marshall testified that when he purchased his 180-acre farm in 1950 the lands in question were fenced in with his farm, that he thought the lands were part of the land which he purchased, and that he had claimed all the way to the highway since he had taken possession of his farm. Neighbors living in the area who had been familiar with the lands for more than thirty years, testified that the strip of land in question had been fenced with the farm purchased by Mr. Marshall and that the lands had always been considered a part of the farm owned by Mr. Marshall.

This particular controversy developed in 1962 when a survey was made for a county road to the river running west from Old Highway No. 70, now Highway No. 5. The surveyor at that time informed Mr. Marshall that he had some "lost land" between his and the highway —*i. e.,* the land was not on the tax books. Thereafter Mr. Marshall had it placed on the tax books for the tax year of 1962 and subsequently offered to give appellants $300 for a quitclaim deed to clear up his record title. It was Mr. Marshall's thinking that it would be cheaper to pay $300 for a quitclaim deed than it would be to bring an action to quiet his title.

Some time before this action was filed, Ouletta Enterprises, Inc. began construction of a house on a portion of the 2.4 acres which had been platted as Lot 1, Bel Monte Estates Subdivision. However, Ouletta Enterprices, Inc. was not made a party to the litigation.

Appellants' argument that the Marshalls are barred by the Clean Hands Doctrine is apparently based upon certain statements allegedly made by Mr. Marshall on the telephone when he tried to purchase the outstanding record title for $300, with reference to tax payments since 1950; and upon the further premise that he knowingly permitted Ouletta Enterprises to build a house on the premises without objection. There is nothing in the record to show that the appellants were misled in any way by the alleged statements, nor is there anything to show how appellants are injured by Mr. Marshall's alleged conduct toward Ouletta Enterprises. Consequently we hold this contention without merit.

The second point urged, that the Marshalls were not making a hostile claim to the lands against the whole world, is based upon the testimony of a subcontractor that he built a brick house on the premises for Ouletta Enterprises within view of the Marshall home without objection from the Marshalls. Here again the record fails to show the connection of Ouletta Enterprises with either party, and since there was ample evidence to sustain the chancellor's finding of adverse possession in favor of Mr. Marshall before Ouletta Enterprises entered the premises, we hold this contention to be without merit.

Nor can we find any merit in the allegation that the Marshalls were holding the land by mistake. When the evidence is viewed in its entirety, the clear preponderance thereof shows that it was considered part of premises owned by the Marshalls and their predecessors for more than thirty years; that it had been enclosed by a fence which also enclosed the farm owned by the Mar-

shalls and their predecessors; and that the Marshalls were definitely claiming that they owned the lands.

The photograph of which appellants complain is a U. S. Department of Agriculture conservation plan aerial photograph on a scale of eight inches to a mile. Before the chancellor permitted it to be introduced it was ascertained that it accurately showed a picture of the lands involved, the location of the Marshall home and the location of the highway about which many witnesses testified. We think it was properly introduced for these purposes.

Affirmed.

HELEN LORETTA MCINTYRE *v.* LEON BENNETT MCINTYRE

5-4051 410 S. W. 2d 117

Opinion delivered January 23, 1967

[Original opinion delivered December 12, 1966, p. 623.]

PER CURIAM. Rehearing is denied, but an examination of the record and the opinion rendered on December 12, 1966, reveals that certain statements in the opinion are, perhaps, erroneous. The original opinion seems to assume that appellant continues in possession of the real property in question. The record, however, reveals that the appellant was given possession of this real estate on which the home of the parties was located by the original decree, based on the agreement of the parties, only until appellee finished paying for certain American Telephone and Telegraph Company stock.

It is undisputed that appellant had already vacated the property by the time the stock was paid for; that appellee then took possession and lived in the home intermittently until he married his present wife and since that marriage he has lived there most of the time. Appellant testified that, under their agreement appellee wanted to live there, that it was fair for him to have the house to live in, and that if he still wanted to live in it and use it, she had no objection.

The present possession of the property should not be interrupted on the basis of the matter now before the court, so we amend the original opinion to direct that appellee's possession (instead of appellant's) be not disturbed prior to sale of the property.

J. C. REED v. STATE

5208 411 S. W. 2d 285

Opinion delivered January 30, 1967
[Rehearing denied March 6, 1967.]

Jeff Duty, for appellant.

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

CARLETON HARRIS, Chief Justice. This appeal relates to the power of the Circuit Court to grant suspended sentences, and subsequently to revoke same. J. C. Reed, appellant herein, was charged with the crime of burglary, and on January 7, 1963, entered a plea of guilty. The Circuit Court sentenced him to three years in the State Penitentiary, but deferred the pronouncement of sentence, dependent upon the good behavior of appellant. On October 24, 1963, Reed was ordered to appear to show cause why sentence should not be pronounced upon him, and, on November 21 of the same year, the hearing having been continued to that date, the court sentenced appellant to serve one year of the three year term, and stated:

"Pronouncement of sentence of the remaining two years be and is hereby deferred upon the proper behavior of the defendant during the remaining two-year period."

Thereafter, Reed was ordered to again appear on March 30, 1965, to show cause why the additional two years of the original sentence should not be pronounced, but appellant failed to appear, and the clerk of the court was directed to issue a warrant of arrest for him. Appellant was arrested on February 14, 1966, and on February 18, 1966, in open court, the court sentenced Reed to serve the remaining two years, finding that appellant had voluntarily withdrawn from the court's jurisdiction about February, 1965. From this judgment, appellant bring this appeal.

For reversal, it is first argued that the trial court lost jurisdiction to revoke the suspension after the passing of three years from the time of the original suspended sentence (January 7, 1963). We find no merit in this assertion. The last "show cause" order was issued in March, 1965, well within the three-year period. The court found that officers were unable to locate Reed in Washington County or within the State of Arkansas, and

that the parole officer, after a diligent search, was unable to find appellant. It was then found:

"***that the voluntary and willful withdrawal of the defendent from the Jurisdiction of the Court on or about February, 1965, and the failure to make reports to the parole officer, or to receive permission to leave the State, and his failure to appear after notice was given to show cause, constitute and serve to toll the remainder of the three-year statute of limitation within which the Court could exercise his right of pronouncement of sentence on the defendant."

In *Parkerson* v. *State,* 230 Ark. 118, 321 S. W. 2d 207, we held that the fact that the actual hearing on a petition (filed during the period of suspension) for the revocation of a suspended sentence, was not heard until a date beyond the period of suspension, did not divest the trial court of jurisdiction to revoke said suspended sentence. In that case, the hearing was not held until after the period of suspension had expired because of the fact that the defendant had undergone major surgery, and was not able to appear in court. Here, there are more cogent reasons for holding that the court had not lost jurisdiction, for Reed had voluntarily absented himself from the county and state, and could not be found by the officers. Undoubtedly, had this not happened, the hearing would have been held nearly a year earlier. For this court to hold as appellant urges, would simply mean that once a defendant received a suspended sentence, he would need only to go to some locality where he could not be found, and remain there until after the expiration of the period of suspension; he would then be free of any restraint of his personal conduct, occasioned by the court's leniency in holding in abeyance the execution of the sentence. We hold this contention to be without merit.

Appellant next urges that the court retained no power to impose the additional term of two years, after earlier sentencing Reed to a one-year term, that term

having been served; that there was no power to render a "piece meal" sentence. It is insisted that the court was without authority to revoke only a part of the deferred sentence, and suspend the remainder; that, after Reed was committed to the State Penitentiary under the November 21, 1963, order, the authority of the Washington Circuit Court was exhausted. Appellant relies principally upon *Emerson* v. *Boyles,* 170 Ark. 621, 280 S. W. 1005, but that case is not in point. It involved the question of whether a sentence could be set aside, the prisoner returned from the penitentiary, and the case continued. This court held, properly, that the defendant could not be placed in double jeopardy, and quashed the judgment of the Pulaski County Circuit Court, which had ordered Boyles released.

There is authority to support the argument by appellant; in fact, it may be that his position is supported by the majority view. However, we are not favorably impressed with the rationale of the decisions that we have read, and consider the procedure urged by appellant to be in conflict with our own statute. Ark. Stat. Ann. § 43-2324 (Repl. 1964) gives the judge trying a case authority to postpone the pronouncement of final sentence and judgment upon such conditions as he shall deem proper and reasonable for probation, the section concluding with this phrase:

"* * * provided, however, the Court having jurisdiction *may at any time* during the period of suspension revoke the same *and order execution of the full sentence.*" (Our emphasis in each instance)

We particularly call attention to the italicized words, and, in fact, many of our Circuit Courts have, for some period of time, followed the procedure here under attack. The South Carolina Supreme Court had a similar question before it in the case of *Moore* v. *Patterson,* 203 S. C. 90, 26 S. E. 2d 319. In affirming the General Sessions Circuit Court, the Supreme Court stated:

"The question then is: Can a Circuit Judge impose a sentence of imprisonment in a case of this sort and provide in it that after the defendant shall have served a part of the time he be placed on probation for the remainder of the term?"

The court then pointed out that, in imposing sentences, the Circuit Judges of the state had followed the practice in misdemeanor cases of imposing only a part of the sentence, and suspending, during good behavior, the execution of a part of the sentence. It was then said:

"In 1941 the Legislature adopted the probation and parole act, sections 1038-1 to 1038-16 of the Code. The first section of this Act reads as follows: 'After conviction or plea for any offense, except a crime punishable by death or life imprisonment, the judge of any court of record with criminal jurisdiction at the time of sentence may suspend the imposition or the execution of a sentence and place the defendant on probation or may impose a fine and also place the defendant on probation.'

"It will be noted that this Act extends the power to suspend sentences to a great many felonies, as well as misdemeanor.

"In view of the long prevailing and approved practice in cases of misdemeanors, before the adoption of the probation law, it is our opinion that Section 1038-1, giving the trial Judges the power to suspend the execution of the entire sentence and to place the defendant on probation, is also intended to give them the right at the time of the sentence to provide for a suspension of a part of such imprisonment and a placing of the defendant on probation, after serving a designated portion of the term of imprisonment."

It seems to us that our statute even more clearly gives the trial court the right to follow the procedure which is here in issue.

After all, how can the defendant properly complain, or contend that he was prejudiced under the circumstances related? To begin with, his entire sentence was suspended, and, by the observance of proper and legal conduct, Reed would never have served *any part* of the three-year sentence. Yet, though violating the conditions of the suspension (which would have justified the court in imposing the full sentence), the judge still, though punishing to some degree the departure from good behavior, gave appellant another chance by suspending the remainder of the three years. Again, appellant had the opportunity to avoid serving the balance, but as before, he violated the trust that had been placed in him. Our Legislature, as well as the courts, has recognized the value and justness of permitting suspended sentences in deserving cases,[1] but it does not follow that one can take advantage of a court's generosity, in requiring a defendant to serve only a small portion of his sentence, and then contend that he should go absolutely free.

Affirmed.

1. For instance, see Act 438 of 1965, which supplements the statute herein discussed.

MATTIE JORDAN COLEMAN ET AL *v.* SALLY WALLS, EX'X

5-4078 410 S. W. 2d 749

Opinion delivered January 30, 1967

[redacted]

L. Hobson Mahon, for appellant.

Forrest E. Long, for appellee.

GEORGE ROSE SMITH, Justice. This is a contest of the will of Mary Gaines Jackson, who died January 10, 1963. The will in question was executed on November 8, 1962. The appellants objected to its probate on the ground that the instrument was not signed and witnessed in the manner required by law and on the additional ground that the testatrix lacked testamentary capacity. The probate court sustained the will. Here the appellants attack the will upon the same grounds that were asserted in the court below.

We consider first the validity of the testatrix's sig-

nature. When the will was executed the testatrix, Mrs. Jackson, was about a hundred years old. For the preceding seventeen or eighteen years she had been totally blind. Before her affliction Mrs. Jackson had been able to read and write, but the contestants proved by several witnesses that after she lost her sight she made no attempt to write and customarily signed her name by mark. Inasmuch as the will bears the testatrix's purported signature, the appellants insist that it could not have been genuine.

This argument fails to take into account the proponents' proof. The typewritten will was prepared by Florence D. Sands, who was present at its execution. Mrs. Sands testified that after reading the will aloud she assisted the testatrix in signing it. The pen was in the testatrix's hand, but Mrs. Sands helped her write her name. The signature, as it appears upon a photostatic copy of the will in the record, is not illegible, but the letters are so badly formed as to confirm Mrs. Sands' testimony.

Upon this point the case is governed by *Vines* v. *Clingfost,* 21 Ark. 309 (1860). There the testator was so feeble that the draftsman of the will guided the testator's hand as he signed the instrument. We upheld the will, saying: "If one having testamentary capacity, is unable from palsy or other cause, to steady his hand so as to make to his will the signature required by law, another person may hold his hand and aid him in so doing; and it is not necessary to prove any express request from the testator for such assistance. The act is his own, with the assistance of another, and not the act of another under authority from him." In the case at bar the testimony convinces us that the testatrix intended to sign the will and merely accepted aid in carrying out her purpose.

We come next to the formalities attending the execution of the will. Mrs. Jackson was in bed when she signed the will. The two attesting witnesses, Fred L.

Harris and Marie Ellison, then came separately into the room and signed the will beneath a typical attestation clause. The appellants seem to contend, though this is not clear, that the two witnesses were required to sign the will in the presence of each other.

There has never been any requirement in Arkansas that the two witnesses sign in the presence of each other, though in construing our original statute we said that such a course might be most prudent. *Rogers* v. *Diamond,* 13 Ark. 474 (1853). In fact, very few states have such a requirement, and where it exists it is clearly expressed in the statute. Atkinson, Wills, 295 (1937).

The Probate Code made no change in our law in this respect. We quote the pertinent section of the Code, Ark. Stat. Ann. § 60-403 (Supp. 1965):

> The execution of a will, other than holographic, must be by the signature of the testator and of at least two witnesses as follows:
>
> a. TESTATOR. The testator shall declare to the attesting witnesses that the instrument is his will and either
>
> (1) Himself sign; or
>
> (2) Acknowledge his signature already made; or
>
> (3) Sign by mark, his name being written near it and witnessed by a person who writes his own name as witness to the signature; or
>
> (4) At his discretion and in his presence have someone else sign his name for him, (the person so signing shall write his own name and state that he signed the testator's name at the request of the testator); and
>
> (5) In any of the above cases the signature must be at the end of the instrument and the act must be

done in the presence of two or more attesting witnesses.

b. WITNESSES. The attesting witnesses must sign at the request and in the presence of the testator.

It will be seen that the section contains two subdivisions. Subsection *a* is headed "Testator" and deals only with the manner in which the testator is to execute the will. The requirement that "the act must be done in the presence of two or more witnesses" discloses no legislative intention to require that the witnesses sign in each other's presence.

Subsection *b* is headed "Witnesses" and requires merely that the witnesses sign at the request and in the presence of the testator. Had the legislature intended to change the law, clearly the modification would have been inserted in subsection *b*. Our conclusion is reinforced by Official Probate Form 4, "Proof of Will," 214 Ark. xix. That form, prepared by the draftsmen of the Code and promulgated by this court, contains no recitation that the witnesses signed in the presence of each other.

Only one of the attesting witnesses, Harris, testified, and he did not explicitly state that Mrs. Jackson acknowledged her signature and requested him to sign as a witness. He did say, however, that he was told that the instrument was a will and that he was asked to sign it. Mrs. Sands, a disinterested witness who was present throughout the execution process, testified clearly that the testatrix knew what she was doing and that the two witnesses came in and signed the will in her presence. The testimony is sufficient, under our decisions, to support an inference from the circumstances that all the statutory provisions were substantially complied with. *Hanel* v. *Springle,* 237 Ark. 356, 372 S. W. 2d 822 (1963); *Leister* v. *Chitwood,* 216 Ark. 418, 225 S. W. 2d 936 (1950).

We need not discuss the remaining issue, that of

testamentary capacity, in detail. The contestants' proof was directed principally to the testatrix's asserted inability to write her name. The one medical witness testified that Mrs. Jackson suffered from senility, that her mind would come and go. He did not attempt to say unequivocally that the testatrix lacked testamentary capacity on the day the will was executed. The lay testimony preponderates in favor of the view that Mrs. Jackson had sufficient mental ability to meet the familiar tests of testamentary capacity. Finally, there is nothing of an unusual nature in the will itself. There is a devise of real property to the testatrix's only child, a bequest of personal property to her brother and sister, and a devise of real property to her niece, Sally Walls, who had lived in Mrs. Jackson's home and taken care of her for more than a year. Upon the record as a whole we are convinced that the probate court correctly upheld the will.

Affirmed.

BYRD, J., concurs.

HARRIS, C. J., dissents.

CONLEY BYRD, Justice, concurring. This is an appeal by Mattie Jordon Coleman et al., heirs at law of Mary Gaines Jackson, from a decree admitting to probate a will executed some three months before the aged testatrix's death. The contestants allege that the will was not signed by the testatrix in the manner required by law; that it was not properly attested by the witnesses in the presence of each other; and that the testatrix did not have sufficient testamentary capacity.

Contestants' first point is directed to the fact that the will bears testatrix's purported signature. During the trial much testimony was directed to the fact that testatrix became blind 17 or 18 years before her death and that she did not thereafter attempt to write. There was also proof to the effect that testatrix had made oth-

er wills before the present one was executed and that testatrix had executed the previous wills with an "X." However, the draftsman of the will, a Mrs. Sands, testified that, after reading the will to the testatrix, she "sorta held her hand to keep it on the line" while she signed the will.

We held in *Vines et al* v. *Clingfost, Exr.,* 21 Ark. 309 (1860), that where the testator holds the pen in subscribing his name to the will, and another person guides it, the signature thus made is the act of the testator and that it was not necessary for the person guiding the testator's hand to sign the will as an attesting witness to the signature. Under the circumstances, we hold that the trial court's finding of validity on this issue is not contrary to the evidence.

The second point raises the issue of whether a will is validly executed when not attested by the witnesses in the presence of each other. The Probate Code, Ark. Stat. Ann. § 60-403 (Supp. 1965), provides as follows, to-wit:

> *Execution.*—The execution of a will, other than holographic, must be by the signature of the testator and of at least two witnesses as follows:
>
> a. . . .
>
> (1) Himself sign; or
>
> . . .
>
> (5) In any of the above cases the signature must be at the end of the instrument and *the act must be done in the presence of two or more attesting witnesses.* (Emphasis supplied.)

This section of the Probate Code was before the court in *Ash* v. *Morgan,* 232 Ark. 602, 339 S. W. 2d 309 (1960). In commenting upon the necessity for the witnesses to attest the will in the presence of each other, the court used the following language, to-wit:

> "We think it evident from the above admitted facts

> that the sections of § 60-403 specifically requiring that a will to be valid must be executed 'in the presence of two or more attesting witnesses... [and] the attesting witnesses must sign at the request and in the presence of the testator', were not complied with, and therefore the will must be and is declared invalid.
>
> But, says appellant, there was substantial compliance with the statute here involved (Ark. Stats. § 60-403). What constitutes substantial compliance with a statute is a matter depending on the facts of each particular case. Here neither of the alleged attesting witnesses signed in the presence of the testator, *nor in the presence of each other.*" (Emphasis supplied.)

Consequently, the writer is of the opinion that under the Probate Code, Ark. Stat. Ann. § 60-403 a(5) (Supp. 1965), it is a prerequisite to the validity of a will that the attesting witnesses must attest the testator's execution or the acknowledgment thereof in the presence not only of the testator but of each other. Other members of the court, relying on *Rogers* v. *Diamond,* 13 Ark. 474 (1853), take the position that there has never been any requirement that the attestation by two witnesses must be in the presence of each other. However, the statute (now codified as Ark. Stat. Ann. § 60-104 [1947]) upon which *Rogers* v. *Diamond, supra,* was based reads substantially different from Probate Code, quoted above. The statute there relied upon provided that the subscription by the attesting witnesses "..shall *be made by the testator in the presence of each of the attesting witnesses...*" (Emphasis supplied.) When the foregoing language is compared with the present Probate Code, *i. e.* "...the act must be done in the presence of two or more attesting witnesses," it appears that the Probate Code, Ark. Stat. Ann. § 60-403 a(5) (Supp. 1965), changed the law to conform to what this court said in *Rogers* v. *Diamond, supra,* would be the most prudent course.

Having decided that the Probate Code requires that the witnesses attesting a will must do so in the presence of the testator and each other, it does not necessarily follow that the witnesses in this case did not attest the will in the presence of each other as the term "presence" has been interpreted under the so-called "conscious presence" tests. *In re Hoffman's Estate,* Dist. Ct. of App., 290 P. 2d 669 (Cal. 1955).

The only attesting witness who testified stated he was one of the witnesses to an instrument that they said was a will, and that he and the other attesting witness had been eating in the kitchen before they went into the room where the testatrix and Mrs. Sands were. They asked him to sign first and after he signed he immediately left the room and went out in the back yard. He didn't know what happened after he left the room, but the other witness (Marie) told him that she had signed her name.

Under any practical interpretation of the statutory provision, Ark. Stat. Ann. § 60-403 a(5) (Supp. 1965), requiring the execution of a will "in the presence of two or more attesting witnesses," the execution described obviously was attested by the witnesses in the presence of each other.

On the issue of testamentary capacity, the testimony was conflicting. While most of the contestants' attack was directed to the asserted inability of the testatrix to write, there was testimony which, if believed by the trial court, would have sustained a finding in their favor. However, the testimony of the will draftsman and others to the effect that testatrix's mental state was reasonably clear; that even with her blindness she would sometimes recognize her friends and kindred; and that she knew her relatives, and also knew what property she owned, was sufficient to sustain the trial court's finding to the effect that she had sufficient testamentary capacity to make the will.

Therefore I concur in the affirmance.

Opinion delivered January 30, 1967

Coleman, Gantt, Ramsay & Cox, for appellant.

Bruce Bennett, Attorney General; *Fletcher Jackson,* Asst. Atty. Gen., for appellee.

PAUL WARD, Justice. This appeal comes to us under Criminal Procedure Rule No. 1.

On March 2, 1964 William Jackson (appellant) was tried and convicted for the crime of burglary and sentenced to five years in the penitentiary. The information charged that he and Timothy Hawkins, on November 18, 1963, unlawfully broke into a grocery store owned by Howard Baker in Jefferson County with the intent to

commit burglary. No appeal was taken, but on July 26, 1965 appellant filed a petition for a writ of *habeas corpus* in the Jefferson County Circuit Court alleging his constitutional rights had been denied at the 1964 trial. The petition was denied and, on certiorari to this Court, we granted this appeal. The case is now here for a review of the record made at the 1964 trial.

For reversal appellant relies on three separate assignments of error.

One. Two days after the burglary was allegedly committed appellant (and Hawkins, an accomplice) became involved in an alleged robbery in Jackson, Mississippi, and both were apprehended there by enforcement officers, and appellant was later returned to this State. He allegedly made certain incriminating statements to officers tending to involve him in the burglary in this State. These incriminating statements were admitted in evidence at the 1964 trial over proper objections.

It is here contended by appellant that the admission of said statements violated his constitutional rights because he was not advised of his rights to remain silent and to be represented by counsel. In support of his contention appellant relies on the holdings in *Escobedo* v. *State of Illinois*, 378 U. S. 478 and *Miranda* v. *Arizona*, 384 U. S. 436.

Conceding, for the purpose of this opinion, appellant is correct in his interpretation of the holdings in the above mentioned cases, his contention for a reversal must fail. As previously pointed out appellant was convicted on March 2, 1964. The *Escobedo* case was decided on June 22, 1964 and the *Miranda* case was decided on June 13, 1966. In the case of *Johnson* v. *New Jersey*, 384 U. S. 719 it was held that the above mentioned cases were not retroactive.

There is nothing in the record to show appellant

was induced to make the statements by any threat or promise of leniency.

Two. This point deals with the question of illegal search and seizure. We agree with appellant that evidence obtained by such methods is not admissible.

At the 1964 trial the State introduced in evidence a pistol found in the possession of appellant while he was in Jackson, Mississippi. It was further shown at the trial that this pistol belonged to Howard Baker and that it was taken from his store at the time of the burglary.

It is here insisted by appellant that the officers obtained possession of the pistol by an illegal search of his motel room in Jackson. Again we cannot agree with appellant, under the facts revealed by the record.

Appellant and Hawkins were suspected of having burglarized a store in Jackson two days after the burglary in this State. Witnesses notified the officers they had seen appellant and Hawkins near the store at the time of the burglary. While investigating the scene of the crime the officers found a key attached to a tab which revealed the room number of a certain motel. The officers went to the room and found appellant and Hawkins. A search of the room revealed incriminating evidence and also the pistol in question. One officer testified he did not obtain a search warrant because he felt it was a case of emergency and that the men might leave town since they were traveling in a car. The officers took possession of the pistol which they found in a desk drawer and placed the men under arrest. Under these circumstances we think the officers were justified in what they did under the holdings in *Ker* v. *California,* 374 U. S. 23 which discusses and evaluates numerous other decisions dealing with this same question. Also, the material facts in the Ker case were somewhat similar to the facts here involved. In the cited case officers entered an apartment occupied by Ker and his wife, arrested them and, after a search, took possession of articles which were later put

in evidence. On appeal Ker and his wife contended "that their arrest in their apartment without a warrant lacked probable cause and that the evidence seized incident thereto was therefore inadmissible". In denying appellant's contention the U. S. Supreme Court made statements which are pertinent, we think, to the issue here raised. We now refer to some of the statements or holdings.

> "We reiterate that the reasonableness of a search is in the first instance a substantive determination to be made by the trial court from the facts and circumstances of the case and in the light of the 'fundamental criteria' laid down by the Fourth Amendment and in opinions of this Court applying that Amendment."
>
> "The lawfulness of the arrest without warrant, in turn, must be based upon probable cause, which exists 'where "the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed.' "

In commenting on information to indicate probable cause, the Court also said:

> "That this information was hearsay does not destroy its role in establishing probable cause."

Applying the above rules to the facts heretofore set out, we are unwilling to say the search made by the Mississippi officers was illegal. The *Ker* case also points out that "the lawfulness of the arrest without warrant is to be determined by reference to state law". The case before us also meets that requirement with reference to the arrest in Mississippi. Miss. Code § 2470 Arrests—When Made Without Warrant.

Three. Finally, appellant contends it was reversible error to introduce the pistol in evidence because (a) it was not identified and (b) its value was not proven. We do not agree.

(a) The pistol was traced from the Mississippi officers to the officers of Jefferson County. It was identified as a .38 Smith & Wesson revolver, serial number 291692, and it was described and identified by Mr. Baker as being the one taken from his store.

(b) Appellant's objection here appears to be that there was no showing as to the value of the pistol, contending it was necessary to show he stole property worth more than $35 to be *guilty* of *grand* larceny. There are two answers to this contention. Appellant was not convicted of grand larceny and Mr. Baker did testify as to the value of the pistol.

Affirmed.

TYLER MEISTER *v.* ALBERT REDDMANN

5-4080 410 S. W. 2d 769

Opinion delivered January 30, 1967

Lohnes T. Timer, for appellant.

Rice L. Van Ausdall, for appellee.

PAUL WARD, Justice. Appellant, Tyler Meister, filed a complaint in chancery court to restrain appellee, Albert Reddmann, from entering upon his land, and to recover the value of timber cut along a ditch located thereon. He also asked to have his title quieted. Appellee admits he cut the timber but claims the ditch in question is a "T" lateral ditch (hereafter referred to as a "ditch"), and that it is a part of Drainage District No. 3 of Poinsett County (hereafter referred to as "ditch No. 3"), and that he had permission from the Commissioners of ditch No. 3 to enter upon a right-of-way across appellant's land to cut all timber necessary to protect and clean out the ditch.

Testimony was taken on the above issues (properly pleaded), and the trial court entered a decree, in substance, as set out below:

The ditch is a part of ditch No. 3; appellant's complaint is dismissed, and; appellant is restrained from interfering with the work being done by appellee.

For a reversal appellant sets out several points but some of them are interrelated, and we feel that all material issues can be adequately discussed under two separate groupings:

One. Appellant contends "the trial court erred in finding the ditch in question to be a Drainage District No. 3 ditch", and that this was a finding in its favor. It is then argued this constituted reversible error because ditch No. 3 was not made a party to this litigation. There is no merit in this argument. In the case of *Smith* v. *Petus, Curator,* 205 Ark. 442, 169 S. W. 2d 586, we said:

> "Furthermore, appellants did not, in the lower Court, ask that these adult heirs be made parties

> and they are, therefore, not in a position to raise this question for the first time on appeal."

See also *Arkansas Road Const. Co.* v. *Evans,* 153 Ark. 142, 239 S. W. 726. No such request was made by appellant in the trial court in the case under consideration.

Two. It is argued that "the court erred in basing its decision upon incompetent testimony". Again we find no merit in appellant's contention that there is no competent testimony to refute his claim to an absolute fee title to his land (free of any right-of-way) by virtue of the deeds he admittedly received from his predecessors in title. It is undisputed that ditch No. 3 executed quitclaim deeds to appellant's predecessors in title, showing they were based on tax sales. This being true the deeds amounted to redemptions from tax sales. See: *Rouse* v. *Teeter,* 214 Ark. 488, 216 S. W. 2d 869. It necessarily follows that appellant could receive no better title than his grantors held. Any other result would make it possible for a legally organized improvement district to divest itself of all lateral ditches. This disposes of appellant's contention it was error to allow the Commissioners to testify relative to their intentions in executing said quitclaim deeds. Even if such testimony was hearsay it was irrelevant and unnecessary.

In this case it is undisputed that ditch No. 3 was organized in 1908, and that it issued bonds in the amount of $245,000 to construct said ditch and numerous laterals. Also there are copies of numerous county court orders (properly introduced) showing, among other things, the execution of the quitclaim deeds and the location of the ditches. The record reveals the ditch was constructed over appellant's land many years before he acquired the land which was some twenty years before this suit was filed.

In view of what we have said above it is, of course, unnecessary to discuss appellant's contentions that the trial court erred in refusing to quiet his title and give

him damages, and also erred in enjoining him from further interference.

The decree of the trial court is therefore affirmed.

Affirmed.

UNION MOTORS, INC. *v.* JAMES A. PHILLIPS

5-4087 410 S. W. 2d 747

Opinion delivered January 30, 1967

Barber, Henry, Thurman, McCaskill & Amsler, for appellant.

U. A. Gentry, for appellee.

LYLE BROWN, Justice. Appellee, James A. Phillips,

purchased an automobile from Union Motors, Inc. Phillips brought this suit to recover compensatory and punitive damages and alleged that he placed a verbal order for a demonstrator with low mileage and in all respects as good as new. He contends that the car delivered was so warranted, but had in fact been involved in a wreck and substantially damaged, which fact was known to the seller, but concealed from the buyer.

Union Motors admitted the sale of a demonstrator, but alleged that the only warranty was the usual manufacturer's warranty which was delivered to Phillips. Secondly, they assert that Phillips acknowledged in writing that no other warranties were involved. A jury was waived, and trial before the Court resulted in a compensatory award to Phillips for $650.00.

The first and principal issue to be determined is whether this is an action in contract or in tort. There are other issues, but the answer to this one is a predicate to their determination.

When fraud is relied upon, it must be distinctly pleaded. This rule requires at least "a clear statement of facts and circumstances which unexplained, would carry the conviction of fraud; in other words would be fraudulent *per se.*" *Jackson* v. *Reeves,* 44 Ark. 496.

In this connection, the complaint alleges that Union Motors' agents represented the car to be in perfect condition and one as good as new; that after the purchase plaintiff Phillips discovered the car had been in a wreck and imperfectly repaired; that Union Motors knew at the time of sale that the car had been wrecked, which fact was concealed from Phillips; that "the wrong perpetrated upon the plaintiff" damaged him in the sum of $1,000.00; and he further prayed for punitive damages in the sum of $500.00.

In *Galion Iron Works & Mfg. Co.* v. *Otto V. Martin Const. Co.,* 176 Ark. 448, 3 S. W. 2d 310 (1928), the pur-

chaser pleaded fraud. He alleged that Galion's agents represented the equipment purchased "was in first class operating condition and as good as new, with the exception of certain parts, which had been stolen, and which said defendant [Galion] was to replace"; that when the equipment arrived "it was found to be old, dilapidated, and wholly worthless for the purposes for which plaintiff intended to use the same and for the purposes which the defendant . . . knew the plaintiff intended to use it, . . ."

Our Court there held that the suit was brought on the theory of false representations inducing the contract, consequently the purchaser, Martin, was permitted to introduce parol evidence in the face of a written contract which in substance recited it to be the entire understanding between the parties.

Appellee Phillips made a stronger charge of fraud than was alleged in the Galion case.

In *Gentry* v. *Little Rock Road Machinery,* 232 Ark. 580, 339 S. W. 2d 101 (1960), Gentry purchased a secondhand tractor under a sales contract. The Trial Court found the salesman assured Gentry that the tractor was in A-1 condition, but efforts by the seller to repair it were unavailing. The seller relied on the contractual disclaimer of all warranties. The Court 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. *Maurice* v. *Chaffin,* 219 Ark. 273, 241 S. W. 2d 257. By the same reasoning such a representation when falsely made, gives rise to a cause of action in tort. *Fausett & Co.* v. *Bullard,* 217 Ark. 176, 229 S. W. 2d 490."

Phillips testified that Don Gregg, salesman for Union Motors, told Phillips that Union had some outstanding buys in demonstrators. Phillips indicated his interest in a demonstrator, "but I said I want a low mileage and good clean one and one that hadn't been in any

trouble, here is what the boy told me, he said Union Motor Company if they have got a demonstrator been [in] any trouble they don't sell that to a customer, they wholesale that automobile, I said if you can find one I want fine and dandy and I will do my best to trade with you."

A few days later, Gregg brought out the demonstrator Phillips purchased and said, "Mr. Phillips, here is a little dumpling they have given to me as my demonstrator and it is a nice little car." He said it had been "handled with kid gloves." The sale was then and there consummated.

The next day Phillips took the car to Union Motors to have the front end aligned. From there he drove home, and when he got out of the car the door, instead of closing properly, "hung shut." Upon inspection, he found the door was held shut by binding against the frame. Then he found where the left rear quarter panel had been replaced; and by measuring and comparing both sides of the car, he found they did not conform, this being difficult to detect except by comparing one side with the other. The car had been completely repainted.

When Gregg delivered the car to him, Phillips did not drive it. He relied on Gregg's representation that it was a demonstrator with 2,000 miles on it; that it was like a brand new one; and that it had been "handled with kid gloves."

The testimony of Lesley Caldwell, sales manager for Union Motors, developed the fact that the car did not come to them from the factory; it came to them from Union Blytheville, Inc., a related company; it was brought down as a wrecked automobile "for the purpose of having it repaired . . ."; and after the repairs it was put on the sales lot of Union Motors.

It was further developed that Joe Vandiver, who

participated in the sale to Phillips, knew the car had been in a wreck, but did not so advise Phillips. The shop foreman testified that the left rear quarter panel was repaired. It was not disputed that the entire car had been repainted.

Union Motors' salesman, Don Gregg, who was alleged to have made the original contract with Phillips and gave the latter the assurance that Union would not sell at retail any demonstrator which had been in any trouble, did not testify. His alleged employment and agency were not disputed.

The evidence recited is certainly sufficient to show justification for the finding that the car had been substantially damaged; that this fact was known by the salesmen, Gregg and Vandiver; that Phillips accepted Gregg's assurance that he would deliver a demonstrator that had not been so involved; and that Phillips relied on these representations in purchasing the car.

Union Motors' contention that no damage resulted to Phillips is without merit. It is true Union offered testimony to the effect that in its repaired condition the car was like new. One car dealer who heard the car described testified that with the damages sustained, the car would ordinarily sell for about 25% less than a similar car which had not been involved in a wreck. Another witness testified that in its damaged condition it would be worth $1,500.00 to $1,600.00. The cash price on the invoice was $2,650.00. Upon discovering the condition of the car, Phillips offered to return it and purchase a new car, but Union Motors refused. Phillips could not be refunded his purchase price because at least one of his two "trade-ins" had been sold. In this suit Phillips was asking compensatory damages based on the difference in the market value of the car, as warranted, and its value as a wrecked car. This measure of damages is proper. Ark. Stat. Ann. § 85-2-714 (Add. 1961)

Affirmed.

ARK. STATE HIGHWAY COMMN. *v.* CLARENCE BROWN ET UX
5-4038 410 S. W. 2d 737
Opinion delivered January 30, 1967

George O. Green and *Don Langston,* for appellant.

Ralph W. Robinson and *Floyd G. Rogers,* for appellee.

JOHN A. FOGLEMAN, Justice. Appellant filed its complaint and declaration of taking condemning 24.83 acres belonging to appellees, Clarence and Lorena Brown, in the Circuit Court of Crawford County on May 25, 1965. These lands, except for oil and gas interests that would not interfere with the surface use for highway purposes, were taken outright, along with temporary construction easements over 8.2 acres for construction of a controlled access, Interstate Highway No. 40. Trial to a jury resulted in an award of $40,000.00 to the landowners, from which this appeal is taken.

Appellant finds itself in the unfortunate predicament of being unable to file a complete court reporter's transcript of the testimony and proceedings in the case because of a breakdown in the reporter's recording machine. This was discovered after the verdict and judgment and the giving of notice of appeal. Appellant then availed itself of the remedy this court has held to be applicable in these circumstances—the filing of a statement of the evidence or proceedings from the best available means, which in this case was the recollections of counsel for appellant, aided by notes taken by him during the trial. See Ark. Stat. Ann. § 27-2127.11 (Repl. 1962); *Tomlin* v. *Reynolds Mining Corp.,* 231 Ark. 393, 329 S. W. 2d 552; *Mowrey* v. *Coleman,* 224 Ark. 979, 277 S. W. 2d 481. While this statute requires that appellee, in such cases, serve objections or propose amendments within ten days, appellees did not file their response until twenty days had elapsed.

Thereafter, the court heard the parties, caused witnesses who testified on behalf of appellees to be brought

in, sworn and examined as to the testimony and ordered that the portion of the record offered by appellant showing the testimony of appellant's witnesses and the statements of appellees' witnesses be approved and incorporated into the record. Prior to the making of this order, appellant moved to strike the objections and proposed amendments filed by appellees, contending that by failure to respond within the period set out by statute, appellees had waived their right to object and that the appellant's statement as to the testimony became the record thereof, insofar as this appeal is concerned. When this motion was denied and the court's order settling the record made, appellant moved for a new trial on the premise that the inability of appellant to have a complete stenographic report of the evidence and proceeding constituted accident or surprise which ordinary prudence could not have guarded against, a statutory ground for new trial. This motion was also denied and appeal was also taken from the order overruling that motion. Appellant now contends that the trial court committed error in denying its motions.

A review of our statutes and the decisions construing the Federal Rules of Civil Procedure, from which our statutes on the subject were adopted, along with the decisions above cited, clearly shows that the trial court has jurisdiction, as well as the responsibility, to settle the record on appeal. Ark. Stat. Ann. § 27-2127.11 requires that any such statement filed by appellant, with objections or proposed amendments, be submitted to the trial court for settlement and approval, and that the *same as settled and approved by the trial judge* be included in the record on appeal.

While Ark. Stat. Ann. § 27-2129.1 (Repl. 1962) provides that it is not necessary for the record on appeal to be approved by the trial court, it requires that any difference that arises as to whether the record discloses what occurred in the trial court be submitted to and settled by the trial court which is authorized to direct that any omission or misstatement be corrected. The

cited sections were adopted from former Rule 75 (h) and (n) of the Federal Rules of Civil Procedure [now 75 (c) and (d)]. Under these rules, it has been held that such a statement not accurately reflecting the truth and not submitted to the trial judge is for the attention, correction and disposition of the trial court. *Miller* v. *Miller,* 114 F. 2d 596 (D. C. Cir. 1940).

If the judge cannot remember the evidence, he may call witnesses who gave or heard the testimony. *Citizens National Trust and Savings Bank* v. *Welch,* 119 F. 2d 717 (9th Cir. 1941). There is no error in the trial judge denying a motion to amend the record where he has no recollection of the matter sought to be inserted. *Cox* v. *United States,* 284 F. 2d 704 (8th Cir. 1960), *cert. denied,* 365 U. S. 863, 5 L. Ed. 2d 825; *Cox* v. *General Elec. Co.,* 302 F. 2d 389 (6th Cir. 1962). The finding of the trial judge is conclusive unless clearly unreasonable, in the absence of any charge of deliberate and intentional falsification of the record. *Gunther* v. *E. I. Du Pont de Nemours & Co.,* 255 F. 2d 710 (4th Cir. 1958); *Belt* v. *Holton,* 197 F. 2d 579 (D. C. Cir. 1952). It is only where the adverse party files no objections, or where no specific fault is pointed out by the trial judge that appellant's statement of evidence is accepted by the appellate court. See *Laughlin* v. *Berens,* 118 F. 2d 193. (D. C. Cir. 1940); *Citizens National Trust & Savings Bank* v. *Welch,* 119 F. 2d 717 (9th Cir. 1941).

But the appellant says that the tardy filing of appellees' objections and proposed amendments requires that its motion to strike be granted and that its version of the record be accepted. Except as limited by statutes relating to the granting of default judgment when the first pleading of a defendant is not timely filed, a trial court has the discretion to permit a litigant to file pleas or other motions out of time as the circumstances of the case and justice may require and this discretion may not be controlled by this court unless it has been exercised to the palpable prejudice and injustice of the adverse party. *Southern Improvement Co.* v. *Elliott,* 160

Ark. 633, 255 S. W. 299; *Norris* v. *Kellogg & Company,* 7 Ark. 112; *Crow* v. *State,* 23 Ark. 684; *Bookout* v. *Hanshaw,* 235 Ark. 924, 363 S. W. 2d 125. It has been held that striking a cross complaint filed two months after the filing of the suit was erroneous where the filing occasioned no delay. *Huffman* v. *City of Hot Springs,* 237 Ark. 756, 375 S. W. 2d 795.

The trial judge seems to have followed the appropriate procedure in settling the record, and we find no prejudicial error. Appellant's contention as to the refusal of its motion for new trial for unavoidable casualty has been answered adversely to appellant in *Ark. State Highway Commn.* v. *Clay,* 241 Ark. 501, 408 S. W. 2d 600.

Error in refusal to give appellant's requested instruction No. 7 is also asserted. That portion of the record transcribed and certified by the court reporter shows that this instruction was given. This statement will have to be accepted by this court, particularly in view of the fact that the trial court accepted appellant's version of the record only as to the testimony of witnesses called by appellant.

Appellant also contends that the trial court erred in overruling its motion to strike the testimony of certain witnesses concerning damages for loss of access to 57 acres of appellees' farm. This is based on appellant's assertion that this tract will be accessible to the remainder of appellees' tract by reason of the fact that access will not be controlled under a bridge over the relief along the eastern boundary of the property and along the northern right-of-way line of the highway, which will traverse the Brown farm from northeast to southwest. The answer to this contention lies in the fact that there was testimony that water stands ten months of the year on this area; that heavy farm implements and trucks required for use on the tract or in harvesting and transporting crops could not be moved in and out by this means; that the area would wash out and be rough; and that this amounted to no access, or was not the

kind of access that prevented a great decrease in the land value due to severance. This presented a factual question for determination by the jury and the motion to strike was properly denied.

Appellant asserts that there is no substantial evidence to support the jury verdict, but with becoming candor, appellant's counsel admits that there is no merit in this point unless the case should be reversed for one of the other errors asserted. It is sufficient to say that after a careful examination of the record, we agree with this admission.

The judgment is affirmed.

WALTER A. FREEMAN & COBB FUNERAL HOME, INC.
v. LEE R. REEVES & VIRGIE REEVES

5-4058 410 S. W. 2d 740

Opinion delivered January 30, 1967

Reid, Burge & Prevallet, for appellant.

Gardner & Steinsiek, for appellee.

JOHN A. FOGLEMAN, Justice. Appellees, Lee R. and Virgie Reeves, husband and wife, recovered judgments of $6,500.00 and $12,000.00 respectively against Walter A. Freeman and Cobb Funeral Home, Inc., on February 1, 1966 for injuries and damages sustained as a result of a collision between a Blytheville city fire truck and an ambulance driven by Freeman for the owner, Cobb Funeral Home, Inc. The collision took place on January 18, 1963 at the intersection of Kentucky and Second Streets in Blytheville. Appellees were occupants of a station wagon which had stopped on Second Street just north of the intersection at a stop sign shortly before the two vehicles collided in the intersection, after which the fire truck struck the front of the station wagon and overturned on top of it. Appellees brought their suit against appellants, Freeman and Cobb Funeral Home, Inc., alleging negligence on the part of Freeman in the operation of the ambulance as the proximate cause of their personal injuries and damages. Appellants filed their answer denying any fault or liability and, with permission of the court, a third party complaint against Billy Bratton, the driver of the fire truck, alleging that the injuries and damages of appellees resulted from

negligence on the part of Bratton, but seeking judgment over against Bratton if judgment should be recovered by appellees against appellants.

After hearing all the evidence and the instructions of the court, the jury, in answer to interrogatories propounded by the trial judge, found that Freeman was guilty of negligence which was a proximate cause of the occurrence but that Bratton was not. Appeal was taken by appellants from the judgment based on that verdict.

Both appellants and the fire truck driver sought to excuse their actions by claiming a status as emergency vehicle drivers and resulting exemption from certain traffic laws and ordinances. The principal ground for reversal urged by appellants is based upon the failure of the trial judge to instruct the jury that the ambulance was an emergency vehicle at the time and place of this occurrence, rather than submitting the question to the jury as a question of fact. This contention was based largely on the testimony of George Ford, a police officer for nine years and assistant chief of police at the time of the incident. He testified that, at that time, the police department had a policy of alternating calls for ambulances between two local funeral homes, calling one the first fifteen days of a month, and the other the last fifteen days. These calls were made whenever the police department received a call for an ambulance or when an officer working a wreck said he needed an ambulance. When asked how he classified ambulances, this witness said: "As emergency vehicles". In September, 1965, he (then chief of police) designated all the ambulances as emergency vehicles in writing. The witness had done all administrative work for the department from 1955 up to the time of this collision. His search of the ordinances failed to reveal any designation of ambulances as emergency vehicles. C. W. Short, who served for perhaps ten years, was his predecessor as chief of police. Prior to the written designation, the police treated ambulances owned by these funeral homes as emergency vehicles if they had a patient and were making an emergency run,

but they had no policy and didn't know anything was required.

James Stovall, an employee of Cobb Funeral Home and a witness called by appellants, stated that the City of Blytheville furnished no ambulance service and that the funeral homes answered ambulance calls from the police department without question and without asking who is going to pay the bill. He testified that the ambulance was operated as a public service for which they collected if they could. Both Freeman and Gerald Thomas Moody, the attendant accompanying him, testified that the call being answered came from a nursing home where they picked up a patient who was having a hard time breathing and required the administration of oxygen by the attendant. On the other hand, it was shown that the patient, after being involved in this wreck, was discharged from the hospital on February 26th. The driver and attendant testified that the siren and red light on the ambulance were turned on.

The Arkansas Statute defining authorized emergency vehicles is § 75-402 (d) (Repl. 1957) which reads:

> "Authorized Emergency Vehicle. Vehicles of the fire department (Fire Patrol), police vehicles and such ambulances and emergency vehicles of municipal departments or public service corporations as are designated or authorized by the (commissioner) or the (chief of police of an incorporated city)."

Our statutes permit an authorized emergency vehicle to be equipped with a siren, whistle or bell of an approved type and require its use when the vehicle is being operated on an emergency call, otherwise the use of a siren is prohibited. Ark. Stat. Ann. § 75-725 (b) (Repl. 1957). They also require drivers of authorized emergency vehicles, when responding to emergency calls, to slow down as necessary for safety upon approaching red lights or stop signals, but permit their proceeding cautiously past them. § 75-423 (b). Prima facie speed lim-

itations are not applicable to authorized emergency vehicles when responding to emergency calls and sounding an audible signal, but drivers are not relieved of the duty to drive with due regard for the safety of all persons using the streets or of the consequences of a reckless disregard of the safety of others. § 75-606. Upon the immediate approach of such a vehicle giving the proper signal, the driver of every other vehicle shall yield the right-of-way, drive to a position near the right-hand edge of the highway and stop and remain until the emergency vehicle has passed. § 75-625.

Since appellants claimed the status as a defense, the burden was upon them to prove that theirs was entitled to be considered an emergency vehicle. While we think there is substantial evidence on which a jury verdict in favor of appellants might have been sustained, we do not find the evidence to be such that the trial judge committed error in submitting the question to the jury. While we do not hold that the designation or authorization of ambulances by the chief of police must necessarily be in writing, there is certainly a factual question as to whether this designation or authorization had been made by the chief of police. The mere fact that there was a police custom of calling the Cobb ambulance at certain periods and "we" treated such ambulances transporting a patient as emergency vehicles, would not constitute any presumption that these ambulances had been so "designated or authorized", particularly when Ford, administrative officer of the police department at the time the action would have been taken, could find no evidence of such action. It is of some significance that neither Ford nor Stovall testified about any action by the chief of police.

The question of constitutionality of the statute for failure to provide standards upon which the designation or authorization might be made was not raised.

We are also aware of decisions such as *Perrine* v. *Charles T. Bisch & Son,* 346 Ill. App. 321, 105 N. E. 2d

543; *Champagne* v. *Employers Liability Insurance Corporation,* 112 So. 2d 118 and *Chastant* v. *Employers Liability Insurance Corporation,* 112 So. 2d 120, which appear to sustain the appellants. The statute applied in the *Perrine* case and the statute then in effect made all ambulances emergency vehicles. Illinois Revised Statutes, § 99 (d), Chapter 95½ (1947). While we do not have the benefit of all the testimony in the *Champagne* and *Chastant* cases, it is clear that the chief of police was the witness by whom recognition of ambulances as emergency vehicles was shown. It is also clear that the court found there was no doubt, from the evidence, that the ambulance involved was a "sanctioned and recognized emergency vehicle". We have found no statute in Louisiana providing for designation or authorization of ambulances as emergency vehicles by a chief of police until 1962, some three years after the decision in those cases, even though there were statutes giving certain exemption to ambulances and emergency vehicles.

Of course, even if an ambulance is exempt from observing certain traffic regulations and has the right-of-way under appropriate circumstances, it does not follow that this is an exemption from the duty to exercise care commensurate with the circumstances for the safety of other travelers or persons. Proper instructions as to these duties of the drivers of these emergency vehicles were given. We think the evidence was sufficient to justify the submission of the question whether there was negligence on the part of appellants to the jury and to sustain the jury's finding that there was such negligence, when viewed in the light most favorable to appellees as we must do.

There was testimony to show the following:

The ambulance struck the fire truck with such force that the whole truck left the ground, turned over on top of the Reeves' car in a sort of angling somersault, with the back end of the fire truck coming to rest on the automobile upside down. The major impact indicates that

the ambulance struck the right rear of the fire truck from the center of its right rear dual wheels toward the rear. The impact was such that the right rear dual wheels were knocked completely loose, three steel tie bolts holding the springs to the axle as big as the fire truck driver's fingers were parted, in two, and another was twisted. The frame of the fire truck was warped. The rear end of the fire truck had passed the center of the intersection and the front end was almost through the intersection when the truck somersaulted. The course taken by the ambulance from the nursing home was north on Ruddle Road, west on Tennessee, south on the street that runs along the west side of Fairview School (probably LaClede) to Kentucky and west on Kentucky to the scene of the collision. The ambulance was coming at a pretty good rate of speed, a lot faster than the speed limit. As the ambulance approached the intersection, it seemed to Reeves to pick up speed (he first saw it a half block away). There was nothing to block the vision of the intersection for traffic coming east and headed west, except a small bush with no leaves on it. The siren at the fire station can be heard for a mile around. The red light on the fire truck was blinking and the siren blowing when it turned on Second Street going north. The driver of the fire truck let up on the gas and looked both ways before he entered the intersection and did not see any vehicle approaching. He could see a good ways up the street. He did not see the ambulance until he had entered the intersection when it was at least thirty to forty yards away. He didn't see the ambulance decrease its speed or take any evasive action. The ambulance was going so fast the fire truck driver could not estimate its speed. It was going awful fast.

This was certainly sufficient to justify the denial of a directed verdict in favor of appellees.

Appellants also contend that the failure of the driver of the fire truck to stop at a stop sign at the intersection under existing conditions (contending that the intersection was blind), made him guilty of negligence as

a matter of law. We think that, at best, this was evidence of negligence, proper for determination by the jury and resolved by it against the appellants.

Another contention of appellants is that the jury verdicts are excessive, without support in the evidence and indicative of passion, prejudice or partiality. Here, again, we must view the evidence in the light most favorable to appellees. When we do so, we find no merit in these contentions.

If the jury viewed the testimony most favorable to Lee Reeves, it may have based its verdict on the following evidence:

That he blacked out; suffered two broken ribs and three cracked ones; severe left chest pain, difficulty in breathing, exhibiting short, rapid, painful respiration; a cut over the left eye; a bruised left knee with limitation of motion, swelling and sprain; a scratch on his lung with scarring which could become an area of chronic bronchitis. His glasses were broken. He was in the hospital four days. He was treated with narcotics for pain, had Furacin applied to his knee and was given Gelusil for indigestion, a cough syrup and antibiotics. He was given an elastic band to hold his ribs immobile. He was unable to go back to work for a couple of weeks at the Blytheville Air Force Base where he was employed as an accounting clerk, losing $450.72. When he was able to return, he could not work a full day. He was given antibiotics again for about eight days. He saw his doctor several times after he was in the hospital and went to a chiropractor because his neck was hurting so badly and got some temporary relief. He took a good many pain pills on account of these injuries. He paid medical and hospital bills totalling $326.27. His automobile loss was $898.28. He lost five days (or $125.20) by reason of having to take his wife to Memphis to a doctor and spent his vacation half a day at a time helping her on her newspaper route. His wife was unable to get

around well, to sleep well, or to do her housework. He had to do some of the housework. She was in the hospital for at least two weeks after the first stay of four days.

As to Virgie Reeves, the jury might have found:

She blacked out and was hysterical when her husband regained consciousness; she was taken to the hospital in Blytheville where she remained under the care of Dr. Files for four days; when she got there she was complaining of very severe headache and pain in her right knee and was moderately upset emotionally. She had some tenderness of the back of her head and base of the skull and pain on motion of the neck. Her exposed skin revealed tiny abrasions and lacerations. There was contusion, swelling, tenderness and general disability of her right knee. She was treated with bed rest, tetanus toxoid booster, a drug to reduce contusion and swelling, narcotics for pain, antinauseants and estrogenic substances. She was discharged for further treatment at her doctor's clinic, still having headaches. She was then unable to sleep (she continued to have trouble sleeping until the time of the trial) and couldn't get around well. She used (and has continued to use) a heating pad and took pain pills. The headaches continued and she was found to have sinusitis for which she was treated with anticongestive products and antibiotics. She then complained of pain in her hip and diathermy treatments were started. When she again complained of headaches and pain in her right hip radiating down the back part of her leg to the knee, Dr. Files made a tentative diagnosis of a ruptured disc. She was returned to the hospital for two weeks where she was treated with drugs to relax her muscles, bed rest, physiotherapy, pain drugs and other measures (put in pelvic traction to decompress the disc). Dr. Files sent her to Dr. DeSaussure, a neurosurgeon in Memphis, who gave her a myelogram at the Baptist Hospital where she remained for several days, after which she had bad headaches for which she was

given medicine. She returned home and continued to see Dr. Files but her condition did not improve. About two months after the injury, she continued to have back and right leg pain when sitting on a hard surface and was given a tranquilizing drug and protein by injection. When the symptoms continued two weeks later, she was started on ultrasonic and diathermy treatments and later had 15 ultrasonic treatments to the low back and right sciatic nerve, along which line she was treated for several months. Dr. Files later diagnosed her condition as spondylolisthesis, or a slipping of one vertebra on another, a condition which is intermittent and may be produced by certain motions, lifting or certain positions, after which the spine may return to normal following bed rest or proper treatment. A person with that condition becomes disabled to a certain extent. She aggravated her condition by a fall on August 12, 1963, when her right leg gave way and her right knee went to the ground. She was examined by Dr. Crenshaw at Campbell's Clinic in Memphis and made five trips to see him. He prescribed certain exercises and gave her a back brace with steel stays to wear. She was wearing this brace daily at the time of the trial and the doctor had given her two of them so she would have a change. Dr. Crenshaw said that she had a permanent partial disability of 15% to her body as a whole, attributable to this injury. She continues to suffer pain and takes from four to ten Excedrin tablets daily. During this period she went to a chiropractor because of her pain. She lost eight weeks from her work of distributing newspapers in bundles to various points for pickup by newsboys and to various stores and display racks. She was paid $33.35 per week for this. While she is doing the same work at higher pay, the newspapers have to be put in smaller bundles for her to handle and her husband has to help her a good bit. Her housework went to pot and she is still unable to do heavy housework, with which her husband and two younger children help. She can't ride in or drive a car except for short distances. Her medical

and hospital bills amounted to $533.64, some of which may have been for other purposes.

We cannot say that these findings do not give substantial support to the jury verdicts.

Finally, appellants contend that there was error in the trial judge's instruction permitting the jury to consider the use by Reeves of accumulated sick leave because of these injuries, saying he suffered no loss because his employer paid him. This court has said that an injured party should be entitled to show all the loss he may have sustained as against such a contention, even though the party may have also been compensated to some extent through Workmen's Compensation. *Swindle* v. *Thornton,* 229 Ark. 437, 316 S. W. 2d 202. Regardless of whether the facts in this case are identical, we see no reason why an injured party should not recover as damages for lost leave (whether accumulated sick time or vacation time) for which he is paid by his employer and which he has earned through his employment, as he certainly cannot later claim this time with pay. To say that the possibility that he may never be sick again renders this speculative is not sufficient to bar recovery for such time. We think that the holding of the United States District Court in *Beaty* v. *Buckeye Fabric Finishing Co.,* 179 F. Supp. 688, on this point is correct and the Arkansas authorities cited there appropriate.

Affirmed.

Byrd, J., dissents.

WHITE COUNTY GUARANTY S&L ASSN. *v.*
SEARCY FED. S&L ASSN. ET AL

5-4086 410 S. W. 2d 760

Opinion delivered January 30, 1967

Spitzberg, Bonner, Mitchell & Hays; By: *Allan W. Horne,* for appellant.

Charles E. Yingling Jr. and *George P. Eldridge*

and *Kaneaster Hodges* and *Murphy & Arnold* and *Smith, Williams, Friday & Bowen;* By: *Ben Allen,* for appellee.

J. FRED JONES, Justice. This case involves the formation of a permanent stock savings and loan association under Act No. 227 of the Acts of Arkansas for 1963.

The State Savings and Loan Association Board and its Supervisor, approved the application of appellants for a charter. Upon appeal, the Circuit Court reversed the Board, and the precise question before us on appeal is whether or not there was any substantial evidence to support the order of the Board.

In 1964, a group of individual citizens in and around Searcy, Arkansas, associated together under the name of "White County Guaranty Savings and Loan Association," and attempted to acquire the status of a legal entity with authority to operate as a permanent stock savings and loan association under charter to be issued by the State Savings and Loan Association Board under and pursuant to Act 227 of the Acts of Arkansas for 1963, Ark. Stat. Ann. § 67-1801-1862 (Repl. 1966).

Two applications were filed with the Board. The first application was filed in 1964, and included the names of thirteen individuals who would constitute the proposed board of directors, and the names of eighty-five individuals who had subscribed to capital stock, and paid in the sum of $181,244.00, which was placed on time deposit in banks. On December 14, 1964, on grounds other than insufficiency of the stock subscriptions, this application was denied.

After this application was denied by the Board, the subscribers to stock were notified that efforts to obtain a charter would be continued, but that anyone desiring a refund of any amount paid on subscription, could obtain same upon request. A few of the original subscrib-

ers claimed refunds in amounts totaling $19,413.02, and their names were stricken from the subscription list. After refunds on subscriptions and the payment of other expenses, there remained on deposit in Searcy banks the sum of $153,834.54 in paid-in subscriptions, when on January 14, 1965, a second application was filed.

The record reveals little change in the two applications except that the names of two of the "proposed chairmen of the incorporators and initial board of directors," in the first application were left off in the second application. It appears that the original copy of the schedule or list of subscribers to the permanent capital stock filed with the first application was copied and filed as the schedule in the second application, the only difference being that the first was an original copy and the second was a duplicate with the names of those who had withdrawn and claimed their refunds stricken out.

Both applications were vigorously opposed by other lending institutions in the White County area and hearings were had on both applications. The second application was approved and a certificate of authority was issued to the White County Guaranty Savings and Loan Association.

The Circuit Court, on appeal from the decision of the Board, found that there was no substantial evidence of applicant's compliance with the necessary statutory prerequisites concerning subscriptions to savings accounts and permanent capital stock to sustain the Board's findings that the subscriptions were sufficient to justify the initial successful operation of a savings and loan association as required by law, and the Circuit Court reversed the Board on these findings, but in all other respects, the findings of the Board were affirmed.

The Circuit Court then entered its judgment remanding the cause to the Arkansas Savings and Loan

Association Board with directions to dismiss the application. The applicant, White County Guaranty Savings and Loan Association, on appeal to this Court, designates one point upon which it relies, as follows:

> "The Circuit Court erred in holding that there was no substantial evidence to support the finding of the Arkansas Savings and Loan Board that the subscriptions to savings accounts and permanent capital stock of Appellant were sufficient."

The protestants before the Board, and appellees here, contended before the Board that savings accounts had not been subscribed from individuals in the aggregate number and amount sufficient to justify the successful operation of a savings and loan association, and that permanent capital stock had not been subscribed as required by law. They directed their most pointed attack at the legal sufficiency of stock subscriptions, and argued that stock subscriptions must be in writing and that an original signed subscription list must, as a matter of law, be filed with each application for a charter. They contended on appeal to the Circuit Court, and they contend on the appeal here, that there was no substantial evidence to support the findings and order of the Board.

It appears clear that in the absence of statute or charter provisions to the contrary, stock subscriptions may be written or oral or in any other form that would satisfy the requirements of a valid contract.

In CJS § 295 we find the following:

> "In the absence of a charter or statutory provision to the contrary, a stock subscription need not be in any particular form or made in any particular mode, as long as there is a present intention to contract with the corporation and the agreement is complete and definite." Citing *Gibson* v. *Oswalt,* 257 N. W. 825, 269 Mich. 300.

In *Rutenbeck* v. *Hohn,* 121 N. W. 698, the Supreme Court of Iowa said:

> "While the strict definition of the word 'subscribe' or 'subscription' involves the idea of a written signature, yet by common usage it is often employed to include an agreement, written or oral, to give or pay some amount to a designed purpose, more usually, perhaps, to some purpose for the promotion of which numerous persons are uniting their means and their efforts." See also *Mills* v. *Friedman,* 111 Misc. 253, 181 N. Y. S. 285, 292, *Jones* v. *Ronkin,* 19 N. M. 56, 140 p. 1120, 1121.

The literal definition of the word "subscribe," of course, is *to write under,* (Black's Law Dictionary) but the word as used in the context here has also been defined as equivalent to "agree to pay." *Strong* v. *Eldridge,* 8 Wash. 595, 37 Pas. 697.

We now examine our own statutory requirements for the formation of a savings and loan association, and then the evidence before the Board in determining whether or not the Board's findings were based on substantial evidence.

Our own statutes are not perfectly clear on whether or not subscriptions to stock in a *savings and loan association* to be chartered under Act 277 of 1963, Ark. Stat. § 67-1801-1802 must be in writing. The *Business Corporation Act,* Act 576 of the Acts of Arkansas for 1965, Ark. Stat. § 64-203 does so provide, but that same act § 64-103 provides as follows:

> A. "Corporations may be organized under this act [chapters 1-10 of this title] for any lawful purposes *except that where another statute of this State * * * requires that corporations of any designated class be organized thereunder, corporations*

of that designated class shall be organized under such other statute and shall be subject to the provisions thereof."

B. "In respect to all corporations of *any designated class* that could be organized under this act *but which are subject to the provisions of any other statute or statutes placing restrictions or conditions on the organization of such* corporations, or *providing for the regulation of such corporations after organization,* the provisions of this act shall apply to such corporations only to the extent that this act is not inconsistent with the provisions of such other statute or statutes; this act not being intended to repeal, amend or qualify any statute of such character.

C. "A corporation originally incorporated under a general business corporation statute of this State, *but belonging to a class whereunder the organigational filing procedures have been transferred to some state office or agency other than the Secretary of State, will not be subjected to the provisions of this act.*" (emphasis supplied)

Act 227, under which appellant's applications were made, is a highly regulatory act and vests authority in a five member board and a supervisor to charter and regulate savings and loan associations under the supervision of the State Securities Commissioner. This act is not long, its provisions are not ambiguous and the organizational procedure under its terms is not complicated. It makes no provision as to manner or form of stock subscriptions.

The organizational section of Ark. Stat. Ann. § 67-1816 (Repl. 1966) simply provides as follows:

"Application for a charter for a savings and loan

association may be made by ten [10] or more citizens of this State (hereinafter referred to as incorporators) by tendering to the Supervisor, along with the prescribed filing fee, an application *consisting of the following*:

(1) Two [2] copies of the articles of incorporation for the proposed association stating:

(a) The name and the site of the principal office of the association;

(b) The names and addresses of the incorporators;

(c) The name and address of the resident agent for service of process on the association;

(d) The terms of the corporate existence, which may be either perpetual or limited to a fixed number of years;

(e) Whether the association will carry on its business as a mutual association or as a permanent stock association;

(f) For a permanent stock association the number of shares of permanent stock authorized and the par value of each share.

(2) *A statement as to* (i) *the amount, if any, of permanent stock* which has been subscribed and paid for at the time of filing, (ii) the names and addresses of such subscribers and the amount subscribed by each, (iii) *the names, addresses and amounts of savings accounts which have been subscribed,* and (iv) the amount of paid-up surplus or expense fund with which the association will commence business.

(3) Two [2] copies of the by-laws under which the association proposes to operate.

(4) The names and addresses of the chairman of the incorporators, the proposed members of the board of directors and the proposed officers.

(5) Such other information in regard to the pro-

posed association and its operation as may be required by the Supervisor.

The articles of incorporation and all statements of fact tendered to the Supervisor in connection with an application for charter shall be subscribed and sworn to under the sanction of an oath, or such affirmation as is by law equivalent to an oath, made before an officer authorized to administer oaths." (emphasis supplied)

Appellees argue that when the first application was denied by the Board, that the applicants or proposed incorporators ceased to exist as an organization, and the subscriptions filed with the application terminated by operation of law, and that when the second application filed by other incorporators with different officers and directors, with different proposed stockholders, at a different date, there must be filed or provided new and different stock subscriptions and savings account subscriptions.

The facts of record in this case do not sustain appellees in their argument. The record in this case reveals that there were nineteen incorporators in the first application, and it appears to be conceded by all parties concerned, that this application as to stock subscriptions, as well as subscriptions to savings accounts, fully met all statutory requirements. The nineteen citizens who made the first application as incorporators, alone subscribed 87,750 shares and paid in $104,000.00 as reflected in the application itself.

Between the first and second applications three of the original nineteen withdrew and did not participate in the second application but *the remaining sixteen* made the second application. The three applicants in the first application who did not participate in the second, had subscribed to 12,000 shares of capital stock in the amount of $14,400.00, leaving 75,750 shares subscribed by the sixteen who made the second application.

One of the applicants in the first application raised his subscription in the second application from 5,000 shares to 6,000 shares, making a total of 76,750 shares (erroneously totaled in transcript as 86,750) in the amount of $92,000.00 subscribed by the applicant *incorporators alone* in the second application.

Even if we should hold that the applicant incorporators were required to file new and different stock *subscriptions* with their second application rather than a *statement as to the amount,* if any, of permanent stock *which had been subscribed and paid for* at the time of filing, as required by paragraph two [2] of Ark. Stat. § 67-1816 (*Supra*), we are unable to see how the ten incorporators *who actually signed the application under oath* as proposed members of the board of directors, and who had between themselves, subscribed 60,250 shares in the amount of $72,300.00, could have added anything to their oath by writing out, or signing and filing, with the second application, a new and additional separate subscription contract.

In 18 CJS § 298, p. 789, is found the following:

"If a subscriber, with knowledge of the facts, expressly ratifies the subscription or so acts that a ratification or a waiver of objection may be applied, he cannot afterward avoid liability on the ground that the corporation has not been formed with powers contemplated or that it is otherwise not the same corporation as that contemplated by the subscription agreement." Citing *Flournoy* v. *Highland Hotel Company,* 153 S. E. 26, 170 G. A. 467.

"Where parties subscribed for stock in a corporation to be thereafter organized, it is not essential that the corporation shall be organized by the parties to the agreement or their representatives unless it is so provided at the subcription." Citing *Avon Springs Sanitorium Company* v. *Weed,* 104

N. Y. S. 58, 119 App. Div. 560 reversed, 82 N. E. 1123, 189 N. Y. 557.

And at 18 C. J. S. 294: "Preliminary subscription of stock may be made by signing the articles of incorporation, in which case they are enforceable only against those who sign." Citing *Shiffer* v. *Akenbrook,* 130 N. E. 241.

Appellees direct our attention to Arkansas Statutes § 67-1830 and argue that before this second application should be approved, there should be sufficient subscribed savings accounts from individuals, filed with the second application, that would justify the initial successful operation of such association. A great deal of discretion is placed in the Board by the legislature, and as to savings accounts, Ark. Stat. § 67-1830 reads as follows:

> "As a prerequisite to approval of any application for a proposed permanent stock association, the incorporators must *show to the satisfaction of the Board* subscribed savings accounts from individuals in the aggregate number and amount *which in the opinion of the Board* will justify the initial successful operation of such association." (emphasis supplied)

When an application for charter has been made by a group of citizens of Arkansas under Act 277, and the application is denied, we find nothing in the Act, by reference or otherwise, that could prevent ten or more members of this same group from making a second application for a charter.

The parties seem agreed that $75,000.00 in paid-in permanent capital stock subscriptions was the required minimum in this case. It seems undisputed that 80,522 shares of capital stock have been subscribed and there has been paid in and is now on time deposit in two

Searcy banks, the sum of $153,712.03 with which to pay for the stock when certificates can be issued. This is more than twice the amount required under the law in this case.

In the first application 216 individuals subscribed $225,010.00 to the *savings accounts.* Twenty-one of this number testified before the Board at the hearing on the second application that they alone would deposit amounts totaling $293,500.00 in savings accounts with appellant, if and when, a charter is granted.

If appellees interpret § 67-1830 *Supra* to mean that the incorporators must show to the Board *subscribed contracts* for savings accounts before the application can be approved, we do not agree with that interpretation. We think the legislature intended that the incorporators must show to the *satisfaction of the Board* that a sufficient number of individuals have agreed to open savings accounts in sufficient amounts *which in the opinion of the Board* will justify the initial successful operation of the association.

It must be remembered that in the formation of a savings and loan association under Act 227, unlike the formation of some business corporations of another class, the amount subscribed for permanent capital stock in savings and loan association stock subscriptions must be paid in before an application is approved, Ark. Stat. § 67-1819, and the permanent capital stock must be *fully paid for in cash in advance of issuance.* Ark. Stat. & 67-1818.

We find, and so hold, that the action of the Board in approving the application was supported by substantial evidence.

The judgment of the trial court is reversed and this cause remanded with directions to remand to the Board for further procedure not inconsistent with this opinion.

Reversed and remanded.

HARRIS, C. J., dissents.

BROWN, J., not participating.

Opinion delivered February 6, 1967
[Amended on denial of rehearing March 13, 1967]

Frank Lady and *H. M. Ellis,* for appellant.

Pickens, Pickens & Boyce, for appellee.

CARLETON HARRIS, Chief Justice. This case is here on a fourth appeal.[1] Clara Andrews, appellant herein, an employee of Victor Metal Products Corporation, was discharged from her employment on March 12, 1959, at the plant. Thereafter, she filed a claim for unemployment benefits under the provisions of Ark. Stat. Ann. § 81-1107 (Repl. 1960). The ESD local office found that she was disqualified for compensation, because the reason for her discharge was insubordination. An appeal was taken to the Appeals Referee, and then to the

[1]See *Andrews* v. *Victor Metal Products Corp.*, 235 Ark. 568, 361 S. W. 2d 19; *Andrews* v. *Victor Metal Products Corp.*, 237 Ark. 540, 374 S. W. 2d 816; *Andrews* v. *Victor Metal Products Corp.*, 239 Ark. 763, 394 S. W. 2d 123.

Board of Review. The Board of Review affirmed the findings, and Mrs. Andrews appealed to the Jackson County Circuit Court. That court then affirmed the decision of the Board of Review, and, in a subsequent common law action, growing out of an alleged contractual relationship between the parties, we held that the court's affirmance, heretofore mentioned, was not *res judicata* of the latter suit instituted by appellant. Mrs. Andrews was permitted to proceed with her suit against Victor Metal Products Corporation, appellee herein, for breach of contract, and on February 21, 1966, the case was tried before a jury, resulting in a verdict for appellee. From the judgment entered in accord with the verdict, appellant brings this appeal. For reversal, Mrs. Andrews first asserts that the trial court erred in permitting appellee to introduce evidence relating to the reason for her discharge, such evidence being offered for the purpose of justifying the termination, and appellant not having received a written notice of discharge as she contends was required under the terms of the contract.

The company had entered into an agreement with A.F.L. Local 230, Aluminum Workers International Union, of which appellant was a member in good standing. Article II, Section 2, of that agreement provides as follows:

"The Company has the right to discharge or suspend any employee for cause, including failure to comply with published or posted plant rules and the terms of this agreement. Such employe and the president of the Local Union shall be advised in writing by the Company within 24 hours of such discharge (excluding Saturday and Sunday) of the reason for such discharge or suspension; and the employee shall have the right to question if the discharge or suspension was for cause or violation of such plant rules or the terms of this agreement by appeal in writing within three working days through the grievance procedure established herein, including arbitration."

This point for reversal is predicated upon the fact that Mrs. Andrews never received a notice in writing of the reason for her discharge, and this is admittedly true.[2] To briefly summarize the evidence, Johnnie Tubbs, a foreman at appellee company, testified that on the morning of March 12, "Mrs. Andrews' line was down and it is the general practice of Victor when a line is down to send the women to the bench; that is where they do salvage work, tubes are set back on the end of the line;" that Mrs. Andrews refused to go to the bench, stating, "No, I am not going." After making several requests for her to follow the order, he reported the matter to Bezo Nicholson, Chief Steward of the local union. Appellant also refused Nicholson's request to go to the bench. Nicholson testified that, as the union steward,[3] he tried to reason with Mrs. Andrews, telling her that, under the union grievance procedure, she was supposed to follow the orders of the foreman, and then, if she felt aggrieved over the task assigned, file a grievance. Subsequently (within three hours), the matter was discussed in the office of the plant superintendent, C. O. Lewallyn. Those present at the time were Mrs. Andrews, Lewallyn, Joe Nuckolls, president of the local union, Tubbs, and Chester Knox, personnel director. All talked with appellant, endeavoring to ascertain if she would obey the orders of her superior, but Mrs. Andrews would not promise to do so. After a meeting that lasted several hours, she was discharged for insubordination. Nuckolls, president of the local union, testified that Mrs. Andrews would not agree to follow Tubbs' orders. It is not disputed by appellant that she was told on March 12 that she was being "fired" for insubordination.

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[2]In the last appeal, we held that an individual employee may maintain an action upon a collective bargaining agreement to enforce rights that are personal as distinguished from those that accrue to the union as a whole.

[3]According to the evidence, when a dispute arises, the steward is due to immediately investigate, and see if he can help in solving the difficulty.

To reiterate, it is appellant's contention that not having served her with written notice, as called for in the company's agreement with the union, appellee was not entitled to offer any proof as to the reason for her discharge. In other words, she contends that, to recover, it was only necessary that she establish that she had been damaged, and her testimony as to damages dealt with loss of pay, it being contended that she was entitled to be paid from the date of her discharge until the termination of the contract, a period of 19 months.

We do not agree that, under the circumstances herein, the failure to give notice barred the raising of the defense of insubordination. Let it be borne in mind that we do not have here a case of an employee being discharged without knowing the reason therefor; nor was it even necessary for Mrs. Andrews to guess at the reason. During a period of several hours, her insubordination was discussed with both company and union officials. As previously stated, there is no contention that she did not know the reason for her discharge.[4]

In the New Hampshire case of *Couture* v. *Hebert et al,* 42 A. 2d 691, the question of the necessity for a written notice was before the court. There, Couture instituted action against Hebert for breach of contract. A contract had been entered into whereby Hebert agreed to employ Couture for a period of one year at a salary of $25.00 per week for the first six months, and a salary of $15.00 per week for the remainder of the year. A clause was included which provided that the contract could be terminated by the employer upon giving 30 days *written* notice to the employee, and upon payment of four weeks salary. Couture immediately assumed his duties and rendered services. Shortly thereafter the

[4]The company did comply with that portion of the agreement requiring that the president of the union should be advised in writing by the company within 24 hours of the reason for the discharge.

employer orally notified the employee that he was discharged and his services no longer required. The question of cause for discharge was not involved. The trial court held that, because no written notice was given (as required by the contract) Couture was entitled to recover for the entire term of the contract, and rendered judgment for $1,040.00. On appeal, the New Hampshire Supreme Court reversed this judgment, stating:

" 'It [a written notice] is merely the vehicle used * * * to transmit * * * information.' [Citing cases]

" 'It is an old maximum of the law that it compels no man to do a useless act, and the principle was applied in the time of Coke, if not before, to the case of conditional promise.' 3 Williston, Contracts, Rev. Ed., p. 2008.

"The oral notice in the instant case gave the plaintiff all the information he would have received had a written notice been given. He understood he was through, and acted accordingly. His conduct corroborates his understanding of what the oral notice meant. He was not prejudiced by failure to be given a written notice [citing cases,] and consequently is not entitled to greater rights than if a written notice had been given. If the latter had been given, he would have been entitled to receive four weeks' pay at the prevailing rate at the time, correctly found by the Court to be $25 per week and that is all he is entitled to receive now."

Here, the purpose of the notice was to acquaint the union and Mrs. Andrews with the definite cause of her discharge in contemplation of a hearing before the grievance committee. The union received written notice, and appellant was told explicitly the reason for termination, and this, after a long discussion of her action in refusing to follow the orders of her

superior. How then, was she prejudiced by failure to be given a written notice that could do no more than reiterate the oral notice? Let it be remembered that the failure to give the written notice *did not preclude* Mrs. Andrews' right to go before the grievance committee, for the grievance provision of the contract provides that any grievance may be taken up by the employee or the shop steward within three working days after the occurrence, "and the foreman shall give his answer immediately if he can and in any event within twenty-four (24) hours of the receipt of the grievance; and failing satisfactory settlement at the time the foreman gives his answer, the complaint shall then be *immediately put in writing and signed by the employee,* [emphasis supplied] and the foreman shall then put his decision in writing thereon." If the employee is still dissatisfied, appeal procedures are provided, but Mrs. Andrews *never did take the first step.* She apparently preferred to follow her common law remedy. The record is clear that no complaint was made.

Under appellant's theory, an employee could burn his employer's property, steal it, or stay away from work for an indeterminate period of time, and upon being fired (specifically for one of these reasons), but without written notice, could recover wages for the period of the contract; the employer could not even testify as to the reason for discharge. Under the circumstances cited, we hold that there was substantial compliance by the company in the giving of notice, and appellant was not prejudiced by the failure to receive this notice in writing.

It is also asserted that the court erred in allowing appellee to introduce evidence of justification for appellant's discharge, since appellee's pleadings only amounted to a general denial of the material allegations. We find no merit in this contention. Appellant's complaint alleged that her employment was "termi-

nated *without cause* [emphasis supplied]." It is pointed out in 17A C. J. S. Contracts, Section 549 (B) 1070, that, under a general denial to a complaint which a plaintiff is required to prove in order to maintain his action, a defendant is at liberty to prove anything tending to show that the plaintiff's arguments are untrue, and he may introduce evidence to disprove, wholly or in part, any fact which the plaintiff must establish to show his cause of action. He is permitted to offer evidence which tends to disprove the facts alleged by a plaintiff.

It was necessary that appellant show that she was discharged "without cause." The proof offered by appellee was properly offered to disprove this allegation, it being appellee's defense that the discharge was "with cause."

Affirmed.

George Rose Smith, Jones and Byrd, JJ., dissent.

Conley Byrd, Justice, dissenting. Involved here is a collective bargaining contract requiring the employer, upon discharging an employee, to give both the employee and the president of the union, within twenty-four hours, a written statement of the reason for the discharge. We held, the third time this matter was before the court, *Andrews* v. *Victor Metal Products Corp.*, 239 Ark. 763, 394 S. W. 2d 123 (1965), that the employee, as a member of the union, was entitled to the benefits of the contract provision on discharge, and was also entitled to seek redress by way of damages because of the employer's failure to give the required written notice.

The majority opinion is this day holding that the employer, who has breached his contract by failing to state his reasons for the discharge of appellant in writing as required by the contract, can now come into court and show any justifiable reason for the discharge of ap-

pellant. If the majority opinion is followed to its logical conclusion, it would follow that the employer can disregard the breach of his contract by showing any reason which he thinks justifiable to sustain the discharge, even in a suit by the union to require the employer to re-instate the employee.

The right of discharge of a servant by a master generally, as distinguished from a contract requiring that an employer must specify the reason for discharge in writing, was pointed out by the Supreme Court of New Mexico in *Kiker* v. *Bank Sav. Life Ins. Co.,* 37 N. M. 346, 349, 23 P. 2d 366, 368 (1933) It was there said:

> "Generally, in an action for wrongful discharge, the employer may plead in defense any sufficient cause, though it may have been unknown to him at the time, though his real reason or motive may have been something else, and though another cause may have been expressly assigned. Williston on Contracts, §§ 744, 839; Labatt on Master and Servant, § 189; Page on Contracts (2d Ed.) § 3058; 18 R. C. L. 516; 39 C. J. 89.
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> But the parties of course have the right to stipulate the manner in which the employer may terminate the contract. If they stipulate that it shall be by written notice specifying the cause, a discharge specifying no cause, or an insufficient cause, would be wrongful. It follows that, under such a contract, a cause not specified would not be available in defense. *Hughes* v. *Gross et al.,* 166 Mass. 61, 43 N. E. 1031, 32 L. R. A. 620, 55 Am. St. Rep. 375, cited; 18 R. C. L. 516; *Mortimer* v. *Bristol,* 190 App. Div. 452, 180 N. Y. S. 55."

In addition to obliterating the provision of the collective bargaining agreement which required a written statement of the reasons for discharge, the majority opinion suggests that—since the president of the union received written notice and appellant was told explicitly

the reason for her termination—there was a substantial compliance with the contract provision requiring a writing. Thus, concludes the majority, the failure to give written notice to Mrs. Andrews *did not preclude* her right to go before the grievance committee within three working days after the occurrence, nor her right to prosecute an appeal therefrom. There are two answers to this suggestion:

ONE: The same suggestion was made in *Andrews v. Victor Metal Products Corp.,* 239 Ark. 763, 394 S. W. 2d 123 (1965), and we said:

> "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. . . ."

TWO: The employee had the right to rely upon the provisions of the collective bargaining agreement requiring the employer to state in writing the reason for the discharge which would limit the issues before the grievance committee.

Furthermore, the record does not show that, within the three-day time limit for going before the grievance committee, Mrs. Andrews knew or had any knowledge that the president of the union had received a written notice in compliance with the contract.

If it were the intent of a lawyer to draft a collective bargaining agreement to require that an employee discharged for cause should receive written notice stating the reasons for the discharge, how could he have made it plainer than the provision in this instance?

For the reasons set forth, I would reverse and remand for a new trial.

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

LLOYD CABBINESS *v.* STATE

5233 410 S. W. 2d 867

Opinion delivered February 6, 1967

Don Langston, for appellant.

Bruce Bennett, Attorney General; *Lance Hanshaw,* Asst. Atty. General, for appellee.

GEORGE ROSE SMITH, Justice. On the night of November 4, 1965, someone broke into Teague's Produce Store in Berryville and pried off the door of a safe. Apparently the intruder left without having taken anything. The appellant, Lloyd Cabbiness, a resident of Little Rock, was arrested the following night and charged with the burglary. Upon trial he was found guilty and sentenced to imprisonment for five years. He questions

the sufficiency of the evidence and the trial court's rulings with respect to physical exhibits offered by the State.

We find the prosecution's testimony to be sufficient to support the verdict. On the day of the burglary Cabbiness, a private investigator and former school teacher, borrowed a car from a woman living next to him in an apartment house and drove to Berryville. That evening Cabbiness was seen in downtown Berryville several times between seven and eleven o'clock. He was accompanied by an unidentified woman (not the owner of the car). Charles Robbins, a Berryville policeman, testified that early in the evening he directed Cabbiness to a telephone booth near the Teague building and that later on he saw Cabbiness's companion sitting in the car alone. There was other testimony from which the jury might have found that Cabbiness returned to the car with some tools and a flashlight, whereupon the couple drove hastily away.

At about two in the morning an employee of the produce company discovered that the building had been broken into and that the door of a safe had been "peeled" off. That door had been insulated by a layer of a white chalky substance. Whoever wrenched off the door had damaged the layer of insulation, scattering the chalky substance over the floor.

Officer Robbins had made a note of Cabbiness's car license number. With that information the police quickly traced the owner of the car and learned that Cabbiness had borrowed it. After Cabbiness was arrested the police found particles of a white chalky substance on the front floorboard of the vehicle. Laboratory tests proved that the substance taken from the car was identical with that found near the safe.

Upon the foregoing testimony the jury were warranted in concluding that Cabbiness was the person who broke into the Teague building. The appellant contends,

however, that there is no proof that he had the requisite intent to commit a felony or larceny, because apparently nothing was stolen. The short answer to this argument is that a larcenous purpose can fairly be inferred from the violent attack upon the safe.

The police took samples of the chalky substance from the scene of the burglary and from the car used by Cabbiness. It is now contended that the State failed to prove all the links in the chain of possession from the taking of the samples to their delivery to the police laboratory. *Jones* v. *City of Forrest City,* 239 Ark. 211, 388 S. W. 2d 386 (1965). The gaps, however, were not serious ones. For instance, Sheriff Bishop testified that he took a sample from the floor, put it in an envelope, and delivered it to Officer Atkinson the next night. The appellant argues that the whereabouts of the sample between the time the sheriff obtained it and the time he turned it over to Atkinson was not accounted for. Presumably it remained in Bishop's possession during that interval, but any doubt about that can be dispelled at a new trial.

After Cabbiness was arrested the police returned to his apartment and searched it, without a warrant. Among other things they found a revolver and some clothing. Before the trial began the defense attorney filed a motion to suppress this evidence on the ground that it had been obtained illegally. The court refused to pass upon the motion, saying that it was premature and that he would rule upon the admissibility of the evidence when it was offered.

When it became apparent during the trial that the State was about to offer the fruits of the illegal search, counsel for the defense asked that the witness be placed on voir dire; that is, that his testimony be heard out of the presence of the jury. That request was denied. The witness was then permitted to describe the revolver and the other articles that had been found in Cabbiness's apartment. After the matter had thus been brought to

the jury's attention the court finally sustained the objection to the evidence.

Despite the ruling the prosecuting attorney later asked another witness if the revolver had been loaded or unloaded. The defendant's objection to the question was sustained, but his motion for a mistrial was denied. Instead, the court polled the jurors individually and was assured by each one that he could erase from his mind the reference to the revolver.

We cannot approve such misguided zeal on the part of the prosecution. There is not, and could not have been, the slightest doubt about the inadmissibility of the revolver, not only because it was the product of an obviously illegal search but also because it had nothing whatever to do with the offense being tried. We have recently held that the introduction in evidence of a pistol having no connection with the crime in question is reversible error. *Rush* v. *State,* 238 Ark. 149, 379 S. W. 2d 29 (1964).

In simple fairness to the accused the motion to suppress the evidence should have been heard before the trial began, out of the presence of the jury. That procedure is required by Rule 41 (e) of the Federal Rules of Criminal Procedure and has been approved by many state courts. *United States* v. *Blalock,* 253 F. Supp. 860 (1966); *People* v. *Holmes,* 47 Cal. Rptr. 246 (1965); *Farrow* v. *Maryland,* 233 Md. 526, 197 A. 2d 434; *Stevens* v. *Oklahoma,* Okl. Cr., 274 P. 2d 402 (1954); *Hill* v. *Tennessee,* 211 Tenn. 682, 367 S. W. 2d 460 (1963). Some of the reasons for hearing the motion before the trial were given in the *Blalock* case, *supra*:

> "Rule 41 (e) 'is designed to eliminate from the trial disputes over police conduct not immediately relevant to the question of guilt.' *Jones* v. *United States,* 362 U. S. 257, 264, 80 S. Ct. 725, 732, 4 L. Ed. 2d 697, 78 A. L. R. 2d 233 (1960). The interruption of 'the trial for such auxiliary inquiries impedes the

> momentum of the main proceeding and breaks the continuity of the jury's attention.' *Nardone* v. *United States,* 308 U. S. 338, 342, 60 S. Ct. 266, 268, 84 L. Ed. 307 (1939). A separate hearing also enables the defendant to testify on the collateral issue of suppression without waiving his privilege against self-incrimination on the merits of the charge or creating the possibility, if he were to testify on the suppression issue before the jury but stand mute on the merits of the charge, that the jury would draw the prohibited adverse inference from his conduct.''

We presume error to have been prejudicial in the absence of an affirmative showing to the contrary. *Connelly* v. *State,* 232 Ark. 297, 335 S. W. 2d 723 (1960). We are inclined to think that, on balance, the court's polling of the jury tended to emphasize the error rather than to correct it. Only a very unusual and very conscientious juror would publicly confess himself to be so weak-minded as to be unable to obey the court's admonition to disregard certain testimony. The sure way to avoid the possibility of prejudice is to exclude the incompetent evidence in the first place. If we should uphold the procedure that was followed in this case there is hardly any limit to the inadmissible testimony that might reach the jury's ears.

Reversed.

HARRIS, C. J., and FOGLEMAN, and JONES, JJ., dissents.

CARLETON HARRIS, Chief Justice, dissenting. I cannot agree that the court committed reversible error by denying appellant's motion for a mistrial, because of reference to the pistol. It is true that counsel for appellant had, prior to the commencement of the trial, moved to suppress the evidence involving the clothing and revolver that were found in appellant's apartment, on the ground that these items had been obtained illegally. I agree with that particular contention, since no search

warrant had been secured. However, appellant's counsel subsequently agreed that these articles could be admitted for purposes of identification, in counsel's words, "for no other purpose." Later, counsel reiterated his consent for that purpose. In *Frazier* v. *Sewell,* 241 Ark. 474, 408 S. W. 2d 597, the appellant requested an instruction, which was refused, and later appellant withdrew the request for the instruction. But on appeal it was contended that, in failing to give the instruction, the court had erred. We disagreed, saying:

"* * * The withdrawal of the requested instruction actually meant that appellant no longer wanted that instruction, and she was thereby placed in the same status as though the instruction had never been requested. We have repeatedly held that a party cannot complain of a trial court's failure to give an instruction unless same is requested."

It seems to me that the same situation exists in the case before us. Counsel's agreement for the articles to be offered, though only for a specific purpose, had the effect of withdrawing the motion to suppress. The articles were never exhibited to the jury; all were in a sack together, and every objection to their introduction as evidence was sustained by the court. The reversal of this case by the majority seems principally to be predicated upon the question by the Prosecuting Attorney as to whether the revolver found in the apartment had been loaded or unloaded. The objection to this question was sustained, but the motion for mistrial was denied, the court telling the jury to disregard any reference to the pistol. The jurors were then polled individually, and each answered that, in determining the guilt or innocence of the accused, he could completely disregard any reference to the revolver. The court was careful and specific, asking such questions as, "You are sure about it?" "Is there any doubt in your mind?" "You can completely disregard it in your deliberations in this case?" As stated, all jurors answered in the affirmative.

We have repeatedly held that an admonition to the jury to disregard improper questions or answers occurring during the trial cures any possible error, and the only exception to this rule is where the testimony is so prejudicial that an admonition cannot cure it. In *Crawford* v. *State,* 204 Ark. 748, 164 S. W. 2d 898, the trial court first admitted certain evidence that it subsequently decided was inadmissible. From the opinion:

"Later on and before the case was sent to the jury the court instructed the jury to disregard the testimony objected to entirely as he doubted whether or not it would shed any light on the state of mind of the parties or on the question as to who was the probable aggressor.

"Relative to the erroneous admission of evidence during the progress of a trial and the subsequent withdrawal thereof before the case was submitted to the jury this court, in the case of *Goynes* v. *State,* 184 Ark. 303, 42 S. W. 2d 406, quoted from 38 Cyc. 1440 as follows: The general rule is that if inadmissible evidence has been received during the trial, the error of the admission is cured by its subsequent withdrawal before the trial closes, and by an instruction to the jury to disregard it."

In *Kasinger* v. *State,* 234 Ark. 788, 354 S. W. 2d 718, we said:

"Appellants contend that error was committed when the Sheriff of Baxter County was asked by the State's attorney why he moved the appellants to a jail in Yellville, Marion County, and he replied, 'They'd broke jail here before;' also, error is asserted because of a question asked appellant Ray Kasinger by the State's attorney, 'How many times has Jack Gregory arrested you?' In each instance, the Court instructed the jury not to consider this question and answer. In *Davis* v. *State,* 155 Ark. 245, 244 S. W. 750, the prosecuting attorney made certain remarks which the appellant contended to be prejudicial, but this Court said:

" 'It will be noted that the court instructed the jury to disregard the remarks made by the prosecuting attorney and this, we think had the effect to cure any prejudice that might have resulted to the defendants from the remarks.' "

Likewise, in *Washington* v. *State,* 227 Ark. 255, 297 S. W. 2d 930, a similar situation arose. We said:

"The next assignment of error relates to the following answer given by Officer Jack Morgan when counsel for appellant asked him whether he knew appellant was a minor about sixteen years of age: 'Yes, we had him one other time.' Appellant's objection to the answer was promptly sustained by the trial court and the jury admonished not to consider it. If it be assumed that the answer was unresponsive to the question and erroneously given, any possible prejudice arising therefrom was cured by the court's action."

Also, in *Knight and Johnson* v. *State,* 228 Ark. 502, 308 S. W. 2d 821, we said:

"Harper was asked by the State if he received any money from any of the accused by way of restitution, and in replying in the affirmative he mentioned appellant's name. The witness was immediately interrupted by an objection on behalf of the appellant. Thereupon the court cautioned the jury to disregard the testimony. The court also asked the jurors if they could do that and all of them held up their hands to indicate they could. From this it is hard to see how any prejudice could have resulted to appellant."

Literally dozens of similar cases could be cited, but no point would be served in adding to the aforementioned citations, which clearly show that an admonition to the jury to disregard particular evidence is entirely sufficient, unless "it is manifest that the prejudicial effect of the evidence on the jury remains, despite its ex-

clusion and influences their verdict.'"[1] I certainly cannot agree that the Prosecuting Attorney's reference to the pistol makes manifest that the jury was prejudiced. The majority cite *Rush* v. *State,* 238 Ark. 149, 379 S. W. 2d 29, where we held that the introduction in evidence of a pistol, having no connection with the crime, was reversible error. Let it be quickly pointed out that in *Rush,* the defendant was being tried for murder—not burglary, the state charging that Rush had entered into a conspiracy to kill his stepfather, the elder Rush having been shot to death. Admittedly, the pistol there offered was not in the alleged crime, though it was of the same caliber as the murder weapon (a .22 pistol, the murder weapon being a .22 rifle), and there was evidence that some of the conspirators had been firing the pistol which was introduced. We said:

"* * * The pistol in question is very heavy for a .22 caliber; it has a 9-inch barrel, and is rather wicked looking. The very fact that the pistol was admitted in evidence could have had a tendency to confuse the jury, notwithstanding there is no contention on the part of the State that the pistol was used in the killing."

It is easy to see that, in a murder case, particularly where some of the alleged conspirators had been using the pistol, the jury could, in their minds, tie this in with the murder, but no such situation exists in the instant case. In the first place, there was no allegation, nor evidence anywhere in the record, that a pistol had been used; the pistol was not even shown to the jury, nor was an answer given to the question by the Prosecuting Attorney, the court sustaining the objection. I do not see how prejudice arises against a defendant simply because he had a pistol in his home. I daresay that thousands of good citizens individually keep a pistol in their respective homes for the purpose of protection. No one considers these citizens "dangerous" or "bad" because of this fact.

[1]This quote is from *Goynes* v. *State,* 184 Ark. 303, 42 S. W. 2d 406.

To summarize, counsel for appellant agreed that the items could be offered for identification; this in my view, means that he had abandoned his motion to suppress. The court sustained every objection made to offering these items in evidence, and when the pistol was referred to by the Prosecuting Attorney, the court quickly admonished the jury to disregard the question, and then took the additional precaution of polling each member individually for the purpose of ascertaining whether any prejudice resulted. Finally, I reiterate that keeping a pistol in one's home does not establish, or even indicate, that one is of bad character, or likely to commit unlawful acts. I respectfully dissent to the reversal.

JOHN A. FOGLEMAN, Justice, dissenting. I concur in the dissent of the Chief Justice. In *Sharp* v. *State*, 51 Ark. 147, 10 S. W. 228, in reversing a conviction of a defendant because of questions asked and a remark made by the trial judge, this court quoted with approval the California Court when it said:

> "* * * From the high and authoritative position of a judge presiding at a trial before a jury, his influence with them is of vast extent, and he has it in his power, by words or actions, or both, to materially prejudice the rights and interests of one or the other of the parties. By words or conduct he may on the one hand support the character or testimony of a witness, or on the other may destroy the same, in the estimation of the jury; and thus his personal and official influence is exerted to the unfair advantage of one of the parties, with a corresponding detriment to the cause of the other."

I cannot see any reason why the statements of a trial judge admonishing a jury not to consider specified matters arising during the course of a trial cannot be presumed to have the same influence for fairness as they can for unfairness, particularly when the judge takes the extra precaution to inquire of each in-

dividual juror if he would and could abide by an admonition of the court.

To reverse this case is to say that the offering of the questioned evidence was so prejudicial to the appellant that even the tremendous influence of the trial judge could not by any means remove the prejudice and that the jurors, depended upon to arrive at just and true verdicts, could not be depended upon to give an honest answer to the judge's inquiry. I am unwilling to say this in the circumstances of this case.

O. D. PENDERGRASS *v.* VADA SHEID

5-4216 411 S. W. 2d 5

Opinion delivered February 6, 1967

John Norman Harkey and *Fred Livingston* and *Bill H. Walmsley,* for appellant.

No brief for appellee.

GEORGE ROSE SMITH, Justice. At the general election held on November 8, 1966, the appellant and the appellee were rival candidates for the office of State Representative for the Fifth District, comprising Fulton and Baxter counties. Mrs. Sheid, the Democratic nominee, was

certified as the winner by a vote of 4,542 to 4,488. Pendergrass, the Republican nominee, brought this action in the Fulton Circuit Court to contest the election. His complaint asserted that the votes of 84 specified electors should be declared illegal for various reasons, such as nonresidence, irregularities in absentee voting, and so on. This appeal is from an order dismissing the suit for want of jurisdiction.

We agree with the trial court. The Constitution provides that each house in the General Assembly "shall be sole judge of the qualifications, returns and elections of its own members." Article 5, § 11. By Act 34 of 1875 the legislature prescribed the procedure for contesting an election for State Senator or Representative. Ark. Stat. Ann. §§ 3-1213 to 3-1217 (Repl. 1956). That statute requires the contestant to give his adversary written notice of the points on which the election is to be contested. The parties then take their evidence by deposition, before the date on which the legislature is to assemble, and file it with the President of the Senate or the Speaker of the House, as the case may be. Thus the statute contemplates that the contest will be decided by the Senate or the House of Representatives, without a court proceeding of any kind.

We have repeatedly held, directly or by implication, that the judicial branch of the State government is without jurisdiction of election contests involving seats in the General Assembly. *Irby* v. *Barrett,* 204 Ark. 682, 163 S. W. 2d 512 (1942); *State ex rel. Evans* v. *Wheatley,* 197 Ark. 997, 125 S. W. 2d 101 (1939); *Parrish* v. *Nelson,* 186 Ark. 786, 55 S. W. 2d 922 (1933); *Young* v. *Boles,* 92 Ark. 242, 122 S. W. 496 (1909); see also *State ex rel. Brooks* v. *Baxter,* 28 Ark. 129 (1873). There is nothing contrary to those decisions in *Matthews* v. *Bailey,* 198 Ark. 830, 131 S. W. 2d 425 (1939), cited by the appellant. That case merely held that the vote of a person appointed to the State Senate by the governor, contrary to the express language of Amendment 29, could not be counted. There the court was compelled to make a choice between

two constitutional provisions, either of which might have been controlling. That is not the situation here.

The appellant urges us to adopt the position taken in cases such as *Odegard* v. *Olson,* 264 Minn. 439, 119 N. W. 2d 717 (1963), Rogosheske, J., concurring; *People ex rel. Brown* v. *Board of Sup'rs of Suffolk County,* 216 N. Y. 732, 110 N. E. 776 (1915); and *Wickersham* v. *State Election Board,* Okl., 357 P. 2d 421 (1960). In those cases the courts reasoned that even though each house in Congress or in the legislature is the sole judge of the elections of its own members, that power to speak the final word does not prevent the courts from entertaining an election contest. Such a judicial proceeding was regarded as a convenient method of taking evidence about the conduct of the election and of reaching a tentative conclusion as to the winning candidate. The appropriate legislative body would then be at liberty to accept the court's decision or to arrive at a determination of its own.

We have no quarrel with those cases, but they do not reach the problem now before us. Those decisions, if followed in Arkansas, would mean only that the General Assembly, if it chose to do so, might permit the courts to take jurisdiction of such an election contest as a means of gathering evidence to assist the Senate or the House in reaching its own conclusion. But, as we have seen, our legislature has not seen fit to adopt such a statute. Instead, its directive for almost a century has been that the contesting parties take their proof by deposition and submit it in the first instance to the appropriate branch of the General Assembly, bypassing the courts altogether.

We are not impressed by the appellant's suggestion that the necessary statutory authority for a judicial contest is to be found in § 1 of Act 15 of 1879. Ark. Stat. Ann. § 3-1210. That section merely provides that in all suits to contest the election "of any State, district, circuit, county or township office," the contestant must

give a bond to insure the payment of any money judgment that he may suffer. We cannot take seriously the argument that this bare requirement of a bond was intended to confer upon the courts jurisdiction of election contests for every one of the offices mentioned. The statute is evidently applicable only to those contests of which the courts otherwise have jurisdiction. The case at bar does not fall within that category.

Affirmed.

JOHN PETTY, LUTHER ERNEST MYRICK AND WILLIAM NEIL DODSON *v.* STATE

5221 411 S. W. 2d 6

Opinion delivered February 6, 1967

Hamilton & Carson, for appellant.

Bruce Bennett, Attorney General; *Clyde Calliotte,* Asst. Atty. Gen., *Fletcher Jackson,* Asst. Atty. Gen., for appellee.

PAUL WARD, Justice. The appellants (John Petty, Luther Ernest Myrick and William Neil Dodson) were charged by information on December 14, 1965 with the crimes of burglary and grand larceny for unlawfully, wilfully and feloniously breaking and entering the Ozark Bowling Lanes, Inc. in Fayetteville, and taking money in excess of $35.

The trial resulted in verdicts of guilty against all defendants on both counts fixing the punishment of each at two years imprisonment for burglary and one year for grand larceny—said sentences to run consecutively.

Upon appeal appellants raise eighteen separate points in an attempt to show reversible error.

Since we have concluded the cause must be reversed for reasons presently set forth we will not discuss many of the assignments of error or the testimony relating thereto. We deem it sufficient therefore to set out only a summary of the facts material to this opinion.

Facts. At approximately 4:30 a.m. December 13, 1965 the night watchman at the bowling lanes discovered that the premises had been burglarized. He also noticed footprints in the soft dirt near the rear door which appeared to have been pried open. He promptly notified the police. He had previously noticed three trucks parked at a filling station nearby. When he went over to ask the drivers if they had seen anything suspicious he found no one. He then returned to the bowling lanes for a few minutes and as he started back he noticed one of the trucks pulling out. He tried to flag the truck down with a flashlight but was unsuccessful, and then the other two trucks also drove away. When the police arrived

they pursued the trucks and apprehended them at West Fork about ten miles south of Fayetteville. When the drivers professed no knowledge of the burglary they were permitted to continue and the police returned to the filling station. Upon arrival they were later informed by the attendant that he saw one of the drivers throw something in a trash can. Upon examination of the can they found certain articles which appeared to have been taken from the bowling lanes. Thereupon a "pickup" was radioed to other police cars.

At about 6 p.m. the same day the drivers were apprehended and arrested at Mt. Ida some 100 miles south of Fayetteville. The arresting officer placed the drivers in jail and took possession of the truck keys. Some six hours later two state policemen arrived, took the keys and searched the trucks. Approximately twelve hours later the trucks were searched again. Each search produced certain incriminating evidence. They found and took possession of filed down screwdrivers, an iron bar, a pair of boots, and two rolls of nickels with wrappers like those used at the bowling lanes. At the trial these items were introduced in evidence over the objections of appellants.

One. It is here contended by appellants that their constitutional rights were violated because the search of their trucks took place without a search warrant, and that, consequently, these items were inadmissible in evidence. We think the contention of appellants must be sustained.

We are unable to distinguish this case, in principle or on facts, from the case of *Preston* v. *United States,* 376 U. S. 364, 11 L. Ed. 2d 777. In that case the police received word that three suspicious men had been parked in an automobile in the business district of Newport, Kentucky for several hours. They proceeded to the scene, questioned the three men, found they were unemployed, had no money, and could give no satisfactory explanation of their presence. Thereupon the police of-

ficers arrested them for vagrancy, searched them for weapons and took them to the police station. The car was first taken to the police station and then towed to a garage. A short while later the police went to the garage and forced their way into the locked trunk of the car and found certain articles which appeared to link them with an alleged conspiracy to rob a bank. Later there was a conviction of Preston and his companions based on the introduction in evidence of the recovered articles. In reversing the convictions the Court made statements applicable to the issue here under consideration.

> "Our cases make it clear that searches of motor cars must meet the test of reasonableness under the Fourth Amendment before evidence obtained as a result of such searches is admissible."
>
> * * *
>
> "Here we may assume, as the Government urges, that either because the arrests were valid or because the police had probable cause to think the car was stolen, the police had a right to search the car when they first came on the scene. But this does not decide the question of reasonableness of a search at a later time and at another place . . .
>
> The search of the car was not undertaken until the petitioner and his companions had been arrested and taken in custody to the police station and the car had been towed to the garage. At this point there was no danger that any of the men arrested could have used any weapons in the car or could have destroyed any evidence of a crime. . ."

Obviously there is a striking similarity between the vital facts in this case and the *Preston* case. There was no search warrant, the men had been arrested, they had no chance to escape, there was a lapse of time (much more in this case) between the arrest and the search, and there was no chance that the articles recovered would be moved or lost.

In the case of *Williams et al* v. *State,* 237 Ark. 569 (p. 573), 375 S. W. 2d 375, we cited *Mapp* v. *Ohio,* 367 U. S. 643, and said:

> " . . evidence illegally obtained is not admissible in the State courts, regardless of the previous holding of the State courts on this point."

Two. There is no merit in appellant's contention that it was error for the trial court to refuse to suppress the evidence at the beginning of the trial on the ground that they were not indicted by a grand jury. As previously mentioned, the appellants were brought to trial on an Information, and it is the contention of appellants that this was in violation of the Fifth Amendment to the U. S. Constitution.

We have held many times that presentment by Information is not in violation of the U. S. Constitution. In 1936 this State adopted Amendment No. 21 to our constitution, which reads:

> "All offenses heretofore required to be prosecuted by indictment may be prosecuted either by indictment or information filed by the Prosecuting Attorney."

For some of the recent decisions upholding the constitutionality of said amendment see:
Smith v. *State,* 218 Ark. 725, 238 S. W. 2d 649
Moore v. *State,* 229 Ark. 335, 315 S. W. 2d 907,
Monts v. *State,* 233 Ark. 816, 349 S. W. 2d 350,
Beckwith v. *State,* 238 Ark. 196, 379 S. W. 2d 19.

Three. Appellants say they were prejudiced because the court would not allow them (a) to "inquire as to the competency, character and reputation for untruthfulness of the state's witness, Mr. Adney", and (b) to question his employer in an attempt "to explore the competency, character and reputation for truthfulness" of Adney.

We feel that the above complaint is too general and indefinite to show reversible error, especially since it is not necessary to do so in this case. If there is another trial and this point arises, we suggest that the case of *Wright* v. *State,* 133 Ark. 16 (p. 25), 201 S. W. be examined.

Four. Appellants attempted to testify to certain conversations among themselves, but the trial court refused to let this testimony go to the jury. We think the court was right in excluding this testimony because it was self-serving. A similar situation was considered in the early case of *Littlejohn* v. *State,* 76 Ark. 481, 89 S. W. 463, where this Court said: "These questions were designated to elicit self-serving declarations, or might have done so, and the court ruled correctly in not permitting the witness to answer them."

Five. It was not error for the trial court to refuse to allow appellants to ask a State witness what a third person had told him on a certain occasion. Whatever the third party may have said to the witness, would, of course, have been hearsay and therefore inadmissible.

Appellants have also made other objections to certain rulings of the court. We have carefully examined each of these objections and find no reversible error.

It follows from what we have said that the judgment of the trial court must be, and it is hereby, reversed.

Reversed.

HARRIS, C. J. & FOGLEMAN, J. dissent.

JONES, J. concurs.

JOHN A. FOGLEMAN, Justice, dissenting. The majority reverse this case on the authority of *Preston* v. *United States,* 376 U. S. 364, 11 L. Ed. 2d 777, 84 S. Ct. 881,

which they say would render the search of the trucks, which were being driven by the appellants at the time of their arrest, unreasonable. I do not agree. I believe that a proper distinction can be made and I am unwilling to join in extending the rule of this case further than its direct holding or to anticipate that the Supreme Court of the United States would do so, and, thus, act upon what such anticipation might indicate. Nothing in any of the decisions of that court limiting the right of police officers to make a search without a warrant has restricted introduction of any evidence obtained other than by an unreasonable search. I cannot agree that the search in this case, without a warrant, was unreasonable.

There is no doubt that searches of motor vehicles must meet the test of reasonableness under the Fourth Amendment before evidence obtained thereby is admissible. But it is recognized in the Preston case that the same standards cannot be applied to searches of motor vehicles or other things readily moved as are applied to searches of fixed structures like houses. See, also, *Carroll* v. *United States,* 267 U. S. 132,69 L. Ed. 543, 45 S. Ct. 280 (1925); *Brinegar* v. *United States,* 338 U. S. 160, 93 L. Ed. 1879, 69 S. Ct. 1302 (1949).

As the writer of the opinion in the *Preston* case observed, what may be an unreasonable search of a house may be reasonable in the case of a motor vehicle. In the *Preston* case, the original arrest was for vagrancy and there was little likelihood that evidence of this crime might be destroyed or removed. It was only after the search of the vehicle of those arrested that federal charges of conspiracy to rob a bank were placed. These appellants were charged with a felony involving larceny, and the intent to commit larceny, and there were reasonable grounds for the officers to believe that incriminating evidence might be found in the trucks operated by appellants. While there is little likelihood that appellants themselves could remove or destroy this evidence after having been incarcerated (as in the *Preston* case), it must be remembered that the trucks being driven by

them belonged to their employer who, no doubt, would take steps to move the trucks on to their destination at the earliest possible moment. There would be no means of the officers knowing whether such drivers as did move the trucks would either inadvertently or deliberately remove or destroy any incriminating evidence. While the keys to the trucks may have been in the custody of the officers at Mt. Ida, it might not have been necessary to have obtained these keys to have moved the trucks and there was no way to know at what hour substitute drivers might arrive.

It must also be remembered that in the *Preston* case, the motor vehicle was not searched at the place of arrest, but that it had been first removed by the officers to the police station (where it was not searched) and then towed to a garage, apparently at the direction of the officers, where there was no likelihood that it would be removed from the jurisdiction. The conclusion that this vehicle was at all times under the complete and exclusive control of the officers seems justified, so that no reason existed why a search warrant might not have been obtained. Here, the distance from the place of arrest and the place the trucks were left was some 100 miles and in a different county from the place of the alleged crime and where appellants were taken to be held for trial. Appellants were arrested by a state policeman stationed at the place of arrest between 6:30 and 7:00 p.m. by virtue of a "pickup" with arrest warrant numbers from Fayetteville given over radio at Clarksville, apparently at the behest of the Fayetteville Chief of Police. It is only reasonable to presume that this officer, at that time, knew nothing except what a warrant would state—that the appellants were charged with burglary and grand largency without any specifications or particulars. He could not have known what evidence to search for at that time. It appears that Chief Spencer and Lt. Griffin arrived at Mt. Ida at 12:30 a.m. of the following day when they took charge of appellants and returned them to Fayetteville, along with a pair of boots, some tools and some coins taken from the trucks. There is

testimony that Officer Thomas was not present when Chief Spencer and Lt. Griffin came to pick up appellants. Thomas, the officer who made the arrests, then searched the trucks, within twenty-four hours following the original arrests, and found a sack of coins in one of the trucks.

The search by the officers who had information as to the alleged crime was made as soon after the arrest as it was reasonably possible to do. While there is no direct testimony, it seems that the inference is that the state policeman who actually made the arrests made his search within a reasonable time after he could have been expected to have detailed information about the offense charged.

The language quoted in the majority opinion from the *Preston* case indicates that its holding turns upon a search made not at the place of arrest, but "at a later time *and* another place." This search took place at the place of arrest and as soon as it might reasonably have been expected to be done. It is significant to me that not only the *Preston* case but the holding in *Stoner v. California,* 376 U. S. 483, 11 L. Ed. 2d 856, 84 S. Ct. 889, decided the same day, is also based on the fact that the searches were completely unrelated to the arrests, both as to time and place.

While it is perhaps academic, it might also be considered that the officers would have had to find the solution as to jurisdiction and venue (as between Washington county and Montgomery county) for the issuance of a search warrant, and this at night when they would also have had to locate a judge or magistrate with the appropriate jurisdiction.

Because of these distinctions, I cannot agree that the search here was unreasonable under any standard heretofore laid down by the courts, state or federal.

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

J. FRED JONES, Justice, concurring. I concur in the results reached by the majority in this case, but on different grounds. I find no substantial competent evidence in the record that the appellants committed the crime for which they were convicted.

CITY OF FORT SMITH *v.* WARREN H. DELAET ET AL

5-4055 411 S. W. 2d 520

Opinion delivered February 6, 1967
[Rehearing denied March 13, 1967]

Shaw, Jones & Shaw, for appellant.

Harold C. Rains Jr. and *Floyd G. Rogers* and *Theron Agee* and *Warren O. Kimbrough,* for appellee.

PAUL WARD, Justice. This is an eminent domain proceedings filed by the City of Fort Smith to procure an easement and right-of-way fifty feet wide over a 137 acre farm owned by Warren DeLaet and wife and a 676 acre farm owned by Logan L. France and his wife. The easement was sought to lay a thirty-six inch water line to be used in transmitting water from lakes in Crawford County to the City. The line was located in accord with the plat attached, as an exhibit, to the City's petition.

A jury trial, based on the pleadings and the testimony, resulted in a judgment in favor of the DeLaets for $3,500 and in favor of the Frances for $5,000.

On appeal appellant relies on two points: *One,* the trial court erred in failing to direct a verdict in favor of appellant at the close of all the testimony, and; *Two,* the verdicts are excessive.

One. There is no merit in this point. The sole contention of appellant here appears to be that it had already paid into court sufficient funds to reimburse appellees. When suit was filed appellant deposited the sum of $84.00 to compensate the DeLaets and $25.00 to compensate the Frances. As will appear hereafter, we are of the opinion that appellees are entitled to damages in excess of the deposits above mentioned. No other reason is advanced by appellant to sustain its contention under this point.

Two. After careful consideration of the entire record we are convinced that the judgments in favor of appellees are excessive, not being supported by substantial evidence.

(a) The testimony relative to damages to the *DeLaet* land is, in substance, as follows:

DeLaet owns 137 acres of good bottom land; has owned it five years; he considers it was worth $25,000 before the taking and $20,000 after the taking. *Mr. Kimes,* an expert witness, has been a real estate dealer for several years; he knows the land and knows where the pipe line runs. The testimony shows appellant has erected or will erect a concrete box on the right-of-way. Kimes thinks the land was worth $23,500 before and $20,000 after the taking. *Mr. Bivens* lives one-half mile away—knows the land and knows where the line runs. In his opinion the land was worth $25,000 or $26,000 before and $20,000 or $21,000 after the taking. He is not a real estate salesman or an expert. Mr. Stanford, an expert witness for appellant thought the land taken was worth $108.

(b) *Mr. France* owns 676 acres of land, well improved and knows the value of land in that vicinity.

In his opinion the land was worth $100,000 before the taking and $60,000 after the taking. *Mr. Craig,* who deals in real estate and knows this land and the value of lands in that vicinity, and is familiar with the location of the line, thought the land was worth $76,500 before the taking and $60,000 after the taking. *Mr. Stanford* thought the land actually taken was worth $40.50, and that the rest of the land was not damaged.

Thus it appears that appellant's own witness considers the lands taken to be worth more than the amounts deposited in court.

The record discloses the following facts with reference to the two farms. *DeLaet*: The pipe line runs 84 rods across his land and the right-of-way covers 1.12 acres. *France*: The line runs 25 rods across his land and the right-of-way covers .36 of an acre.

It would serve no useful purpose to detail the somewhat lengthy testimony given by appellees and their witnesses. It suffices to say we do not find, in the testimony, any substantial evidence to support the amounts fixed by the jury. None of the witnesses made any explanation, other than heretofore set out, of the conclusions reached. No witness attempted to give any reason why the right-of-way adversely affected the value or use of the farms for which they were best suited.

In the case of *Arkansas State Highway Commission* v. *Byars*, 221 Ark. 845 (p. 851), 256 S. W. 2d 738, we approved this language:

> "Juries are not permitted to base their verdicts on speculation and conjecture, and as to whether there is any substantial evidence to support the verdict is a question of law and not fact."

In the above case, at page 849 of the Ark. Reports, we also said:

> "Where a witness gives his opinion as to damages, such testimony must be considered in connection with related facts upon which the opinion is based."

In the case of *Arkansas State Highway Commn.* v. *Ptak,* 236 Ark. 105 (p. 107), 364 S. W. 2d 794, there appears this statement:

> "But the fact that Mr. Powell gave the property a before (the taking) and after (the taking) value does not, within itself, raise the testimony to that degree known as substantial evidence."

Considering the testimony in this case in connection with the rules above announced, we cannot in good conscience, say the jury verdicts are supported by substantial evidence.

Reversed and remanded.

FOGLEMAN and BYRD, JJ., dissent.

CONLEY BYRD, Justice, dissenting. In *Arkansas State Highway Commn.* v. *Johns,* 236 Ark. 585, 367 S. W. 2d 436 (1963), we said:

"Two of the witnesses, Bob Gelly and Joe Snelly, were real estate dealers in Crawford county. After having first stated that they were familiar with land values in the vicinity of the Johns property and that they had inspected this property, both these witnesses expressed their opinion as to the fair market value of the appellees' property before and after the taking. The appellant made an unsuccessful attempt to have this testimony stricken, on the ground that neither witness had stated the facts and reasons forming the basis for his opinion. In insisting that the testimony should have been excluded the appellant cites cases such as *Ark. State Highway Commn.* v. *Byars,* 221 Ark. 845, 256 S. W. 2d 738, holding that the opinion of an expert witness is not substantial evidence when the witness fails to give a fair or reasonable basis for his conclusions.

We think counsel have misconstrued the intent of our cases. It is true that a non-expert witness, such as a layman testifying about a testator's mental capacity, must state the facts upon which his opinion is based before giving that opinion. *Walsh* v. *Fairhead,* 215 Ark. 218, 219 S. W. 2d 941. But there is no similar condition to the admissibility of an expert's opinion.

An expert witness, after having established his qualifications and his familiarity with the subject of the inquiry, is ordinarily in a position to state his opinion. For instance, a physician might testify that he had examined a certain patient and found him to be afflicted with malaria. That testimony would unquestionably be admissible. Yet if this physician, on cross-examination, were forced to admit that he had found no recognized symptom of malaria and had based his conclusion solely upon the fact that the patient had been bitten by a mosquito, then, under the rule in the *Byars* case, the witness's opinion would no longer constitute substantial evidence.

It was incumbent upon counsel for the appellant to support their motion to strike by showing that the landowners' expert witnesses had no reasonable basis for their opinions. Counsel actually made no effort in that direction, the motion to strike Snelly's testimony having been made without any cross-examination at all. Thus there was a complete failure to overcome the *prima facie* admissibility of the testimony that was challenged."

The property owners here followed the same procedure set out in the *Johns* case by establishing the qualifications of their witnesses and then having them testify to the before and after fair market values of their lands. Appellant, the City of Fort Smith, made no effort to show that the witnesses had no basis for their testimony.

On appeal, appellant has argued that there is no evidence of any severance damages, but its arguments

overlook the effect of the proof of damages by giving the fair market values of the total lands before and after the taking of the easement.

I have found no case overruling the *Johns* case, which incidentally was tried in the same county and before the same judge involved in the case at bar. With the *Johns* case as my authority, I, too, would have tried this lawsuit in the same manner as did the trial court and lawyers.

Furthermore, I think that a basis for the severance damages of the appellees is shown. One of the benefits of owning property is the right to exclude others, and consequently the loss of this right affects the market value of the lands. The appellees were cattle farmers, and it makes no difference in this situation whether they were dairy or beef cattle farmers, for in each instance the pounds of milk produced each day or the pounds of beef produced each day has a direct relation to the grass consumed by the cows. Consequently, every entry on the premises by persons to whom the cows are not acclimated will cause a disturbance which cuts down on the amount of grass consumed by the cows.

Appellant has placed air blow boxes (concrete boxes) on the lands of both appellees. The boxes, being of a mechanical nature, obviously will require some type of maintenance. How many trips will result from maintenance and how many trips will result from unauthorized persons as a result of a pecan tree or a squirrel that the authorized personnel told somebody about is a matter of speculation, but it is a common problem with cattle farmers. Those little concrete boxes would stick out like a sore thumb to a prospective purchaser of the lands.

While this argument may sound like "nit picking" to some, I have only to remind many business men that they prefer that their production lines be not interrupted by a candidate for public office. It gets down to the

same reason: the interruption affects the volume of production.

For these reasons, I dissent.

JOHN A. FOGLEMAN, Justice, dissenting. Certainly the verdicts in these cases seem extremely liberal, but I do not believe that we are justified in reversing the judgments on the lack of substantial evidence to support the verdicts on the record before us. As an appellate court, we are concerned only with errors of a trial court as a basis for reversal. This is a question never properly raised in the trial court, so it has not properly reached us.

There were two witnesses in addition to the owner who testified about values of the DeLaet lands and four, in addition to owner France, who testified about values of the latter's property. Our attention is called to only one objection to the testimony of any of the witnesses and that was to the qualifications of the witness George Bivens for appellee DeLaet. Appellant then calls attention to a motion for directed verdict after appellee France had rested, motion having been made previously when appellee DeLaet rested, contending that the landowners had failed to sustain the burden of proof as to the value of the land actually taken, and that there had been no testimony by appellees except as to the before and after value of the land. He next directs our attention to a motion for a directed verdict at the conclusion of all the testimony on the basis of the evidence adduced by both sides.

No motion had been made to strike the testimony of any witness and no motion for a new trial was made. Appellant apparently relies on the motions for a directed verdict as the basis for his appeal. At no time did appellant make known to the trial court his objections to the lack of evidence sufficiently substantial to support a verdict,—action made sufficient by Ark. Stat. Ann. § 27-1762 (Repl. 1962).

We have long been committed to the rule in Arkansas that a verdict should not be directed when, taking that view of the evidence most favorable to the party against whom the verdict would go, there is *any* evidence to establish an issue in his favor. *Barrentine* v. *Henry Wrape Co.,* 120 Ark. 206, 179 S. W. 328. This was called a well-established rule in *Yahraus* v. *Continental Oil Co.,* 218 Ark. 872, 239 S. W. 2d 594. See, also, *Great Southern Mutual Life Ins. Co.* v. *Smith,* 177 Ark. 1194, 291 S. W. 441.

Sometimes the rule is stated conversely, *i. e.*, a verdict should be directed against a party *only* when there is *no* evidence tending to establish an issue in his favor, when viewed in the light most favorable to him, as in *Pugh* v. *Camp,* 213 Ark. 282, 210 S. W. 2d 120, where the decision turned on the point that a jury issue exists whenever the only evidence on that issue is the testimony of a party, and the *issue is made only because the testimony of a party cannot be taken as undisputed.*

I am not unaware of the statement in *Hawkins* v. *Missouri Pacific R. Co.,* 217 Ark. 42, 228 S. W. 2d 642, that a trial judge may grant a motion for directed verdict "only if the evidence would be so insubstantial as to require him to set aside a verdict for the plaintiff should such a verdict be returned by the jury." The court, however, reversed the action of the trial court in directing a verdict, so the decision did not change the rule from "any evidence". This is further illustrated by the fact that none of the authorities cited for the statement require that the trial court direct a verdict in the absence of "substantial" evidence. One of these, *St. Louis Southwestern R. Co.* v. *Britton,* 107 Ark. 158, 154 S. W. 215, says quite the contrary. Another, *Missouri Pacific Railroad Co.* v. *McKamey,* 205 Ark. 907, 171 S. W. 2d 932, is only authority for the proposition that a motion for a directed verdict is properly *denied* when there is substantial evidence which would support a contrary verdict. In the other, *Ozan Lumber Co.* v. *Tidwell,* 210 Ark. 942, 198 S. W. 2d 182,

it is only stated that the question at issue should go to the jury whenever fair-minded men might honestly differ as to the conclusions to be drawn from the facts. While the *Hawkins* case was cited as authority in *Harper* v. *Missouri Pacific R. Co.,* 229 Ark. 348, 314 S. W. 2d 696, the court affirmed because there was *no* evidence to show certain requisite facts. The *Hawkins* case is also cited as authority in *Wood* v. *Combs*, 237 Ark. 738, 375 S. W. 2d 800, but only for the proposition that a question is made for the jury when reasonable men might differ as to which party was guilty of the greater degree of negligence. This opinion is also cited by its author in another case, *Penny* v. *Gulf Refining Co.,* 217 Ark. 805, 233 S. W. 2d 372, but he stated that the court could not say that the statements relied upon by appellants there to make a fact issue constituted *any* evidence to support his theory. I have not found where the case is cited as authority for the proposition that a verdict should be directed where there is evidence to support a contrary verdict found to be not substantial.

The failure of a motion for a directed verdict to raise the question on which the majority chooses to act in reversing these judgments is pointed up in *St. Louis Southwestern, R. Co.* v. *Britton,* 107 Ark. 158, 154 S. W. 215. There it was said:

> "* * * it has been repeatedly held that the circuit court has no power to determine the facts of the case and direct a verdict for either party, *even though, if returned for the opposite party, it would set it aside as against the weight of the evidence. The only remedy in such cases is for the circuit court to promptly set aside verdicts that are clearly against the weight of the evidence.*" [Italics ours]

It was also stated that in passing upon a *motion for a new trial on the ground that the evidence is not legally sufficient to sustain the verdict,* the trial court is required to consider the element of improbability, and, if

the trial judge should be of the opinion that the verdict is clearly against the preponderance of the evidence, it is his duty to grant a new trial. "Not so with this court", said the writer of the opinion, adding that this court only reviews for errors and *cannot reject testimony unless it is contrary to the laws of nature or is opposed to the physical facts in the case.*

The question, whether the evidence is substantial enough to support the verdict, *on appeal,* is raised by the overruling of a motion for a new trial by the trial court. In *St. Louis Southwestern R. Co.* v. *Ellenwood,* 123 Ark. 428, 185 S. W. 768, where this court reviewed the rule, it was said:

"In view of the testimony in this case, once more we will take occasion to point out the distinction between the rules which govern trial courts and this court with respect to setting aside verdicts. This court has repeatedly declared the rule to be that, where the trial court has overruled a motion for a new trial based upon the insufficiency of the evidence, and where there is any substantial evidence to support it, the verdict of a jury will be upheld on appeal. The reason for the rule is: First, that the jury have weighed the evidence and found the verdict; second, that the circuit judge, who also heard the testimony from the mouths of witnesses and weighed the same, has by overruling the motion for a new trial given the approval of his legal judgment to the verdict; third, this court cannot have the benefit of seeing and hearing the witnesses and observing the peculiarity of their expressions while testifying, but only has the opportunity generally to read the substance of their testimony. Therefore the court has repeatedly declared the law to be that if, after a consideration of all the evidence, the trial court is of the opinion that the verdict of the jury is contrary to the weight of the evidence, it is the duty of that court to set aside the verdict. This distinction has been uniformly made. *St. L. S. W. Ry. Co.* v. *Britton,* 107 Ark. 158, 154 S. W. 215; *McDonnell* v. *St. L. S. W. Ry. Co.,* 98 Ark. 334, 135 S. W. 925; *Black-*

wood v. *Eads,* 98 Ark. 304, 135 S. W. 922; *Richardson* v. *State,* 47 Ark. 567, 2 S. W. 187; *Catlett* v. *Railway Co.,* 57 Ark. 461, 21 S. W. 1062, 38 Am. St. Rep. 254. So under the settled rules of this court we must uphold a verdict on appeal if there is any substantial evidence to support it."

See, also, *Kansas City Southern R. Co.* v. *Sparks,* 144 Ark. 227, 222 S. W. 724; *Northwest Arkansas Farmers' Mutual Tornado Ins. Co.* v. *Osborn,* 180 Ark. 757, 22 S. W. 2d 387.

It is true that the court has said in some cases that a case *will not be reversed by this court* where the trial court is charged with error in failure to instruct a verdict, where there is any substantial evidence to support the verdict. See, *e. g., Chicago R. I. & P. Ry. Co* v. *Houston,* 209 Ark. 217, 189 S. W. 2d 904; *Huffman Wholesale Supply Co.* v. *Terry,* 240 Ark. 399, 399 S. W. 2d 658.

It has also been said that it is error for the trial court to direct a verdict if there is any substantial evidence tending to establish an issue. *Shearer* v. *Morgan,* 240 Ark. 616, 401 S. W. 2d 21. This is a far cry from saying that a trial judge should determine whether the evidence favoring one against whom a verdict would be directed is substantial, and, if not, that he commits error in failing to direct the verdict. The *Huffman* case, decided March 7, 1966, and the *Shearer* case, decided April 4, 1966, cited the *Barrentine* case as authority so they, this recently, did not change the rule of the *Barrentine* case but recognized it.

I am fully aware of the fact that Act 555 of 1953, Ark. Stat. Ann. § 27-2127.5 (Repl. 1962), made motions for a new trial unnecessary, but the motion was not done away with and this would be an appropriate use of the motion. The Act definitely did not change the rule so that a motion for a directed verdict raised the question whether the evidence was "substantial". As to

this point, the situation is entirely different from that which obtained in *Southern National Insurance Co.* v. *Williams*, 224 Ark. 938, 277 S. W. 2d 487. There it was held that Act 555 made it no longer necessary to challenge the excessiveness of a jury verdict by a motion for new trial. The conflict of the inference of the section of the Act eliminating the necessity of a motion for new trial with that of the section [Ark. Stat. Ann. § 27-1762] requiring that the trial judge be given an opportunity to avoid an error of his own making was resolved by reason of the fact that an excessive verdict is attributable to the jury and in no way to the judge. Thus, this court can act just as well as the trial court. On the other hand, it is inevitable that in determining the question whether evidence is substantial there be some weighing of the testimony which requires observation of the appearance, manner and behavior of the witnesses—something not apparent from a cold typewritten transcript.

In addition to filing a motion for new trial, appellant might have earlier raised the question as to whether the evidence was "substantial" by other means. If the examination of appellees' witnesses demonstrated that there was no reasonable basis for their opinions, their testimony should have been stricken on motion to strike. *Arkansas State Highway Commn.* v. *Russell,* 240 Ark. 21, 398 S. W. 2d 201.

If we are to remain truly an appellate court, we must consistently require that questions be properly raised in the trial court and that court given a proper opportunity to act before we will consider them. I would affirm the judgment of the lower court for the reasons herein stated. I would also affirm on the basis of the reasons stated by Justice Byrd in his dissent.

C. CURLEY GERHARDT v. PLASTICS RESEARCH & DEVELOPMENT CORP.

5-4069 411 S. W. 2d 1

Opinion delivered February 6, 1967

Franklin Wilder, for appellant.

Shaw, Jones & Shaw, for appellee.

PAUL WARD, Justice. This is an action to cancel a written contract and to recover on cross-complaint. Some of the pertinent facts which are not in dispute are briefly summarized below.

C. Curley Gerhardt (appellant) "invented" a product called "Dome-Sight" battery cap. This is a product which fits on top of each cell of an automobile battery, the purpose of which was to make it easy to determine whether the battery needed water. On June 2, 1965 he entered into a rather lengthy written contract with the Plastic Research and Development Corp. (appellee) wherein it was agreed that when and if a patent was secured on the product it would be manufactured and sold by appellee, and appellant would receive a specified percentage of the net sales. Within a few weeks after the contract was executed it was learned that no patent could be secured. On December 14, 1965 appellant filed suit in chancery court to cancel the contract. Appellee answered, praying judgment for money advanced appellee under the terms of the contract and for other expenses incurred.

At the conclusion of the trial the court cancelled the contract (as requested by appellant) and awarded appellee judgment against appellant in the amount of $8,041.61.

On appeal appellant makes three separate contentions for a reversal but they can be disposed of by answering two questions: *One*, is appellant liable to appellee in any amount, and; *Two,* is the judgment excessive?

One. The answer to this question is in the affirmative, but to explain the reason it is necessary to examine briefly the terms of the contract and the events following its execution.

The agreement provides: (a) appellant was to secure a patent on the product, and appellee was to advance some of his expenses in doing so; (b) if, however, a patent could not be secured all such advances were to be repaid to appellee; (c) appellee, at his own expense, was to manufacture and sell the product, and appellant was to receive 5% of the net profits; (d) appellee was to have exclusive franchise during the life of the patent and any extension thereof; (e) during the early stages of the operation appellee was to advance appellant $300 per month (beginning June 2, 1965) until mass production began, but all such advances were to be refunded to appellee out of appellant's 5% of the net proceeds.

The record discloses: (a) It became known to both parties about the first of August, 1965 that a patent could not be obtained; (b) following this turn in events appellant and appellee got together and orally agreed to continue the undertaking under the terms of the written contract; (c) pursuant to this oral agreement appellee continued to make molds and to prepare for mass production until appellant filed this suit on December 14, 1965 to cancel all contracts. At that time appellee asked to be reimbursed for expenses incurred if the contract be cancelled.

The trial court found that "the parties agreed orally to continue under the same terms and conditions of said contract . . ." and also agreed that appellant would reimburse defendant for its expenditures if defendant would continue to give plaintiff Three Hundred ($300) per month, would continue to work for production of the article, and would aid in the sale and distribution of same.

It is our view that, under the above situation, appellant had a right, at any time, to cancel all contracts and stop all operations thereunder, but that he had no right to do so without reimbursing appellee for expenses incurred. It is well settled by many decisions of this Court that an oral agreement to alter a written contract is valid. See: *Byrd* v. *Bertrand,* 7 Ark. 321; *Elkins* v. *Aliceville,* 170 Ark. 195, 279 S. W. 379; *Dodson* v. *Wade,* 193 Ark. 534, 101 S. W. 2d 182, and *Swift* v. *Lovegrove,* 237 Ark. 43, 371 S. W. 2d 129. It is not denied that appellee did incur considerable expense in attempting to comply with the contract as modified.

It was contended by appellant that the product being produced by appellee was defective, but the record contains ample testimony to justify the court in finding that the defects were minor, that they were to be expected at first, and that appellee was in the process of correcting same when this suit was filed.

Two. The trial court found that appellee had incurred expenses in the sum of $8,387.42 in trying to comply with its contracts with appellant. In our opinion the court's finding is in accord with the weight of the evidence.

Appellee introduced in evidence, without objection, its Exhibit No. 3. This exhibit itemizes in minute detail (including dates, check numbers and explanations) a total expenditure of $8,387.42. The exhibit was identified by appellee's witness, Loren Jones, an accountant, who testified:

"Q. Did you make this analysis?

A. I did.

Q. From what was it taken?

A. Directly from the ledgers, journals, accumulations and work sheets of Plastics Research and Development accounting department."

As previously pointed out, no objection was made by appellant to the introduction of the exhibit, he did *not* ask to see the original records, and he introduced no testimony to show any item of expense was incorrect. We must, therefore, sustain the court's finding on this point.

Affirmed.

MID-SOUTH INSURANCE COMPANY *v.* FIRST NATIONAL BANK OF FORT SMITH

5-4056 410 S. W. 2d 873

Opinion delivered February 6, 1967

H. Clay Robinson, for appellant.

Daily & Woods, for appellee.

LYLE BROWN, Justice. Summary judgment was awarded appellee, First National Bank of Fort Smith, against appellant, Mid-South Insurance Company. Mid-South appeals from the award, contending there were substantial issues of fact to be first decided. First National filed this suit against three corporations and one individual, one of the corporations being Mid-South. The instrument forming the basis of the litigation was a promissory note in the principal sum of $150,000.00. The note was executed by Handley Trading Company, Inc., and endorsed by National Automobile Insurance Underwriters of Arkansas, Inc. and Oscar E. Chambers. All of these parties, along with Mid-South, were the defendants. Service could not be obtained on Handley and National; and Chambers does not appeal from the summary judgment against him.

Mid-South was not an endorser on the note. First National contends that Mid-South, for valuable consideration received from National Automobile Insurance Underwriters, assumed the balance of the note, being $70,000.00. First National attached to its complaint photocopies of Mid-South's records, and of bank records in support of its contention that Mid-South had assumed the obligation and had in fact reduced the note to $45,000.00. In its pleadings Mid-South denied it had ever contracted any obligation to First National, and further, that Mid-South could not legally assume the obligation on this note.

In challenging the summary judgment entered by the court below, Mid-South contends there is no proof that Mid-South ever contracted any obligation to the bank. The answer to this contention must be in the negative.

A photocopy of a record entitled *Minutes of a Special Meeting of the Board of Directors of Mid-South Insurance Company* was introduced. The item of business was the proposed repurchase by Mid-South of its agency agreement held by National Automobile Insurers, the consideration being the assumption by Mid-South of the balance of the involved note. The Board of Directors approved the purchase and directed its officers to execute the instruments necessary to complete the transaction. Thereafter, Mid-South made three payments on the principal and interest exceeding $25,000.00.

It is highly significant that Mid-South did not controvert, by affidavit or otherwise, the truthfulness of the statements contained in the minutes of the special meeting; nor did they dispute the signatures of the officers of the company contained thereon. The three substantial payments alleged to have been made were conceded.

The motion for summary judgment was controverted by filing an affidavit of a special auditor. On or near March 26, 1966, this auditor is alleged to have inspected the available records of Mid-South. He stated that he could find nothing pertaining to the aforementioned resolution, no record of the assumption of the bank note, and no record of the agency transfer. It should be noted that this auditor was retained to perform a special audit, in an effort to ascertain what occurred a year prior to that audit. It should also be noted that the control of Mid-South had in the interim changed hands three times. So what this auditor could not find a year later does not controvert written instruments unimpeachably establishing the transaction—all of which were previously relied on by the Insurance Commissioner and by the court in the rehabilitation proceedings, and served as a basis for the expenditure of over $25,000.00 by Mid-South in carrying out the agreement. Mid-South further certified the existence of the bank debt in the Contract for Rehabilitation of Mid-South Insurance Company, dated April 20, 1965.

To say that Mid-South never contracted any obligation to the bank may in the strictest sense be correct; yet they *assumed* an obligation owed the bank and made substantial performance thereon. Mid-South's board authorized the assumption of the note under date of March 1, 1965. From that time until July 1st, all payments made on the note were made by Mid-South. Such substantial payments made exclusively by Mid-South would indicate it had assumed the debt and caused the bank to forebear any proceedings against the original maker and endorsers. By the time the bank did take action, Handley and National could not be located for service.

Summarizing, the bank supported its Motion for Summary Judgment with the following documents:

1. The original note in the principal sum of $150,000.00, showing that Mid-South had unquestionably made the last three payments thereon totaling $25,000.00 and accrued interest;

2. Call and Waiver of Special Meeting of the Board of Directors of Mid-South, signed by all the directors;

3. Minutes of Special Meeting of the Mid-South Board, wherein the board approved the assumption of the indebtedness owed First National Bank. The balance was agreed to be $70,000.00. This instrument bears the signatures of the president and secretary of Mid-South;

4. Contract for Rehabilitation of Mid-South Insurance Company, in which contract Mid-South listed its liabilities, one of which was this same bank note. This contract contained six signatures;

5. Petition of Harvey G. Combs, Insurance Commissioner, State of Arkansas, in a separate action in the same court, asking the circuit court to approve the plan of rehabilitation set forth in Item 4 above.

In the face of all these instruments, the execution of which was participated in by at least twelve different

persons, Mid-South filed a single instrument executed by the special auditor. In a pleading styled *Amended and Substituted Answer, Counter-Claim and Cross-Complaint,* Mid-South says it received no consideration for the alleged assumption of the obligation to the bank, but admits that it paid $20,000.00 on the note. Thus we see payments are admitted to have been made under some type of assumption of obligation, which action Mid-South defends on the ground of failure of consideration. The minutes of Mid-South's board meeting do in fact describe the consideration, the same being a reassignment of an agency agreement by National Automobile Insurers. Mid-South tendered nothing to support the allegation.

Thus it is clear that Mid-South offers nothing to substantiate its real defense except an unverified pleading. This does not meet the requirements of our summary judgment procedure.

In *Epps* v. *Remmel,* 237 Ark. 391, 373 S. W. 2d 141 (1963), this court approved the following statement from *United States* v. *Dollar,* 100 F. Supp. 881 (1951): "The motion [for summary judgment] requires the opposition to remove the shielding cloak of formal allegations and demonstrate a genuine issue as to a material fact."

In the face of documentary support for summary judgment, Mid-South would force the case to trial by merely contending that an issue exists, without any showing of evidence. This would defeat the whole purpose of summary judgment procedure.

One other point is relied on by Mid-South, namely, that the repurchase of an agency agreement would be classed as an investment and that it is not an eligible investment for an insurance company under Ark. Stat. Ann. § 66-2603 (Repl. 1966). Mid-South did not pursue this contention in the trial court. Nowhere is such an allegation set out in the pleadings, nor was it raised on

the motion for summary judgment. If such allegation as is now made were a defense it certainly should have been placed before the trial court, with appropriate proof, and that court given an opportunity to rule thereon.

Affirmed.

HARRY A. PARKER, JR. ETC. *v.* JAMES PRICE ET AL

5-4071 411 S. W. 2d 12

Opinion delivered February 6, 1967

Shackleford & Shackleford, for appellant.

Bernard Whetstone and *Rogers & Armstrong,* for appellee.

LYLE BROWN, Justice. This action for damages arose from a collision between two motor boats near Calion, Arkansas, on the Ouachita River, a navigable stream of the United States. Both boats were pleasure craft, and both were pulling skiers. Jerald Carney, a minor, along with his father, Homer Carney, plaintiffs below, were each awarded damages as against two of the five defendants, Harry Parker and Eric Davis. The appellant here is Harry Parker, and he appeals—not from the judgment awarded the Carneys—but from judgments in favor of five third party defendants. The appeal is grounded on the contention that the trial court erred in giving two instructions.

The lead boat was owned by James Price and being operated by Billy Price; Danny Washington and Russell Hale occupied the rear of the lead boat and served as lookouts. This boat was towing a piece of styrofoam on which Jerald Carney and Johnny Price were riding. the styrofoam broke, throwing Carney into the water, where he was struck by a boat operated by defendant, Harry Parker. Eric Davis, Parker's co-defendant, was skiing behind the boat operated by Parker. The Carneys also joined as defendant the owner of the boat, Walter Horn. This boat was originally loaned to Eric Davis, Jimmy Duffey, Tom Cranston, and Harry Parker. A joint venture was alleged as against all the named parties.

The defendants made the owner and operator of the lead boat, the two lookouts, and Johnny Price (riding on the styrofoam) all third party defendants, alleging specific acts of negligence and joint venture.

Parker's appeal is grounded on the single contention that the substantive law of admiralty applicable to the case was not applied by the trial court. The two instructions complained of deal with standard of care and with lookout.

Standard of Care. Parker contends that the standard of care imposed on a boat operator in navigable waters is the exercise of *due diligence and maritime skill.* He offered the following instruction:

> "You are instructed that a person in charge of the operation of a vessel must at all times exercise due diligence and maritime skill to avoid injury to others, by collision or otherwise. He should use such care as is reasonable under the circumstances then existing. The conduct of the operator of a vessel is to be judged in light of the danger, emergency, and conditions that existed at the time and place of the accident."

The court refused the instruction and gave court's Instruction No. 8:

> "Now in connection with these Interrogatories which I have just read, you are instructed that it was the duty of all persons involved in the occurrence which gave rise to this case to use ordinary care for their own safety and the safety of others. When I use the words, 'ordinary care,' I mean that care which a reasonably careful person would use under circumstances similar to those shown by the evidence in this case. It is for you to decide how a reasonably careful person would act under those circumstances and, of course, the failure to use such ordinary care is negligence."

Here, it should be noted that in the instruction immediately preceding No. 8, the court told the jury that the term negligence means "the failure to do something which a reasonably careful person would do, or the doing of something which a reasonably careful person would not do, under circumstances similar to those shown by the evidence in this case."

The crux of Parker's argument is that it was error for the court to omit the phrase "due diligence and maritime skill" from its instruction to the jury.

We are not in disagreement with appellant Parker's general statement of the maritime law, namely, that persons in charge of watercraft must exercise due diligence and maritime skill to avoid injury to others. But this is simply another way of saying the operator should act as a reasonably careful person would act under the circumstances.

Appellant cites 48 Am. Jur. 153, § 227, to support the requirement of due diligence and maritime skill. But that same section, continuing, recites that the requirement is satisfied by the use of such care as is reasonable under the circumstances. In the case at bar, the trial court properly permitted two witnesses of considerable experience with watercraft to testify concerning facts constituting good or poor seamanship. They were also permitted to give opinion testimony based on hypothetical questions.

Thus, the jury had for its consideration testimony going to the main issue—whether the boats in question were operated with reasonable care under all the circumstances, including, but not limited to, maritime skill. To use the phrase "maritime skill" might well have tended to place undue emphasis on the testimony of these two expert witnesses and to detract from the ultimate test of "reasonable care under the circumstances." The phrase "maritime skill" could well be interpreted by jurors to connote a variety of meanings, such words as

"art," "dexterity," "ingenuity," and "wisdon," being well known synonyms of the word "skill." Therefore, "maritime skill" could to a juror connote the highest degree of caution and skill, when the law requires only reasonable care. Appellant did not incorporate in his proffered instruction any definition of maritime skill.

There is yet another fallacy in Parker's proposed Instruction No. 1: it could well have indicated to the jury a double standard of care, namely, due diligence and maritime skill, and, additionally, reasonable care under the circumstances.

Greathouse v. *Wolff* (Mo. App.), 360 S. W. 2d 297 (1962) is a case which arose out of a water skiing accident in navigable waters. There we find an instruction which comports with our theory that the court's No. 8 was correct. It is a long instruction, and to set it out verbatim is not necessary. Summarizing, the test of ordinary care was applied to that case. The phrase "exercise of ordinary care" appears three times in that instruction. Nowhere therein does the phrase "maritime skill" appear.

Maritime cases are replete with awards based on specific findings of failure to use ordinary care. To cite a few: *Malmin* v. *Sternheim,* 202 Ill. App. 214 (1917); *Rautbord* v. *Ehmann,* 190 F. 2d 533 (1951); and *U. S.* v *Meckling,* 141 F. Supp. 608 (1956).

Lookout. Appellant Parker next complains of Instruction No. 10 (2), this being an instruction on lookout:

> "No person shall operate a vessel on any waters of the State of Arkansas for towing a person or persons on water skis, or an aquaplane, or similar device unless there is in such vessel a person, in addition to the operator, in a position to observe the progress of the person or persons being towed. Provided, however, if the towing boat is equipped with a wide angle marine rear view mirror in a position to observe the skiers being towed, the above requirement shall not apply, and, ..."

In Instruction No. 11 the court told the jury a violation of this rule could be considered by them as evidence of negligence.

Instruction No. 10 is based on a statutory rule. Ark. Stat. Ann. § 21-232(b) (Repl. 1956).

Admiralty law does not specifically require the presence of a person in addition to the operator to assist the latter in keeping a lookout. T. 33 U.S.C.A. § 351 is as follows:

> "Usual additional precautions required (*Rule* 26). Nothing in Sections 302-352 of this title shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, *or of any neglect to keep a proper lookout,* or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case. R. S. § 4233; Feb. 19, 1895, c. 102, § 1, 28 Stat. 672; Mar. 3, 1897, c. 389, § 13, 29 Stat. 690; May 21, 1948, c. 328, § 4, 62 Stat. 250." (Emphasis supplied.)

It is the position of appellant Parker that our statute requiring a posted lookout in addition to the operator is in conflict with admiralty law. We gather it to be the position of appellant that Congress has preempted the field of navigation in navigable waters. So appellant would argue that since Congress has not enacted a law requiring an additional person for a lookout, the State is prohibited from so providing. This position is not tenable.

Reynolds Channel, Long Beach, New York, is a navigable waterway and within the territorial limits of the Town of Hempstead, New York. Hempstead passed an ordinance governing the operation of motorboats on this waterway. In *People* v. *Bianchi,* 155 N. Y. S. 2d 703

(1956), Bianchi appealed from a conviction under two sections of the ordinance. One section required careful and prudent operation and at a speed which would not endanger the life or property of another. The other section fixed the maximum speed in the channel at 12 miles per hour, and in premises designated as basin, dock anchorage, or bathing areas, four miles per hour. The convictions were affirmed. The Bianchi case furnishes an exhaustive treatise on the question of conflict between federal and state authority. The following statement and cited authorities support the view that the theory of federal pre-emption has long been discarded:

> "It may be true that the United States Constitution confers upon the Federal Government jurisdiction over interstate commerce but it does not follow from this that the state or its derivative creature, the town, is thereby prohibited from exercising its police power to regulate a local incident of that commerce. This has been the judgment of the United States Supreme Court in an unbroken line of cases from *Cooley* v. *Board of Port Wardens,* 12 How. 299, 13 L. Ed. 996, to the present day. *Willson* v. *Blackbird Creek Marsh Co.*, 2 Pet. 245, 7 L. Ed. 412; *State of California* v. *Thompson,* 313 U. S. 109, 61 S. Ct. 930, 85 L. Ed. 1219; *Parker* v. *Brown,* 317 U. S. 341, 63 S. Ct. 307, 87 L. Ed. 315.
>
> "In the Cooley case the view is sanctioned that the state government possesses a commerce power concurrent with that of the Federal Government as to the local incidents of interstate commerce."

With further respect to this particular field of navigation, the Bianchi case makes this significant statement, which well fits the case at bar:

> "While it is true, as the defendant asserts, that the Federal Government has an *interest* in the field of navigation (just as it has an interest in other areas over which the nation and the states have been held

to possess concurrent jurisdiction), in the field of navigation [*sic*], the federal interest is not so dominant, and the problems involved are not so completely national in character, as to make any or all local regulation unthinkable where the Federal Government has acted. *On the contrary, dissimilar conditions in different parts of the country require that special consideration and handling that only a decentralized treatment can afford.* (Emphasis added). Furthermore, the federal regulatory scheme established in the Motorboat Act of 1940 is not so complete as to make reasonable the inference that Congress left no room for the states to supplement it."

We think it highly significant that Congress has, in fact, encouraged the enactment of uniform State legislation governing pleasure boats. In *U. S. Code Congressional and Administrative News*, Vol. 3, p. 5228, is recited the history surrounding the Federal Boating Act of 1958. The Committee on Interstate and Foreign Commerce recommended the passage of the bill which, among other things, would "provide co-ordination and co-operation with the states in the interest of uniformity of boating laws. . ." The Committee further observed that a model State bill had been prepared by the Council of State Governments and would possibly be considered in 1959 by forty-five States which would then be holding legislative sessions. The Committee placed its stamp of approval on model State laws governing boating in these words:

"There is particular urgency in passage at this session because 45 States will hold legislative sessions in 1959, at which the model State bill developed by the recreational boating regulation subcommittee, committee on suggested State legislation, Council of State Governments, could be considered. Enactment of this model bill by the States would provide substantially uniform Federal and State boating safety laws and regulations and enforcement procedures.

"Such a development would be vastly in the interests of the millions who now are finding recreational boating an increasingly alluring pastime, by obviating conflicting requirements when State lines are crossed and by achieving greater uniformity of regulations in the several States.

"It would mark, too, a healthy advance in coordination of legislation and enforcement as between the States and the Federal Government, by permitting State regulation and enforcement on navigable waters which heretofore have been the sole province of the Federal Government."

Our Legislature in 1959 enacted Act No. 453, a comprehensive act regulating boats. The stated purpose of the act was to promote safety in respect to the operation of vessels "and to promote uniformity of laws relating thereto." Thus, it is reasonably certain that our act stems from the model State bill mentioned in the report of the Committee on Interstate and Foreign Commerce. Boating laws enacted by all of our neighboring States are very similar to ours, and further confirm the belief that ours is a model act.

Appellant Parker contends that under admiralty law a special lookout is not necessary "if the bridge actually observes what a lookout should have seen." He cites *Osaka Shosen Kaisha Ltd.* v. *Angelos, Leitch & Co. Ltd.*, 301 F. 2d 59 (1962), and *United States* v. *S. S. Soya Atlantic*, 330 F. 2d 732 (1964). In those cases there were men on the bridge or the forecastle, or both, and it was found to be a fact that they observed what a special lookout should have seen had he been present. In the case before us, Parker was the sole occupant of the boat which struck Carney; Parker was charged with failure to maintain a lookout. Just ahead of him was a boat pulling two skiers; he was pulling one skier. Thus, he owed a duty to keep a lookout both ahead and behind. He had no rearview mirror. In this situation it was for the jury to determine, under appropriate instructions as applied to the evidence, whether a proper lookout was being maintained. Quoting from *Osaka*, cited by appel-

lant, a proper lookout is said to be a factual question and a duty which "is an inexorable requirement or prudent navigation."

Finally, in support of his theory that the substantive law of admiralty precludes the giving of an instruction based on our statute requiring a posted lookout, Parker cites *Intagliata* v. *Shipowners & Merchants Towboat Co.* (Calif.) 159 P. 2d 1 (1945). At that time a characteristic feature of maritime law was to the effect that if both parties were at fault the damages would be equally divided. In the Intagliata case the trial court adhered to the rule of contributory negligence which generally precludes a plaintiff from recovering damages. The appellate court held that comparative negligence is a principle of admiralty and to ignore it would be to contravene an essential purpose expressed by an act of Congress. When Arkansas adopted a model boating code which recites that the absence of a rearview mirror and a posted lookout can be considered as evidence of negligence, it certainly did not contravene "an essential purpose exprssed by an act of Congress." The laws enacted by Congress require a lookout. Maritime cases recognize lookout to be a duty which "is an inexorable requirement of prudent navigation." To require one towing a skier to either equip his boat with a rearview mirror or post a lookout is a most sensible requirement. Rather than contravene federal law, it can reasonably be said to aid in the enforcement of prudent navigation.

Since we hold that appellant's objections to the instructions are without merit, we do not reach questions raised by appellees.

Affirmed.

ARK. STATE HIGHWAY COMMN. *v.*

C. V. STEED & JEFF STEED

5-4109 411 S. W. 2d 17

Opinion delivered February 6, 1967

George O. Green and *Joe Gunter* and *Robert H. Hall,* for appellant.

Carroll C. Cannon, for appellee.

JOHN A. FOGLEMAN, Justice. Appellant took the fee simple title to 27.2 acres from one Jeannette Becker Lenygon together with certain construction easements over her lands consisting of approximately 580 acres being used for agricultural purposes. This was right-of-way for construction of Interstate Highway No. 40, a controlled access highway in St. Francis County, Arkansas. Its complaint and declaration of taking were filed on the 21st day of February, 1963. Although the property was under an agricultural lease to appellee C. V. Steed, expiring at the end of the year 1963,[1] through which he and appellee Jeff Steed, as farming partners, were in possession of the property, they were not made parties, nor did they have any notice of the taking until May 16th when surveyors began "stomping his fresh levees down", and after which the driving of piling for highway construction was commenced. Summons was issued for and served on appellees on June 12, 1963. When appellees first became aware of the taking, they had already planted and commenced irrigation of a rice crop on the leased lands and had also planted cotton and beans.

The right-of-way taken ran diagonally across the Lenygon lands from a point near the northeast corner to a point near the southwest corner. The Steeds had farmed a substantial portion of the lands in rice production, using two wells and a system of canals for the necessary irrigation. They also used the lands for fall and winter pasture.

Appellees promptly filed their answer on June 24, 1963, claiming that by reason of the taking of the land and crops thereon planted by them, they would be dam-

[1]While the lease recites a two-year term ending December 31, 1963, it describes three notes for rent at the rate of $3,300.00 per year, one being due in each of the years 1962, 1963 and 1964 .

aged in the sum of $820.00 and as a result of the taking of the strip of land, they were unable to properly water, plant and cultivate the remaining acreage and were damaged in the sum of $7,155.00, their irrigation canals having been blocked and the drainage interfered with. They also claimed damages for the deprivation of the use of the land taken by appellant during the year 1963, saying that it was impossible at that late date to get other lands for farming.

The case was tried as to both landlord and tenant and separate awards were made to each by the jury. The jury awarded damages "to the leasehold" in the sum of $400.00; to crops on the right-of-way, $1,420.00; and to crops off the right-of-way, $6,000.00. This appeal is only from that part of the judgment awarding damages for the crops growing off the right-of-way. We do not know any of the instructions that the jury considered in arriving at its verdict, except for two requested by appellees and given by the trial court, as the record was abbreviated to cover only those points urged by appellant for reversal.

No demurrer to appellees' answer, motion to strike, or reply was filed by appellant. The case was called for trial and after a jury was selected, but before opening statements were made, appellant's attorneys asked to be heard in chambers. At this hearing appellant, for the first time, stated its contention that the claim for crop damage to the residual acreage was actually in tort against either the highway commission or its contractor and not recoverable in the eminent domain action. The trial judge ruled that the sole question was whether or not the water stoppage claimed by appellees was shown by the evidence to be a damage caused by the taking and following the construction of the highway. The judge also went on to say that if the damage was caused by the negligence of someone not a party to the suit, it would be a tort action, but he did not believe that the court could say this solely on the allegations of the pleadings filed. In order to clarify his ruling, the judge stated that proof which was in accordance with the

pleadings would be accepted and permitted and that appellees would be permitted to offer testimony proving any damages occasioned by the taking of the property and the construction which followed, and if there was evidence that the damage was caused by the negligence of someone and not by the taking, then the court would pass upon the question. Appellant objected and it was understood that the objection would go to any testimony admitted under this ruling. From time to time during the presentation of the evidence, this objection was renewed.

At the conclusion of all the evidence, appellant unsuccessfully moved to strike all evidence with regard to damages to residual tracts, apparently on the contention that these damages caused by the taking were "incidental", so that appellees would be entitled to recover only for damages to those crops on the right-of-way. The court then gave the instructions requested by appellees. One of these stated the measure of damages to a crop to be the difference in the fair market value between the crop that the land would otherwise have produced and the crop actually produced, less the difference between what it would have cost to have produced, harvested, and marketed an undamaged crop and what it did cost to produce, harvest, and market the actual crop. The other told the jury that the tenant was entitled to just compensation for damages to his crops on land adjoining land taken by condemnation and farmed as a single operation which they found from a preponderance of the evidence resulted from the taking.

The points relied on here are: (1) That the instructions are erroneous because they permitted the jury to consider elements of damages which amounted to a counterclaim against the state prohibited by Article 5, § 20 of The Arkansas Constitution and, (2) that the court erred in permitting testimony relating to crops growing on lands not taken, as this constituted a constitutionally prohibited suit against the state. No objection relating to these points, other than those hereinabove stated, was made.

For the purposes of this opinion, it is sufficient to say that the testimony of appellees and the witnesses called by them tended to prove damages to the crops on lands of the leasehold remaining after the taking, under the rules outlined by the trial judge, and that these damages were caused by removal of fences crossing the right-of-way, blocking of drainage on the right-of-way, blocking of an irrigation canal crossed by the right-of-way so that there was no canal there at the time of the trial, and damaging of a water gate and bridge during construction of the highway for which the lands were taken. There is no evidence on behalf of appellant in the abbreviated transcript and nothing to indicate that any was offered by it as to the claim of appellees. It was stipulated that no one had any right to cross the limited access highway with a rice canal or a bridge.

A sufficient answer to the contention of appellant that appellees' right of recovery is against a contractor, if anyone, lies in the failure to show that the construction was undertaken by the letting of a contract by appellant. Aside from statements of appellant's attorneys and assumptions made by them in putting questions to witnesses, and an inference that might be drawn from a question by appellees' attorney, there is nothing in the record to indicate that the construction was not done with the highway department's own forces. If this were not sufficient, a further answer is that there is no liability on the part of a contractor if he follows the designs and plans and specifications of the condemnor and complies with his contract with it if he did not do so in an improper or unskillful manner or was not guilty of negligence which caused the damage of which complaint is made. *Burt* v. *Henderson,* 152 Ark. 547, 238 S.W. 626; *Roselotte* v. *Road Improvement Dist. No.* 1 *of Lawrence County,* 141 Ark. 8, 215 S. W. 891; *Wood* v. *Drainage Dist. No.* 2 *of Conway County,* 110 Ark. 416, 161 S. W. 1057.

The contention of appellant raises questions as to the right of the lessee under an agricultural lease to

recover severance damages for crops growing on that portion of the leased farm not physically taken.

It has long been recognized that a lessee can recover compensation for the taking and damage of his leasehold interest. See *Little Rock & Fort Smith Ry. Co.* v. *Alister*, 62 Ark. 1, 34 S. W. 82; *McLaughlin* v. *City of Hope*, 107 Ark. 442, 155 S. W. 910; *Capitol Monument Co.* v. *State Capitol Grounds Comm.*, 220 Ark. 946, 251 S. W. 2d 473; *Arkansas State Highway Comm.* v. *Fox*, 230 Ark. 287, 322 S. W. 2d 81; *Arkansas State Highway Comm.* v. *Cochran*, 230 Ark. 881, 327 S. W. 2d 733; *Arkansas State Highway Comm.* v. *Thomas*, 231 Ark. 98, 328 S. W. 2d 367.

In two of these cases it is clearly demonstrated that the lessee's recovery is not limited to his damages on the area actually taken. In *McLaughlin* v. *City of Hope* it was said that the owner of a mill on a millsite leased by him, having the right to use of a stream, was entitled to recover to the extent of the damage to his interest when the millsite was rendered worthless by a condemnation by discharge of sewage into the stream. In *Arkansas State Highway Comm.* v. *Cochran*, 230 Ark. 881, 327 S. W. 2d 733, the lessee, under a mineral lease for select material for highway construction, was awarded damages when the taking of two acres of a three-acre tract rendered the mining of the acre not taken impractical. This is in keeping with our constitutional provision requiring just compensation for the taking or damaging of property. It has consistently been held that the owner of property damaged but not physically taken has the same right to demand compensation as has the owner whose property has been occupied and taken from his possession. *Arkansas State Highway Commn.* v. *Kincannon*, 193 Ark. 450, 100 S. W. 2d 969. And this is so even though the injuries may be consequential. *Campbell* v. *Arkansas State Highway Commn.*, 183 Ark. 780, 38 S. W. 2d 753. The contention of appellant that appellees could not recover for damages to the remaining lands resulting from the taking is, therefore, not well

founded. It follows necessarily, that condemnor is liable for the damage which is the result of its taking and any damage by reason of acts of a contractor which are required in performing his contract are a part of the just compensation to which the condemnee is entitled.

It has also been recognized that, in fixing compensation to the owner of lands taken or damaged by a condemnor, it is proper to take into consideration the value of his crops destroyed or damaged. *Ross* v. *Clark County*, 185 Ark. 1, 45 S. W. 2d 31. See, also, 29A C. J. S. 734, Eminent Domain, § 173.

A lessee is an "owner" for the purposes of eminent domain cases. 27 Am. Jur. 2d, 21, Eminent Domain, § 250. There is no reason why his recovery should not include the same elements.

It appears that this court has never prescribed the measure of damages in cases such as this, but appellant did not question the measure submitted to the jury by objection to testimony or instructions. Although we do not reach the question for this reason, there are authorities supporting the position of appellees and the measure apparently applied—the difference between the value of the crop that would have been produced at maturity and the cost of production (with reduction for the value of the crop produced, as here directed). See *Pieper* v. *City of Scottsbluff,* 176 Neb. 561, 126 N. W. 2d 865; *Daily* v. *United States,* 90 F. Supp. 699; *Board of Commissioners of Fairfield County* v. *Richardson,* 122 S. C. 58, 114 S. E. 632.

Appellant bases its appeal entirely on the one objection made in the trial court—that this is a tort action from which appellant is immune. Reliance is placed principally on the decisions in *Arkansas State Highway Commn.* v. *Lasley*, 239 Ark. 538, 390 S. W. 2d 443 and *St. Francis Drainage District* v. *Austin,* 227 Ark. 167, 296 S. W. 2d 668, apparently on the basis that any de-

struction of crops is a tort. These cases are easily distinguished from the present one. In the latter, the damage to the crops was caused by the drifting of poison used by a drainage district to kill willows growing on its right-of-way well after the taking. The distinction was pointed out by Mr. Justice Robinson in the opinion itself—appellee's crops were neither intentionally nor *inevitably* damaged, nor was the damage of a permanent nature. It was also pointed out that the rule was different where the damage was of a permanent nature. In the former case, the opinion clearly states that the damages to the landowner's crops and his loss of cattle were caused by the *negligent* acts of appellant's agents and employees in permitting the landowner's cattle to escape.

There is no indication that any of appellees' damage was anything other than that ordinarily and naturally resulting from the taking and use of the right-of-way. It is obvious that no irrigation canal or pasture fence crossing the right-of-way could remain intact either during or after construction of an interstate, controlled access highway. No suggestion is even made that this was a temporary construction condition, it being stipulated that no such condition would be permitted.

Clearly, neither the pleadings nor the proof showed any attempt on the part of the appellees to recover for any tort. On the other hand, the damage to them was the direct result of the taking of the right-of-way for a proper public use.

The judgment is affirmed.

Opinion delivered February 6, 1967
[Rehearing denied March 13, 1967]

W. B. Howard and *Jack Segars,* for appellant.

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

J. FRED JONES, Justice. This appeal is from a judgment of the Craighead County Circuit Court revoking the suspension of a penitentiary sentence previously imposed on the appellant.

On January 27, 1964, the appellant, Leveon Smith, was properly tried and found guilty by a jury in the

Craighead County Circuit Court on two separate charges of burglary and grand larceny. The trial court postponed the pronouncement of final sentence upon condition of appellant's good behavior in the future, and entered judgment, in the form of suspended sentences to the Arkansas penitentiary for a period of five years under authority of Ark. Stat. Ann. § 43-2324 (Repl. 1964).

On the 11th day of April, 1966, the prosecuting attorney filed information against the appellant on two counts of burglary and grand larceny and on one count of petit larceny, and also filed a petition for revocation of the suspension of sentences in the previous cases, alleging that appellant had violated the conditions of the suspension of sentence in that he had not been of good behavior, but had committed several acts of burglary and grand larceny since the rendition of the original judgments.

Apparently in anticipation of evidence the State might attempt to offer at the trial of appellant on the three new charges, as well as in support of its petition to revoke the suspension of sentences on the previous judgments, the appellant filed motions to quash and suppress a confession purportedly made by the appellant and meticulously set out and included in his motion, each and every item of testimony, as well as exhibits, he anticipated the State would offer as evidence at the trial on the informations, as well as at the hearing on its petitions for revocation.

When the appellant's case came on for jury trial on the three counts charged in the information, appellant's counsel insisted that appellant's motions be first disposed of. The jury was discharged and appellant's motions to suppress and the State's petition for revocation were taken up by the Court in Chambers under the following procedure as revealed by the record:

"MR. PEARSON: If the Court please, I am not sure what would be proper procedure in disposing

of those motions. Mr. Howard suggested they be disposed of at this time before getting into the hearing on the revocation. It might require some duplication of evidence from witnesses. We might do that or wait until the evidence is offered or confession is offered and then take those up.

MR. HOWARD: If your honor please, while the motions are separate and nearly each one states a separate theory, taken together they challenge all the evidence by way of physical evidence we anticipate will be offered by the State in these petitions for revocation, and taken together they challenge the confession we anticipate the State will attempt to offer.

To save time we think the two petitions should be consolidated and we should proceed on the motions, because if the motions are granted, there will be no need. If they are not, so far as an duplication of evidence, I don't believe it would be necessary to duplicate it. I think we could stipulate it would be the same. I don't know of any intelligent way you can pass on these motions and the admissibility of evidence other than to take them up and dispose of them.

COURT: We will proceed with the motions as has been suggested.

MR. HOWARD: All witnesses subpoenaed by the defendant stand up and raise your right hand."

Appellant's attorney then proceeded to elicit from prospective State's witnesses the evidence in detail he was seeking to suppress.

During two days testimony from police officers, numerous articles were identified as those missing from business places, residents, and offices that had been broken and entered in Jonesboro, and it was definitely

established by witnesses on direct examination by appellant's attorney before the judge of the circuit court that some of these articles had been pawned by the appellant and others found in and recovered from appellant's automobile and his home. After appellant's attorney had introduced into the record appellant's detailed written confession that he had broken and entered all the places reported burglarized and had taken the objects identified and had destroyed and disposed of others, it was stipulated between the appellant's attorney and the prosecuting attorney that if appellant's motion to suppress the evidence should be overruled by the court, then the evidence introduced in support of the motions could be treated as if the State had introduced exactly the same evidence on its petition to revoke the suspension of sentence.

The fact that the burglaries and grand larcenies had been committed by appellant and that appellant freely admitted that he had committed them, does not seem to be seriously questioned in this case. The *competency of the evidence* for the purpose of the *State's petition to revoke* is what is questioned by appellant in this case, and that brings us to the crux of appellant's contention on his motions to suppress.

Appellant, in effect, says that if he had not been unlawfully arrested, neither the police officers, nor the court, nor anyone else would ever have known that it was he who had burglarized the houses, business places, and offices in Jonesboro, and that the court would never have known about money and goods he had stolen, pawned, hid in his home and carried in his automobile and on his person, and would never have known about his bad conduct in general if he had not confessed to the crimes, and if he had not directed the officers to where he had hidden the stolen goods and objects while under the unlawful arrest.

Appellant says that his constitutional rights were violated in the manner of his arrest and that the meat

cleaver or corn knife he carried in his hip pocket, the stolen pipe lighter he carried on his person, the stolen gun case and jewelry he carried in his automobile, the stolen radio he had in his home, the stolen shotgun he had pawned at a grocery store for ten dollars, as well as his voluntary confession that it was he who had committed the numerous burglaries where these objects were obtained were simply "fruits of a poison tree" as announced by the United States Supreme Court in the California case of *Wong Sun* v. *United States,* 371 U. S. 471, 83 S. Ct. 407, and that this evidence was incompetent and totally inadmissible as evidence of his *bad behavior,* on a petition to revoke the suspension of the final pronouncement of sentence on his previous guilty of felony judgment, bearing no taint.

There is a great deal of difference between the Wong Sun case and the case at bar, but we will not prolong this opinion by distinguishing the two except to point out, that the defendants in the *Wong Sun* case were not under a suspended sentence and brought into court on a motion to revoke a suspended sentence under the laws of Arkansas.

Appellant's apprehension came about in this manner—about 11:00 one night officer Gammill of the Jonesboro police department received a complaint from a Mrs. Taylor that there was a prowler in her house at 330 Carson Street. Officer Gammill drove to the address in a squad car, found no one in the house but proceeded to drive around in the neighborhood. Sometime within fifteen minutes after his investigation at the house, and while still cruising around in the neighborhood near Mrs. Taylor's house, officer Gammill saw the appellant in the street running south away from the direction of the Taylor house and about a block or a block and a half from the house. Officer Gammill overtook the appellant and after "conversing with him" told the appellant he was under arrest for investigation of burglary. He searched the appellant by "brushing him down" and found a meat cleaver or corn knife, with a blade ten inches long, in appellant's hip pocket. He took

appellant to the police station where appellant admitted numerous burglaries and thefts which resulted in the recovery of the stolen goods identified as those missing in recent burglaries, and resulted in the revocation of the suspension of the final judgment of conviction on the former felonies as above set out.

The suspension of pronouncement of sentence upon convictions rests in the sound discretion of the trial courts in this State. Ark. Stat. Ann. § 43-2324 (Repl. 1964), *Suit* v. *State*, 212 Ark. 584, 207 S. W. 2d 315, and the sufficiency of evidence for the revocation of such suspension also lies within the sound discretion of the trial court, *Spears* v. *State,* 194 Ark. 836, 109 S. W. 2d 926.

A so-called "suspended sentence" or "suspension of sentence" is in the nature of a *privilege* extended to a defendant upon *condition* and is awarded or withheld in the court's sound discretion as to the worthiness and possibility of rehabilitation of the defendant and on conditions fixed by the court. A revocation of a suspension is in the nature of a *revocation of a privilege* previously extended, and the sufficiency of evidence as to whether or not the conditions upon which the suspension was granted have or have not been met or complied with by the defendant, also lies within the sound discretion of the trial court.

During the period of suspension of a penitentiary sentence on good behavior, the choice is simply left up to the defendant as to whether he serves out his sentence in good behavior or in the penitentiary.

Appellant argues three points for reversal, which we now take up in order.

> Point 1: "Appellant was entitled to a trial on the petition for revocation under the same evidentiary rules and constitutional guarantees that would obtain in a trial on the merits of guilt or innocence in any criminal case."

Appellant cites *Gerard* v. *State,* 235 Ark. 1015, 363 S. W. 2d 916 in support of point No. 1.

In the Gerard case, the trial court revoked the suspended sentence in a *summary* proceeding and *denied the defendant the right to testify.*

In the case at bar, appellant's own attorney elicited all the damaging evidence against the defendant in support of his motions to suppress it and the defendant did not offer to testify.

Officer Gammill testified that appellant was carrying a knife with a ten inch blade and when asked what explanation the appellant gave for carrying the knife, the officer stated:

> "He said his girl friend was in Marked Tree with another boy and he was waiting for him on Carson street, going to wait on Matthews and Carson, that was the route they would come."

Appellant did not deny carrying the knife or making the statement nor did he offer to do so. He simply argues that officer Gammill told him he was under arrest before the knife was found in his hip pocket, and that the court could not consider this as bad behavior since his constitutional rights were violated in his arrest by officer Gammill.

Ark. Stat. Ann. § 43-2331 (Supp. 1965) is the last pronouncement from the legislature on suspension of sentences and probation in Arkansas, and our own latest pronouncements on the subject are found in our decisions in *Frankie Kinard* v. *City of Conway,* 241 Ark. 255, and *Burt* v. *State,* 241 Ark. 798 where we held, as we now hold again, that the sufficiency of the evidence to sustain an order of revocation of a suspended sentence is a matter addressing itself to the sound discretion of the trial court.

Certainly the same quality or degree of evidence should not be required in the exercise of judicial dis-

cretion as is required for the proof of guilt beyond a reasonable doubt against presumption of innocence and we find no abuse of the Court's discretion in this case.

> Point 2: "The appellant's arrest was illegal and in violation of his rights under the 4th amendment to the constitution of the United States of America."

Appellant argues that his arrest was illegal because it was without reasonable or probable cause as required by amendment 4 of the United States constitution and without reasonable grounds for believing that he had committed a felony as required by Ark. Stat. Ann. § 43-403 (Repl. 1964). This section of the Arkansas statutes is short and reads as follows:

> "A peace officer may make arrest:
>
> First. In obedience to a warrant of arrest delivered to him.
>
> Second. Without a warrant, where a public offense is committed in his presence, or where he has reasonable grounds for believing that the person arrested has committed a felony."

In the examination of the arresting officer a fine line of distinction is drawn between "burglary" which is a felony and "house prowling" in trespass, which is a misdemeanor.

In determining what is "reasonable" and what is "probable" in an effort to determine what constitutes "reasonable or probable cause," under amendment 4 of the U. S. constitution, and what constitutes "reasonable grounds for believing," under the State statutes, one must of necessity, depend to some extent, on time, place and circumstances.

There is no question but that the Jonesboro police were well aware of numerous unsolved burglaries in the

City, when officer Gammill was advised by Mrs. Taylor at 11:00 p.m. that a prowler was in her house. Officer Gammill was not unreasonable in believing Mrs. Taylor when she said there was a prowler in her home, and certainly officer Gammill would not have been reasonable in believing that the prowler was paying a social call or merely inspecting the contents of the house out of curiosity. It was not unreasonable for officer Gammill to believe that such prowler had entered the house with intent to commit a felony or larceny. Officer Gammill would have come nearer being unreasonable to have believed otherwise, and he was not duty bound to determine the exact nature or degree of the prowler's intent before making up his own mind.

When a few minutes after the house entry was reported, officer Gammill observed the appellant, a grown man, running down the street away from the house that had been entered at 11:00 at night, he was not unreasonable in believing that the appellant was the one who had entered the house.

Applying the fine technicalities of the law *in favor* of the arrest, that appellant would have us apply *against it*, officer Gammill had a right to actually arrest the appellant because of a public offense being committed in the officer's presence.

No ordinance is cited on walking or running down the streets of Jonesboro near midnight, but Ark. Stat. Ann. § 41-4521 (Repl. 1964) provides as follows:

> "A person who carries a knife as a weapon, except when upon a journey or upon his own premises, shall be punished as provided by Act 96 * * *"

and Ark. Stat. Ann. § 41-4523 (Repl. 1964) provides as follows:

> "If a person carries a knife with a blade three and a half inches (3½ in.) long or longer, this fact shall

be *prima facie* proof that the knife is carried as a weapon."

In this case the appellant was not only carrying a knife in the presence of the officer, he was running with it. The blade of the knife was not less than three and a half inches long, it was ten inches long.

Having reached the conclusion that appellant's arrest was legal, under all the attending circumstances of this case, and having reaffirmed our previous holdings that the sufficiency of the evidence for the revocation of suspended sentences is addressed to the sound discretions of the trial court, and finding no abuse of that discretion in the case before us, we find it unnecessary to discuss appellant's point No. 3.

The judgment of the trial court is affirmed.

FOGLEMAN, J. not participating.

SISTERS OF MERCY OF WARNER BROWN HOSPITAL *v.* NELLIE JOE ROBERTSON

5-4104 411 S. W. 2d 3

Opinion delivered February 6, 1967

Crumpler, O'Connor, Wynne & Mays, for appellant.

Brown, Compton & Prewett, for appellee.

J. Fred Jones, Justice. This case involves the proceeds paid by two separate insurance companies under two separate family group hospitalization policies on the hospital bill of one of the family group covered in both policies. The payment by both companies resulted in an over-payment of the account, and the question pertains to the disposition of the over-payment.

At the outset we agree with appellant, as well as the appellee, that this case is unique.

Ralph Robertson and Nellie Joe Robertson were husband and wife living in El Dorado. Mr. Robertson was employed by the Lion Oil Company and he and his family were covered by a group hospitalization policy with Metropolitan Insurance Company procured through his employer. Mrs. Robertson was employed by the El Dorado school district and also carried a family group hospitalization policy procured through her employer.

Mr. Robertson was hospitalized in Warner Brown Hospital operated by Sisters of Mercy, and on August 15, 1965, his account with the hospital amounted to $7,-006.88. Mrs. Robertson was also a patient at the hospital from April 12 until May 21, 1965, and incurred a bill in the amount of $1,503.30.

On June 28, 1965, Blue Cross-Blue Shield paid the hospital $1,283.30 for credit to the account of Mrs. Robertson, leaving a balance of $220.00 due on Mrs. Robertson's account.

On July 28, 1965, Metropolitan also paid the hospital $1,433.89 on Mrs. Robertson's account, and on August 4, 1965, paid the additional sum of $59.25, making a total over-payment on Mrs. Robertson's account in the amount of $1,273.14. Metropolitan filed a claim with the hospital for a refund of $305.56 erroneously overpaid under its policy.

When Mrs. Robertson was admitted to the hospital, she and Mr. Robertson were separated, and on August

12, 1965, she instituted suit against Mr. Robertson in the Union County Chancery Court for separate maintenance.

On August 17, 1965, the Sisters of Mercy of Warner Brown Hospital filed an intervention in the separate maintenance action claiming the amount of over-payment on Mrs. Robertson's account should be applied on Mr. Robertson's account, less the $305.56 claimed in over-payment by Metropolitan on its policy.

The case was submitted to the court on stipulation of facts and the court decreed that $967.64 be paid over to Mrs. Robertson, and that $305.50 be paid into the registry of the court subject to the claim of Metropolitan.

Sisters of Mercy of Warner Brown Hospital brings this appeal contending as their only point relied on, "that the chancellor erred in holding that the plaintiff, Nelly Joe Robertson, is entitled to the over-payment made by husband's hospital insurance carrier, Metropolitan Insurance Company, to the Sisters of Mercy of Warner Brown Hospital on the plaintiff's account."

We are of the opinion that the chancellor was correct in holding that the over-payment on Mrs. Robertson's account should be reimbursed to Mrs. Robertson.

Neither of the group policies, nor abstracts of their provisions, are of record in this case and subrogation between insurance companies is not involved. Appellant's right to intervene in appellee's separate maintenance action is not questioned by appellee and will not be questioned by us. Appellants do not contend that appellee is liable in any manner for her estranged husband's hospital bills.

Appellants have offered no proof that the money paid on appellee's account, under a group policy procured by the husband through his employer, at any time belonged to the husband, and certainly appellants have

offered no proof that the over-payment belonged to them.

The chancellor's decree is not against the preponderance of the evidence and must be affirmed.

Decree affirmed.

MARK BLOCK *v.* BEN ALLEN ET AL

5-4210 411 S. W. 2d 21

Opinion delivered February 6, 1967

Carl Langston and *John Langston,* for appellant.

Robinson, Thornton, McCloy & Young, for appellee.

CONLEY BYRD, Justice. This litigation arises as a result of the "one man, one vote" decisions of the United States Supreme Court[1], and the case of *Yancey* v. *Faubus,* 238 F. Supp. 290 (E. D. Ark. 1965). Appellant

[1]"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. *Lomenzo,* 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." *Faubus* v. *Kinney,* 239 Ark. 444, Footnote 2.

Mark Block, a qualified voter, has brought this declaratory judgment action against the five Senators of the eighteenth senatorial district to determine whether the Senate must be divided into two classes by lot in accordance with Section 6 of Amendment 23 to the Constitution of the State of Arkansas. Appellees, Ben Allen, Max Howell, Dan Sprick, Joe Ford and Oscar Alagood, being the five Senators of the eighteenth senatorial district, filed a demurrer to the complaint which the trial court sustained.

In sustaining the demurrer, the trial court held that Amendment 23, Section 6, the Senate must be divided of Arkansas was not applicable. While we agree that the demurrer should have been sustained, we do not adopt the theory of the trial court.

Appellant contends that the apportionment made by The Board of Apportionment following the cases of *Yancey* v. *Faubus, supra,* and *Faubus* v. *Kinney,* 239 Ark. 443, 389 S. W. 2d 887 (1965), is but an apportionment following the 1960 federal census, and that under Amendment 23, Section 6, the Senate must be divided into two classes by lot. Appellant's theory is that Amendment 45[2] has been voided in its entirety by the "one man, one vote" decisions, since the sole purpose of Amendment 45 was to freeze the senatorial apportionment existing at the time of its adoption in 1956. Appellees first take the position that Amendment 45 is controlling and that under that amendment a Senator is elected for a term of four years. For their alternative position, appellees contend that even if we should decide that Amendment 23 is the controlling law, by virtue of the provisions of Section 4 thereof the Senate will not be required to divide itself into two classes by lot until after an apportionment is made following a federal census.

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[2]Amendments 23 and 45 are set out in full as an appendix to this opinion.

The historical background out of which this problem arose is hereinafter set out to give a better understanding of the problem involved.

The 1874 Constitution of Arkansas, Art. VIII, § 2, provided that the legislature should from time to time divide the state into convenient senatorial districts, having not more than 35 nor less than 30 Senators. Article V, § 3 provided that at the first session the Senators should divide themselves into two classes by lot, in which case the first class would hold office for two years only but thereafter all Senators would be elected for four-year terms.

In 1936, Amendment 23 to the Constitution of Arkansas was adopted. This amendment, providing for 35 Senators, set up a Board of Apportionment, consisting of the governor, secretary of state, and attorney general. The Board of Apportionment had the imperative duty to make apportionment of the Representatives and Senators in accordance with population as shown by the federal census within 90 days after January 1, 1937, and thereafter on or before February 1 immediately following each federal census. Section 6 of this amendment provided that at the next general election following any such apportionment, the Senators and Representatives should be elected in accordance with the apportionment, and furthermore, that the Senate at the first regular session succeeding any apportionment so made "...shall be divided into two classes by lot, eighteen of whom shall serve for a period of two years and the remaining seventeen for four years, after which all shall be elected for four years until the next apportionment hereunder." This amendment also prohibited the division of a county in the formation of senatorial districts.

As far as the problem here is concerned, Amendment 23 was before this court twice following the 1940 decennial census. No change was made in any senatorial district following the 1940 census, and in *Bailey* v. *Abington*, 201 Ark. 1072, 148 S. W. 2d 176 (1941), and *Butler*

v. *Democratic State Comm.,* 204 Ark. 14, 160 S. W. 2d 494 (1942), we held that where no change was made in the geographical boundaries of any senatorial district, it was not necessary to elect an entirely new Senate nor for the Senate to divide itself into two classes by lot as provided in Section 6 of the amendment. We there held, however, that if there was any change in any senatorial district following a decennial census, an entirely new Senate must be elected at the next general election and that at the first regular session following such election it would be necessary for the Senate to divide itself into two classes by lot as provided in Amendment 23, Section 6.

Following the 1950 decennial census, senatorial apportionment was again before this court in *Smith* v. *Board of Apportionment,* 219 Ark. 611, 243 S. W. 2d 755 (1951), and *Pickens* v. *Board of Apportionment,* 220 Ark. 145, 246 S. W. 2d 556 (1952). These two cases were direct appeals from the action of The Board of Apportionment pursuant to Amendment 23, Section 5, which confers original jurisdiction on this court in such matters.

The 1950 reapportionment and the subsequent division of the Senate into two classes by lot, for the purpose of the two- and four-year term provisions of Section 6 of Amendment 23, were not popular with members of the Senate. The Senators who ostensibly were elected to a four-year term in 1950, and some whose districts were not affected, found themselves running for office again in 1952, and some of them subsequently found themselves running for office again in 1954 because of the "division into two classes by lot" required by Section 6 of the amendment.

In 1956 the problem of apportionment was temporarily solved by the passage of Amendment 45 to the Constitution of Arkansas. By this amendment the senatorial districts were frozen in the manner set out in *Pickens* v. *Board of Apportionment, supra,* and the Sen-

ate was removed from the jurisdiction of The Board of Apportionment. Following the "one man, one vote" decisions of the United States Supreme Court, that portion of Amendment 45 which froze the senatorial districts was declared void by a three-judge federal court in *Yancey* v. *Faubus, supra.*

Since the "one man, one vote" decisions voided so many sections of our Constitution, the decision by this court in *Faubus* v. *Kinney, supra,* was expedited through the courts to get a judicial determination to see if the portions of Amendment 45, which established 100 members in the House of Representatives and 35 members in the Senate, were still valid and, if so, whether the apportionment ordered by the federal court in *Yancey* v. *Faubus, supra,* should be made by the legislature or by The Board of Apportionment. We there held that the portions of Amendment 45 which provided for 100 members in the House of Representatives and 35 members in the Senate were still valid and that The Board of Apportionment set up thereunder was the proper body to reapportion the legislature as directed by the federal court in *Yancey* v. *Faubus, supra.*

Following *Faubus* v. *Kinney, supra,* The Board of Apportionment, pursuant to the directions of *Yancey* v. *Faubus, supra,* reapportioned the state upon the basis of "one man, one vote," but in doing so left unaffected the districts of nine Senators who had ostensibly been elected to a four-year term in 1964. In *Catlett* v. *Jones,* 240 Ark. 101, 398 S. W. 2d 229 (1966), we held that these nine Senators could serve out the remainder of their four-year terms without standing for re-election in 1966.

While there is logic and apparent merit in appellees' contention that we cannot hold Section 6 of Amendment 23 applicable at this session if we follow our previous decisions— *i. e., Bailey, Butler* and *Catlett, supra* —we do not at this time find ourselves in a position to make a final determination upon the merits. There is

an obvious defect in the parties defendant, since only five members of the Senate are made parties to this declaratory judgment action. See Ark. Stat. Ann. § 34-2510 (Repl. 1962), which provides as follows:

> "*Parties.*—When the declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. . . [Acts 1953, No. 274, § 10, p. 802.]"

Consequently, the decree of the trial court will be affirmed upon the ground that the demurrer should have been sustained because of the defect in the parties defendant.

The gravity of this defect is pointed up by reason of the fact that any decision as to these five members could not control the action of the Senate. The constitutional provision sought to be invoked would require action by the Senate, not individual Senators. Thus, no effective relief could have been granted to either party in this case.

Affirmed as modified.

HARRIS, C. J., and FOGLEMAN, J., concur.

AMENDMENT NO. 23

Sec. 1. *Board of apportionment created—Powers and duties.*—A board to be known as "The Board of Apportionment," consisting of the Governor (who shall be Chairman), the Secretary of State and the Attorney General is hereby created and it shall be its imperative duty to make apportionment of representatives and senators in accordance with the provisions hereof; the action of a majority in each instance shall be deemed the action of said Board.

Sec. 2. One hundred members in house of representatives.—Apportionment.—The house of representatives shall consist of one hundred members and each county existing at the time of any apportionment shall have at least one representative; the remaining members shall be equally distributed (as nearly as practicable) among the more populous counties of the State, in accordance with a ratio to be determined by the population of said counties as shown by the Federal census next preceding any apportionment hereunder.

Sec. 3. Senatorial districts—Thirty-five members of senate.—The Senate shall consist of thirty-five members. Senatorial districts shall at all times consist of contiguous territory, and no county shall be divided in the formation of such districts. "The Board of Apportionment" hereby created shall, from time to time, divide the State into convenient senatorial districts in such manner as that the Senate shall be based upon the inhabitants of the State, each Senator representing, as nearly as practicable, an equal number thereof; each district shall have at least one Senator.

Sec. 4. Duties of board of apportionment.—The Board shall make the first apportionment hereunder within ninety days from January 1, 1937; thereafter, on or before February 1 immediately following each Federal census, said Board shall reapportion the State for both Representatives and Senators, and in each instance said Board shall file its report with the Secretary of State, setting forth (a) the basis of population adopted for representatives; (b) the basis for senators; (c) the number of representatives assigned to each county; (d) the counties comprising each senatorial district and the number of senators assigned to each, whereupon, after thirty days from such filing date, the apportionment thus made shall become effective unless proceedings for revision be instituted in the Supreme Court within said period.

Sec. 5. Mandamus to compel board of apportionment to act.—Original jurisdiction (to be exercised on

application of any citizens and taxpayer) is hereby vested in the Supreme Court of the State (a) to compel (by mandamus or otherwise) The Board to perform its duties as here directed and (b) to revise any arbitrary action of or abuse of discretion by The Board in making any such apportionment; provided any such application for revision shall be filed with said Court within thirty days after the filing of the report of apportionment by said Board with the Secretary of State; if revised by the Court, a certified copy of its judgment shall be by the clerk thereof forthwith transmitted to the Secretary of State, and thereupon be and become a substitute for the apportionment made by the Board.

Sec. 6. *Election of senators and representatives.* —At the next general election for State and County officers ensuing after any such apportionment, senators and representatives shall be elected in accordance therewith and their respective terms of office shall begin on January 1 next following. At the first regular session succeeding any apportionment so made, the Senate shall be divided into two classes by lot, eighteen of whom shall serve for a period of two years and the remaining seventeen for four years, after which all shall be elected for four years until the next reapportionment hereunder.

AMENDMENT NO. 45

§ 1. *Board of apportionment created — Powers and duties.*—A Board to be known as "The Board of Apportionment," consisting of the Governor (who shall be Chairman), the Secretary of State and the Attorney General is hereby created and it shall be its imperative duty to make apportionment of representatives in accordance with the provisions hereof; the action of a majority in each instance shall be deemed the action of said board.

§ 2. *One hundred members in house of representatives.—Apportionment.*—The House of Representatives shall consist of one hundred members and each county existing at the time of any apportionment shall

have at least one representative; the remaining members shall be equally distributed (as nearly as practicable) among the more populous counties of the State, in accordance with a ratio to be determined by the population of said counties as shown by the Federal census next preceding any apportionment hereunder.

§ 3. *Senatorial districts—Thirty-five members of senate.*—The Senate shall consist of thirty-five members, Senatorial districts as now constituted and existing, as heretofore directed by the Supreme Court of Arkansas in the case of *Pickens* v. *Board of Apportionment,* 220 Ark. 145, 246 S. W. 2d 556, shall remain the same and the number of Senators from the districts shall not be changed.

§ 4. *Duties of board of apportionment.*—On or before February 1 immediately following each Federal census, said Board shall reapportion the State for Representatives, and in each instance said Board shall file its report with the Secretary of State, setting forth (a) the basis of population adopted for representatives; (b) the number of representatives assigned to each county; whereupon, after 30 days from such filing date, the apportionment thus made shall become effective unless proceedings for revision be instituted in the Supreme Court within said period.

§ 5. *Mandamus to compel board of apportionment to act.*—Original jurisdiction (to be exercised on application of any citizens and taxpayers) is hereby vested in the Supreme Court of this State (a) to compel (by mandamus or otherwise) the Board to perform its duties as here directed and (b) to revise any arbitrary action of or abuse of discretion by the Board in making such apportionment; provided any such application for revision shall be filed with said Court within 30 days after the filing of the report of apportionment by said Board with the Secretary of State; if revised by the Court, a certified copy of its judgment shall be by the clerk thereof forthwith transmitted to the Secretary of State, and

thereupon be and become a substitute for the apportionment made by the Board.

§ 6. *Election of senators and representatives.*— At the next general election for the State and County officers ensuing after any such apportionment, Representatives shall be elected in accordance therewith, Senators shall be elected henceforth according to the apportionment now existing, and their respective terms of office shall begin on January 1 next following. Senators shall be elected for a term of four years at the expiration of their present terms of office.

CARLETON HARRIS, Chief Justice, concurring. I concur in the opinion handed down by the court, since I would also affirm, but for an additional reason. I agree that there is a defect of parties, and, strictly speaking, other members of the Senate should have likewise been named party defendants. However, this matter was mentioned to counsel during oral argument, and I gained the impression, at that time, that the entire Senate was interested, and desired a decision on the merits. The defect of parties is not raised in the briefs.

In *Faubus, Governor* v. *Kinney,* 239 Ark. 443, 389 S. W. 2d 887, we held only those provisions of Amendment 23 to the Constitution of Arkansas invalid, which were in conflict with the Federal Court decision of *Yancey* v. *Faubus,* 238 F. Supp. 290 (E. D. Ark. 1965). The provision, hereafter quoted, of Section 6 of Amendment 23, was not affected in *Faubus* v. *Kinney, supra.* That provision is as follows:

"* * * At the first regular session succeeding any apportionment so made, the Senate shall be divided into two classes by lot, eighteen of whom shall serve for a period of two years and the remaining seventeen for four years, after which all shall be elected for four years until the next reapportionment hereunder."

The words, "any apportionment," refer to the reapportionment made following the Federal csusus; Section 4 of Amendment 23 provides:

"The Board shall make the first apportionment hereunder within ninety days from January 1, 1937; thereafter, on or before February 1 *immediately following each Federal census* (*my emphasis*), said Board shall reapportion the State for both Representatives and Senators,* * *."

In *Butler* v. *Democratic State Committee,* 204 Ark. 14, 160 S. W. 2d 494, we held that Amendment 23 was intended to apply only to apportionments of the House and Senate made after each Federal decennial census in the state, and further held that, if no change was required in the geographical boundaries of any senatorial district (as a result of an apportionment made pursuant to this census), no drawing of lots for two and four-year terms was necessary, and each Senator would be entitled to serve a four-year term.

Accordingly, it is my view that it would be improper to draw lots for two and four-year terms at the present session of the General Assembly; rather, there is no occasion for a drawing until at least after the 1970 Federal census has been taken.

I therefore agree with the trial court to the extent that Amendment 23 does not require a drawing for terms at this session of the Legislature.

JOHN A. FOGLEMAN, Justice, concurring. I concur in the result reached in this case without any reservation, but I would also affirm the action of the trial court because appellant had no right to be protected or interest sufficient to provide the justiciable controversy necessary for an action such as this, either individually or as a citizen, taxpayer and elector of one senatorial district.

A litigant can question a statute's validity only when and insofar as it is being, or is about to be applied to his disadvantage and a demurrer properly raises this point. *Dowell* v. *School Dist. No.* 1, 220 Ark. 828, 250 S. W. 2d 127; *Arkansas Power & Light Co.* v. *West Memphis Power & Water Co.,* 184 Ark. 206, 41 S. W. 2d 755; *Ferguson* v. *Hudson,* 143 Ark. 187, 220 S. W. 306; *Lienhart* v. *Burton,* 207 Ark. 536, 181 S. W. 2d 468; *Citizens Pipe Line Co.* v. *Twin City Pipe Line Co.,* 178 Ark. 309, 10 S. W. 2d 493; *Connor* v. *Blackwood,* 176 Ark. 139, 2 S. W. 2d 44; *Priest* v. *Mack,* 194 Ark. 788, 109 S. W. 2d 665.

While these authorities have to do with statutes, we apply the same rules to constitutional provisions as we do to statutes when called upon for construction.

If appellant has any litigable right at all, there is no showing of any kind what the *Senate,* as distinguished from five of its members, intends or is about to do in the matter.

If appellant has any litigable rights, they are political rights, not civil or property rights, and were not within the jurisdiction of the chancery court; so the demurrer should have been sustained for that reason. *Gladish* v. *Lovewell,* 95 Ark. 618, 130 S. W. 579; *Walls* v. *Brundidge,* 109 Ark. 250, 160 S. W. 230; *Davis* v. *Wilson,* 183 Ark. 271, 35 S. W. 2d 1020; *Seabolt* v. *Moses,* 220 Ark. 242, 247 S. W. 2d 24.

Of course, a question of jurisdiction of the subject matter cannot be waived by the parties, can be raised at any time and even if not raised, must be determined by the court. *McCain, Commissioner of Labor* v. *Crossett Lumber Co.,* 206 Ark. 51, 174 S. W. 2d 114.

The declaratory judgment act is not intended to be the vehicle for advisory opinions to persons not having a justiciable controversy with their apparent adversaries by a court having no jurisdiction. It is far better, in

my opinion, that important questions, particularly constitutional ones, be pounded out on the anvil of advocacy by persons whose interests are vitally real, not academic, with all interested parties before the court.

OLD EQUITY LIFE INSURANCE CO. *v.* HATTIE MAE CRUMBY

5-4099 411 S. W. 2d 292

Opinion delivered February 13, 1967

George K. Cracraft Jr., for appellant.

David Solomon, for appellee.

CARLETON HARRIS, Chief Justice. Appellee, Hattie Mae Crumby, a 72-year-old widow, purchased two policies of insurance from appellant insurance company on

April 6, 1964. One policy provided hospital benefits, and the other provided reimbursement for medical and surgical expenses. Appellee was not required to take a physical examination prior to issuance of the policies, the company only requesting a statement from appellee that she was in good health, along with a statement of her past medical history. On March 30, 1965, while visiting in Memphis, Tennessee, Mrs. Crumby, at the insistence of her children, went to Sanders Clinic for a general "check-up" and physical examination, her only complaint relating to a condition totally unconnected with the issue in this litigation. During the examination, Dr. Strain observed several tumors[1] on her forehead, and this doctor sent her to another member of the clinic, Dr. Eugene Nobles, for a further examination of the tumors. Dr. Nobles diagnosed these (also termed ulcers) as malignant, the pathology report terming them "basal cell carcinoma," or in "laymen's language," skin cancer. Surgery was performed, and the tumors removed. Mrs. Crumby sought payment of the benefits provided by the two insurance policies heretofore mentioned, but the company declined to pay on the basis that the hospitalization policy provided that the company was not liable for cancer unless that sickness originated after the policy had been in force for three months preceding the date of the origin; as to surgical benefits, the policy provided no compensation due to surgery for cancer, unless the sickness originated six months after the policy had been in force. The company contended that this condition was in existence at the time the policies were taken out by appellee and refused to make payment. Suit was instituted by Mrs. Crumby, and on hearing, the Circuit Court, sitting as a jury, found that appellee was entitled to a judgment against appellant in the amount sued for, $695.00, and was entitled to 12% penalty, a reasonable attorney's fee, interest, and costs. From the judgment so entered, appellant brings this appeal. For reversal, only one point is relied on, *viz*:

[1]The record discloses that the growths are referred to both in the singular and plural. Apparently, there were several, one being somewhat larger than the others.

"A disease originates within the meaning of the exclusionary clause of a policy of medical insurance when it becomes active and so manifests itself and displays sufficient symptoms from which a reasonable and accurate diagnosis can be made whether or not the insured is aware of the consequences of these symptoms or has actual knowledge that the disease exists."

Both sides rely upon the same cases, each contending the cases strongly support their view. These cases are: *State National Life Insurance Company* v. *Stamper,* 228 Ark. 1128, 312 S. W. 2d 441; *American Insurance Company of Texas* v. *Neal,* 234 Ark. 784, 354 S. W. 2d 741; and *United Insurance Company of America* v. *Wall,* 233 Ark. 554, 345 S. W. 2d 927. In the *Stamper* case, Mrs. Stamper had purchased a similar policy, with a similar exclusion clause. A little over a year after the purchase, she began to suffer pain in her neck and shoulders. At first thinking it was caused by her teeth, she had them extracted, but this did not bring relief. During most of her life, she had had a small bony growth or knot on the back of her head, but had suffered no ill effects whatever from the growth until August, 1955 (fourteen months after the policy had been taken out), when it was determined that this growth had increased in size to the point where it was causing the pain suffered. The company contended that this knot had been present for a long number of years, and it was not liable for surgical and hospital benefits. The trial court held against this contention, and we affirmed. A similar situation was involved in *American Insurance Company of Texas* v. *Neal, supra,* and we likewise affirmed a judgment for the policyholder, citing *Stamper,* and stating:

"The decision in the above case was in line with the decided weight of authority that the condition should be deemed to have had its inception either at the time it became active, or when sufficient evidence existed to allow a reasonably accurate diagnosis even though disease germs, infection, or physical condition might have been present in the body prior to the excluded time if

the condition was latent, inactive, and perhaps undiscovered."

Likewise, in *United Insurance Company of America* v. *Wall, supra,* a similar exclusion was raised as a defense, it being contended that the policyholder had suffered from a circulatory ailment for a long period of time before the policy was taken out. This ailment finally resulted in Wall's having both legs amputated. On trial, Wall obtained judgment and we affirmed. At once, it is noticeable that in all three of these cases, relied upon by both parties, the policyholder recovered.

The testimony in the case before us consists entirely of that of Mrs. Crumby and the deposition of Dr. Nobles. Mrs. Crumby testified (and none of her testimony is disputed) that the tumors had been on her forehead for a long number of years, but had never given her any trouble. Apparently one had formed from an old scar occasioned by an injury received when she was three years of age. Appellee mentioned consulting another physician six or eight years before the visit to Sanders Clinic, at which time, she showed the growth to that physician (though she was consulting him about another matter), "and he said that it was all right to leave it alone." She stated that prior to her visit to Dr. Strain in 1965, she had had "No trouble at all. Dr. Nobles said he didn't know whether they would have to be removed until he took X-rays."

Dr. Nobles testified that he could not say how long the tumors had been malignant, but when asked if he could tell whether the malignancy had reached the point where it might have been diagnosed earlier than March 30, 1965, as cancer, he replied:

"Yes, undoubtedly, if a biopsy had been taken, which is a removal of a small portion of a lesion for pathological examination, the diagnosis could have been made at an earlier time."

The doctor stated that he was expressing his personal feeling, that he had no idea how long the tumors had been malignant, but when asked if a qualified medical doctor could have made a reasonable or accurate diagnosis of her condition, as much as six months before he (Dr. Nobles) saw her, the witness replied, "I would say this is correct." He further stated, "I feel that this ulcer had become malignant before a year ago. I think that a year prior to her admission here it was malignant at that time." Dr. Nobles also testified that Mrs. Crumby was unaware of any malignancy; that he knew of no previous treatment that she had had relative to this condition. This was all of the proof offered in the case.

Mrs. Crumby's case, in many respects, is really a stronger case for recovery than the three heretofore mentioned. For instance, in *United Insurance Company of America* v. *Wall* (the amputation case), we pointed out that "the fact that appellee had experienced some symptoms before the policy was issued was no indication that the disease would advance to a state causing total disability." In *Stamper,* the policyholder had the small bony growth or knot on the back of her head for a long number of years, and had suffered pain in her neck and shoulders, but thought it was caused by bad teeth. Here, it is undisputed that the tumors had grown on appellee's forehead[2] for a long number of years (the first commencing when she was a child); that they had been viewed by a physician some years before that, the physician finding no cause for alarm, and appellee had never suffered one moment of pain from these growths.

What is meant by the expression that a "condition should be deemed to have had its inception either at the time it became active, or *when sufficient evidence existed to allow a reasonably accurate disgnosis*? (Emphasis supplied) * * *" A reasonably accurate diagnosis by whom? A specialist? A general practitioner? As

[2]These were not at once apparent to a mere glance from other persons, since Mrs. Crumby, as a matter of appearance, had followed the practice of combing her hair over the tumors.

stated, Mrs. Crumby had, some years before, mentioned the matter to her doctor, and in her application for the policies, she had given the name and address of the family physician. It will be, of course, noted that Dr. Nobles, connected with a very fine medical clinic, was only expressing his opinion. Would the fact that Dr. Nobles was able to diagnose appellee's condition mean that *any general practitioner* could have made the same diagnosis, particularly when no discomfort had been caused by the tumors? We do not think that Dr. Nobles' testimony was *conclusive* proof that her condition could, or would, have been diagnosed as cancerous by any other physician.

Here, there is no question of fraudulent or misleading statements. Furthermore, Mrs. Crumby gave the name and address of her physician, and her permission for him to disclose any knowledge or information that he might have relative to her condition. Likewise, she was 72 years of age, an age that might have caused some companies to, at least, check on the state of her health. It might be also mentioned that appellee paid a substantial premium for protection under these policies, approximately $181.00 per year.

Under appellant's contention, an applicant for insurance, in order to feel safely covered by his policy, would have to take a physical examination before applying for insurance—and, of course, even then, some condition might not be properly diagnosed by the examining physician, though some other physician might subsequently state that that condition could have, and should have, been correctly diagnosed at that time.

We are of the view that Mrs. Crumby's testimony that she had never had any pain, nor experienced any difficulty with these growths, nor been advised that the growths should receive attention, constituted substantial evidence to make a jury question of when sufficient symptoms were present to permit a reasonably accurate

diagnosis that the tumors were malignant. The trial court, sitting as a jury, determined that question.

Affirmed.

FOGLEMAN, J., concurs.

JOHN A. FOGLEMAN, Justice, concurring. While it may not have been necessary in reaching the conclusion set out in the principal opinion, I feel that it is appropriate to add that the proper meaning of the word *sickness* in the exclusionary clause of the policy in question here requires some manifestation of a diseased condition which would make one aware of his condition, not just that the condition has originated. There are many definitions of the word *sickness* in cases involving these exclusionary clauses requiring some confinement of the patient or restriction or limitation of his normal work occupation, avocation or activities, or of the normal functions of his body or organs.

A dormant condition (fistula) which existed from birth of an insured until about six months after a policy was issued has been held not to be a *sickness* which was excluded as a pre-existing one. *Horace Mann Mutual Ins. Co.* v. *Burrow,* 213 Tenn. 262, 373 S. W. 2d 469 (1963).

A hernia discovered before his policy lapsed but which did not cause an insured any pain or inconvenience or prevent him from carrying on his normal activities until after a lapse and reinstatement of the policy but for which he underwent surgery on the advice of his family doctor, was held not to be excluded because it pre-existed the reinstatement. *Old National Insurance* Co. v. *Johnson,* 312 S. W. 2d 715 (Tex. Civ. App. 1958).

The presence of malignant cells in an insured's colon for many months before an application for insurance was held not to exclude him from coverage when

surgery, because of abdominal cancer, was required within two weeks after the expiration of the exclusionary period. *Fuller* v. *Aetna Life Ins. Co.,* 259 F. 2d 402 (5th Cir. 1958).

Many other cases could be cited along these lines. These holdings are not in conflict with the Arkansas cases. While it was said in *State National Life Ins. Co.* v. *Stamper,* 228 Ark. 1128, 312 S. W. 2d 441, that there was an annotation in 53 A. L. R. 2d 687 and that the weight of authority was that the sickness should be deemed to have had its inception at the time it first manifested itself or became active, or when sufficient symptoms existed to allow a reasonably accurate diagnosis of the case, so that recovery can be had, even though the disease, germ, or infection was present in the body prior to the excluded time, if the condition was latent, inactive, and perhaps not discovered, our decisions have turned on the active manifestation of the condition and not on the ability to diagnose.

The *Stamper* case was one which involved a bony growth from childhood of the insured and the decision was based upon the fact that she did not have any condition causing her disability which manifested itself prior to its causing her pain, well after the expiration of the exclusionary period. In *American Ins. Co. of Texas* v. *Neal,* 234 Ark. 784, 354 S. W. 2d 741, the court found that there was a jury question when the condition causing insured's surgery and hospitalization had not given her any trouble until after the exclusionary period. In *United Insurance Co.* v. *Wall,* 233 Ark. 554, 345 S. W. 2d 927, the emphasis was upon the fact that even though the insured had some symptoms of arteriosclerosis before the policy was issued, there was no indication that the disease would advance to a state causing total disability. The cancer of appellee was at least as latent as the condition of the insured in *Home Life Insurance Co.* v. *Allison,* 179 Ark. 65, 14 S. W. 2d 229, where this court held that such a latent condition would not cause a subsequent disability therefrom to be excluded.

We have not applied the "diagnosis" test heretofore and I find scant support for it in the annotation from which it was quoted. It seems that most, if not all, of these cases required that there be a diseased condition known to be such by the insured. Stipulations in insurance policies exempting insurer from liabilty under certain conditions are always construed strictly against the insurer, since such policies are issued on printed forms prepared by experts at insurer's instance and insured has no voice in their preparation. *Benham* v. *American Central Life Ins. Co.,* 140 Ark. 612, 217 S. W. 462. Exceptions and limitations are strictly construed against the insurer. *Washington Fire & Marine Ins. Co.* v. *Ryburn,* 228 Ark. 930, 311 S. W. 2d 302.

I think it is definite that before a sickness can be said to be excluded, there must at least have been sufficient manifestation of it to make the insured seek a diagnosis and that it be of such a nature that a reasonably accurate diagnosis could have been made with reasonable medical certainty. That was not the condition in this case.

ARKANSAS VALLEY INDUSTRIES, INC., ET AL *v.*
DELLA GILES ET AL

5-4082 411 S. W. 2d 288

Opinion delivered February 13, 1967

Mobley & Bullock, for appellant.

White & Young, for appellee.

GEORGE ROSE SMITH, Justice. The appellees, Della Giles and her husband, brought this action for personal injuries and property damage suffered in a collision in Russellville between the Giles car and an AVI truck. The jury awarded the plaintiffs $10,100. The appellants complain of error in three of the trial court's rulings.

Mrs. Giles was driving north on Denver Street. The AVI truck was traveling west in the outer righthand

lane of Main Street, a four-lane thoroughfare. The disputed issue of fact was the point of impact. Mrs. Giles testified that she crossed Main Street and had left its intersection with Denver when the AVI driver turned to his right and struck her car. The truckdriver testified that his vision had been obstructed by a third car to his left. He said that when that car went on past him Mrs. Giles appeared in front of him so suddenly that he was unable to avoid hitting her car while it was still crossing the righthand lane of Main Street.

Two of the appellants' arguments relate to a police report about the accident. Officer McCarley investigated the collision and took notes that were not available at the trial. From those notes another officer completed a form of report that had spaces for certain information on one side and a blank diagram for a sketch of the accident on the other side.

Officer McCarley was called as a witness by the defendants. In the course of his testimony the court at first held the report to be admissible, but the next morning, in chambers, the court changed its mind and decided to exclude the exhibit (which apparently had not been seen by the jury). Later on, in the courtroom, counsel for the plaintiffs asked the court to instruct the jury that the plat had been withdrawn from their consideration. There followed this ruling and objection:

> "The Court: It has been—after I examined it this morning. It has certain information that he [McCarley] couldn't possibly testify to, and for that reason I held it in confidence [incompetent].
> "Mr. Mobley: Let the record show that the defendants object and except to the ruling of the Court and to the comments of the Court."

We do not agree with the appellants' insistence that the court's ruling involved a prejudicial comment on the weight of the evidence. Apparently the court was referring to the report as a whole. Yet only a photostatic

copy of the diagram is in the record; so we cannot tell whether the court's remark was justified by the other side of the report. Moreover, a mere objection to the court's comment was not sufficient. Counsel should have asked the court to instruct the jury to disregard the remark. See *St. Louis, I. M. & S. Ry.* v. *Coke,* 118 Ark. 49, 175 S. W. 1177 (1915); *Southern Cotton Oil Co.* v. *Campbell,* 106 Ark. 379, 153 S. W. 256 (1913); *Jones* v. *Bank of Horatio,* 102 Ark. 302, 143 S. W. 1060 (1912). We have no doubt that such a request, had it been made, would have been granted.

Next, the appellants insist that the court was in error in holding the diagram, apart from the rest of the report, to be inadmissible. We find no abuse of the court's discretion, because no witness testified that the exhibit accurately portrayed what it purported to show. The defense, in offering the plat, relied upon a statement made by Mrs. Giles, in her discovery deposition, that a diagram which was handed to her depicted the position of the vehicles after they collided. At the trial, however, Mrs. Giles was unable to say that the diagram then shown to her was the same one that she had seen on the other occasion. We find no positive statement in the record sufficiently establishing the accuracy of the exhibit. Hence we cannot say that the court erred in withdrawing the diagram from the jury's consideration.

Lastly, the appellants contend that John Booher was a surprise witness who should not have been permitted to testify. At the taking of the discovery depositions the opposing lawyers exchanged the names of their witnesses and orally agreed to disclose to each other the names of any additional witnesses that might be found. A day or two before the trial Mr. White, the plaintiffs' attorney, learned through his clients that Booher had seen the position of the cars after the collision. White's partner was being taken to the hospital, and in the confusion White forgot to report the name of the new witness to his adversary. He did mention the matter during the trial, however, and defense counsel interviewed the

witness before he took the stand. The court allowed Booher to testify.

We see no prejudicial error. The trial court unquestionably has a wide discretion in a situation of this kind. There is no reason to doubt White's explanation of the oversight. Opposing counsel did interview the witness before he took the stand. Apparently counsel were not surprised, for they made no request for a continuance. Taking the circumstances as a whole, we are unwilling to say that the court should have ruled inflexibly that the plaintiffs had forfeited their right to use Booher's testimony.

Affirmed.

METROPOLITAN LIFE INSURANCE COMPANY *v.* PAUL K. ROBERTS

5-4052 411 S. W. 2d 299

Coleman, Gantt, Ramsay & Cox, for appellant.

Frank W. Wynne, for appellee.

PAUL WARD, Justice. A complaint was filed by Attorney Paul K. Roberts (appellee, represented by another attorney) to collect a fee from the Metropolitan Life Insurance Company (appellant) based on legal services rendered in an attempt to collect on an insurance policy written by appellant in which his client was the beneficiary.

A jury trial resulted in a judgment in favor of appellee for $1,000, and this appeal follows.

Facts. The basic background facts, about which there is no dispute, are as follows. On November 1, 1950 appellant issued its policy to George O. Henley undertaking to pay, at his death, the sum of $5,000 to his wife, Mrs. Lela M. Henley. Mr. Henley died January 5, 1964 and when payment was not promptly paid Mrs. Henley on July 22, 1964, employed appellee to effect settlement, agreeing to pay a fee. Appellee promptly gave appellant notice of his employment and forthwith began writing letters and gathering information, with appellant's knowledge and consent, in an effort to effect payment. These activities by appellee continued until March 4, 1965 when he was notified by Mrs. Henley that his employment was terminated. This information was also made known to appellant.

On May 12, 1965 appellant wrote appellee it would pay Mrs. Henley the $5,000 when she executed certain forms and returned them, which she did. On June 3, 1965 appellee wrote appellant that he had "expended a great amount of labor and time in the prosecution of Mrs. Henley's claim", and that he was impressing a lien, under Ark. Stat. Ann. § 25-301 (Repl. 1962) on the proceeds of the policy. Replying to this letter on June 10,

1965 appellant wrote appellee stating, in substance, that his claim had no merit, and that it would pay the $5,000 to Mrs. Henley "unless within ten days from the date of this letter you are able to restrain the company from doing so by legal process". The money was paid to Mrs. Henley and appellee filed this action on July 7, 1965, asking for a reasonable attorney's fee on a quantum meruit basis.

On appeal appellant urges only two points for a reversal.

One. It is that "appellee was not entitled to an attorney's lien because he failed to comply with requirements for notice in the statute".

The statute mentioned above is Ark. Stat. Ann. § 25-301 (Repl. 1962). This statute is a lengthy one and it would serve no useful purpose to quote it in full, especially so due to the point here raised. Suffice to point out the following language:

> "From and after service upon the adverse party a written notice signed by the *client* and by the attorney . . . to be served by registered mail . . . ." (Emphasis ours.)

Referring to the above language it is appellant's sole contention that the notice given by appellee in his letter written on June 3, 1965 (mentioned previously) was not signed by the *client,* Mrs. Henley. It is true that Mrs. Henley did not sign the notice, but we cannot agree that this omission is fatal.

As we interpret the intent and purpose of the statute it was enacted to make sure (in this case) that appellee represented Mrs. Henley and that appellant would be aware of appellee's intention to claim a lien, for his fee, on the proceeds of the litigation before they were paid to the client (Mrs. Henley). We hold that the notice here given by appellee was a substantial compliance with

the above provision of the statute, under the undisputed facts as previously set out. Here appellant was fully aware of appellee's claim before paying the money to Mrs. Henley. This view is supported by language found in the emergency clause of Act No. 306 of 1941 (said act being 25-301), where it explains the reason for avoiding the "necessity of filing suit under existing laws in order to establish the lien of attorneys. . ." This Court has held that a statute of this kind should be liberally construed: *St. Louis, Iron Mountain & Southern Railway Company* v. *Hays and Ward,* 128 Ark. 471 (p. 478), 195 S. W. 28; *Slayton* v. *Russ,* 205 Ark. 474 (p. 476), 169 S. W. 2d 571, and *Whetstone* v. *Daniel,* 217 Ark. 899 (p. 901), 233 S. W. 2d 625.

Having concluded that the notice here given by appellee was a substantial compliance with the statute, it follows that appellee is entitled to a "*reasonable* fee for his services", as was held in *Whetstone* v. *Travis, et al,* 223 Ark. 856 (p. 858), 269 S. W. 2d 320.

Two. We find no reversible error based on this point, which is that the statute does not cover an *unmatured* contract right. The thrust of appellant's argument appears to be that no liability or *cause of action* attached against it until proof was furnished that Mr. Henley was continuously disabled from 1961 to the time of his death (as provided by the terms of the policy), pointing out such proof was not furnished here before appellee gave notice of his claim. It is then pointed out that section 25-301 provides for an attorney's lien upon his clients *cause of action.*

We cannot agree with the above contention. In the case of *Metropolitan Life Insurance Company* v. *McNeil,* 192 Ark. 978 (p. 984), 96 S. W. 2d 476, where this same question was under consideration, we said:

> "The rule is that liability attaches upon the happening of total and permanent disability, although not recoverable until due proof of disability was made".

In this case there can be no question about "due proof" being made, because the full claim was paid by appellant.

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

Affirmed.

ARK. HIGHWAY COMM. *v.* WESLEY L. WARNOCK, ET UX

5-4107 411 S. W. 2d 283

Opinion delivered February 13, 1967

George O. Green and *Don Langston,* for appellant.

Robinson & Rogers and *N. D. Edwards,* for appellee.

PAUL WARD, Justice. This is an eminent domain proceeding brought by the Arkansas State Highway Com-

mission (appellant) to condemn (for highway purposes) approximately 15¾ acres across 140 acres of land owned by Wesley Warnock and wife (appellees).

Appellant deposited in the trial court $8,000 as estimated compensation for the taking, but the jury awarded compensation in the amount of $30,000.

On appeal to this Court appellant relies on only one ground for reversal: There is *"no substantial evidence"* to support the verdict.

It is correctly stated by appellant that the question of whether or not there is *substantial evidence* to support a verdict is not a question of *fact* but one of law. It was so held in *Arkansas State Highway Commission* v. *Byars,* 221 Ark. 845, 256 S. W. 2d 738.

Mr. Warnock testified, in substance:

> I am a licensed real estate broker and have been active as such since 1959; I have owned ten or twelve pieces of property in this county during the past three years; I purchased the subject property in June 1964 for $32,500 for the purpose of raising cattle; I felt like it was a bargain—that it was worth between $45,000 and $50,000; I have improved the land since buying by clearing and sodding about forty acres and putting it in lespedeza and clover, and have also built a stock pond; most of the land (about ninety five acres) is north of the new highway and is now isolated from it; since I bought the land there has been installed a six inch water line to it from Alma which is located three miles away and which has increased the value of adjacent land. In arriving at the value of his property appellant took into consideration other sales in that vicinity. It is my opinion that this property was worth $58,000 at the time of taking.

Bobby Gelly (a witness for appellees) has been a licensed real estate broker since 1957 with an office in

Van Buren, and sells between sixty and seventy five parcels of property each year; He is acquainted with the subject property and thinks it was worth $54,000 on June 30, 1965 (the time suit was filed). He explained how he arrives at the value by comparing it with sales of other property, and by the fact that property in general, in that vicinity, has increased in value during the past year. *Mack Bolding,* a witness for appellees, testified, in substance: He has lived at Alma fifty seven years, and is in the cattle business; he has been a licensed real estate broker since 1962; he has known subject property all his life; in his opinion the property was worth $52,000 at the time of the taking. He based this opinion on other sales. He also stated that about 98 acres north of the highway was not accessible except through a culvert which is not suitable for cattle to pass through. *E. K. Ragge,* who handles real estate transactions and claims to be a qualified real estate appraiser, valued the land at $58,000 before the taking, based on what other property had sold for in that vicinity. In his opinion part of the land could possibly be subdivided for residential purposes in the near future due to the water line. *J. W. Polk,* also a licensed real estate broker, who has made about forty sales per year, was of the opinion that appellee's property was worth $52,000 before the taking.

In opposition to the above testimony, appellant placed in evidence the testimony of two professional real estate appraisers who are employees of the Highway Commission (Walker and Hays). Walker thought the land was worth $33,000 before the taking and Hays thought the value was $35,000 before the taking. Each witness also based his opinion on the sale of other property in the vicinity. However one witness thought the highest and best use of the property was for residential purposes—especially "the front part".

In the light of the record as reflected above, we are unwilling to say there is no substantial evidence to support the verdict of the jury.

As previously pointed out appellant frankly admits, in effect, that there is substantial evidence to show appellees' property was worth only $20,700 after the taking. It must follow, therefore, that this case must be affirmed if there is substantial evidence for the jury to find the property was worth as much as $50,700 before the taking.

We are unwilling to say, as a matter of law, there is no such evidence in this case. Two witnesses placed the value at $52,000, one witness at $54,000, and two at $58,000.

It is true, as pointed out by appellant, that the jury must consider the price paid by appellant for the land. See: *Meyers* v. *Ark. State Highway Comm.,* 238 Ark. 734, 384 S. W. 2d 258, and *Ark. State Highway Comm.* v. *Snowden,* 233 Ark. 565, 345 S. W. 2d 917. We cannot, however, say they failed to do so in this case.

We are aware of the fact that we have held opinion testimony as to the value of land "must be considered in connection with related facts upon which the opinion is based". *Arkansas State Highway Commission* v. *Byars,* 221 Ark. 845, 256 S. W. 2d 738. To the same effect see *Ark. Highway Comm.* v. *Ptak,* 236 Ark. 105, 364 S. W. 2d 794.

There are, we think, sufficient "related facts" present here to give substantiality to the opinion testimony of appellees' witnesses, as is above set out. It is true that appellees' testimony is contradicted by appellant's testimony, but that presents a question for the jury. In the *Byars* case we restated the well settled rule that "evidence must be viewed in the light most favorable to appellee".

Affirmed.

O. K. PROCESSORS, INC. *v.* CHARLES DYE

5-4120 411 S. W. 2d 290

Opinion delivered February 13, 1967

Harper, Harper, Young & Durden, for appellant.

D. L. Grace, for appellee.

PAUL WARD, Justice. We are here called on to construe certain provisions of Ark. Stat. Ann. § 81-1313 (Repl. 1960) (a part of the Workmen's Compensation Act) relative to multiple permanent partial disabilities to the body as a whole.

Undisputed Facts. On February 8, 1964 Charles Dye (appellee), an employee of O. K. Processors, Inc. (appellant), received an injury to an area of his lower back. Previously, he had received somewhat similar injuries, on two occasions, while working for another employer in Oklahoma. For the first injury he was adjudged to have received a 5% permanent partial disability to the body as a whole, and for the second injury

he was similarly adjudged to have received a 20% disability. He has received full payment for these injuries.

For the injury on February 8, 1964 the Referee found that appellee had suffered a maximum disability of 15% to the body as a whole. However, he also found that appellee was not entitled to any compensation because his injury of 15% did not exceed the two previous injuries totaling 25%.

The Commission reversed the Referee and awarded appellee compensation on the basis of 10% disability to the body as a whole, holding (in essence) that the 20% injury was to a different part of his body but that the 5% injury was not. Accordingly the Commission held that the 5% injury should be deducted from the last injury of 15%. On appeal to the circuit court the Commission was affirmed.

For reasons hereafter set out we have concluded the circuit court must be affirmed.

The statute referred to previously (Section 81-1313) deals with "The money allowance payable to an injured employee for disability . . . ." Subsection (c) of the statute deals with "scheduled permanent injuries". It is agreed that the three injuries involved here are not classified as scheduled injuries. Subsection (d) deals with "other cases" where there is a permanent partial disability (as were these three) and says such "shall be apportioned to the body as a whole. . . ." Subsection (f) deals with a "permanent disability arising from a subsequent accident", as is the case here. Subparagraph (2) [under (b) above] applies where a subsequent injury occurs under a different employer—as is the case here. Finally, under "ii" of subparagraph (2) it is provided that "the injured employee shall be paid compensation. . . ."

(In the case here there is no dispute over the amount of compensation, if any is due).

It is our opinion that appellee is covered by the provision "ii" above.

However, appellant raises another issue that must be resolved. In essence, appellant here insists that appellee is not entitled to compensation because the injury on February 8, 1967 was to the same portion of the body as was the previous 20% injuries in Oklahoma. We do not agree that this is true. We think it was a fact question for the Commission to decide.

The Commission found that the 20% permanent partial disability was to "the cervical spine which involved the neck and head". This finding is not questioned. The Commission further found that "the present disability is distinct and separate from the previous disability due to the specific locations of the injured areas. . . ." This finding is supported by Dr. Martin who testified that appellee's leg went through a hole in the wall; that he fell on his elbow; that he was injured in the area of the pelvis, and; that his leg was injured.

It is well settled by numerous decisions of this Court that we will sustain the Commission's finding of a fact question if it is supported by substantial evidence. We find there is such evidence in this instance.

It appears that the conclusion above reached is in accord with Larson's interpretation of this portion of the statute. In volume 2 of his treatise on Workmen's Compensation Law, § 59.42, he says:

> "The capacities of the human being cannot be arbitrarily and finally divided and written off by percentages. The fact that a man has once received compensation as for 50% of total disability does not mean that ever after he is in the eyes of compensation law but half a man, so that he can never again receive a compensation award going beyond the other 50% of total."

Affirmed.

PLANTERS LUMBER CO., INC. *v.* THE WILSON CO. INC.

5-4108 413 S. W. 2d 55

Opinion delivered February 13, 1967

(Supplemental opinion on denial of rehearing delivered April 10, 1967, p. 1100.)

H. B. Stubblefield, for appellant.

Owens, McHaney & McHaney and *Robinson, Thornton, McCloy & Young,* for appellee.

LYLE BROWN, Justice. This appeal questions the correctness of the decree of the chancellor, declaring the mortgage lien of appellee, The Wilson Company, Inc., superior to the materialman's lien of appellant, Planters Lumber Company, Inc. Wilson advanced certain monies to Roy Stillman under a construction mortgage. Upon default by Stillman, Wilson brought foreclosure proceedings and made Planters a party, the latter having filed a lien for materials supplied in the construction of a house on each of the two lots mortgaged. The bill for materials and its timely filing are not in dispute. Both parties were awarded judgment against Stillman; he does not appeal.

Separate foreclosure suits were filed, one involving Lot 2, Darby's Subdivision, Pulaski County, and the other involving Lot 4 in the same subdivision. The cases were consolidated for trial. The causes are so similar that they need be considered separately only briefly.

Lot 2: Wilson Company conveyed to Stillman by warranty deed dated October 9, 1964, reciting $100.00 and other consideration paid. A week later Stillman executed a construction mortgage to Wilson Company, which was promptly recorded. Wilson pledged $15,000.00 for construction money. However, Wilson withheld $3,-200.00, the purchase price of the lot, and delivered $11,-800.00 to the disbursing agent. Also, during the course of construction, Wilson directed the disbursing agent to return $465.81 to Wilson for accrued interest owed by Stillman on the note.

Lot 4: Wilson Company conveyed to Stillman by warranty deed dated January 6, 1965, reciting $100.00 and other consideration paid. Stillman executed a construction mortgage, dated December 14, 1964, to Wilson Company, which was immediately recorded. Wilson pledged $14,400.00 for construction money, but delivered to the disbursing agent only $11,200.00, having withheld $3,200.00 for the purchase price of the lot. Also, during the course of construction, Wilson directed the disbursing agent to return $394.28 to Wilson for accrued interest owed by Stillman on the note.

As to both lots, Arkansas Abstract Company, the disbursing agent designated by Wilson, paid out the balance of the construction monies for construction purposes, except for some minor expenses incident to the venture; these expenditures are not questioned. All bills for labor and materials were paid except those forming the basis of Planters' claim.

Both parties to this appeal base their claims to priority on Ark. Stat. Ann. § 51-605 (1947). This section, in conjunction with Ark. Stat. Ann. § 51-601, gives

to a materialman a lien upon the improvement for which the materials are furnished. The lien is in preference to any prior lien existing upon said land or building, unless the prior lien was given for the purpose of raising money with which to make the improvement, in which event the lien is prior to the lien given by these two sections.

We hold that, as to Lot 2, Wilson Company has a valid lien for construction money advanced, in the sum of $11,334.19, calculated by taking the sum of $11,800.00, which was turned over to the disbursing agent, and subtracting therefrom the sum of $465.81, which Wilson directed the disbursing agent to return to Wilson for interest on the loan. We further hold that Planters Company is entitled to a second lien on Lot 2 in the principal sum of $2,834.57, the full amount of its materials bill.

We hold that, as to Lot 4, Wilson Company has a valid lien for construction money advanced in the sum of $10,805.72, calculated by taking the sum of $11,200.00, which Wilson turned over to the disbursing agent, and subtracting therefrom the sum of $394.28, which Wilson directed the disbursing agent to return to it as interest on the loan. We further hold that Planters is entitled to a second lien on Lot 4 in the principal sum of $2,181.95, the full amount of its materials bill.

The essence of our modification of the decree of the chancellor is to deny to Wilson Company a lien prior to that of the materialman, first, for money advanced to purchase the lot, and, second, for money owed to it by Stillman for interest on the loan.

The Purchase Price of the Lots. Wilson delivered to Stillman a warranty deed which recited a paid consideration and mentioned no encumbrance. Secondly, Wilson caused to be executed and placed of record identical mortgages on the two lots, except for the amounts pledged for construction. We shall use the mortgage on Lot 4 to recite certain pertinent provisions:

"TO HAVE AND TO HOLD The same, with all and singular the tenements, hereditaments and appurtenances thereunto belonging, unto the said Grantee, and to its successors and assigns forever.

"And the said Grantor does hereby covenant and agree that Grantor is the lawful owner of the premises above granted, and seized of a good and indefeasible estate of inheritance therein, free and clear of all incumbrances, and that Grantor will warrant and defend the same in the quiet and peaceable possession of said Grantee, its successors and assigns forever, against the lawful claims of all persons whomsoever.

"PROVIDED ALWAYS, That this instrument is made, executed and delivered upon the following conditions, to-wit:

"FIRST: Grantor has applied to the Grantee for a loan in the principal sum of Fourteen Thousand Four Hundred and No/100 Dollars ($14,400.00) to be used solely for and in construction of a one-family residence on the lands above described, and the Grantee has agreed to make said loan for such purposes, and the Grantor is justly indebted to the Grantee for advances made or to be made hereafter by Grantee to Grantor from time to time for such purposes, aggregating the principal sum aforesaid, each such advance to be evidenced by a negotiable promissory note of Grantor, payable to the order of Grantee, of even date with the date such advance is made and in the principal sum thereof, and each such note to bear interest from date until maturity at Six % per annum and from maturity until paid at 10% per annum, said notes to be due and payable as follows: On or before June 14, 1965. Grantee agrees that the acceptance and recordation of this mortgage binds Grantee, its successors and assigns, absolutely and unconditionally, to make said loan and advances. Such advances will be made as requested by Grantor as such work progresses."

Such recitations in these two instruments, the deed and the mortgage, constitute notice to the world that Stillman owns Lot 4 free and clear of any encumbrances. Further, Wilson warrants, not only to Stillman, but to possible laborers, materialmen, and other creditors who may be asked to participate in construction, that Wilson is bound absolutely and unconditionally to make the advances as the work progresses.

With this information gleaned from the record, an alert materialman might desire to make another financial check as the work progresses; namely, to check with the disbursing agent to get the total expended for construction. Had Planters so inquired, it would have found the running account to have shown ample funds unexpended. The disbursing agent had no record of a lot payment; although it may have been aware that Wilson customarily withheld such payments, the disbursing agent would have no cause to know the amount. At least, it is not so reflected in the record.

In phrasing the terms of the construction mortgage, Wilson was seeking to establish a priority for its expenditures. See the proviso in Ark. Stat. Ann. § 51-605, and *Shaw* v. *Rackensack Apt. Corp.,* 174 Ark. 492, 295-S. W. 966 (1927).

Equity dictates that one who seeks a priority of this nature should live up to the clear prerequisite of the requirement that the privileged funds be raised to make such erections and improvements or to build such buildings.

Wilson Company relies strongly on *Ashdown Hdwe. Co.* v. *Hughes,* 223 Ark. 541, 267 S. W. 2d 294 (1954). In this case, J. C. Stewart owned six acres on which there was a residence. It was subject to an outstanding mortgage of $4,500.00. No laborer or materialman could pierce the priority of this mortgage. Hughes loaned Stewart the money with which to satisfy this mortgage and took a mortgage from Stewart covering this loan.

In addition, Hughes committed himself to advance $,5-500.00 with which to build four cabins. Hughes, in clearing the land and residence of the mortgage for $4,500.00, succeeded to the same enviable position as the original mortgagee to whom Stewart had mortgaged the premises, that is, Hughes held a lien which no laborer or materialman could pierce. As stated in the concurring opinion by Justice McFaddin, Hughes' mortgage for the $4,500.00 that he advanced was superior to any materialman's claim for materials which might be furnished *after* the date of the mortgage. The majority opinion in that case concedes that this advancement was not used for construction purposes but reasons that it enhanced the owner's property, leaving the impression that this fact justified giving Hughes priority. We think the principle of subrogation, mentioned by Justice McFaddin, would have more appropriately described the basis for Hughes' priority.

Wilson Company's position is entirely different from that of Hughes. Wilson caused a deed to Stillman to be recorded, which reflected full consideration having been paid. Then Wilson obtained a mortgage wherein the advancement of stated construction funds was guaranteed. Wilson "padded" the mortgage with the price of the lot and retained the money. In the Ashdown case, Hughes actually advanced the money to clear the Steward lot and recited in his (Hughes') mortgage that Stewart was indebted to Hughes' "separate estate" in that amount.

Wilson Company would defend its use of a part of the funds for payment of the lots and for interest, on the theory that a construction money mortgage has been held to be superior, notwithstanding the use of the money for other purposes. Wilson cites two cases on this point, namely, *Shaw* v. *Rackensack Apt. Corp.*, 174 Ark. 492, 295 S. W. 966; and *Sebastian B. & L. Assn.* v. *Minten*, 181 Ark. 700, 27 S. W. 2d 1011 (1930). We are not unmindful of the fact that it is the "purpose" and not the "use" of the funds that is controlling. It is also

recognized that the purpose, as stated in the mortgage, is paramount. But where it is not disputed, as here, that the lender withheld from the amount of construction funds stated in the mortgages, the cost of the two lots, and withdrew from advancements to the disbursing agent the interest monies, the lender cannot be held to claim priority in these amounts. The "purpose" doctrine cannot be used to prohibit a showing that the amount stated in the mortgage was never advanced.

On appeal, and for the first time, Planters makes the contention that Wilson Company is liable to it for the amounts withheld, plus the money returned to Wilson for interest. Planters cites *Lyman Lamb Co.* v. *Union Bank of Benton,* 237 Ark. 629, 374 S. W. 2d 820.

In its answer and cross complaint, Planters did not seek personal judgment against Wilson Company; Planters pleaded its lien and prayed that Wilson Company's lien be declared inferior to Planters'; it prayed for personal judgment against Stillman, and asked for a sale of Stillman's property if the judgment be not paid within the time fixed by the court.

Planters contends that this court should treat the pleadings as amended to conform to the proof, and cites *Railway Co.* v. *Triplett,* 54 Ark. 289, 15 S. W. 831, 16 S. W. 266; *Kansas City Southern Ry.* v. *Rogers,* 146 Ark. 232, 225 S. W. 640; and *Thomas* v. *Spires,* 180 Ark. 671, 22 S. W. 2d 553. These holdings justify the *trial court* in treating pleadings as amended, when the defects supplied by the proof are germane to the issues actually pleaded. But here, Planters' proposed amendment, which it seeks from this court, would border on stating a new cause of action.

In the early stages of the trial, Wilson's first witness revealed that Wilson had withheld the purchase price of the lots from the funds pledged in the mortgage for construction. Notwithstanding this development, Planters at no time asked the trial court to treat the

pleadings as amended so Planters could pursue Wilson for these funds withheld. So naturally the trial court had no opportunity to rule on this point.

Again, just before all testimony was concluded, counsel for Wilson stated that the only question in controversy was the question of priority of the lien of his mortgagee client, as compared to the materialman's lien of Planters. Equity would dictate that at this point Planters should have appraised court and counsel of a claim for judgment against Wilson for the money Wilson diverted from the construction funds.

Under these circumstances, we hold that Planters' contention for judgment *in personam* against Wilson—being raised for the first time in this court—must be denied.

The cause is remanded, with directions that the decree of foreclosure be modified in such respects as are necessary to harmonize with the rulings herein, and in order that final proceedings of foreclosure and disbursement may be conducted.

ARK. STATE HIGHWAY COMM. *v.* J. R. OWEN ET UX.

5-4098 411 S. W. 2d 304

Opinion delivered February 13, 1967

George O. Green and *Phil Stratton,* for appellant.

Robert J. White and *James K. Young,* for appellee.

JOHN A. FOGLEMAN, Justice. Appellant contends that the trial court committed error in granting a new trial to appellees, landowner defendants in an action brought by appellant in eminent domain for acquisition of right-of-way for Interstate Highway No. 40.

The case was tried to a jury on June 17, 1966 on evidence of differences in value ranging from $4,250.00 to $24,150.00. The jury returned a verdict for appellees in the amount of $6,250.00. Appellees filed a motion for a new trial alleging that the verdict was inadequate and not supported by the preponderance of the evidence. An amendment to the motion for new trial states newly discovered evidence as cause therefor. Appellees contend that after the trial they learned that a large drainage structure, discharging drainage water from the north side of the proposed highway onto their residual tract of one and one-half acres south of the highway, was to be installed. They asserted diligent but unsuccessful effort in obtaining construction plans. They allege that a subpoena duces tecum was issued by the trial court over

the resistance of appellant and that plans and specifications were brought into court, pursuant to the trial court's order, two days before this trial, while the attorney for appellees was engaged in the trial of another case involving the same right-of-way across other lands. Appellees say that their attorney was unable to avail himself of the chance to inspect the plans offered by appellant, due to the trial previously set and that appellant removed the plans and specifications before the end of this trial, leaving appellees with no opportunity to learn of the proposed drainage structure. They also alleged that no work was done toward digging a ditch for the drainage tile until after the trial. They claim that the extent of the damage by reason of the location of this drainage tile, being greater than appellees believed would result, was prejudicial.

Appellant's response to the amendment to the motion for new trial states that the plans on file and used as exhibits in the case clearly showed the location of the drainage structures; that the order of the court requiring appellant to produce construction plans was issued in another case to be tried on June 15th, while the trial in this case was held on June 17th; that the subpoena duces tecum only called for production of a contract between appellant and its contractor, which was produced in open court in the trial of another case on June 15th, along with construction plans, and that appellees' attorney made use thereof during the previous trial; and that the right-of-way plans clearly showed the location of culverts with respect to appellees' residual properties.

The trial judge, after a hearing on the motion and an inspection of the premises, granted a new trial, setting aside the jury verdict on the ground of newly discovered evidence. In so doing, we find that he committed reversible error.

In order for a party to be entitled to a new trial because of newly discovered evidence, the statute re-

quires that it be evidence that he could not, with reasonable diligence, have discovered and produced before the trial. Ark. Stat. Ann. § 27-1901 (Repl. 1962); *Medlock* v. *Jones,* 152 Ark. 57, 237 S. W. 438; *Turner* v. *Richardson,* 188 Ark. 470, 65 S. W. 2d 1071; *Southern National Ins. Co.* v. *Heggie,* 206 Ark. 196, 174 S. W. 2d 931.

Appellant's complaint filed December 14, 1965, alleged that the plans were on file at the Arkansas State Highway Department at Little Rock. Appellees' petition for subpoena duces tecum, filed on June 9, 1966, only sought to have produced the general specifications for the sources of bars, pits and quarries, and copies of contracts in force between appellant and its contractors. Subpoena duces tecum was issued for these documents only, pursuant to order of the trial court.

Appellant's Exhibit No. 1, showing right-of-way limits and outlining proposed roadways, control of access and location of existing improvements, clearly indicates what appears to be drainage structures near appellees' stock pond. Appellee J. R. Owen examined this exhibit, testified in relation to it, and its accuracy was approved by appellees' attorney. While appellees' amendment to their motion for new trial mentions a subpoena duces tecum for construction plans, a search of the record reveals no subpoena or petition therefor in the record, other than those above described.

Appellees' attorney stated during the hearing on the motion for new trial that when they called the Highway Department, they were told that if they wanted to see the construction plans they could come to Little Rock and see them. He also stated that appellant brought in the plans and specifications during the trial of a preceding case in which he was engaged and that he checked them on the tract then involved. Furthermore, he said that the tile "was laying down there like they were going on the land." There is nothing to indicate that appellees ever called for these plans at any other time or in any other way, nor is there any indication that they

were referred to in the trial in any way. The only excuse offered by appellees for not pursuing the matter further was appellant's alleged continued contention that these plans and specifications were not material.

Appellees did not avail themselves of many discovery procedures provided by which they might have obtained these documents so important in a partial taking case. No discovery depositions by oral examination or written interrogatories [provided for by Ark. Stat. Ann. § 28-348 (Repl. 1962)] were taken. No interrogatories [§ 28-353] were attached to appellees' answer, nor were any [§ 28-355] served on appellant. The only effort was their motion for subpoena duces tecum, which might better have been a motion for production of documents [§ 28-356]. Even then appellees did not follow up on the motion filed by calling for either the witness subpoenaed or the documents called for, and as pointed out hereinabove, this subpoena did not even call for the construction plans.

This court has consistently held from 1841 [See *Robins* v. *Fowler,* 2 Ark. 133] to the present date that one seeking a new trial must show that the evidence *could not* have been obtained with reasonable diligence on the former trial. In determining whether there has been such diligence, it is proper to consider that the trial was several months after the incident on which the litigation was based and that appellees had ample time to make a thorough investigation. *Missouri Pacific Transportation Co.* v. *Simon,* 200 Ark. 430, 140 S. W. 2d 129; *Citrus Products Co.* v. *Tankersley,* 185 Ark. 965, 50 S. W. 2d 582.

Failure to obtain the evidence by deposition was considered in *Swift* v. *Lovegrove,* 237 Ark. 43, 371 S. W. 2d 129. Failure to obtain evidence which could have been procured through discovery depositions, interrogatories, or further interrogatories propounded during the trial of the case has been held to be an appropriate basis for

denying a new trial. *Nichols* v. *Freeman*, 237 Ark. 536, 374 S. W. 2d 353.

That the matter sought to be shown by "newly discovered evidence" was a matter of public record has also been taken into consideration. *Stockton* v. *Baker*, 213 Ark. 918, 213 S. W. 2d 896. The fact that one seeking a new trial had some knowledge of the newly discovered evidence was considered sufficient for denial of of a new trial. *Rutland* v. *P. H. Ruebel & Co.*, 202 Ark. 987, 154 S. W. 2d 578.

Failure of the moving party to seek a postponement or to take a deposition was held to justify the denial of a motion for new trial on newly discovered evidence. *Arkansas Power & Light Co.* v. *Mart*, 188 Ark. 202, 65 S. W. 2d 39.

Of course, we recognize that the granting or refusing of a motion for new trial on the ground of newly discovered evidence is within the sound judicial discretion of the trial court which will be interfered with only when it appears that this discretion has been abused. *Arkansas Amusement Corp.* v. *Ward*, 204 Ark. 130, 161 S. W. 2d 178. This discretion is not absolute, but is a sound judicial discretion which necessarily requires an appropriate factual basis for the exercise of that discretion.

In sustaining the lower court's denial of a motion for new trial, this court, in *Halbrook* v. *Halbrook*, 232 Ark. 850, 341 S. W. 2d 29, said:

> "We are not willing to say that the circuit court abused its broad discretion in the matter. Our pertinent cases are cited and discussed in a comment appearing at 4 Ark. L. Rev. 60. There the authors point out that a motion of this kind is not favored by the courts, owing to the manifest disadvantages in allowing the losing litigant a second trial after he has been afforded a fair opportunity to present

his proof at the original hearing. Before granting such a motion the trial court should be convinced, among other things, that an injustice has been done, that the newly found evidence is not merely cumulative to that produced at the first trial, that the proof was not discoverable through the exercise of due diligence, and that the additional testimony will probably change the result."

In view of all the circumstances in this case indicating the ability of appellees to have had the construction plans and specifications before the trial of this case, we find no evidence of diligence. We cannot see how appellees' expert witnesses could have testified as to "before and after values" without having obtained information as to the construction proposed. Because of this and the disfavor in which the granting of such motions is held, we cannot help but conclude that the trial court's action in granting a new trial was an abuse of discretion, requiring that we reverse and reinstate the original judgment.

JONES, J., dissents.

J. FRED JONES, Justice, dissenting. I do not agree with the majority view in this case. On June 23, 1966, appellees filed their motion for a new trial, alleging that the verdict was grossly inadequate, that the verdict was against the preponderance of the evidence and that the verdict reflected that the jury did not understand the testimony presented. On June 27, 1966, appellees filed an amendment to their motion for new trial, alleging what amounts to newly discovered evidence as additional grounds for a new trial.

It is obvious to me from the record before us, that this case was tried as the last in a series of three condemnation cases by tired counsel, with tired witnesses and before a tired judge. The broad discretion of a trial judge in granting new trials is not questioned. I feel that the trial court could have very logically granted a new trial on appellees' *original motion* in this case without

abuse of discretion, and it is my view that the trial court's broad discretion was not narrowed to the point of abuse when it predicated its order for a new trial upon the amendment, rather than the original motion. I would affirm.

NEW YORK FIRE & MARINE UNDERWRITERS, INC. *v.* G. B. COLVIN, JR., JUDGE

5-4111 411 S. W. 2d 657

Opinion delivered February 13, 1967
[Rehearing denied March 20, 1967.]

Arnold & Hamilton, for appellant.

Switzer & Griffin, for appellee.

J. FRED JONES, Justice. This case involves a petition for a writ of prohibition directed to the Ashley County Circuit Court where a complaint was filed by an Ashley County resident against two insurance companies domiciled in another state. The suit was filed by Mrs. C. A. Hughes against New York Fire & Marine Underwriters, Inc., hereinafter called Underwriters, and Fireman's Fund Insurance Company, hereinafter called Fireman's Fund, and process was timely served on the Insur-

ance Commissioner as provided in Ark. Stat. Ann. § 66-2218 (Repl. 1966).

Fireman's Fund filed its answer but Underwriters appeared specially, and on a motion to quash, objected to the jurisdiction of the court on two grounds as follows:

> "1. That this defendant has done no act to subject itself to the jurisdiction of this court under the allegations of the complaint.
>
> "2. That this court lacks jurisdiction both of this defendant and of the cause of action, if any, alleged in the complaint of the plaintiff."

The motion to quash was overruled by the trial court and Underwriters has filed its petition here for a writ of prohibition to prevent the Ashley County Circuit Court from assuming jurisdiction over the petitioner and the subject matter of the law suit.

It is admitted by stipulation that the insurance commissioner is the duly appointed agent of petitioner for service of process in Arkansas, and that the insurance commissioner was duly served with summons in this case.

Briefly stated, the facts are as follows:

The plaintiff, Mrs. C. A. Hughes, is a resident of Ashley County, Arkansas, and her daughter and son-in-law are residents of Louisiana. While riding as a passenger with the daughter and son-in-law in their automobile on a trip into Texas, Mrs. Hughes was injured in a collision between the automobile in which she was riding and one driven by a resident of Texas. Fireman's Fund had issued an insurance policy to the son-in-law in Louisiana, insuring members of his family or anyone riding in his automobile, against damages such occupant would be entitled to recover against an uninsured motorist.

Mrs. Hughes filed suit against the petitioner in the Ashley County Circuit Court alleging damages in the

amount of $8,000.00 for personal injuries sustained in the collision in Texas through the negligent acts of an uninsured Texas motorist and while she was riding in the automobile owned by her daughter and son-in-law, and being driven at the time by her son-in-law, Milbern Don Pennington. Mrs. Hughes then alleged in her complaint, that the petitioner, New York Fire & Marine Underwriters, Inc. had issued its family automobile liability policy to Milbern Don Pennington, Mrs. Hughes' son-in-law, insuring "the named insured, any relative, or any other person while occupying the insured automobile with respects to damages she is entitled to recover because of bodily injury from the owner or operator of an uninsured automobile."

Plaintiff then alleged that she had complied with all the conditions of the policy precedent to establishing liability of the defendant thereunder, that demand for payment had been made upon the defendant and that defendant had refused to even discuss payment.

The petitioner sets out one point on which it relies as follows:

> "Lower court wholly lacks jurisdiction of subject matter and petitioner."

The petitioner properly sets out in its brief, the office of the writ of prohibition. Petitioner then argues that it is doing no business in the State of Arkansas, maintains no office in this State, and that the policy sued on was written in the State of Louisiana with a Louisiana resident as the named insured. Petitioner contends that the plaintiff brought suit in Arkansas on an insurance contract written in Louisiana, when the cause of action actually arose in the State of Texas, and that the trial court is without jurisdiction under § 11, article 12 of the Arkansas constitution quoted by petitioner as follows:

> "Foreign corporations may be authorized to do business in this State under such limitations and restrictions as may be prescribed by law; provided that no

> such corporation shall do any business in this state except while it maintains therein one or more known places of business and authorized agent or agents in the same, upon whom process may be served; and, as to contracts made or business done in this State, they shall be subjected to the same regulations, limitations, and liabilities as like corporations of this State."

Petitioner cites several cases in support of its petition, but none of them involve an uninsured motorist clause in an automobile liability policy where service is had on the insurance companies' designated agent for service in Arkansas.

Whatever rights and benefits Mrs. Hughes may have under the terms of the policy are matters for determination by the trial court. In a transitory action such as this, Mrs. Hughes being a resident of Arkansas could sue the petitioner in this State, so we hold that the court had jurisdiction of the subject matter in this case. *Equitable Life Assurance Society* v. *Mann,* 189 Ark. 751, 75 S. W. 2d, 232.

Petitioner argues that even though it is *authorized* to do business in Arkansas, *it is not actually doing business in Arkansas* and therefore, the trial court has no jurisdiction of the petitioner.

In the early case of *American Casualty Company* v. *Lea*, 56 Ark. 539, 20 S. W. 416, this court said:

> "The only question now here is, whether the circuit court obtained jurisdiction of the corporation by the service of the summons upon the auditor as its agent. If so, it can render a personal judgment against the corporation, if the pleadings and proof in the case warrant it. The service was in accordance with the statutes."

Petitioner admits that the insurance commissioner was its duly designated agent for service in Arkansas,

and we hold that when the petitioner became authorized to do business in Arkansas and designated the insurance commissioner its agent for service, it made itself subject to the jurisdiction of the Arkansas courts, and the Ashley County Circuit Court had jurisdiction of petitioner in this case.

The petition for a writ of prohibition is hereby denied.

W. J. STYERS, ET AL *v.* DALTON NORTHERN, ET AL

5-4082 411 S. W. 2d 296

Opinion delivered February 13, 1967

J. B. Milham, for appellant.

Fred E. Briner, for appellee.

CONLEY BYRD, Justice. Appellants, W. J. Styers, et al., brought this suit to quiet title to a strip of land lying between his house and a service station owned by appellee Eddie Davis in the city of Benton, Arkansas. Appellants have no record title and proceed upon the theory that they have acquired title by adverse possession. Mr. Davis denied Mr. Styers' title, set up title in himself by adverse possession and prayed that the title to the lands be quieted in him.

The trial court found that neither appellants nor appellee is entitled to have the title quieted in him by reason of adverse possession, that neither of them has the right to deny the other the use of the driveway, and refused to quiet appellants' title. The driveway covers only a portion of the north end of the strip of land in question.

On this appeal appellants raise four alleged issues, all of which we group together for discussion purposes.

The facts show that Mr. Styers acquired title to his home which lies immediately west of the disputed strip in 1929, and that his son acquired title to the 111-foot tract on Edison Avenue where appellee's service station is now located. The latter tract lies immediately east of the disputed strip. For the first six or eight years of his ownership, Mr. Styers had a garden on the strip and had it under fence, but later on he and his son went into the wine business and the strip was used in connection with their wine business. The service station now owned by appellee is built on the foundation of the winery, which was on the 111-foot tract acquired by the son.

The son conveyed title in 1946 to Robert Thomas and wife, who conveyed to Dalton Northern, et al. In 1951, Dalton Northern conveyed to Dr. Buffington.

It is admitted that in 1952 Dr. Buffington built the filling station on the 111-foot tract, and that at that time Dr. Buffington made an agreement with Mr. Styers concerning the concreted portion of the strip. Appellant Styers admits that, with respect to the concreted portion, he gave permission to Dr. Buffington or anyone else to use it, so long as it was kept open for his use—apparently the concreting of the strip benefited appellant Styers.

At the time the service station was constructed by Buffington, Dalton Northern was an agent for American Oil Company and the station was leased by Dr. Buffington to American Oil Company for a period of years which

has expired. Dalton Northern, subsequent to the construction of the station, re-acquired ownership from Dr. Buffington, and in September, 1963, the station was sold to appellee Davis.

The parties are in agreement that during the American Oil lease, which expired some time in the early sixties, all of the operators made an effort to comply with the agreement between Dr. Buffington and Mr. Styers by keeping cars out of the easement.

Appellee Davis testified that the concreted portion of the strip of land was shown to him as being part of the service station; that he bought the service station thinking it was part of the premises; and that one could not operate the station without the concreted portion of the strip involved. Appellant offered no testimony to show that the service station could be operated without the concreted portion of the strip, and the overwhelming evidence points this up to have been a known fact when the agreement was made with Dr. Buffington.

Appellant Styers' fencing of the tract in question and his use of it for a garden was substantiated by Jody Gentry, who had known the place ever since Mr. Styers went into possession in 1929.

Under the circumstances, it is seen that appellant Styers was aware that Dr. Buffington constructed the service station on the old winery foundation in reliance upon the agreement with respect to the use of the concreted portion of the strip of land involved in this litigation. Furthermore, appellant Styers' testimony indicates that the concreting of that portion of the strip for driveway purposes was a benefit to him at the time.

The record shows without contradiction that, from 1952 until appellee Davis acquired the premises in 1963, appellees' predecessors in title accepted the benefit of Dr. Buffington's agreement which recognized appellants' right to the land.

Appellants, having permitted Dr. Buffington to make substantial improvements upon his own property in reliance upon their oral agreement with reference to the driveway, together with Dr. Buffington's performance of the condition of the oral agreement by improving his driveway so that it cauld be used for the benefit of both appellant Styers and himself, are estopped to contest appellee Davis' right to use the driveway in accordance with the agreement between appellant Styers and Dr. Buffington. *Wynn* v. *Garland,* 19 Ark. 23 (1857). It also follows that, since appellee Davis' predecessors in title accepted the benefits of the oral agreement between appellant Styers and Dr. Buffington by which they were permitted to enter on the lands, appellee is also estopped to question appellant Styers' title to the property. See *Illinois Standard Mortgage Corp.* v. *Collins,* 187 Ark. 902, 63 S. W. 2d 342 (1933) and *Mantooth* v. *Burke,* 35 Ark. 541 (1880).

Therefore, we hold that upon the record in this case the trial court should have quieted appellants' title to the property involved as against appellee Davis, subject, however, to the agreement made between appellant Styers and Dr. Buffington with respect to the concreted portion of the strip. Since this is in effect the result reached by the trial court when it said that neither of the parties has the right to deny the other the use of the driveway, we are modifying this on appeal to the extent indicated but directing that each party bear his own cost.

Affirmed as modified, and remanded for entry of a decree in conformance with this opinion.

DAN PORTIS *v.* STUCKEY BROTHERS, INC.

5-4092 411 S. W. 2d 301

Opinion delivered February 13, 1967

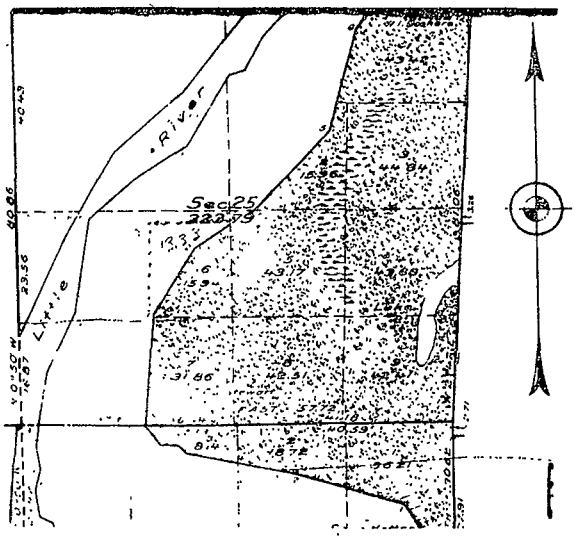
Hale & Fogleman, for appellant.

Gardner & Steinsiek, for appellee.

CONLEY BYRD, Justice. Involved in this dispute is the title to 13.33 acres of land which C. J. Stewart had acquired without color of title, by adverse pedal possession. Appellant, D. F. Portis, and appellee, Stuckey Brothers, Inc., both claim title to the disputed tract through the heirs at law of C. J. Stewart. The trial court found that Stuckey Brothers owned an undivided one-half interest in the disputed tract. Portis brings this appeal alleging that Stuckey Brothers holds whatever title it has subject to the rights and equities of Portis and that Stuckey Brothers' predecessors in title had previously mortgaged their undivided interest to Portis.

Appellant Portis raised two other points in his brief which have passed out of the picture by virtue of appellee's failure to cross-appeal and its concession on the points alleged.

The facts show that when the first U. S. Government Survey was made in 1845, there was meandered



out of Sec. 25, T-12-N, R-7-E in Poinsett County, Arkansas, an area known as Dismal Lake. In 1923 the Dismal Lake area was surveyed into lots and C. J. Stewart, who had earlier gone into possession for homestading purposes, received a patent in 1925 to Lots 5, 6, 7 and 8 of Sec. 25 and Lot 3 of Sec. 36, T-12-N, R-7-E, containing 141.62 acres. The testimony indicates that C. J. Stewart was in possession of the foregoing lands, together with the 13.33-acre tract, when the 1923 survey was made, under the theory that they all constituted a part of the homestead, and that after he was informed differently by the survey he continued to claim the 13.33 acres as part of his homestead. The witnesses refer to the 13.33-acre tract as "lost lands," sometimes as "strip lands," and sometimes as "meander lands." The northern boundary of the 13.33-acre disputed tract is 1,083 feet, the western boundary is 1,335 feet, and the triangle formed by the northern and western boundaries is closed on the south and east by the meander line of Dismal Lake. A portion of the 1923 survey which shows the original meander line of Dismal Lake in Sec. 25 and the lots laid out in Dismal Lake is copied below. The 13.33-acre disputed tract is indicated by dotted lines.

Prior to 1959, Florence Stewart Rosamond and Ora Marie Rosamond, two of C. J. Stewart's four surviving heirs, with their husbands executed mortgages to Portis on the lands described in the patent to Stewart. After Portis started foreclosure proceedings on the Rosamond mortgages according to the property description in the mortgages, the Rosamonds quitclaimed the 13.33-acre tract to Stuckey Brothers in return for extinguishment of $2,136.22 in obligations and $938.43 in cash. Shortly after the quitclaim deed to Stuckey Brothers, Portis, without making the Stuckeys a party to the foreclosure proceedings, amended his complaints to describe Lot 6 as follows:

> "...Lot Six (6), with accretions, more particularly described as: Beginning at the intersection of the meander line and the half-section line and running West 990 feet to a dirt road; thence South along said dirt road to the quarter-quarter section line; thence East along the quarter-quarter section line to the half-section line; thence North along the half-section line to the point of beginning proper, and containing 27.94 acres, more or less;..."

Portis purchased the undivided interest of the Rosamonds at the subsequent foreclosure sales. He also acquired from the other two heirs of C. J. Stewart deeds to their undivided interests which included a metes and bounds description of the disputed lands.

Stuckey Brothers initiated the present litigation, claiming that it was the owner of the disputed tract. It asked for an injunction to prevent Portis and his lessee from trespassing upon the lands and for an accounting of rents for the years 1959-1962. Portis denied Stuckey Brothers' title and counter-claimed to have the title quieted in him.

Appellant Portis argues that Stuckey Brothers not only recognized and acquiesced in the boundary between it and the C. J. Stewart lands, but that they knew or

should have known of Portis's claim at the time the quitclaim deed was executed. Portis argues that even the quitclaim "protesteth too much" because the description closes with the statement, "said land not being any part of Lot No. 6, which lies South and East of said meander line." In this connection Portis cites *Miller* v. *Fraley and Greenwood & Co.*, 23 Ark. 735 (1861), where we said:

> "We have been able to find no case in which it has been adjudged, nor is it asserted in the text books that the purchaser must hold under a general warranty deed to entitle him to protection; but it is no doubt the law that where a person bargains for and takes a mere quit claim deed, or deed without warranty, it is a circumstance, if unexplained, to show that he had notice of imperfections in the vendor's title, and only purchased such interest as the vendor might have in the property, and that he is not entitled to protection in equity as an innocent purchaser without notice, etc. *Oliver et al* v. *Piatt,* 3 *How. U. S. R.* 410; 2 *Hare & Wal. Notes Lead. Ca. Eq.* 69."

From the foregoing authority, it would follow that if Stuckey's vendors had good title to the disputed tract as against the mortgages executed to Portis, then it will be unnecessary for us to determine whether Stuckey Brothers is entitled to protection as an innocent purchaser without notice.

Appellant characterizes this litigation as a boundary dispute and asserts that by the actions of C. J. Stewart and his widow and children, and the acquiescence of the adjoining owners—Stuckeys among them—the disputed area must be considered as being within the boundaries of Lots 5, 6, 7 and 8 of Sec. 25 regardless of whether an actual survey would place it within the boundaries of these tracts as they are delineated by the government surveys.

In *Rindeikis* v. *Coffman,* 231 Ark. 422, 329 S. W. 2d 550 (1959), we had before us a deed from a grantor which conveyed by the government land calls, and a subsequent deed to a different party conveying 0.68 acres which the same grantor had acquired by adverse possession. We there held that whether the portion acquired by adverse possession passed to the grantee of the government land calls depended upon the intent of the grantor.

Upon the issue of whether the disputed tract was intended to be included in the description of Lot 6, the tetsimony of William T. Rosamond, Mrs. Florence Stewart Rosamond, Mrs. Ora Marie Rosamond, and Arthur Rosamond is that they never intended to mortgage anything but the "deeded lands" and that they definitely did not intend to mortgage the disputed tract which they refer to as "strip lands." Opposed to the testimony of the Rosamonds is that of Mr. Portis that the Rosamonds intended to mortgage all of the lands owned by them; that he had a conversation with Arthur Rosamond about the deed after it was executed; and that Arthur stated that he thought he had mortgaged it all to Portis until he was advised differently by Mr. Stuckey. Mr. Rosamond denied any conversation with Mr. Portis concerning the quitclaim deed to Stuckey.

The supervisor for the Farmers Home Administration, which had received a mortgage from the Rosamonds containing the identical description used in the Portis mortgages, testified that Arthur Rosamond told him the whole 160 acres would be mortgaged. This mortgage, however, was prepared by the Farmers Home Administration from a land description obtained in the court house.

While it is true that Mr. Portis had to get a Writ of Assistance to obtain possession from the Rosamonds after the foreclosure of his mortgages, we can not say that the chancellor's finding in favor of Stuckey Brothers is contrary to a preponderance of the evidence. The

chancellor was entitled to take into consideration the size of the tract, which is considerably larger than the inconsequential addition usual in boundary disputes.

We agree with appellant that the portion of the decree quieting title to that part of the NE¼ SW¼ Sec. 25 that lies immediately north of the disputed tract was not an issue in the litigation and that it was erroneously included in the decree.

Therefore, the decree is affirmed in so far as it quiets title to the 13.33-acre disputed tract, and is reversed and remanded with respect to the strip of land immediately north thereof in the NE¼, SW¼, Sec. 25. Each party shall bear his own costs.

FOGLEMAN, J., disqualified and not participating.

JONES, J., not participating.

HARRIS, C. J., dissents to the affirmance.

ARKANSAS STATE HIGHWAY COMMISSION *v.*
HARRY GRIFFIN, ET UX

5-4066 411 S. W. 2d 495

Opinion delivered February 20, 1967

George O. Green and *Don Langston,* for appellant.

Harold C. Rains, Jr., for appellees.

CARLETON HARRIS, Chief Justice. The principal question in this case is whether a condemnor should be required to pay an enhanced price for the land condemned, which its demand alone has created. On May 27, 1965, the Arkansas State Highway Commission filed a condemnation complaint in the Circuit Court of Crawford County, condemning a part of four lots out of a tract of land described as Tract 345, owned by appellees, Harry Griffin and Louise Griffin. The sum of $7,150.00 was

deposited in the registry of the court as estimated just compensation for the taking and damaging of appellees' property. The Griffins contended that this amount was insufficient, and they asked for a jury trial to determine the amount of just compensation. On trial, the jury returned a verdict in favor of appellees in the amount of $18,500.00, and from the judgment so entered, appellant brings this appeal. For reversal, it is first asserted that the trial court erred in permitting testimony concerning land sales to oil companies, the value of such land having been greatly increased because of the proposed construction of Interstate Highway No. 40.

The evidence reflects that the Griffins had owned the tract involved since approximately 1926, and their home was located thereon. This tract was a part of property platted in 1955 into twenty-two lots fronting on U. S. Highway No. 71, and most of the lots had been sold prior to the date of taking. In 1960, appellees sold two lots to an individual named Mettler for $500.00 each, and in 1963 Mettler purchased another lot from the Griffins for $500.00. Sometime prior to August, 1964, the Highway Department determined that the proposed Interstate 40 Highway would overpass Highway 71, and there would be a major interchange in the vicinity for purposes of traffic getting on and off the new highway. In August of that year, the department sent its appraisers into the area for a market study; stakes were placed in the area, and construction plans and sketch maps became a matter of public record. Various oil companies began to go into the area and take options on particular lots for the purpose of locating service stations. Tony Zeni, business representative of the Humble Oil and Refining Company, testified that his company took an option on four lots owned by one Blaylock, and on March 2, 1965, purchased these lots. This particular property is located right on the interchange, and is considered a "primary location" for a service station.[1] Zeni testified

[1]Accordng to Mr. Zeni, the difference in a primary location and a secondary location depends on two factors, one being visibility, and the other access to the property. "The closer you can get to

that, in his opinion, the Humble Company would not have bought the property if an interchange had not been located there. He testified that the price paid ($59,000.00 for two acres) was greatly enhanced because of the location, and competition for the property. Evidence reflected that Sun Ray DX Oil Company bought the Mettler property (which was immediately north of the Blaylock property, and had been sold by Griffin to Mettler) for $20,000.00 on April 19, 1965, and the testimony reflects that, south of the interchange, the Texaco Company bought the property on the southeast corner, and Skelly Oil Company purchased that immediately south of Texaco.[2] We think the evidence during the trial clearly establishes that the price of property in this area "sky-rocketed" when the proposed location of Interstate 40 became known, the variance in the price of the several lots, of course, depending upon the exact location of the property desired. In valuing the Griffin property, witnesses for appellees took into consideration these sales to the oil companies (which were based solely on the location of the interchange), and it is this evidence about which appellant complains in the particular point under discussion. The question before us, therefore, is: Should the Arkansas State Highway Department be required to pay an enhanced price (for property) *which was brought about solely by its own proposed improvement*? This issue is discussed in *Nichols on Eminent Domain,* Third Edition, 1962, Volume 4, Section 12.3151, Pages 201-204, as follows:

"It rarely happens that proceedings for the condemnation of land for the public use are instituted with-

the control of access the better location you have." The witness also testified that a secondary location would be immediately adjacent to the primary location.

[2]According to the evidence, the Griffin property, here involved, would not be nearly so valuable for service station or other commercial purposes, since it is located some 600 feet from the interchange, north of the property purchased by D.X Mr. and Mrs. Griffin had previously (April, 1965) sold Sun Ray DX Oil Company two and one-half lots for $10,000.00, which are located just south of the property in this litigation.

out months, years, and, in some instances, decades of time spent in preliminary discussion and in the making of tentative plans. These discussions and plans are usually known to the owners and other persons interested in land in the vicinity of the proposed improvement, and are matters of common talk in the neighborhood. If the projected public work will be injurious to the neighborhood through which it will pass, the fact that it is hanging like the sword of Damocles over the heads of the land owners in the vicinity cannot but fail to have a depressing effect upon values, and on the other hand, if it is expected that the improvement will be of such a character as to benefit the surrounding land, values usually rise in anticipation of the construction of the improvement. When the taking is finally made, the question arises whether this anticipatory modification of values should be considered in awarding damages.

"*The general rule is that any enhancement in value which is brought about in anticipation of and by reason of a proposed improvement is to be excluded in determining the market value of such land,* (emphasis supplied) although there is some authority which, contrariwise, unqualifiedly allows recovery for such enhanced value."

While, as pointed out, there is some authority to the contrary, we like the logic of the general rule, and align ourselves with those who have adopted that view. In *Bonaparte* v. *Mayor, etc., of Baltimore,* 101 Atlantic 594, the Maryland Court of Appeals (corresponding to our Supreme Court) said:

"The measure of the compensation to which the appellant is entitled in this proceeding is the actual market value of the property condemned. Its market value depends upon the uses for which it is available, and any special utility which may tend to enhance its value in the market is a proper element to be considered. The availability of the property for a particular use, contributing to its market value, is not to be ignored merely

because it has not in fact been applied to that use. The valuation for condemnation purposes *must disregard the effect of the public project, for which the property is acquired* (our emphasis), but must take into consideration all the uses to which it is capable of being applied at the time of the appropriation and which affect its marketability."

Actually, as far back as 1891, we recognized this same principle. In *Newgass* v. *Railway Company*, 54 Ark. 140, 15 S. W. 188, which involved a condemnation proceeding instituted by the St. Louis, Arkansas and Texas Railway Company for a right-of-way, we said:

"All that the constitution guarantees or the law demands is that just compensation shall be made to the owner in return for property appropriated by the public. A rule that would exact of a corporation the payment of a sum to cover the value of a railroad as such, constructed at its own expense, would go beyond the demands of justice, and could find no sort of countenance in conscience or in law outside of the strict letter and fanciful presumptions of the rule stated.

"The same question has been often adjudicated by the courts of the highest dignity and learning in sister States, and the decided weight of adjudged cases is against the appellant. Aside from adjudication, reason and justice condemn the contention.* * *

"The measure of compensation is the value which the land taken would have had at the time of filing the petition, if the road had not been constructed on it, together with the difference between the present value of the owner's contiguous land, with the road constructed where it is and what would have been its present value if the road had not been built. (Citing case) And in determining as to the value of the land taken, any appreciation or deterioration that may have resulted to it specially by reason of the building of the road on it will be disregarded* * *."

Also, though not passing on the question, we recognized the general rule in *Arkansas State Highway Commission* v. *Cochran,* 230 Ark. 881, 327 S. W. 2d 733. In accordance with the authorities cited, we hold that the testimony as to the enhanced value of the Griffin property, occasioned by the contemplated construction of Interstate 40, was inadmissible. The proper valuation date for appellants' property is the date of taking, May 27, 1965; although the oil company purchases of nearby properties were made shortly before this date, these inflated sales cannot be used in arriving at the before value of the property. Only normal inflation, *i. e.*, that inflation which is engendered by the general economy, can be taken into consideration. As pointed out in *Newgass,* it is our view that reason and justice demand this conclusion.

For its second point, appellant complains that the court permitted incompetent evidence, in that appellees introduced testimony of damage to their lands based on commercial values, and also introduced evidence relating to damage (loss of the dwelling located on the lands) which was based on residential values. Appellant says that these are inconsistent uses, that the landowner is entitled only to damages for the highest and best use of his property, but that the court's action in admitting the evidence had the effect of allowing recovery of double damages, *i' e.,* both for commercial and residential purposes. It is also contended that the evidence given concerning the value of the home was inadmissible.

It is entirely proper to allow evidence of all potential uses of a landowner's property. In *Arkansas State Highway Commission* v. *Brewer,* 240 Ark. 390, 400 S. W. 2d 276, we said:

"The trial court properly admitted the landowners' proof as to both the agricultural use and the industrial potential of their land. The proof should not be limited to either. Our rule is succinctly stated in the case of *Ft.*

Smith & Van Buren Bridge Dist. v. *Scott,* 103 Ark. 405, 147 S. W. 440:

"'The measure of the owner's compensation for the land condemned is the market value thereof at the time of the taking for all purposes, comprehending its availability *for any use* to which it is plainly adapted, as well as the most valuable purpose for which it *can be used* and will bring most in the market.'

See, also, *Arkansas State Highway Comm.* v. *O and B, Inc.,* 227 Ark. 739, 301 S. W. 2d 5. In the case at bar the appellees had the right to show all the purposes to which their land is adapted in order for the jury to determine just compensation."

Of course, a verdict rendered by a jury which was partially based on testimony relating to the commercial value of the land, and partially based on testimony relating to the land's value for residential purposes, would not be proper, but it is for the jury to determine the best and highest use of a landowner's property.

It is also asserted that the valuation placed on the Griffin home was improper, appellant stating that these witnesses considered only the cost of the house (at the time it was built), rather than depreciating it on the basis of its age. In *Arkansas State Highway Commission* v. *Richards,* 229 Ark. 783, 318 S. W. 2d 605, we commented on the question of "cost as criterion," stating:

"* * * As has been stated previously where the character of the property is such as not to be susceptible to the application of the market value doctrine, resort has been had, among other things, to the original cost of the property, or to the current cost of reproduction less depreciation. Market value, it has been held, is not equivalent to the amount expended for the property by the owner.

"*The proper measure is the market value of the*

land with the buildings upon it (emphasis supplied), and the owner therefore receives nothing for the buildings unless they increase the market value of the land. Accordingly, evidence of the structural value of the buildings is not admissible as an independent test of value. When, however, it is shown that the character of the buildings is well adapted to the location the structural cost of the buildings, after making proper deductions for depreciation by wear and tear, is a reasonable test of the amount by which the buildings enhance the market value of the property. As in other cases of determining market value, not only the character and condition of the building, but also the uses to which it might be put, are matters for consideration."

Because of the errors herein pointed out, the judgment is reversed, and the cause is remanded to the Crawford County Circuit Court with instructions to proceed in a manner not inconsistent with this opinion.

VELDA ROSE MOTEL, INC. *v.* MRS. EVERETT EASON

5-4105 411 S. W. 2d 502

Opinion delivered February 20, 1967

Fulk, Wood, Lovett, Parham & Mayes, for appellant.

Howell, Price & Worsham, for appellee.

CARLETON HARRIS, Chief Justice. On July 30, 1965, Mrs. Everett Eason, appellee herein, instituted suit against Velda Rose Motel, Incorporated, appellant herein, for the sum of $75,000.00 damages, alleging that, as a result of appellant's negligence and carelessness, she had received a severe sprain of the cervical spine, sprain of the lumbar spine, and bruises and contusions over and about her entire body. A general denial was filed and the case proceeded to trial. At the conclusion of the testimony, the jury retired, and returned a verdict, signed by nine members of the jury, in the amount of $50,000.00. From the judgment so entered, appellant brings this appeal. Pertinent background facts developed by the testimony are as follows:

On the evening of June 10, 1965, appellee, wife of a State Policeman, was attending the annual banquet of

the Arkansas Peace Officers' Association, which was being held at the Velda Rose Motel in Hot Springs. During dinner, a large panel, seven feet tall and three feet wide, fell and struck Mrs. Eason on the head. According to Mrs. Eason's testimony, the panel, after striking her on the head, "bounced off" and came back down, striking her shoulders. After the meal, she, together with her husband, left the meeting, and went to their home. After a sleepless night, Mrs. Eason consulted Dr. John Hundley, a Little Rock orthopedic physician, and X-rays were taken. A neck brace was prepared for appellee to wear, and she was sent to the hospital, where she was placed in traction, and received medication. After eleven days in the hospital, she returned home, still with her neck in traction. The brace, at time of trial, was being used at night, for one or two hours in the afternoon, and anytime that she rode in an automobile traveling over fifty miles per hour. On July 23, 1965, Norflex, a muscle relaxant, was prescribed, and appellee used this for approximately two weeks (the drug was also administered intravenously). On August 5 (this date being six days after her suit was filed), she noticed a breaking-out on the lower part of her stomach, and upper part of the legs, "welts, big red welts and streaks, some six, seven inches long, and approximately one-quarter of an inch wide.* * *" She testified that the itching was very bad, and within an hour her entire body, from her knees to her neck, was covered in welts. The family physician was called, and he diagnosed it as a drug reaction, and "gave me a shot to knock me out, because I was almost to the point of hysteria. I was in such an itching, burning condition, and he gave me three different medicines, pills to take that he said would help the condition. That was on Saturday night. Sunday I continued and he told me to quit taking these Norflex tablets because he felt sure that was what was causing it. * * * On Monday I broke out some more in other spots and by Monday the places that I had broken out Saturday night had turned blood red and looked like blood would start coming from the pores of the skin." She then testified that the red places were hemorrhag-

ing. Mrs. Eason described the home treatment that was then taken, but it became necessary to again send her to the hospital. There, she was treated by an allergist, the "breaking out" having increased until it was on her face, ears, eyes, and mouth. After five days and nights in the hospital, she was dismissed by this specialist, and within a few more days, the skin eruptions ceased. After the drug reaction and hospitalization, Mrs. Eason developed a tremor, and loss of sensation, in her right hand, which grew progressively worse. This tremor was evident during her testimony at the trial, and she testified that she was no longer able to perform prior activities.[1]

During the medical testimony, appellee's doctor expressed the opinion that Mrs. Eason was suffering from Parkinson's disease, and this bore a causal relation to the trauma. It is this evidence that gives rise to appellant's complaints, and its points for reversal are predicated upon the court's actions pursuant to this testimony.[2] Appellant contends that the verdict is in an amount far in excess of the proven damage, and that this verdict occurred because of two rulings by the court that were highly prejudicial to appellant. We will discuss these contentions in the order listed.

It is first asserted that the court committed error by "peremptorily permitting appellee to amend her complaint in the midst of trial to inject a new element of damage—Parkinsonism, supposedly caused by the drug in the face of appellant's claim of surprise." Let it be stated that we will not detail the medical evidence

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[1]Appellee testified that she had made most of her own clothing, did her own cooking, and "canned and preserved." She had also won the state championship (for women) in pistol shooting several times, but the tremor in her right hand prevented participation in these activities.

[2]The queston of whether there was negligence on the part of appellant, which was a proximate cause of the injuries sustained, is not argued.

offered by appellee relative to the cervical spine sprain,[3] nor the other conditions testified to by Dr. Hundley, relative to his findings as an orthopedic physician and surgeon, nor do we deem it necessary to describe the suffering detailed by appellee. The contention that the judgment is excessive is based on the allegation that the testimony relative to Parkinson's disease was the cause of the large amount awarded; accordingly, if this evidence was proper, and there was no abuse of discretion in allowing the complaint to be amended, the point is without merit.

Dr. Hundley, after testifying in detail as to the spine sprain and neck injury, stated that appellee was afflicted with Parkinson's disease, and that, in his opinion, there was a causal relationship between her trauma and this disease; that she was considerably disabled, would continue to need treatment, and that such a condition continually grows worse, "Well, all Parkinson's goes on and on." On cross-examination, the doctor stated that the rash was caused from the Norflex drug. He said that it first occurred to him that she might have Parkinson's disease when he observed the tremor, and likewise on cross-examination he stated that he sent her to Dr. William King Jordan, a neurologist. It was the opinion of Dr. Hundley that the Parkinson's disease was probably occasioned by the taking of the Norflex drug. At the conclusion of the doctor's testimony, counsel for appellee moved that the complaint be amended to conform to the proof. Counsel for appellant objected to the motion, stating, "it came as a complete and absolute surprise to the defendant." This brings us to appellant's first argument, the contention being that the court abused its discretion in permitting the complaint to be amended.

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[3]Dr. Hundley distinguished between strain and sprain as follows: "Strain is simply stretching of the muscles, ligamentous structures. A sprain is associated with tearing of muscles, tissues, or fascia, tissues or joints or ligaments of the joints and capsules, ligaments about the joints."

It is admitted that normally a court has the right to permit pleadings to be amended, even while the trial is in progress, but appellant asserts that the court should have recognized that the defending party, in this instance, could not protect itself immediately, and the granting of the motion was therefore an abuse of discretion, and constituted error. We do not agree. If counsel for appellant was surprised, he should have moved for a continuance. This was not done. Not only that, but it would seem that, if totally unaware of any possible Parkinson's disease, appellant would have objected when evidence, relative to this ailment, was first introduced. However, though Mrs. Eason, her husband, and Dr. Hundley, directed quite a bit of testimony to this condition, no objection was ever raised. Instead, appellant's counsel proceeded to cross examine these witnesses on this point,[4] and subsequently, interrogated his own witness, Dr. Horace Murphy, about this disease. It is difficult to understand why appellant was surprised, for Dr. Murphy, an orthopedic surgeon, while testifying on behalf of appellant, stated that he had previously suggested in a report submitted to appellant's counsel, that "a neurological examination should be carried out to see if this is an anxiety reaction or could be some neurological disease. *This is in my report*[5] (emphasis supplied) and I simply did not really know what the reason for the trembling of the arm was. * * * Well, Parkinson isn't basically from my meager knowledge of the condition. That is, it is a condition which takes place as a result of an area in the brain of a basal ganglion, special area which has to do with controlling certain motions in the arm. Now, if, for example, arteriosclerosis or changes of this type take place here then the controlled mechanism isn't present and the motions that the patient develop, fine tremors, and this is basically what Parkinson does, a lot of work on Laser Beam and ac-

[4]It was during cross-examination that Dr. Hundley testified that the Parkinson's disease was likely a result of Norflex intoxication.

[5]Dr. Murphy's report was dated January 5, 1966, which was approximately twenty-five days before the trial commenced.

tually treating these things certain types of beams into the brain but again it is a highly specialized area and many things resemble Parkinson that aren't Parkinson; brain tumors, other things can give you various types of symptoms. *That's why I wanted, from my standpoint, a neurological consultation* (emphasis supplied)." At any rate, we have frequently held that pleadings can be amended, in the sound discretion of the court, and, under the facts and circumstances herein, we find no abuse of that discretion, particularly when there was no motion for a continuance, and no objection to the testimony relating to Parkinsonism was ever made.

Appellant next asserts:

"It was prejudicial error to permit only a portion of Dr. Hundley's testimony relating to Parkinson's disease to be read to jury during closing argument. Counsel and court had agreed that all of such testimony would be read but the court terminated the reading of this part of the testimony after reporter read such as developed on direct examination."

We cannot agree that error has been demonstrated. The official court reporter stated that she did not follow the practice of taking closing arguments of counsel, unless previously requested to do so, and that she had left the courtroom. The bailiff sought her out and asked her to bring her stenographic notes. She was then requested to find Dr. Hundley's testimony on direct-examination concerning Parkinson's disease. Both counsel then agreed that the testimony of Hundley as to whether there was a causal relationship between the trauma and Parkinson's disease could be read, and accordingly read a portion of the evidence. Counsel for appellant asked that she find his cross-examination on this point. The reporter stated that she read a portion; that counsel said, "Go on, go on further," and she was searching through the testimony when:

"* * * Mr. Wood [again] stated: 'May I state I

asked specifically, for the record, that the Court request the Court reporter to read from the record, wherein I was cross-examining Dr. Hundley with reference to Parkinson's disease, and the Court says no.' Mr. Howell stated: 'With all respect, may I request the Court to agree with the request.' Mr. Wood stated: 'No, don't do it.' The Court stated: 'Read the whole testimony of Dr. Hundley.' Mr. Howell stated: 'I want to read the part Mr. Wood wants read.' Whereupon the Court stated: 'Continue, Mr. Howell.' Thereupon, according to my notes Mr. Howell made his closing argument."

At once, it is evident that this record is confusing, but it appears that when counsel for appellee asked the Court to agree with the request counsel for appellant said: "*No, don't do it* (emphasis supplied)," *i. e.*, he was withdrawing the request that the testimony be read.

Counsel for appellant then made the following statement for the record:

"I want to dictate. Defendant renews its objection to the court permitting a portion of Dr. Hundley's testimony to be read to the jury and not having sufficient patience to permit the reporter to read, locate and read all of Dr. Hundley's testimony, including that on cross-examination."

The court thereupon stated:

"Put this in the record. Let the record show while the reporter was out of the room, the Court instructed the jury that they were the sole judges of the testimony and that statements of attorneys were not evidence and they heard the witness' testimony and that they would make the decision as to what the witnesses testified; that thereafter both Mr. — counsel for plaintiff and counsel for defendant agreed to reading the testimony which was read."

We try cases on the record, and certainly, under this record, we cannot say that error was committed.

Affirmed.

T.I.M.E. FREIGHT, INC. v. RUAL WAYNE MCNEW ET AL
5-4079 411 S. W. 2d 500
Opinion delivered February 20, 1967

Wright, Lindsey & Jennings, for appellant.

Guy H. Jones and *Francis T. Donovan* and *A. B. "Rob" Dawson,* for appellee.

GEORGE ROSE SMITH, Justice. This appeal challenges a verdict and judgment holding the appellant responsible for a head-on collision that occurred on the night of March 11, 1965, on Highway 65 in the city of Conway. T.I.M.E. contends that it was entitled to a directed verdict, for the reason that the appellees' evidence failed to prove that a T.I.M.E. tractor-trailer unit was involved in the collision.

The collision took place on a four-lane highway having two lanes of traffic in each direction. Two cars, one being driven by the appellee McNew and the other by the appellee Bunting, were approaching each other in the inner lanes of traffic. According to the appellees' proof a tractor-trailer rig bearing the letters T.I.M.E. on the back of the trailer was traveling next to Bunting, in the outer lane of traffic to his right. The collision was caused by the negligence of the truckdriver, who at-

tempted to pass a truck ahead of him and in doing so side-swiped the Bunting vehicle and knocked it into the path of the oncoming McNew car. Mrs. McNew was killed and the other occupants of the two cars were injured. The jury verdicts for the appellees totaled $33,200.00.

The truckdriver in question was never identified, for he did not stop after the accident. Nevertheless, the plaintiffs (with whom we align the cross-complainants) offered proof ordinarily sufficient to support a verdict against the defendant. Both occupants of the Bunting car testified that the name T.I.M.E. was painted on the back of the trailer. Another witness, apparently disinterested, testified that a few minutes before the collision three tractor-trailers bearing the letters T.I.M.E. on both tractor and trailer were parked at a nearby truck stop. According to that witness, who arrived at the scene of the collision soon after the tragedy occurred, the three T.I.M.E. drivers left the truck stop and drove off in the direction of the accident at about the right time for one of them to have been involved. Under our earlier decisions the testimony just summarized, standing alone, would support a finding that a T.I.M.E. tractor-trailer caused the accident and that it was being driven by a T.I.M.E. driver in the course of his employment. *Lion Oil Ref. Co.* v. *Smith,* 199 Ark. 397, 133 S. W. 2d 895 (1939); *Plunkett-Jarrell Gro. Co.* v. *Freeman,* 192 Ark. 380, 92 S. W. 2d 849 (1936); *Arkansas Baking Co.* v. *Wyman,* 185 Ark. 310, 47 S. W. 2d 45 (1932).

The appellant argues that its proof overcame the appellees' prima facie case. T.I.M.E. is a comparatively large concern operating its vehicles from 29 different terminals scattered over the United States. On the date of the collision it owned about 1,100 trailers and about 500 tractors. At least nine of its units (and perhaps as many as 36) might have been in the vicinity of Conway at the time of the accident. Seven of those nine drivers testified at the trial, each one denying that he was implicated in the collision. By an oversight on T.I.M.E.'s part the other two drivers were not mentioned in its an-

swers to the plaintiffs' interrogatories and were not called as witnesses.

In insisting that it was entitled to a directed verdict T.I.M.E. relies upon proof that about ten per cent of its trailers were in the possession of other trucking companies on the date of the accident. Such transfers of possession are referred to as interchanges. An interchange occurs when a shipment originating with T.I.M.E. is turned over to a carrier authorized to serve the point of destination. In such a situation the necessity for unloading and reloading the shipment is avoided by releasing the loaded T.I.M.E. trailer to the connecting carrier. In a transaction of that kind T.I.M.E. takes a receipt for its trailer and makes a daily charge of $10.00 for the use of the vehicle. At the trial neither side made any attempt to prove the whereabouts of the 100-odd trailers that were on interchange on the day of the accident.

Laying aside T.I.M.E.'s much better opportunity to trace the missing trailers, we are unwilling to say that the plaintiffs' failure to develop that line of inquiry was fatal to their prima facie case. Their testimony placed at least three T.I.M.E. tractor-trailer units at a point close enough to the site of the collision to support a finding that one of them was involved. Moreover, only about ten per cent of the T.I.M.E. trailers were on interchange; so the probabilities were about nine to one that if a T.I.M.E. trailer was actually involved it was being hauled by a T.I.M.E. tractor.

The ultimately decisive question is whether some explanation of the whereabouts of the interchanged trailers was so essential to the plaintiffs' case that the jury could not fairly and reasonably reach a conclusion without that explanation. We have no hesitancy in holding that the asserted gap in the plaintiffs' proof was not fatal to their causes of action. In no event could the plaintiffs have done more than track down the drivers of the unaccounted-for trailers, produce all of them as witnesses, and submit to the jury a hundred or more monotonously similar denials of their participation in

the accident. Yet that mass of testimony, even though it proved to be as favorable as possible to the plaintiffs, would not carry the jury far in its deliberations. The guilty truckdriver failed to stop after the collision. It is altogether unlikely that one of the missing drivers, when discovered weeks or months later, would voluntarily admit that he was the culprit who fled from the scene. Thus the question for the jury would have been essentially the same as it was at the actual trial—a matter of weighing probabilities and credibility. Mathematical certainty could not be achieved. In the circumstances the court properly submitted the case to the jury, whose verdict settles the controversy.

Affirmed.

BROWN, J., dissents.

NEW EMPIRE LIFE INSURANCE COMPANY *v.* FRED BOWLING

5-4129 411 S. W. 2d 863

Opinion delivered February 20, 1967
[Rehearing denied March 27, 1967.]

Gordon & Gordon, for appellant.

George J. Cambiano, for appellee.

GEORGE ROSE SMITH, Justice. This is an action brought by the appellee to recover the $5,000 death benefit payable under a policy insuring his son, Jerry Bowling, against injury or death "resulting directly and independently of all other causes from bodily injury . . . effected solely through accidental means." At the trial the jury's verdict was for the plaintiff in the full amount of the policy. The insurer contends that it was entitled to a directed verdict for the reason that under Missouri law, which the trial court found to be controlling, the insured's death was not effected by accidental means.

In January, 1964, the elder Bowling, a resident of Arkansas, received by mail an advertisement of an accident policy issued by the appellant, a Missouri corporation. Bowling applied for a policy upon his nineteen-year-old son Jerry, sending the application and premium to the insurer's principal office in Missouri. The company issued the policy and delivered it by depositing it in the mails in Missouri. In the past we have held that in such circumstances the policy is to be governed by the law of Missouri. *State Mutual Fire Ins. Assn.* v. *Brinkley Stave & Heading Co.,* 61 Ark. 1, 31 S. W. 157, 29 L. R. A. 712, 54 Am. St. Rep. 191 (1895).

In November, 1964, Jerry was living in Arkansas but was working in Oklahoma. On November 23 he and a companion, Donnie Nixon, spent most of the day riding around in or near Keota, Oklahoma. They stopped several times to drink beer at taverns. The evidence indicates that at about ten o'clock that night Jerry was driving their car at great speed on a highway near Keota. Donnie was asleep. Jerry lost control of the car, which skidded on and off the highway for about 450 feet before plunging into a gravel pit filled with water. Donnie managed to escape, but Jerry was drowned.

Was Jerry's death effected through accidental means? In Missouri the leading case upon this issue was originally that of *Caldwell* v. *Travelers' Ins. Co.,* 305 Mo. 619, 267 S. W. 907, 39 A. L. R. 56 (1924). There the

court made a choice between two lines of authority, which it summarized in these words:

> "There are two clearly defined lines of cases on this question. One holds that, where an unusual or unexpected result occurs by reason of the doing by insured of an intentional act, where no mischance, slip, or mishap occurs in doing the act itself, the ensuing injury or death is not caused through accidental means; that it must appear that the means used was accidental, and it is not enough that the result may be unusual, unexpected, or unforeseen.
>
> "The other line of cases holds that, where injury or death is the unusual, unexpected, or unforeseen result of an intentional act, such injury or death is by accidental means, even though there is no proof of mishap, slip, or anything out of the ordinary in the act or event which caused such injury or death."

After reviewing the authorities at great length the court elected in the *Caldwell* case to adopt the first of the two rules, by which there must be some accidental element in the doing of the intentional act that causes the injury or death. It is accordingly argued in the case at bar that the insurance company is not liable, because Jerry Bowling intentionally drank beer to the point of intoxication and in that condition intentionally drove at a speed estimated by a highway patrolman to have been between 90 and 100 miles an hour. Under those circumstances, counsel say, Bowling's death cannot be regarded as unforeseeable or unexpectable.

We must reject this argument, for either of two reasons. First, Donnie Nixon testified that Jerry was not drunk that night. If the jury accepted that testimony it would follow that Jerry's death was the result of his losing control of the car while driving at an excessive speed. Unquestionably the jury could have concluded that the loss of control was itself attributable to accident rather than to intention. Secondly, the more re-

cent Missouri cases hold that when the plaintiff's proof shows that the insured's death was violent, as it was in the case at bar, there is a prima facie case for submission to the jury. *King* v. *New Empire Ins. Co.*, Mo. App., 364 S. W. 2d 40 (1962); *Ward* v. *Penn Mutual Life Ins. Co.*, Mo. App., 352 S. W. 2d 413 (1961).

Since the judgment must be affirmed even under the law of Missouri, we do not reach the question whether the more liberal rule of substantive law that prevails in Arkansas ought to govern in a case such as this one. In recent years many principles in the field of conflict of laws have undergone re-examination—a process that is still in progress. Courts are taking a second look at the older inflexible approach by which in certain fact situations the law of a particular jurisdiction is to be woodenly applied, even though there may be a sound basis in public policy or simply in common sense for preferring the law of some other jurisdiction. We touched upon this point in *McGinty* v. *Ballentine Produce,* 241 Ark. 533, 408 S. W. 2d 891 (1966), but there, as here, we did not find it necessary to take a stand in the matter.

With respect to the narrow issue involved in the case at hand we may appropriately say that there are good reasons for construing a contract of life insurance by the law of the state where the insured was living when the policy was issued. See Restatement of Conflict of Laws (2d), 6th Tentative Draft, § 346h; *Zogg* v. *Penn Mutual Life Ins. Co.,* 2d Cir., 276 F. 2d 861 (1960); *Peterson* v. *Warren,* 31 Wis. 2d 547, 143 N. W. 2d 560 (1966). Should the issue be squarely presented we shall feel free to review the wisdom of our earlier decisions.

There is a second question to be decided. The plaintiff asked in the court below that he be allowed the penalty and attorney's fee authorized by our statute. Ark. Stat. Ann. § 66-3238 (Repl. 1966). The trial court rejected the request, holding that the Missouri statute upon that aspect of the case was controlling and that the plaintiff had not shown that the insurer's delay was

"vexatious," as the law of Missouri requires it to be. This was error. The question is essentially a procedural one, to be governed by the law of the forum. *Aetna Cas. & Surety Co.* v. *Simpson,* 228 Ark. 157, 306 S. W. 2d 117 (1957). It is true that we said in that case that "the policy matured in Arkansas and the action is brought in Arkansas." Even though the policy now before us might be said to have matured in Oklahoma, where Jerry Bowling met his death, the action is properly maintainable in Arkansas, where the plaintiff resides. We consider this to be an adequate basis for the application of our statute. The judgment will be modified on the cross-appeal to include a 12% penalty and an attorney's fee of $1,500.

Modified and affirmed.

INTERNATIONAL MINERALS & CHEMICAL CORPORATION *v.* DON S. CAPLINGER

5-4124 411 S. W. 2d 526

Opinion delivered February 20, 1967

Barrett, Wheatley, Smith & Deacon; By: *Joe C. Boone*, for appellant.

Greer & Collier and *Ward & Mooney,* for appellee.

PAUL WARD, Justice. This is a suit to collect for goods sold—but under unusual circumstances which will be explained. The facts presently set out are not controverted.

(a) International Minerals and Chemical Corporation (appellant)—a foreign corporation authorized to do business in Arkansas—is engaged in selling fertilizer

to its agents who are retailers. (b) In this case Waldenburg Gin and Supply Company was its agent to retail fertilizer in Poinsett County. (c) Don S. Caplinger (appellee) was the sole owner of said company. (d) On February 17, 1960 appellant and appellee executed an "Agent's Contract" which is quite lengthy and deals with many items not pertinent here. In material part it provides that appellee guaranteed to pay for all fertilizer purchased for resale. (e) On June 25, 1964 when appellee sold his business (including all assets) to Clinton E. Bowling, he owed appellant a balance of $18,810.65. (f) On the date last mentioned and when appellee refused to pay said balance Bowling executed three notes to appellant totaling the amount due—the notes were due December 1, 1964. (g) Bowling paid off two notes, but appellant was unable (after many efforts) to collect the third note in the amount of $6,810.65.

On July 23, 1965 appellant filed this suit against appellee to collect "said account". The essence of appellee's answer which is pertinent here was: (a) A few hours before Bowling executed the notes appellee notified appellant that he had sold out to Bowling "including its accounts both payable and receivable". (b) With that knowledge appellant "accepted the note . . . and in doing so extended the due date without notice . . . . " (c) This indulgence without notice operated to release him from further liability.

The matter proceeded to trial before a jury, and, after both sides rested, the trial judge instructed a verdict in favor of appellee on the ground that, as a matter of law, appellee "was not responsible to plaintiff upon the account sued on because of indulgence granted by plaintiff to one Clinton Bowling subsequent to December 1, 1964".

It is not disputed that: (a) Appellee purchased fertilizer from appellant; (b) He owed appellant a balance of $18,810.65 on or about June 25, 1964; (c) $12,000 has been paid; (d) A balance of $6,810.65 is unpaid, and; (e) Appellee guaranteed the payment of said amount.

To avoid liability for the above amount, appellee contends: *One*. The time of payment was extended without his knowledge. *Two*. There was a "novation" of the written "Agency Contract".

One. It is here contended by appellee that he was relieved of all obligation to pay appellant because he (appellant) gave Bowling extra time in which to pay. We are unable to agree with this contention.

In the first place appellant sued on the overdue "account" which appellee acknowledged but refused to pay, and did not sue on the note. Not only so, but we find nothing in the record to show appellant ever extended the time for Bowling to pay the note or the account. What appellant did do was to make repeated efforts to have Bowling pay, and when this failed it filed this suit against appellee.

This action by appellant merely tended to protect appellee from having to pay the balance due on the account.

Two. Appellee's further contention is that when Bowling executed his note to appellant that constituted a "novation" and, thereby, released him from all obligation to pay the past due account. This contention is not in accord with our decisions under the facts in this case.

This issue was considered in the case of *Simmons National Bank* v. *Dalton,* 232 Ark. 359, 337 S. W. 2d 667. In that case, in holding Dalton was not released from liability on the ground of a *novation*, we used language applicable to this case. There the Bank made efforts to collect from Thompson who was secondarily liable, and we said: ". . . what the Bank did amounted to nothing more than an effort to accommodate Dalton in its efforts to have Thompson pay Dalton's debt." We said:

> "Our decisions and the text-writers appear to be uniform in holding that it is necessary to show an *intent* on the part of the creditor to release an old debtor and substitute therefor a new debtor. In *Home Life Insurance Company* v. *Arnold,* 196 Ark. 1046, 120 S.W. 2d 1012, this Court, in dealing with this same question, said: '. . . the effect of the novation is the *intention* of the parties.' (Emphasis supplied.) Likewise, at Pages 266 and 267 of Volume 39 Am. Jur., it is stated, among other things, that: 'In order to effect a novation there must be a *clear and definite intention* on the part of *all* concerned that such is the purpose of the agreement.' (Emphasis supplied.)"

We also said: "In a case of this kind the burden was on Dalton to show that he has been released by appellant Bank," citing *Brewer & Son* v. *Winston,* 46 Ark. 163.

In our opinion there is no testimony in the record that shows "a clear and definite intention" of the parties to this action to release appellee from liability. To the contrary, William Little, an agent of appellant, stated that on June 26, 1964 he called on appellee to settle the account he owed appellant; that he learned appellee had sold to Bowling; that appellee told him "it would be all right to have Mr. Bowling sign the notes"; he then told appellee that "if anything happened and the notes were not paid, we would look to him for payment on his personal guarantee."

Appellee testified, on cross-examination, that when Mr. Little called him to settle the account he refused to execute any notes or be responsible any further, and that Bowling had no authority to bind him.

Clearly a fact question was made for the jury on this point, and the court erred in directing a verdict for appellee.

Reversed.

GEORGE LEE TATUM *v.* K. W. RESTER

5-4106 412 S. W. 2d 293

Opinion delivered February 20, 1967
[Rehearing denied March 27, 1967.]
[Supplemental opinion on rehearing delivered March 27, 1967, 242 Ark. 271, 412 S. W. 2d 293.]

Bernard Whetstone, for appellant.

Shackleford & Shacklefor, for appellee.

PAUL WARD, Justice. This is a personal injury suit. While George Lee Tatum, a five year old boy (hereafter referred to as appellant), was playing with the children of K. W. Rester (appellee) at Rester's home he was injured when appellee was attempting to back his car out of the carport.

Suit was filed by George's father (who, having died later, was replaced by a guardian—Robert E. Rorex) against appellee to recover damages for the injury allegedly caused by the negligence of appellee. A jury trial resulted in a verdict for appellee.

For a reversal appellant relies on two points which we will discuss in reverse order from that presented in his brief.

One. This point relates to certain instructions given and refused by the trial court, but first it is necessary to set out a summary of the pertinent facts which are not in dispute.

Appellant lives with his family who are close neighbors of appellee who has a wife and small children. The children of the two families frequently play together in their yards. On the day of the accident appellant was playing with appellee's children in his yard. It is not contended that he was invited over on this particular occasion nor is it contended he was a trespasser. Apparently it is agreed that appellant was a licensee or an invitee.

On that occasion appellee was washing his car in the carport, aware of the presence of the children in his yard and that they were nearby. When appellee decided he would back his car clear of the carport to finish the job he told the children of his intention and also told them to keep out of the way. Appellee then proceeded to back the car, holding the left front door open with his hand. In doing so the edge of the open door struck appellant's hand while it was resting on the post which supported the rear corner of the carport.

At the close of the testimony appellant requested the court to give the following instruction:

> "You are instructed that under the circumstances that existed in the present case that K. W. Rester owed the duty to George Lee Tatum to use ordinary care not to cause injury to George Lee Tatum."

The trial court refused the above instruction over the objection of appellant, and then gave to the jury the following instruction over appellant's objection.

> "You are also instructed that at the time of the occurence here involved the Defendant, K. W. Rester, did not have a duty to use ordinary care for the safety of the Plaintiff, George Lee Tatum, unless he knew or reasonably should have known that George Lee Tatum was in a position of danger."
>
> "And, of course, if the Defendant did know or rea-

sonably should have known that George Lee Tatum was in a position of danger at the time of the occurence, then the Defendant had a duty to use ordinary care to avoid injury to him."

It is our conclusion the court erred both in refusing and giving the above instructions. This conclusion is supported by the case of *Linxwiler* v. *El Dorado Sports Center, Inc.*, 233 Ark. 191, 343 S. W. 2d 411.

In the above cited case this same issue was raised under similar circumstances. Appellant (a boy eighteen years old) stopped in a bowling alley and chatted with a nineteen year old employee of the alley. They employee picked up a pistol which a policeman had checked at the counter and accidentally shot and injured the appellant. The trial court, in that case, instructed the jury as follows:

" 'The owner of a premises or place of business is under no duty to protect one who goes upon the premises or in the place of business as a volunteer for his own pleasure, privacy, or curiosity.' "

On appeal to this Court we reversed the judgment in favor of appellee, stating, among other things:

"This instruction should not have been given, for it embodies a rule of limited liability that is properly applicable to a landowner's responsibility for the condition of his premises rather than to his liability for the conduct of his employees."

Following the above statement we said:

"The condition of the appellee's bowling center had nothing to do with Billy Linxwiler's injury. Lavelle Parker was well aware of Billy's presence. In this situation Parker and his employer owed Billy the standard duty of ordinary care, regardless of his indecision about whether to bowl or not."

We can see no distinction, in principle, between the cited case and the case under consideration here. It is possible that the trial court could have been misled by the similarity between AMI instruction 1106 and the one which it gave in this case. However it is apparent that AMI 1106 refers to the duty of a person to keep his premises in a safe condition, which is not the situation in this case.

Two. It is also urged by appellant that the trial court "erred in his handling of the *voir dire* of the jury panel". However, since the case must be reversed on the first point and since we find no reversible error here, we deem it unnecessary to discuss this point in detail.

It appears that appellant attempted to ask each of the jurors two questions. One, in effect, was whether he would disregard the apparent ability or inability of the defendant to pay any judgment rendered against him. The other was, in effect, if he owned any stock in or worked for any casualty or liability insurance company. The trial court, upon objection, refused to allow appellant to ask these questions at that time and in the exact way they were presented.

For reasons set out below we find that the trial court committed no reversible error.

In the case of *Hogg* v. *Darden,* 237 Ark. 478, 374 S. W. 2d 184, we said:

> "It has long been recognized in this State that 'litigants in civil cases, as well as in criminal cases, have the right to examine the jurors separately in order to determine whether such jurors are subject to challenge for cause, or to elicit information on which to base the right of peremptory challenge, *subject of course to the right of the Court to control the extent of such examination, acting in its sound discretion.*' " (Emphasis ours.)

The court did not, we think, abuse its discretion under the circumstances disclosed by the record.

The court, on two occasions, told appellant he could inquire of the jury as to the content of the questions mentioned above. The court also explained that it would take up too much time to ask the questions of each juror separately—as requested by appellant. Moreover, the court asked each juror as to his or her occupation, and excused two because of their connection, in some way, with insurance companies. The court also questioned the panel at length regarding their duty to render a fair and impartial verdict under the law and the evidence. Thereafter appellant declined to ask any more questions. This, we said in the *Hogg* case, supra, "constitutes a waiver".

By this opinion we do not mean to hold that the questions appellant desired to ask the jury are, per se, inadmissible if asked in good faith subject to reasonable control by the trial court.

Reversed.

GEORGE ROSE SMITH and BROWN, JJ., concur.

LYLE BROWN, Justice, concurring. I agree this case should be reversed because of error in instructions. However, I believe the opinion fails to give proper consideration to some important points which were raised and which are most likely to occur in the event of another trial.

This cause first was called for trial on February 14, 1966. On behalf of Tatum (plaintiff), his attorney asked this question on *voir dire* examination:

> "Bernard Whetstone—My question is, gentlemen of the jury, do you or any member of your family now, or have you in the past, worked for or own any stock in or have any interest in any casualty or liability insurance company?"

Counsel for Rester (defendant) immediately asked for a mistrial and the court promptly granted the motion.

Although a prior question asked is not in the record, it is apparent from the statements made by the presiding judge that the question regarding insurance was immediately preceded by another question. In substance, the first question inquired of the panel whether the apparent ability or inability of the defendant to pay a judgment would affect the findings of the jury.

After granting the mistrial, the court expressed the view that the propounding of these two questions "back to back" were meant to impress upon the jury the fact that the defendant probably had insurance. This reasoning seemed to impel the trial court to grant the mistrial.

The second trial began May 25, 1966. On *voir dire* examination Mr. Whetstone inquired of juror Smitherman, in substance, if he could disregard the apparent ability or inability of a defendant to pay a judgment. Mr. Shackleford objected and the question was unanswered. The court overruled the objection and proceeded to take over the questioning of the panel. After numerous questions were asked by the court, Mr. Whetstone requested a conference at the Bench. After some discussion, the judge and attorneys retired to Chambers. The judge addressed this question to Mr. Whetstone:

> "As I understood your motion, you wanted to ask each one of the jurors individually the question whether or not they would try this case and render a judgment for the plaintiff if they feel the law and evidence justified it, without considering his apparent ability or inability to pay the judgment. Now is that the question you wanted to ask?" (To which Mr. Whetstone replied in the affirmative.)

The court denied the motion and gave three reasons therefor; the reasons are summarized in italics, and the balance constitutes my comments:

1. *To propound the same question individually to 23 jurors would be too much of a burden on the jury and the court and is unnecessary.* The court was certainly acting within the bounds of discretion in so ruling.

2. *The question is improper because the ability or inability to pay a judgment cannot be involved in a case. It is not a proper thing for the jury to take into consideration. Ability or inability to pay cannot be introduced into evidence.* On this point I believe the court is in error, assuming it to have been ruled that the question is never proper under any circumstances. It is human nature for most people to sympathize with the poor, the unfortunate, or the underprivileged. Direct testimony is not necessary for jurors to reach a conclusion or impression that a party to a case has ability or inability to pay. A question of the same content is in fact not infrequently propounded by counsel for a large corporation when it is being sued by a widow or on behalf of minor children whose parent has suffered death in an accident.

To admit the propriety of this question, when asked in good faith, knowing it is a cause wherein the jury will undoubtedly reach definite impressions about the ability or inability to pay, still does not remove from the trial court all its discretion. Acting in sound discretion, the court is privileged to conclude that the question is not proper in a particular case.

3. *The purpose of this question is to indicate to the jury that liability insurance is involved, "that this man (defendant) does not have the ability to pay but he has plenty of insurance."* Herein lies the danger of coupling the two questions. And in this situation the court's discretion comes into play. The court passes on the question of good faith, knows the attorneys, their mannerisms in asking the questions, the word emphases they may use—all of which are important in discerning good faith. The appellate court does not have this advantage. So, unless from the record itself we can glean

an abuse of discretion, we should not say the trial court erred in this respect.

Lawyers have the right to question jurors, separately and individually, to determine whether they are subject to challenge for cause, or to elicit information on which to base the right of peremptory challenge. But all this is subject to the right of the court, acting in sound discretion, to control the extent of the examination. Then, too, the court would seem to have the responsibility of moving forward on questions concerning statutory qualifications. See Ark. Stat. Ann. § 39-226 (Repl. 1962).

The case and statutory law relative to *voir dire* examination are not complicated when compared to other fields of trial procedure. When a problem in fact is anticipated it can undoubtedly be settled by raising it in pre-trial conference. In those rare instances where it might not be settled in pre-trial, the record can there be made and the time and patience of jurors are not jeopardized.

George Rose Smith, J., joins in this concurrence.

Opinion delivered February 20, 1967

Odell C. Carter, for appellant.

Joe Purcell, Attorney General; *Don Langston,* Asst. Atty. General, for appellee.

LYLE BROWN, Justice. Appellant is an inmate of the Arkansas penitentiary and by this proceeding questions the ruling of the Lincoln County Circuit Court wherein appellant's prayer under a habeas corpus proceeding was denied.

Wells received a five year sentence in the Cross County Circuit Court in 1956. A fellow inmate at the penitentiary was killed in 1957 and appellant was charged in the Lincoln County Circuit Court with murder. He entered a plea of guilty to second degree murder on August 3, 1957, and received a sentence of 21 years to run consecutively with the previous sentence.

In October 1965, Wells filed a handwritten petition in the Lincoln Circuit Court, which was appropriately treated by the trial court as a petition for a writ of habeas corpus. He alleged he was being detained in violation of his constitutional rights, in that he was a minor at the time, that he was not afforded counsel, and that he was coerced by the late Capt. Lee Henslee into making a confession. Wells was brought before Hon. Henry W. Smith, presiding judge of the Lincoln Circuit Court, and the same judge who was presiding in 1957 and sentenced Wells. Hearing was set for March 9, 1966, and Attorney Odell Carter was appointed to represent the petitioner. The trial court entered these findings on his docket:

> "3-9-66. Odell Carter appointed to represent the defendant. The Court finds no merit in the petitioner's petition. On 8-3-57 the petitioner was brought into court on a first degree murder charge and all his constitutional rights were explained to him and he was offered an attorney and a jury trial. The petition is denied and he is remanded to Supt. of State Penitentiary."

The proceedings of March 9 were not transcribed; however, counsel for appellant states in his brief that appellant testified to the matters contained in his petition for writ of habeas corpus; that the State responded by denying the allegations and presenting a penitentiary commitment valid on its face.

Two points are relied upon for reversal, and they will be set forth as they are discussed.

First: *The appellant's constitutional rights were violated in that he was not properly represented by counsel at all stages of the legal proceedings.* Appellant asserts that the right to counsel began upon the filing of the information on June 21, 1957.

Appellant cites *United States* v. *Richmond,* 295 F. 2d 83 (1961). This decision does not sustain appellant's first contention. It holds that whether the appointment of counsel is timely depends on whether the trial is fundamentally unfair because of delay in assigning counsel. Further, it is there held that the precise point at which the duty to assign counsel arises "is not set by any inflexible rule." In our case, appellant would have us set an inflexible rule of requiring appointment of counsel immediately upon the filing of the information. We have also examined the other authority upon which appellant relies. *Hawk* v. *Olson,* 326 U. S. 271 (1945). It simply holds that the appointment of counsel must be timely made, substantially as is held in *Richmond.*

Under the first point, appellant further contends that he made a confession under threat of death, that the influence of this confession continued down to and included the confession of guilt in open court and made the latter admission illegal. Appellant overlooks the fact that the trial court listened to his testimony about the alleged confession made at the penitentiary and found no merit in it. As was pointed out in the *Hawk* v. *Olson* case, the giving of such testimony, although uncontradicted, does not mean it must be accepted as true by the trial court. As has been pointed out by this court in previous cases, Capt. Henslee is deceased; further, the same judge presided at both hearings.

This brings us to a consideration of the final contention advanced by appellant under his first point, namely, that the plea of guilty made in open court in the absence of counsel, is void. He cites *Massiah* v. *United States,* 377 U. S. 201, 84 S. Ct. 1199 (1964). We fail to see the analogy. Massiah was free on bail and

had obtained a lawyer; a government agent obtained a statement from Massiah in the absence of his attorney; the court, of course, held it to be inadmissible. It is a rule of law firmly established that a defendant may intelligently waive right to counsel. In this instance the trial court advised defendant of his constitutional rights including right to counsel, and he waived it and entered his plea of guilty to second degree murder. We presume that Judge Smith explained the degrees of murder, and, as defendants oftimes do, Wells countered that he was not guilty of murder in the first degree. The next logical step is to take up the lesser degree, explain the elements of the charge and the punishment. At this stage of the proceeding, Wells apparently indicated his desire to enter a plea of guilty. Appellant certainly does not claim the trial judge did not follow the statutory procedure.

The second heading of appellant's points—"Point II"—is to the effect that the confession made at the penitentiary was involuntary. As previously pointed out in this opinion, the trial court found this contention to be without merit. We are sure the trial court was impressed, as we are, with the fact that these contentions are becoming stereotyped. For example, the pleadings in this respect by Wells are almost identical with the contentions made by the petitioner in *Burks* v. *State,* 241 Ark. 1, 405 S. W. 2d 935 (1966). Furthermore, when Wells was brought before the court in 1957, he apparently did not choose to reveal to the trial court the alleged acts of coercion which he now raises for the first time and some eight years later.

Affirmed.

CITY OF LITTLE ROCK, *v.* SAMUEL LANIER RAINES III

5-4177 411 S. W. 2d 486

Opinion delivered February 20, 1967

Joe Kemp and *Riddick Riffel* and *Moses, McClellan, Arnold, Owen & McDermott,* for appellant.

Patten & Brown and *Catlett & Henderson,* for appellee.

JOHN A. FOGLEMAN, Justice. The fundamental question in this case is whether the City of Little Rock has the authority to exercise the power of eminent domain to take private property for use as an industrial park. This involves consideration of two legal questions: (1) Has the power of eminent domain been delegated to the city for this purpose? (2) Is the use for this purpose a public use satisfying constitutional requirements for the exercise of the power?

On June 21, 1965 the City of Little Rock passed an Ordinance (No. 11,612) condemning property of appellees, used for agricultural purposes outside the city limits, for the stated purpose of constructing a port, establishing an industrial park, and for related facilities. This ordinance directed the City Attorney to file condemnation proceedings. Before this was done, appellees filed this action in the Pulaski Chancery Court on October 8, 1965. They alleged that the city was purporting to take their lands for a private purpose—the establishment of an industrial park. They asserted that this action was beyond the city's powers and contrary to the Constitutions of Arkansas and the United States, thus rendering the ordinance void and creating a cloud upon appellees' title. Alternatively, appellees prayed for just compensation. The city filed its answer, but before trial it filed two condemnation suits against different appellees in the Pulaski Circuit Court. Each of the appellees answered and successfully moved the transfer of the cases to the chancery court where, by agreement, all cases were consolidated. After hearing testimony on April 27th and 28th, the chancellor rendered a decree on September 27, 1966, holding the city ordinances null and void, insofar as they applied to the lands of appellees.

In the decree the court made these pertinent findings:

1. That the city ordinances purport to condemn the appellees' property for the purpose of con-

structing a port, establishing an industrial park and related facilities;

2. that the use for which the city proposed to condemn the property of appellees was to place improvements thereon and otherwise prepare the land for industrial sites, and to sell or lease said lands to private industries;

3. that these lands were proposed to be used other than as a site for a port facility;

4. that the proposed use of these lands is not a "public purpose or use permitted by the Constitution of the State of Arkansas under the right of eminent domain of the City of Little Rock, Arkansas."

Appellant contends: That the lands of appellees were being taken for an industrial park that constituted an over-all proposal for port facilities adjacent to the industrial project; that this use was for a public and lawful purpose; that the necessity for the proposed taking was concluded by (1) the vote of the electors of the city approving the issuance of bonds under the authority of Amendment 49 to the Constitution of Arkansas, and (2) the action of the city; and that the city has the authority, both express and implied, to condemn the properties involved.

An understanding of the basis of these findings requires some review of the record. For this purpose we will, for the most part, review the action of appellant and the testimony offered by it.

The title of Ordinance No. 11,612 states that the property is "to be used for the *purpose of constructing a port, establishing an industrial park* and for related facilities." The statement of necessity in this section is that the properties "are necessary for the purpose of creating and developing a port facility and terminal,

and an industrial park and related facilities." [Italics ours]

Appellees filed a motion to require appellant to produce plans for development of the lands of appellees prepared by Garver and Garver, Forrest and Cotton, or by any other person, firm or corporation. In response, appellant stated that it had adopted no plan prepared by those named or any other persons, firm or corporation and added:

> "As indicated in the Complaint the Defendant proposes to *develop the lands of the Plaintiff, when acquired, for general industrial purposes* but has established *no detailed land use plan for such development.*" [Italics ours]

In its condemnation complaint against appellees, Samuel L. Raines, et ux, appellant alleges that it had declared that the acquisition of the lands was "necessary for public use in its undertaking in creating, constructing and developing *an* industrial park, *a* port facility and related facilities." [Italics ours] The complaint of the city in the case against appellee Mary J. Raines states the proposed use to be "in creating, constructing and developing an industrial park and related facilities", without mention of a port.

The preamble to City Ordinance No. 11,674, repealing an ordinance condemning lands of another owner and a section of the ordinance by which appellant sought to condemn appellees' property along with that of other owners, states that the condemnation "was for lands to be used and utilized in the establishment and construction of an industrial park and for related facilities" without mentioning a port facility.

During the examination of one E. L. Killingsworth, Jr., a civil engineer called as a witness by appellant, one of the city's attorneys asked whether the witness prepared "the preliminary plans and the cost figures

for this industrial park to be operated in relation with the Port Authority" and offered the plans prepared by him. This exhibit called the project "Little Rock Port Industrial Park". It consisted of six sheets, and portrayed apparent proposals for water distribution lines, railroad lines, streets, sanitary sewers and storm drainage, along with a proposed typical street section. Nowhere is a port mentioned, except in the title, and its proposed location is not shown. From examination of this plan in conjunction with other exhibits and testimony, it appears that a road or street would be provided to cross a levee into the proposed port site. Mr. Fred I. Brown, Jr., currently Chairman of the Little Rock Port Authority, testified that this agency was "charged with building a port and developing an adjoining industrial district on the Arkansas River". Even though he stated that the two would necessarily be considered a unit, he stated that the purpose was "to build a municipal dock with a *related* industrial area." Little Rock Resolution No. 3,428 was introduced through this witness. Its preamble contains a finding that it is necessary and vital to proceed with acquisition of lands "to be utilized for *industrial development* and *related* port and port terminal facilities *purposes*". The reason Mr. Brown gave for the plan to sell or lease the property acquired to private business was the inability of anyone to make money out of it and the fact that the project is a non-profit venture. He further testified that neither the port nor the industrial district would be a profitable venture and that the city only had the money to develop 129 acres of the projected 1,200 acres. [Italics ours]

Mr. Harry Pittard, the Director of Pulaski County Flood Control and Navigation Committee, a group that served in an advisory capacity in the formulation of this proposed district, when asked his understanding of the use to be made of the district answered, "*Part of it as an industrial site and part of it as a port site.*" He said that at the time of his appraisals of appellees' property the existing plans were only to develop it as an industrial site *and* port facility. [Italics ours]

Mr. Floyd Fulkerson, another witness for appellant, stated that the *port* on the Arkansas River would *support an industrial district.*

It might further be noted that no plans exhibited by appellant showed anything more than the location of a proposed port site. They showed nothing purporting to be a plan of development of the port site or an interrelation of the two facilities whatever.

It appears to us that the trial court's factual findings that the proposed taking of appellees' property is for the establishment of an industrial park, by placing improvements thereon and otherwise preparing the lands for industrial sites to be sold or leased to private industries and that the use is for other than a port facility are supported by a preponderance of the evidence. Certainly it cannot be said that they are clearly against the preponderance of the evidence.

The city contends that it has the power of eminent domain for taking the property of appellees for industrial park purposes upon these bases:

(1) As a power fairly implied in or incident to the express powers granted by Amendment No. 49 to the State Constitution authorizing cities and counties to issue bonds and levy taxes "for the purpose of securing and developing industry within or near the municipality holding the election" and by the provisions of the Act implementing the Amendment [Act 9 of 1960, Extraordinary Session, Ark. Stat. Ann. § 13-1602] (Supp. 1965)].

(2) As an express grant by Act 231 of 1937, as amended by Act 189 of 1947 [Ark. Stat. Ann. §§ 19-2702—19-2719 (Repl. 1956)], authorizing cities to purchase, construct, establish and operate ports, harbors and barge terminals.

(3) As an express grant by Act 167 of 1947 [Ark.

Stat. Ann. §§ 19-2720—19-2731 (Repl. 1956)], authorizing cities to create port authorities.

(4) As an express grant by Act 206 of 1963 [Ark. Stat. Ann. §§ 19-3101—19-3108 (Supp. 1965)], an Act implementing Amendment No. 18 to the Constitution which provided for the levy of a city tax to be used for securing the location of factories, industries and river transportation and facilities.

(5) As an express grant by the Act of March 9, 1875 [Ark. Stat. Ann. § 35-902 (Repl. 1962)], as amended.

In considering these contentions of the city, we must keep in mind certain fundamental principals of the law of eminent domain, especially as it relates to municipal corporations.

The power of eminent domain is an attribute of, and inherent in, a sovereign state. Article 2, § 23, Constitution of Arkansas; *Young* v. *City of Gurdon,* 169 Ark. 399, 275 S. W. 890; *City of Little Rock* v. *Sawyer,* 228 Ark. 516, 309 S. W. 2d 30. The right of property is before and higher than constitutional sanction. Article 2, § 22, Constitution of Arkansas.

Cities are creatures of the state to aid it in the regulation and administration of local affairs. *Woods* v. *Haas,* 229 Ark. 1007, 320 S. W. 2d 655; *Portis* v. *Board of Public Utilities of Lepanto,* 213 Ark. 201, 209 S. W. 2d 864; *City of Hot Springs* v. *Gray,* 215 Ark. 243, 219 S. W. 2d 930. They have no inherent powers and can exercise only (1) those expressly given them by the state through the constitution or by legislative grant, (2) those necessarily implied for the purposes of, or incident to, these express powers and (3) those indispensible (not merely convenient) to their objects and purposes. *City of Piggott* v. *Eblen,* 236 Ark. 390, 366 S. W. 2d 192; *McClendon* v. *City of Hope,* 217 Ark. 367, 230 S. W. 2d 57; *Bain* v. *Ft. Smith Light & Traction Co.,*

116 Ark. 125, 172 S. W. 843, LRA 1915 D 1021; *Laprairie* v. *City of Hot Springs,* 124 Ark. 346, 187 S. W. 442; *City of Argenta* v. *Keath,* 130 Ark. 334, 197 S. W. 686, LRA 1918 B 888; *Cumnock* v. *City of Little Rock,* 154 Ark. 471, 243 S. W. 57, 25 ALR 608; *Arkansas Utilities Co.* v. *City of Paragould,* 200 Ark. 1051, 143 S. W. 2d 11; *Williams* v. *Dent,* 207 Ark. 440, 181 S. W. 2d 29; *Deaderick* v. *Parker,* 211 Ark. 394, 450, 200 S. W. 2d 787.

Cities may act legally only within the powers derived from or delegated by the constitution and statutes. *Neal* v. *City of Morrilton,* 192 Ark. 450, 92 S. W. 2d 208. The validity of their ordinances depends on the authority granted by the constitution or by the legislature. *Incorporated Town of Paris* v. *Hall,* 131 Ark. 104, 198 S. W. 705; *Nesler* v. *City of Paragould,* 187 Ark. 177, 58 S. W. 2d 677; *Bennett* v. *City of Hope,* 204 Ark. 147, 161 S. W. 2d 186; *City of Stuttgart* v. *Strait,* 212 Ark. 126, 205 S. W. 2d 35.

Consequently, if the City of Little Rock has the power of eminent domain for the purposes for which they seek to exercise it here, it must be granted by the constitution or statutes. Grants from sovereigns are to be construed strictly against the grantee. *Citizens Pipe Line Co.* v. *Twin City Pipe Line Co.,* 178 Ark. 309, 10 S. W. 2d 493. The authority for the taking of private property (for public use) should be clearly expressed. *City of City Rock* v. *Sawyer,* 228 Ark. 516, 309 S. W. 2d 30.

Statutes relating to the exercise of the right of eminent domain, especially where there is an alleged delegation of the power, should be strictly construed in favor of the landowner and against the condemnor, largely because they are in derogation of the common right. *City of Little Rock* v. *Sawyer, supra; Hampton* v. *Arkansas State Game and Fish Comm.,* 218 Ark. 757, 238 S. W. 2d 950.

Any fair, reasonable and substantial doubt about

the existence of a power in a municipal corporation must be resolved against it. *City of Piggott* v. *Eblen,* 236 Ark. 390, 366 S. W. 2d 192; *Yancey* v. *City of Searcy,* 213 Ark. 673, 212 S. W. 2d 546.

Having these cardinal principles in mind, we proceed to examine the city's contentions as to sources of its alleged power.

(1) Amendment No. 49 was proposed by the General Assembly. Nothing in that amendment, the resolution proposing it, its content or the ballot title under which the people adopted it, even faintly intimated to the voters that it would permit the taking of private property for securing and developing industry or that any power to do so was, or would be, delegated to cities. Nothing was sought to be done, or was accomplished, by this amendment except to permit the issuance of bonds and the levy of taxes to secure and develop industry. The title of Act 9 Ark. [Stat. Ann. §§ 13-1601—13-1614 (Supp. 1965)] is "Municipalities, Counties Industrial Development Revenue Bond Law." The statement of purposes (§ 13-1614) does not even suggest the conferring or delegating of the power of eminent domain. The only possible inference that there could have been any contemplation of the power of eminent domain is section (§ 13-1602) authorizing municipalities to acquire land, buildings or facilities that can be used in securing and developing industries. If we give the effect to this amendment and its implementing act, contended for by appellant, the city could condemn the plant of an existing industry to secure another. We cannot believe that either the people or the General Assembly intended this. In any event, we do not find the power that appellant seeks to exercise in the present proceeding.

We recognize that the Act calls for a liberal construction to accomplish the purposes thereof. We do not believe that it was intended that this be the vehicle for overruling all principles of existing law of eminent domain, in view of our recognition that the right of pri-

vate property is higher than constitutional sanction. It would take an extremely liberal construction indeed to find the power appellant seeks to exercise here. If the mere fact that cities are authorized to promote industry and to use tax money for that purpose gives it this power, then it seems that it could exercise the power to take a headquarters for a welfare association, since it has been held that contributions to such are a proper public purpose under statutes conferring on municipalities power to make ordinances necessary to promote the prosperity and improve the morals, order, comfort and convenience of the municipality and its inhabitants. See *Bourland* v. *Pollock,* 157 Ark. 538, 249 S. W. 360.

(2) Ark. Stat. Ann. §§ 19-2702—19-2719 (Repl. 1956) does delegate the power of eminent domain to cities, but only for the purpose of acquiring ports, harbors, river-rail and barge terminals. The Act specifically mentions wharves, docks, piers, quays, elevators, compresses, refrigeration storage plants, warehouses and landing places and basins and other structures and any and all facilities needful for the convenient use of the same in aid of commerce, including belt line roads and highways and bridges and causeways, shipyards, shipping facilities and transportation facilities incident thereto and useful or convenient for the use thereof. Industrial sites or parks are not even remotely suggested. The doctrine of *ejusdem generis* would require their exclusion from the contemplation of the Act.

(3) The Act authorizing the creation of a Port Authority probably should not be considered because there is no effort on the part of that authority to take appellees' property. This is attempted by a city ordinance. Even if the Port Authority were acting, however, its powers of eminent domain (§ 19-2723) can be exercised to acquire property only for terminal railroads and structures, including railroad crossings, airports, seaplane bases, naval bases, wharves, piers, ships, docks, quays, elevators, compresses, refrigeration storage plants, warehouses, and other riparian and littoral ter-

minals and structures and approaches thereto, transportation facilities needful for the convenient use of the same, belt line roads and highways and causeways and bridges. None of these purposes for appellees' property are even remotely suggested in the city ordinances, pleadings, or testimony.

(4) Ark. Stat. Ann. §§ 19-3101—19-3108 (Repl. 1956) is an Act implementing Amendment No. 18 and providing for creation of industrial commissions authorized by this amendment. This Act only authorizes the use of the proceeds of a special tax or bond issue authorized thereby. The amendment does not purport to delegate the power of eminent domain. These proceedings are not under the provisions of either the constitutional amendment or its implementing act; so we need not decide whether the section of the Act authorizing the use of these funds for the acquisition of industrial sites can be considered a delegation of the power of eminent domain.

(5) Appellant seeks to find the power in the rather general words, "other lawful purposes", found in § 35-902 Ark. Stat. Ann. (Repl. 1962). This court has already held that no such broad and liberal construction can be given this section. *City of Osceola* v. *Whistle;* 241 Ark. 604, 410 S. W. 2d 393. While the appellant urges that the Act should not be given such an extremely narrow construction, this clause cannot, in any event, be extended beyond the municipal purposes provided for in the Act of March 9, 1875 (as amended), of which the clause is a part.

Thus, we find no delegation to the city of the power of eminent domain by the state under which this taking can be sustained, if indeed the state has any such power in view of the use to which the property would be put. A state cannot grant greater powers to a municipal corporation than it possesses. *McClendon* v. *City of Hope,* 217 Ark. 367, 230 S. W. 2d 57. Without the consent of the owner, private property cannot be taken for private

use, even under the authority of the legislature. *Roberts* v. *Williams,* 15 Ark. 43; *Mountain Park Terminal Railway Co.* v. *Field,* 76 Ark. 239, 88 S. W. 897; *Gilbert* v. *Shaver,* 91 Ark. 231, 120 S. W. 833; *Ozark Coal Co.* v. *Pennsylvania Anthracite R. Co.,* 97 Ark. 495, 134 S. W. 634.

Whether or not a proposed use for which private property is to be taken, even with legislative sanction, is a public or private use is a judicial question which the owner has a right to have determined by the courts. *Mountain Park Terminal Ry. Co.* v. *Field, supra; Ozark Coal Co.* v. *Pennsylvania Anthracite R. Co., supra; Cloth* v. *Chicago R. I. & P. Ry. Co.,* 97 Ark. 86, 132 S. W. 1005; *Hogue* v. *Housing Authority of North Little Rock,* 201 Ark. 263, 144 S. W. 2d 49.

Private property can be taken under the power of eminent domain only for a public use. For a use to be public it is necessary that the public shall be concerned in the use to be made thereof and the purpose for which the property is to be used must in fact be a public one. *Cloth* v. *Chicago R. I. & P. Ry. Co., supra; St. Louis I.M. & S. Ry. Co.* v. *Petty,* 57 Ark. 359, 21 S. W. 884, 20 L.R.A. 434.

As this court said in the *Petty* case, where the delegated power of eminent domain was being exercised by a railroad:

> "* * * A railway cannot exercise the right of eminent domain to establish a private shipping station for an individual shipper. If the station is for the exclusive use of a single individual, or a collection of individuals less than the public, that stamps it as a private use, and private property cannot be taken for private use. The fact that the railway's business would be increased by the additional private facilities is not enough to make the use public."

The findings of fact by the trial court that appellees' lands were to be used to place improvements there-

on and otherwise prepare the lands for industrial sites for sale or lease to private industries and that the use was not as a site for a port facility, not being clearly against the preponderance of the evidence, would lead to the legal conclusion that the use is not a public one for which the power of eminent domain may be exercised.

But appellant seeks to obtain a different result by saying the determination of the necessity for the use closes the inquiry by the courts, relying on *Woollard* v. *State Highway Commission,* 220 Ark. 731, 249 S. W. 2d 564 and *State Highway Commission* v. *Saline County,* 205 Ark. 860, 171 S. W. 2d 60. This contention is not well founded because the question in those cases related to the necessity of the taking for an admitted public use—highway construction. In the *Woollard* case the question was whether right-of-way could be taken where it was needed for future, not present, use. The question in the *Saline County* case had to do with location and route of a highway. Neither question is involved here.

The city also seeks to justify taking of industrial sites as a public use under the authority of such cases as *Hackler* v. *Baker, County Judge,* 233 Ark. 690, 346 S. W. 2d 677; *Wayland* v. *Snapp,* 232 Ark. 57, 334 S. W. 2d 633. These cases refer to industrial development as a public purpose insofar as expenditure of tax funds is concerned. The constitutional questions considered were whether the legislation violated those sections of our constitution: (1) Prohibiting a city or county from becoming a stockholder in or appropriating money to, or lending its credit to a company; (2) prohibiting expenditures in excess of revenues; (3) prohibiting exemption of any property from taxation, except that used exclusively for public purposes; (4) prescribing the jurisdiction of county courts, and (5) permitting a county to issue bonds for industrial development purposes. Nowhere in either of these cases is there any discussion that leads to the conclusion that use of private property

taken under eminent domain for sale to private industries is a "public use" under our constitution and statutes. This would also lead to the conclusion which would permit the taking of the buildings for a welfare association, under the authority of *Bourland* v. *Pollock,* 157 Ark. 538, 249 S. W. 360, as hereinabove pointed out. That a project is one for which public funds may be expended is not a sufficient basis for finding that use of the property is a public use justifying the taking of private property.

Appellant also relies on the decision in *Sublett* v. *City of Tulsa,* 405 P. 2d 185 (Okla. 1966). It is significant that the Oklahoma Constitution prevents the denial of the right of the State to engage in *any occupation or business for public* purposes. We prefer the result reached in *Hogue* v. *Port of Seattle,* 54 Wash. 2d 799, 341 P. 2d 171. There it was held that the Port of Seattle could not constitutionally acquire well-developed agricultural and residential lands for industrial development purposes by eminent domain as the use was private, not public. It was further held that before the power of eminent domain could properly be exercised, the courts must find that the proposed use of the property is a really public one. The condemning authority in that case had contended that the taking of this land was incidental to the reclamation of certain marginal lands in the proposed industrial district, just as appellant contends that this industrial park is incidental to the establishment of a Port.

The city also contends that the housing authority cases constitute precedent and authority for its contention that the proposed use of this property is a public use. Appellant cites *Hogue* v. *Housing Authority of North Little Rock,* 201 Ark. 263, 144 S. W. 2d 49, and *Rowe* v. *Housing Authority of City of Little Rock,* 220 Ark. 698, 249 S. W. 2d 551, on the basis of the holding that the mere fact the property taken might later be sold to another private individual or corporation would not render the use private or the Act conferring the

power of eminent domain unconstitutional. Apparently appellant feels that this makes the purpose of the attempted taking here a valid public use. What it overlooks is that in these cases the purpose of the taking expressed in the Acts authorizing the creation of these authorities was slum clearance, elimination of unsafe, unsanitary housing, and providing safe and sanitary dwelling accommodations—which the courts found to constitute a public use. The right of sale of portions of the property after the public purpose was accomplished was held not to make the use any the less public nor the Acts unconstitutional. Here, the sole and only purpose is to acquire the property of appellees now being used for agricultural purposes and to sell or lease it to private industries. Those Acts granted the power of eminent domain in specific words and stated that the objectives were not only public purposes, but public uses.

If the people of Arkansas desire to confer the power on municipalities to acquire private property by eminent domain for industrial development, they should do so in clear and unmistakable language in view of the provisions of our constitution.

Our holding is not intended, nor should it in anywise be taken, to be critical of the commendable efforts of the public-spirited citizens constituting the Little Rock Port Authority or its Board of Directors or other officials or agencies who have collaborated in these projects. On the other hand, they are to be commended, not only for the expenditure of their energies, but for their frankness and candor in their statements and actions in treating the subject of this litigation. Yet, when commendable desire for progressive development and fundamental constitutional principles conflict, there is no doubt that the latter must prevail. Otherwise, constitutional government—government by law, on which our system will stand or fall—could not exist.

The decree is affirmed.

5-4126 411 S. W. 2d 662

Opinion delivered February 20, 1967

Robert C. Downie for appellant;

W. J. Walker for appellee.

J. FRED JONES, Justice. The appellee, Intra Products, Inc., hereinafter referred to as "Intra," is a manufacturer of drugs and pharmaceutical products, and the appellant, Ambort Medical Products, Inc., hereinafter referred to as "Ambort," is a distributor of such drugs and products in Arkansas and surrounding areas. This case involves a suit by Intra against Ambort for the sum of $1,376.02 allegedly past due on open account. Ambort filed answer and counterclaim for $2,178.53.

The case was tried to the trial court sitting as a jury and the "substantial evidence rule" applies here. The trial court entered judgment for Intra for $1,376.02, and for Ambort, on its counterclaim, for $104.00 and Ambort has appealed.

As background for the relationship of the parties, appellant had purchased drugs and related products from appellee for a number of years prior to 1962. In late 1961 or early 1962, a breakdown occurred in the structure of an aqueous hormone product produced by appellee which made the product unfit for the use for

which it was intended. All of the defective product was voluntarily recalled by appellee under advice and directions of the Federal Food and Drug Administration.

Some of the defective product had been distributed to appellant, who had in turn, sold and distributed some of it to doctors and other customers in its territory, and appellant was required to recall these sales. Appellant was given credit on its account with appellee for the products returned to appellee, but appellant contended that appellee owed for additional expenses incurred by appellant in picking up the defective product from its customers.

After considerable negotiations were carried on between the parties, appellee finally credited appellant's account to the extent of the balance owed by appellant in the approximate amount of $500.00. Appellant and appellee ceased doing business with each other for a short time but later resumed their business relations but on more restricted month to month credit basis.

As background for the present litigation, in December 1963, appellant owed appellee $1,376.02 for drugs and related products purchased in October and November of 1963. In December 1963, appellant advised appellee that there was a "black precipitate" in some of the vials of "aqueous estrone," received by appellant from the appellee. Appellee advised the appellant that this difference in color was brought about by change in temperature and only affected the *appearance* of the product and not its safety or fitness for use, and appellee suggested to appellant that the vials showing this change be picked up from doctors' offices, upon complaint or request by the customer, and in the course of regular routine business calls by appellant's salesmen.

When appellant refused to pay its account and claimed an offset against the account for the alleged expenses it had incurred in locating and picking up some of the discolored products, appellee filed suit on the

account and appellant filed counterclaim for the expense it allegedly incurred.

Appellee sent one of its salesmen on a special trip to Missouri for the purpose of picking up and returning an order of several vials of the product at a cost of $104.00, and appellant picked up other vials from various doctors' offices over a period of several months. Appellant did not request its customers by phone to return any of the product that appeared bad, and on this point at page 75 of the transcript appears testimony as follows:

"Q. When did you make your last call with regard to this picking up?

A. Well, it is hard to say that.

Q. Approximately?

A. I am still making those calls.

Q. Still making calls to pick it up and it has been—

A. Two and a half years.

Q. Two and a half years?

A. Yes, because other drugs—

Q. Did you send telegram to any of the doctors, you call doctors on telephones make an effort to get in touch with doctors?

A. In search for these things no sir? I didn't. Cost of telegram is a lot more than going to see them."

At the trial of the case, appellant contended, as set out on pages 27, 30 and 33 of its brief as follows:

"I sent our Mr. Chudy to Missouri to pick up 25 bottles on a weekend and told him to spare no expense to get up and get them. He did and charged

the company $104.81. I have that check if you want to see it. I paid him the following Saturday when he brought the merchandise in. There was no other occasion for this trip other than to pick up this. I made the rest of the pick ups. I had to search 1,500 accounts to satisfy myself that there was no more of this out and in so doing I have it written down. Of the 1,500 searches, 143 calls produced results. That is where I found bad drugs. I didn't sell the doctor nothing and these are calls I am charging these people. In figuring my expenses in making such a call, the national average is $14.00 a call to call on a doctor, wait 2½ or three hours and any drug firm will confirm this in Arkansas. We don't have expenses national people do, it don't cost as much. At $8 a call, that is gasoline, insurance, oil, motel, food, parking meters, storage, long distance calls and then your office backing you up.

* * *

"I had 143 calls and I estimate $8.00 a call. As near as I can figure, that includes all expense I went to in getting products back off my customer's shelves.

* * *

"I am not telling the court that when I called on these doctors I called on them for the sole purpose of picking up these products and didn't talk about selling any other product or anything. I called on accounts and tried to handle this like everything was fine. If I sold an order or if I made some other adjustment not having anything to do with this, we didn't charge it against this."

Appellant relies on three points which we now discuss in order.

1

"The finding of the trial court that appellant had not met the burden of proving that trips made by appellant were made solely to pick up that defective products is without any substantial evidence to support it and is reversible error."

We have examined the record and agree with the trial court on this point.

2

"The court committed reversible error in finding that appellee should have judgment 'because this all had to do with Vitamin B-12.' "

Regardless of whether the account was for Vitamin B-12 appearing as Exhibit "A" on page three of the transcript or for the other item of the exhibit through page eight of the transcript, there is no evidence in the record that appellant had paid this account and did not owe it when the suit was filed. The trial court's finding under point No. 2 was not reversible error.

3

"The court erred in refusing to allow appellant $239.63 for its costs in replacing the defective products of appellee."

Appellant did not return, or offer to return, the products to appellee and request credit or refund.

At pages 67 and 73 of the transcript, Mr. Ambort testified as follows:

"Q. Mr. Lusher said something about samples or vials you have not returned, have you been holding these I assume for this particular hearing today?

A. Yes, sir, I have.

Q. *You propose to either return them to Mr. Lusher or Food and Drug Administration?*

A. *Yes, sir, and I have got another four hundred some odd dollars in my truck outside.*

* * *

Q. You say you carrying that stuff in your truck, is that where salesmen—

A. Was in my truck, we are not peddlers, ship from warehouse under constant control, these are in my truck today, *I don't know what disposition I am going to make, take a hammer and bust it up or give it back.*" (Emphasis supplied)

We find that there is substantial evidence in the record to sustain the judgment of the trial court in this case. The judgment is affirmed.

Affirmed.

B. & P. Inc. *v.* Letha Ann Norment

5-4090 411 S. W. 2d 506

Opinion delivered February 20, 1967

Russell and Hurley for appellant.

Harold Sharpe for appellee.

CONLEY BYRD, Justice. This appeal is prosecuted from a summary judgment entered by the trial court in favor of appellee, Letha Ann Norment, because of appellant B. & P. Inc.'s failure to respond to certain requests for admissions in the manner required by Ark. Stat. Ann. § 28-358 (Repl. 1962).

The litigation was initiated by a foreclosure petition upon a mortgage. Attached to the complaint was the note, executed in Forrest City, Arkansas; the mortgage to Bevis Shell Homes, Inc., showing a Tennessee acknowledgment; and the assignment to appellant B. & P., Inc.

After answer, appellee filed on November 5, 1965 and again on December 7, 1965 requests for admissions of fact. Appellant, by these requests for admissions, was asked to admit, among other things, that the mortgage was executed in St. Francis County, Arkansas, and that Bevis Shell Homes, Inc., to whom the note and mortgage was executed, was neither an Arkansas corporation nor a foreign corporation licensed to do business in the state of Arkansas on the date the mortgage and note were executed.

Appellant made no reply to the requests until after appellee filed a motion for summary judgment in March of 1966. The first responses filed by appellant in April of 1966 were not verified and were signed only by appellant's attorney. About two weeks later, appellant's second responses to the requests for admissions were filed, containing only the verification of appellant's attorney.

On appeal, appellant contends that the trial court abused its discretion in taking the requests for admissions as admitted because there was no time limit placed in the requests for admissions in which appellant should respond, and because in *Kingrey* v. *Wilson,* 227 Ark. 690, 301 S. W. 2d 23 (1957), we permitted the answers

to requests for admissions to be verified at the beginning of the trial.

In *Young* v. *Dodson*, 239 Ark. 143, 388 S. W. 2d 94 (1965), we held that responses to requests for adis-m sions verified by a party's attorney did not comply with § 28-358, *supra,* and that even though the responses were verified by the attorney, the requested facts would stand as admitted.

In *Kingrey* v. *Wilson, supra,* we held that the trial court did not abuse its discretion in permitting the answers to be verified at the beginning of the trial. However, when *Kingrey* v. *Wilson* was decided, the lawyers had not had as much time to become acquainted with the penalties invoked upon failure to comply with the discovery procedures provided in Act 335 of 1953, as is the situation today. Furthermore, the record is silent as to any request by appellant for permission to verify properly the answers to the requests for admissions.

Nor can we agree with appellant that it was misled by the appellee's failure to specify the time within which the requested facts were to be admitted or denied. Obviously, more than three months had elapsed from the date the requests were made until the date of the motion for summary judgment, and another month elapsed between the date of the summary judgment motion and the date of the second response. Therefore, the trial court did not abuse its discretion in accepting the facts set forth in the requests for admissions as being admitted. Ark. Stat. Ann. § 28-358, *supra.*

The facts thus admitted, together with the facts pleaded by appellant, show that Bevis Shell Homes, Inc., a Florida corporation, entered into a mortgage upon real estate in the state of Arkansas contrary to the provisions of Ark. Stat. Ann. § 64-1202 (Repl. 1966), which provides:

"any foreign corporation which shall fail or re-

fuse to file its articles of incorporation or certificate as aforesaid, *cannot make any contract in the State which can be enforced by it either in law or in equity,* and the complying with the provisions of this act after the date of any such contract, or after any suit is instituted thereon, shall in no way validate said contract." (Emphasis supplied.)

It follows that under the terms of the statute the trial court properly entered summary judgment for the appellee.

Nor can appellant find any relief in *Furst* v. *Brewster,* 282 U. S. 493, 51 S. Ct. 295, 75 L. Ed. 478 (1931), and *UPI* v. *Hernreich, d/b/a Station KZNG,* 241 Ark. 36, 406 S. W. 2d 317 (1966), which hold the statute inapplicable to transactions in interstate commerce, for the taking of a note and mortgage is not ordinarily a transaction in interstate commerce. *Hemphill* v. *Orloff,* 277 U. S. 537 (1928), and *Blumenstock Bros.* v. *Curtis Pub. Co.,* 252 U. S. 436 (1920). Furthermore, if such an issue were involved, appellant had the duty of pointing it out to the trial court, either in its pleadings or by affidavits in response to the motion for summary judgment. *Mid-South Ins. Co.* v. *First Nat'l Bank of Fort Smith,* 241 Ark. 935 410 S. W. 2d 873 (1967).

Affirmed.

S AND S CONSTRUCTION CO. ET AL *v.* A. J. STACKS ET AL
5-4116 411 S. W. 2d 508

Opinion delivered February 20, 1967

S. Hubert Mayes Jr. for appellant.

Felver A. Rowell Jr. for appellee.

CONLEY BYRD, Justice. Appellants, S and S Construction Company and Marvin Sherman, bring this appeal from a tort judgment in favor of the owner, driver and passengers of an automobile which was involved with appellants' 2010 John Deere tractor, equipped with a front end loader and back hoe attachment and being used in construction of a sewer near Highway 64 in the city of Plumerville, Conway County, Arkansas. Appellants rely upon two points only for reversal:

I. The trial court erred in admitting the opinion testimony of the investigating officer as to the point of impact.

II. The verdicts for personal injuries of appellees in this case were grossly excessive.

The facts show that appellees, Mr. A. J. Stacks et al, were traveling west on Highway 64 in the city of Plumerville when they struck the front end loader scoop with the right side of their vehicle, and then struck a cotton trailer proceeding in the opposite direction. The driver and two passengers were in appellees' vehicle, and the operator and two witnesses for appellants were present at the time of the occurrence, all of whom testified as to the point of impact. Notwithstanding, appellees called

the officer who arrived at the scene of the accident some twenty or thirty minutes later and asked him if he were able to determine the point of impact between the 2010 John Deere pay loader and the Stacks automobile. The state trooper testified that from the debris and the tire marks he was so able to determine the point of impact. Over the objection of appellants the trooper was permitted to testify as follows:

> "The Stacks car was traveling west—Of course, when I arrived at the scene, as I said, the payloader was sitting off the pavement on the shoulder, but had been in this position, digging a ditch putting in a sewer system. And on the front of the payloader is a ditch digger; and on the back of this loader is a scoop where they pick up the dirt and load it on the truck. It was sitting in this position digging this ditch, *with the scoop overhanging out into the west bound lane of traffic.* The vehicle traveling west hit the back end of the scoop of the payloader." (Emphasis added.)

We had a similar problem before us in *Reed* v. *Humphreys,* 237 Ark. 315, 373 S. W. 2d 580 (1963). We there said:

> "The collision here in question was uncomplicated and there were photographs of the automobile, truck, and the scene of the accident, showing gouges and marks on and off the road, as well as testimony of witnesses who vividly described the conditions prevailing and the scene. The police officer's testimony conflicts in part with testimony of some of appellee's witnesses who arrived at the scene before the officer; however, virtually the only fact testified to by the officer not already clearly covered by testimony of witnesses for both appellee and appellants was the location of debris on the highway, which the officer testified about, in detail and at length. As was stated in the *Waters* case, *supra,* 'The facts to be determined were not complicated.

> This was a relatively simple collision. Certainly there was no evidence to indicate that it was beyond the jury's ability to understand the facts and draw it's own conclusions. The state of the record being thus, we find that the trial court erred in allowing appellee to resort to such expert opinion.'
>
> "It follows, therefore, in the present case, that the trial court committed no error in excluding the police officer's testimony. In so holding, we take this occasion to restate the rule so succinctly stated in *Cahil* v. *Bradford,* 172 Ark. 69, 287 S. W. 595, 'Opinion evidence is not admissible when the fact is susceptible of being adequately exhibited to the jury in the ordinary way.' "

Therefore, we hold that the admission of the officer's opinion testimony as to the point of impact was error.

While the damages awarded appellees are a bit liberal, we need not review them here since the issue may not arise on a new trial.

Reversed and remanded.

DORIS MAY, ETC., *v.* SPIVEY CHEVROLET CO., INC.

5-4128 411 S. W. 2d 528

Opinion delivered February 20, 1967

J. B. Milham for appellant.

No brief for appellee.

CONLEY BYRD, Justice. This collateral attack on an order removing the disabilities of a minor was initiated in the trial court by appellant Doris May as next friend of her son, Wayne May, against the appellee, Spivey Chevrolet Company. Appellant elected to stand on her complaint and prosecutes this appeal from an order sustaining appellee's demurrer. No brief has been filed by appellee.

Early in 1966, appellant had obtained an order from Saline Chancery Court removing her son's disabilities. Later, appellant filed this action against appellee seeking to have the order removing disabilities modified, for cancellation of a note and contract and for other relief. Appellee demurred to the complaint and amendment to the complaint, which were properly sustained.

Since enactment in 1869 of the procedure for removal of disabilities of minors, this court has consistently held that a decree valid on its face removing disabilities of a minor may not be attacked collaterally. *Hindman* v. *O'Connor,* 54 Ark. 627, 16 S. W. 1052; *Young* v. *Hiner,* 72 Ark. 299, 79 S. W. 1062; *Gilmore* v. *Union Sawmill Co.,* 178 Ark. 297, 10 S. W. 2d 517. Discussing these cases in *Wilson* v. *Magnolia Petroleum Co.,* 181 Ark. 391, 26 S. W. 2d 92, Justice Hart observed, "No doubt numerous rights have grown up under these decisions, and the holding of the court has become a rule of property." Our present statute, Ark. Stat. Ann. § 34-2001 (Repl. 1962), with the added provision that judges may act in vacation, is a re-enactment of the 1869 law. Obviously, since the minor is not a party to this action, and the decree removing the disabilities of the minor may not be collaterally attacked, the demurrer was properly sustained for defect of parties.

Affirmed.

PLANTERS LUMBER COMPANY, INC. *v.* THE WILSON COMPANY, INC.

5-4108 413 S. W. 2d 55

[Supplemental opinion on rehearing. Rehearing denied.]

[Original opinion delivered February 13, 1967, p. 1005, 413 S. W. 2d 55.]

LYLE BROWN, Justice. Appellee, The Wilson Company, Inc., contends there is no distinction between the case at bar and *Sebastian B. & L. Assn.* v. *Minten,* 181 Ark. 700, 27 S. W. 2d 1011 (1930). In *Minten* the lender disbursed the full amount of the mortgage money. In *Minten* there was no guarantee placed of record whereby the building and loan association was committed to a stipulated advancement for construction purposes. In both these respects the opposite is true in the case at bar.

We are asked to clarify our opinion with respect to Wilson's priority for interest. As to Lot 2, Wilson is entitled to priority for interest on $11,334.19; as to Lot 4, Wilson is entitled to priority for interest on $10,805.72. With regard to clarification requested by appellee on certain minor items, it is sufficient to say that the chancellor made awards in these respects and we do not disturb them on appeal.

[redacted]