[redacted]

[redacted]

[redacted]

[redacted]

GEORGE ALEXANDER BROWN *v.* ADEPT, INC., LOUISE SWETNAN, JOHNNY MYERS ET AL

5-4118 411 S. W. 2d 868

Opinion delivered February 27, 1967

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

Fred Newth, Jr., for appellees.

CARLETON HARRIS, Chief Justice. Appellees, Adept, Incorporated, an Arkansas corporation, Johnny Myers, Louise Swetnan, W. B. McSwain, Ted W. Calva, J. O. Anderson, Joe Calva, J. B. Fowler and Buel C. Worthen, instituted suit against, among others, George Alexander Brown, appellant herein, to restrain him from extracting, pumping, or diverting waters of Old River Lake below the natural water level of the lake. A hearing was conducted on September 9, 1965, for the purpose of determining whether a temporary injunction should be issued during the pendency of the suit. At the conclusion of the hearing, the court orally ordered Brown

to cease pumping water from the lake as long as the water level was 12 inches below the spillway; however, no written order was entered. On July 18, 1966, appellees filed a motion asserting that Brown was pumping water from the lake in violation of the court's order of September 9, 1965, and the court was asked to find appellant in contempt. On July 19, a special Chancellor passed the question of contempt until a subsequent date, but again directed Brown to discontinue the pumping of water from Old River Lake immediately, and further required appellant to perfect a surety bond in the amount of $1,000.00, "guaranteeing this court that the defendant will not pump water from Old River Lake until further orders of this court." A written order was entered. No bond was required of the plaintiffs (appellees) in either instance. Thereafter, on August 4, 1966, a hearing was held before the regular Chancellor on the motion to hold appellant in contempt of court. Since the original order had been made orally, nearly a year before, the Chancellor, stating that he could not remember the exact language used, refused to hold Brown in contempt, but appellant was again enjoined and restrained from pumping, and the court further directed that the surety bond made by Brown be continued in effect. From the order so entered, appellant brings this appeal. For reversal, it is contended that "the court erred in awarding a temporary injunction to appellees without first requiring a bond in an adequate amount, and with sufficient sureties, insuring that appellees would pay to Brown any damages resulting from improper issuance of the temporary injunction."

Chapter 2 of Title 32, Arkansas Statutes, 1962 Replacement, deals with "Proceedings for Injunction." Section 32-206 provides as follows:

"In every case, the court or judge granting an injunction shall specify in the order therefor an amount, for which the party obtaining it shall give security in a bond to the party enjoined, before the injunction shall become effectual; which amount shall be sufficient to

cover all the probable damages and costs that may be occasioned by the injunction. The court or judge may prescribe the effect of the bond, so as to secure to the party enjoined the damages to which he may become entitled, if it is finally decided that the injunction ought not to have been granted.* * *"

Section 32-207 states:

"The order of injunction shall not be issued by the clerk, until the bond mentioned in the last section has been executed in his office by one [1] or more sufficient sureties of the party obtaining the injunction.* * *"

Again, Section 32-212 provides:

"Where notice of the application for an injunction has been given to the party enjoined, it shall not be necessary to serve the order upon him; he is bound by the injunction as soon as the bond required of the adverse party is executed."

In *Harahan Viaduct Improvement District* v. *Martineau,* 172 Ark. 189, 288 S. W. 10, the question here presented was passed upon by this court. We said:

"Our statute provides as follows: 'In every case, the court or judge granting an injunction shall specify in the order therefor an amount for which the party obtaining it shall give security in a bond to the party enjoined, before the injunction shall become effectual, which amount shall be sufficient to cover all the probable damages and costs that may be occasioned by the injunction.' Section 5801, C. & M. Digest[1]. Under the above statute, before the injunction order by the court could be issued or become effectual, the court must specify that the party obtaining it shall give a bond to the party enjoined, naming an amount sufficient to cover all possible damages and costs that may be occasioned by the injunction. Compliance with the above statute on the part of the judge of the chancery court was absolutely essential to his jurisdiction to direct the clerk to issue the order and to have the order put into effect.

[1]This section is identical to Section 32-206.

Without compliance with the above statute, any order issued by the clerk would be absolutely void, and disobedience of the order on the part of the defendants could not be held a contempt of the court or of the judge issuing the order. In other words, a compliance with the above statute is essential to the jurisdiction of the chancery court, or judge in vacation, to have the order for a temporary injunction issued and made effectual.

"* * * The chancery court or judge had no jurisdiction to order the issuance and enforcement of a temporary injunction without complying with the above statute."

Appellees present two arguments, the first being that the statutory requirements for a bond only apply in those cases where a temporary injunction is entered before a hearing. We do not agree with this interpretation for the statutes make no such distinction. The making of the bond by the party obtaining a temporary injunction seems to be mandatory in this type of case, and, of course, the purpose of the bond is to protect the party against whom the injunction is directed, if it develops when the case is heard on its merits that the temporary injunction should not have been granted.

The second contention advanced by appellees is that the injunctions entered actually were not temporary, but rather were permanent, and appellee states that the court is empowered to enter permanent injunctions without requiring a bond from the plaintiff. We agree with this last statement, but we disagree with the statement upon which it is predicated, i. e., that the injunctions granted were permanent. Normally, it would appear that after three hearings, any order entered would be of a permanent nature, but an examination of the record discloses that no hearing involving the merits of the case was ever held. In fact, when discussing the order to be entered on August 4, counsel for appellant asked:

"This is a temporary order pending the hearing on its merits?"

The court replied:

"If it is a temporary order, whatever it may be called, temporary, in between, quasi-permanent, it is an order prohibiting pumping in Old River Lake, reiteration of the July 21, 1966, order of Special Chancellor Louis Rosteck."

It will be noted that every descriptive word used by the court denoted the *temporary* character of the order; the court *never* used the word, "permanent." We hold that, under the authority heretofore cited, the injunction issued was not binding.

Appellant also attacks the validity of the court's order in requiring a bond from appellant to the effect that he would "comply with the terms of the *temporary* (our emphasis) injunction entered on the 21st day of July, 1966."[2] We agree that there is no authority for this action, under the circumstances of this case; enforcement of the court's order (if it had been legally entered) would properly be through contempt proceedings.

Reversed.

---

[2]This quotation from the bond itself is further evidence that the order was only temporary. At the conclusion of the hearing on August 4, the following colloquy took place between the court and counsel:

"Mr. Haley: No bond is required of Plaintiffs?

"The Court: No bond of the Plaintiffs, a one thousand dollar bond in the July 21, 1966, order will be required of the Defendant as Judge Rosteck has required on his hearing. Any other questions.

"Mr. Haley: We previously filed a bond referring to the July 21, 1966, order and if the Court will void the necessity of filing additional bond, if this bond were deemed sufficient and approved for purposes of this subsequent order.

"The Court: The bond was issued covering that very order and *this Court is reiterating and affirming that order* (our emphasis) and this bond is sufficient."

BOBBY J. LAWSON ET AL *v.* TAYLOR HOTELS, INC., ET AL

5-4101 411 S. W. 2d 669

Opinion delivered February 27, 1967

Thomas E. Sparks, for appellant.

Clint Huey, Paul K. Roberts and *Tom Haley,* for appellee.

GEORGE ROSE SMITH, Justice. The only question now presented is whether the appellants, Bobby J. Lawson and Lawson & Lyon Hotel, Inc., as lessees of the Southern Hotel in the city of Warren, are entitled to specific performance of an option in the lease by which they had the right to purchase the hotel at any time during the term. The chancellor refused to order specific performance, holding that the lessees' failure to pay or even to tender two delinquent monthly installments of rent precluded them from exercising the option to purchase. We are unable to say that the chancellor was wrong.

The material facts must be winnowed from an extensive record. On December 30, 1963, the appellee Taylor Hotels, Inc., as owner, leased the hotel land and

building to Omar Greene for a term of one year beginning January 13, 1964. The rent was $525.00 a month, payable in advance on the first day of each month. The lessor agreed to keep in force an existing $70,000.00 insurance policy on the hotel. The lease contained an option by which the lessee might buy the property by assuming an outstanding purchase-money mortgage and paying an additional $10,000.00—a third in cash and the rest over a period of ten years.

By assignment the appellants acquired the leasehold interest. H. E. Taylor, president of the corporate lessor, died in June, 1964. In August the lessees began negotiating with Taylor's widow for the purchase of the hotel, not under the option but under a new proposal by which they would have bought the Warren Music Company along with the hotel.

On October 12 the hotel building was destroyed by fire. Two days later the parties reached an agreement about the sale of the music company, but Mrs. Taylor broke off the negotiations about the lots where the hotel had stood. Before the fire she had been asking $30,000.00 for the lessor's equity in the property—a figure considered by the lessees to be excessive. After Mrs. Taylor's withdrawal there was no more discussion about a sale of the hotel site.

When the hotel burned there was pending in the chancery court a suit between Taylor Hotels, Inc., and the estate of H. E. Taylor, involving the ownership of personal property. On November 23 Taylor Hotels filed in that case a petition reporting the availability of insurance proceeds in the amount of $70,000.00 and asking that $64,977.88 of the money be used to satisfy the outstanding mortgage, with the surplus remaining on deposit subject to the court's orders. The next day the court entered an order granting the prayer of the petition.

On December 1 the lessees gave notice that they were exercising the option to purchase and also filed

an intervention in the chancery case. In that pleading they asked for specific performance of the option to purchase and also asked that the surplus insurance proceeds be paid to them. With the intervention the lessees paid into court a third of the $10,000.00 purchase price and tendered their promissory note for the other two thirds. The chancellor, as we have indicated, held that the lessees' failure to make the rent payments that were due on October 1 and November 1 barred their right to specific performance.

We think the chancellor was right. There is no contention that the destruction of the hotel building relieved the lessees of their duty to pay rent. That obligation, absent any agreement to the contrary, was not affected by the fire loss. *Davis* v. *Shepperd,* 196 Ark. 302, 117 S. W. 2d 337 (1938); *Burger* v. *Boyd,* 25 Ark. 441 (1869). Hence the lessees were in the attitude of seeking specific performance when they were themselves in default. That position is not tenable. In *Lacey* v. *Bennett,* 210 Ark. 277, 195 S. W. 2d 341 (1946) we held that a party seeking specific performance "must show that he has all the time been ready, able and willing to perform his part of the contract" and that he has complied with the terms of his contract "by performing or offering to perform, on his part, the acts which formed the consideration of the undertaking on the part of the defendant." In the lease now in question there was no consideration for the option to purchase except the lessees' agreement to pay rent. Yet no tender of the back rent was made during the thirteen months or more that the case was pending in the trial court.

The appellants argue that the lessor would not have accepted such a tender and that therefore they were excused from making what would have been a useless gesture. *Quality Motors* v. *Hays,* 216 Ark. 264, 225 S. W. 2d 326 (1949). There are two flaws in that argument. First, it is by no means certain that the lessor would have refused the tender. The matter was never discussed

between the parties. While it is true that on October 14 Mrs. Taylor dropped the negotiations for a sale to these appellants and that later on she sought to interest another prospective purchaser in the property, we cannot say with confidence that the tender would have been rejected. Mrs. Taylor had already engaged an attorney and no doubt would have consulted him. There is nothing in the record to indicate what his advice would have been.

Secondly, and perhaps more important, the tender of the delinquent rent, amounting to $1,050.00, would, whether it was accepted or not, have gone far toward establishing the lessees' good faith in the matter. That good faith was manifestly open to question. After the negotiations fell through on October 14 the lessees made no move until the lessor had committed itself to using the insurance money to pay the mortgage. Then, perhaps sensing a windfall both in the purchase of the hotel site and in the capture of the surplus insurance money, the appellants for the first time declared their intention to exercise the option to purchase.

We think it significant, however, that even in that declaration they acted in such a way as to avoid the possibility of any financial loss. That is, there was no risk in their tender of a third of the purchase price, because the lessor could not accept that money without binding itself to sell the property. But the situation with respect to the rentals was materially different. That debt, under the law, was unconditionally due. Thus the lessor might have accepted the past-due rent and still have contested the lessees' right to purchase the property. Upon these facts the chancellor was not without justification in attaching controlling importance to the lessees' continued disinclination to pay the rent that was owed.

At the oral argument counsel for the appellants expressed some anxiety about the possibility that the fin-

al decree, by reason of its reference to the chancellor's comprehensive interim findings, might be construed to include a money judgment against the appellants for the overdue rentals. The appellees' attorney disclaimed any such understanding of the decree; so that issue passes out of the case.

Affirmed.

BYRD, J., disqualified.

KENNETH JOHNSON *v.* PAT NELSON

5-4139 411 S. W. 2d 661

Opinion delivered February 27, 1967

Loftin, Herrod & Cole, for appellant.

Cockrill, Laser, McGehee, Sharp & Boswell, for appellee.

PAUL WARD, Justice. This is an action to recover for injuries to Kenneth Johnson, age fourteen, (referred to as appellant) brought by his father, Autice E. Johnson. Appellant was struck by a car driven by Pat Nelson (appellee). From a jury verdict in favor of appellee comes this appeal.

Background Facts. Appellee was driving east on Ninth Street in Little Rock, and when she had crossed

or was in the act of crossing Cumberland Street she saw three boys (one being appellant) walking west along the sidewalk on the south side of Ninth Street. Suddenly appellee saw one of the boys (later identified as appellant) step or fall into the street. Appellee allegedly promptly tried to stop her car but could not do so before she hit and injured appellant. The point of impact was about forty feet east of the east side of Cumberland Street.

The only point relied on by appellant is that "The Court erred in giving an instruction on behalf of defendant for a sudden Emergency . . . ." The instruction referred to was No. 4 which reads:

> "A person who is suddenly and unexpectedly confronted with danger to himself or others not caused by his own negligence is not required to use the same judgment that is required of him in calmer and more deliberate moments. He is required to use only the care that a reasonably careful person would use in the same situation."

We think the above instruction was correct. It is an exact copy of AMI 614, Sudden Emergency. In turn, the AMI instruction is based on and justified by the case of *Hooten* v. *DeJarnatt,* 237 Ark. 792, 376 S. W. 2d 272.

Apparently appellant does not argue that the instruction is inherently wrong, but that it was not justified under the testimony in this case. That is, appellant argues there is no substantial evidence in the record from which the jury could find that an emergency actually existed and, if so, that appellee did *not* cause it. We think the record does contain such testimony. *Hansel Boyd,* who was at the intersection in his car on the north side of Ninth Street when the accident happened, testified he saw the boys and there was nothing "to suggest there was going to be an accident". *Jerry Horton,* who was following behind appellee on the south side of Ninth Street, and who also saw the boys, testified; ap-

pellee was not exceeding the speed limit; there was nothing to alarm him, and; there was nothing to suggest one of the boys "might wind up in the street". *Thelma Gustus*, who was on Ninth Street near the scene of the accident and saw appellant fall in the street, testified:

> "Q. Did you see what caused Kenny to be in the street?
>
> A. Well, I don't know whether he slipped or turned his ankle or stumbled or something to that effect. It seemed like it give way.
>
> Q. All right. Now, when you saw that could you tell us where Mrs. Nelson's car was at that time?
>
> A. Well, she looked like she was right on him. Just like it was going—that was it—she hit him."

None of the above testimony is denied by any witness.

It must be concluded therefore that there is substantial evidence in the record to justify the trial court in giving instruction No. 4.

Affirmed.

JEFFERY STONE CO. *v.* LESTER H. RAULSTON

5-4131 412 S. W. 2d 275

Opinion delivered February 27, 1967

[Rehearing denied April 3, 1967.]

Terral, Rawlings, Matthews & Purtle, for appellant.

Edward Boyett, for appellee.

PAUL WARD, Justice. This is a Workmen's Compensation case. Jeffery Stone Company (appellant) is the employer and Lester H. Raulston (appellee) is the

claimant. Appellant's insurance carrier was a defendant and is also one of the appellants. Appellee's claim is based on silicosis.

The Referee denied appellee's claim, the full Commission allowed the claim, and the Circuit Court upheld the Commission.

Appellant here urges four separate points for a reversal. These points will be designated and discussed in the order presented to us. Necessary references to the record will be made as each point is discussed.

One. The essence of appellant's first contention is that appellee must offer more than mere *substantial* evidence that his disability was caused by silicosis because he was not employed for a period of five years. A basis for this contention is Ark. Stat. § 81-1314 (b) (2) (Repl. 1960). The portion of subdivision (2) applicable to the facts here reads as follows:

> "In the absence of conclusive evidence in favor of the claim, disability or death from silicosis . . . shall be presumed not to be due to the nature of any occupation within the provisions of this section, unless . . . the employee has been exposed to the inhalation of silica dust . . . over a period of not less than five (5) years . . . ."

We see no merit in this contention.

Both the Referee (who denied the claim) and the full Commission found appellee had been in the employment of appellant for a period of more than five years, and we think they were correct in doing so. Appellant admits appellee began work on June 15, 1959 and quit (or had to leave) on October 8, 1964—a period of three months and twenty three days more than five years. However, there are some deductions which appellant would make as presently shown.

(a) It is true that there was a period of two months and ten days when appellee did not work. However it does not clearly appear that he was not still in the employment of appellant during this time. Appellee said he thought he was. At any rate we think the Commission wa. justified in so finding. Even if he was not, that still leaves a period of one month and thirteen days over the five year period.

(b) The record shows that appellee was not actively working, due to illness, on two different occasions totaling a few days more than the one month and thirteen days mentioned above. Appellant apparently contends that these two sickness periods should also be deducted. On this point we agree with appellee that, under a liberal construction of the statute in favor of the claimant, these sick periods should not be deducted from his total period of employment. To carry appellant's interpretation of the statute to its fullest possibility an employee could be penalized for Saturdays, Sundays, holidays and one or two days of sickness. In any event, there is substantial evidence to support the Referee and the Commission on this point.

There is no merit in the contention that appellee became disabled prior to October 8, 1964. In the case of *Ark. Coal Co.* v. *Steele,* 237 Ark. 727, 375 S. W. 2d 673, we said:

> "In silicosis cases the statute commences to run at the time of disablement and not from the time the claimant learns that he is suffering from the disease, and disablement does not occur until the employee is unable to work and earn his usual wages."

Also, in *Hixon Coal Co.* v. *Furstenberg,* 225 Ark. 568, 284 S. W. 2d 120, it is stated:

> "In silicosis, the injury may occur many years before the disease becomes manifest, as the accumulated effects of the deleterious substance are of slow, insidious nature."

Two. We cannot agree with appellant's contention there is no substantial evidence to support a finding that appellee's disability was caused from silicosis.

Ark. Stat. Ann. § 81-1314 (Repl. 1960) deals with occupational diseases, and subsection (b) (1) reads:

> " 'Silicosis' means the characteristic fibrotic condition of the lungs caused by the inhalation of silica dust . . ."

It would serve no useful purpose to set out in detail the voluminous testimony of some four or five doctors on this issue, some of which is somewhat conflicting if not confusing and irrelevant. It suffices, we think, to point out some facts and testimony to show *substantial* evidence to support the Commission on this point.

In June of 1959 appellee was a strong healthy man six feet and four inches tall, weighing 192 pounds. In 1964 he was admittedly totally disabled, weighing around 157. It is also admitted that for years he worked under conditions where he was exposed to the inhalation of silica dust. Testimony shows that at times appellee had dust all over him, and even in his nose and mouth to the extent he was forced to wash before drinking water—sometimes his teeth were not visible. There was testimony that gravel picked up where he worked contained as much as 60 silican dioxide. One doctor diagnosed appellee's ailment as pulmonary fibrosis. Another doctor's report showed appellee had a fibrotic process with fibrosis of both lungs. Still another doctor said appellee showed a finely granular fibrotic appearing process throughout both lungs. One doctor said appellee was totally disabled because of silicosis.

Three. It is here argued by appellant, for the first time, that it was error to allow appellee full compensation for total disability caused by silicosis. This argument is based on certain medical testimony that appel-

lee was also suffering from other ailments. For two reasons we do not agree with this contention.

First, the issue was not raised before the Commission and, under our well established procedural practice, it cannot be raised here.

Also, as we have heretofore pointed out, the Commission found appellee was totally disabled because of silicosis and we have sustained that finding.

Four. Finally, appellant contends "The Commission erred in holding that appellant had the burden of proving that appellee was *not* suffering from silicosis." (Our emphasis.) Again, we cannot agree with this contention for two reasons.

One, we do not find in the record where the Commission placed any such burden on appellant. Two, as is made clear from what we have heretofore said, the finding of the Commission is supported by substantial evidence.

Affirmed.

R. T. Ueltzen et al *v.* Billy Roe and Neva Roe Sowl

5-4121 411 S. W. 2d 894

Opinion delivered February 27, 1967

David O. Partain, for appellant.

Batchelor & Batchelor, for appellee.

LYLE BROWN, Justice. This is a suit to quiet title brought by plaintiffs-appellees, Billy Roe and Neva Roe Sowl, brother and sister. They brought suit against the six brothers and sisters of their mother, Maude Roe. Basing his findings on adverse possession, estoppel, and laches, the trial court vested title in appellees. Appellants contend, first, that the Roe family failed to establish hostile possession, and, second, that no notice of adverse claim was ever brought home to appellants.

Here is the opinion of the trial court. It sets out the issues with clarity and of course states the factual conclusions, together with the law found to be applicable:

OPINION

The land in controversy, a farm of about 277 acres lying southeast of the town of Graphic in Crawford County, Arkansas, was owned by Laura and R. R. Ueltzen, wife and husband, prior to 1900. To this union six children were born, namely, Maude Roe, plaintiffs' mother, R. T. Ueltzen, Onenta Ward, W. R. Ueltzen, Chloe Durham, and Mae Henzig. Defendant, Emma Cash, is a daughter of R. R. Ueltzen by a former marriage.

This family lived on the property until about 1913 or 1914, when R. R. Ueltzen sold all his personal property and moved to Oklahoma with his family. What happened to the property from then until Maude Roe took possession and raised her family there is not clear. R. R. Ueltzen died, seized and possessed of this land about 1925 or 1926; and his wife, Laura, continued to live in Oklahoma. In 1929 this property went delinquent and was sold for nonpayment of real estate taxes. At this time, plaintiffs and their mother were living on "Grant Farm" on Highway 64 east of Mulberry. During the time the property was in possession of persons under the tax forfeiture, all improvements were destroyed.

On April 3, 1934, Maude Roe obtained a Redemption Deed from the State of Arkansas to this property and apparently went into possession. Here the testimony is in conflict. Plaintiffs testified that Mrs. Roe contacted her mother, Laura, and her brothers and sisters in Oklahoma, requesting them to contribute to the amount of money necessary to redeem the land; but they refused and agreed with their mother, Maude Roe, that if she would redeem the property herself, she could have it as her own property. To corroborate this testimony, Amos Watkins testified that he was an old friend of the family and about two or three years ago he met Billy Roe and R. T. Ueltzen at the store at Graphic and in the conversation asked R. T. Ueltzen what had happened to the old home place, and he stated to him [Watkins] that he and his brothers and sisters had given the property to their sister, Maude Roe. This is denied by the defendant, R. T. Ueltzen, and by Mae Henzig, who testified that they had not given the property to Maude Roe, but had agreed that Mrs. Roe put up the money and redeem the property in lieu of rent.

Laura Ueltzen died intestate in Oklahoma about 1936 or 1937.

Maude Roe and her husband, shortly after 1934,

moved into an old log cabin on the place, daubed the cracks with clay, and raised their family there.

Between 1934 and 1940, plaintiffs' father built a log share cropper's house some distance west of the log cabin where they lived. Plaintiff Sowl later lived in this house.

About 1942, plaintiffs and their parents built a frame farm home upon this land, which was still farther west of the old log home and on the county road. They also built a barn.

From April 1934 to about 1947, the year plaintiffs' father died, the Roes had cut from this land all merchantable timber, farmed the land for their living, keeping and using all benefits from the land.

About 1947, plaintiff Billy Roe built a two-room home on the land in controversy.

Plaintiffs testified, and the defendants did not deny, that they visited from time to time in all of these homes, spent nights there, and knew of the making of all improvements to which they did not contribute anything or claim any benefits from the farm.

On June 15, 1956, plaintiffs' mother, Maude Roe, executed and delivered to Billy Roe and Neva Roe Sowl a warranty deed to all of said property, which deed was duly recorded shortly thereafter. About two years later, Maude Roe died, intestate.

In the latter part of 1957, Billy Roe constructed a new frame farm home on the land, where he now lives.

Plaintiffs' mother, Maude Roe, paid all taxes upon the land in controversy for the years 1933 to 1955, inclusive, and plaintiffs have paid the taxes for the years 1956 through 1964.

Plaintiffs and defendants are tenants in common. Plaintiffs claim title to the entire tract by adverse pos-

session. It must be remembered at the outset that the possession of one tenant in common is the possession of all tenants. *Franklin* v. *Hempstead County Hunting Club*, 216 Ark. 927, 228 S. W. 2d 65; *Ashley* v. *Garrett*, 218 Ark. 126, 234 S. W. 2d 513; *Woolfolk* v. *McDonnell*, 215 Ark. 34, 219 S. W. 2d 223; *Gibbs* v. *Pace*, 207 Ark. 199, 179 S. W. 2d 690. And, further, in view of the family relation stronger evidence of adverse possession is required than in the case where no such relation exists. *McGuire* v. *Wallis*, 231 Ark. 506, 330 S. W. 2d 714; *Staggs* v. *Story*, 220 Ark. 823, 250 S. W. 2d 125; *Baxter* v. *Young*, 229 Ark. 1035, 320 S. W. 2d 640.

It is also well established that in order for the possession of a tenant in common to be adverse it is incumbent upon him to bring home to his cotenants knowledge of his hostile claim, either directly or by acts so notorious and unequivocal that notice must be presumed. *McGuire* v. *Wallis, supra*; *Hildreth* v. *Hildreth*, 210 Ark. 342, 196 S. W. 2d 353; *Smith* v. *Kappler*, 220 Ark. 10, 245 S. W. 2d 809.

The court is faced with a difficult problem indeed. For as the court said in *Linebarger* v. *Late*, 214 Ark. 278, at p. 282, 216 S. W. 2d 56:

> "Where property is held in joint tenancy, the possession of one is deemed to be conjunctive with others, hence there is mutuality of seisin; and this status presumptively continues until some affirmative act by the joint tenant who holds for all is of such a nature as to warn other proprietors that the status has shifted from mutuality to hostility. This may be done in so many ways that judges and text writers have not undertaken an enumeration. What in one case would be sufficient as a warning might not be enough in another. Relationship of the parties, their reasonable access to the property and opportunity or necessity for dealing with it, their right to rely upon conduct and assurances of the

tenant in possession, kinship, business transactions directly or incidentally touching the primary subject matter, silence when one should have spoken, natural inferences arising from indifference—these and other means of conveying or concealing intent may be important in a particular case, but not controlling in another; for after all what a designated plaintiff or defendant had in mind when he or she consummated an act or engaged in a course of conduct often depends upon the personal equation and the individual's method of expression. There can, therefore, be no 'open and shut' rule by which purpose can be measured."

In order to arrive at a correct solution, it is necessary to look at the evidence as a whole using as a yardstick the rules above set forth.

In the cited case of *Linebarger* v. *Late,* decided in 1948, the court took judicial knowledge that 1930 and the years immediately following were periods of economic stress when property values generally were adversely affected. The testimony that Maude Roe tried unsuccessfully to get her mother, brothers, and sisters to contribute to the fund necessary to redeem this land, coupled with the testimony of Amos Watkins to the effect that R. T. Ueltzen told him that he and his brothers and sisters had given the old home place to Maude Roe, compels the court to consider this as a circumstance in the chain of events creating a natural inference of indifference on their part. In 1934 money was scarce and it is unbelievable that Maude Roe would have raised the money alone to redeem this land for the meager future rent from a farm unimproved and at a time when there was no market for products from the operation of such a farm.

The tax deed was recorded. It is fair to say that the defendants knew of the execution and recording of this deed. To establish adverse possession against his cotenants the plaintiffs have the burden of proving eith-

er that they brought notice home to them or that their conduct was so open and unequivocal that they should have known of the hostile claim. There is no testimony that the plaintiff did in so many words say to the defendants, "We are claiming this land as our own," but the rule is in the conjunctive. So far, learned counsel for the parties have failed in their excellent briefs to cite a decision or text that defines "Such acts or conduct so unequivocal and notorious in character that notice will be presumed," and the court has found none. Possession alone is insufficient. Payment of taxes, while strong evidence of a claim of title, it alone is insufficient. So, as said before, the evidence as a whole must be examined and each case stands on its own bottom.

Significant in this case, Maude Roe, in 1956, executed a warranty deed to all of the land to plaintiffs, which deed was duly recorded. Up to this time fairly substantial improvements had been made on the land and after this deed, and more than seven years before the commencement of this action, Billy Roe built his own substantial frame home upon this property. The defendants visited in this home and the other homes and knew of these improvements.* * * *

After the entry of Billy Roe under the deed from his mother and more than seven years from that date, some oil company was about to drill for oil and gas under a lease from plaintiffs. An examiner of the abstract of title made a requirement of protective leases from the defendants. For the first time in thirty years the defendants made claim to an interest in this land.

Our courts have ordinarily held that to constitute estoppel, adverse possession or laches with reference to a cotenant, that no one or two specific acts, and sometime even more, necessarily, of themselves amount to a disseisin, but the following each are items to be considered in determining whether the possession is adverse, or the individual is estopped or guilty of laches and they include such acts as (1) possession of the

property; (2) payment of taxes; (3) enjoyment of rents and profits; (4) making of improvements (particularly of a substantial nature); (5) payments of insurance made payable to himself; (6) holding possession of lands for a long period of time, such as 30 years; (7) treating property as one's own; (8) selling timber; (9) executing leases; (10) assessment of property in one's own name; (11) selling crops; (12) the execution, delivery, and recording of a deed by one cotenant which purports to convey the entire property; and (13) generally treating property as his own. *Jones et al* v. *Morgan et al,* 196 Ark. 1153, 121 S. W. 2d 96 (1938); *Hildreth et al* v. *Hildreth,* 210 Ark. 342, 196 S. W. 2d 353 (1946); *Linebarger* v. *Late, supra; Ulrich* v. *Coleman et al,* 218 Ark. 236, 235 S. W. 2d 868 (1951); *Johnson et al* v. *James,* 237 Ark. 900, 377 S. W. 2d 44 (1964).

Laches or estoppel, is not brought into being merely by delay, but by delay that works a disadvantage to another. So long as the parties are in the same condition, it matters little whether one presses a right promptly or slowly within limits allowed by law. But where, knowing his rights, he takes no steps to enforce them until the condition of the other party has, in good faith become so changed that he cannot be restored to his former state, if the right be enforced, delay becomes inequitable, and operates as estoppel against the asserted right. This disadvantage may come from loss of evidence, change of title, intervention of equities, and other causes, the making of substantial improvements to the land, and other causes, for where the court sees negligence on one side and injury therefrom on the other, it is a ground for denial of relief.

Put in other terms, estoppel is merely the manner, in courts of equity, and sometimes even in courts of law, where when one party, or one group of parties sit idly by and do not speak when, in good conscience, they should speak, they will not later be heard to speak when they should in good conscience, remain silent. *Steele* v.

Jackson, 194 Ark. 1060, 110 S. W. 2d 1 (1937); *Linebarger* v. *Late, supra.*

Plaintiffs and their mother and father have had the exclusive and complete use, control, and possession of all of the land for more than thirty consecutive years prior to the commencement of this action. None of the defendants has been in possession of, or attempted, in any wise to exercise any dominion over, or possession of, the property during all of this time. There were no buildings or improvements on this property when it was redeemed in 1934. All improvements were made more than seven years before the commencement of this action and with full knowledge of defendants.

Plaintiffs' mother paid all taxes in her own name, in addition to the redemption, for the years 1933 to 1955, inclusive, and plaintiffs have paid taxes in their own names for the years 1956 to 1964, inclusive. Plaintiffs executed an oil and gas lease in their own names. Plaintiffs cut and sold all merchantable timber.

For all of these thirty years the defendants, while visiting and knowing that plaintiffs were making permanent and valuable improvements and doing other acts, sat idly by and made no claim until aroused by possible enrichment from the drilling of a gas well. Individuals do not slumber on their property rights for thirty years under circumstances like this.

Considering all of these factors in the aggregate, the court is convinced that plaintiffs are entitled to have their title to said property quieted in them by reason of adverse possession, estoppel, and laches.

The testimony recited by the chancellor, supplemented by a study of the entire record, reveals only one important factual issue in controversy. This concerns the circumstances surrounding entry upon the lands by Maude Roe, that is, whether she entered on the basis of an agreement with the other heirs that the place would

be hers if she would redeem it. On this point the chancellor, who had the advantage of seeing and hearing the witnesses, ruled in favor of appellees, and we certainly cannot say his findings were contrary to a preponderance of the evidence. The circumstances of the entry as found by the trial court, the silence of the aunts and uncles for three decades, together with the multitudinous acts of ownership recited in the record and undisputed, justify the factual conclusions of the chancellor.

Affirmed.

FOGLEMAN and BYRD, JJ., dissent.

JOHN A. FOGLEMAN, Justice, dissenting. The learned trial judge's opinion contains a thorough and concise statement of the facts disclosed by this record and excellent statements of legal principles. My disagreement with him and the majority lies in what I take to be misapplication of law to the facts and their overlooking certain applicable legal and equitable principles. I am unable to distinguish this case from other decisions of this court which reached a contrary result.

The fundamental basis of appellees' claim is an alleged parol gift of the land. This is clearly alleged in the complaint and the appellees attempted to make a showing that their mother obtained a redemption deed from a tax forfeiture to the state based upon an agreement with her brothers and sisters that if she would redeem the land it would be hers. Some of appellants concede that there was an agreement but they say that it was that she could live on, use and occupy the property without payment of rent if she would pay the taxes.

Here the appellees are confronted with the requirement that they show the parol gift, not by a mere preponderance of the evidence, but by evidence that is clear, convincing and satisfactory, or, as sometimes stated, by evidence that is clear and unequivocal. *Gibbs* v. *Pace*, 207 Ark. 199, 179 S. W. 2d 690. Not only is this parol gift the fundamental basis of appellees' claim, but it is

also the foundation stone of the opinion of both the trial court and the majority that the possession of appellees was adverse and hostile to appellants.

My examination of the testimony in support of the parol gift discloses that the evidence supporting it is far from clear, convincing or satisfactory. No one testified about the gift except appellees. Appellee Roe was about 7 or 8 years old when his mother moved on the property, so he does not attempt to tell very much about the parol gift. He first said that none of his aunts and uncles ever said anything about the ownership of the property except his Uncle Will (W. R. Ueltzen). He then related that his Uncle Will had, about six or seven years ago, advised him to go ahead and divide the property with his sister, appellee Sowl; that they (the other Ueltzen heirs) had tried to get it and couldn't; and that they didn't want it. When asked, he first said that there was nothing said by any of his other aunts and uncles with reference to the ownership of the property until his memory was refreshed by his attorney. Then he told of an occasion at a store at Graphic when one Amos Watkins asked his Uncle Bob (R. T. Ueltzen) what they had ever done about the old home place and Uncle Bob replied that *he* had given it to Roe's mother years ago. In this, Roe was corroborated by Amos Watkins. Although R. T. Ueltzen denied the conversation, he remembers going with Roe to the store.

In spite of appellee Roe's testimony that there were no statements by his aunts and uncles relating to the ownership of the property, when later asked if there was any discussion as to who owned the property during his mother's lifetime, he undertook to tell of a conversation among his mother, his Aunt May and his Aunt Chloe in which each of the aunts said that his mother could have her part of the place. He does not fix the time of these conversations in any way.

Appellee Sowl's testimony is most unsatisfactory.

She said that she and her brother were just little kids when her mother redeemed the property, but she could remember her mother discussing the matter with her brothers and sisters before she redeemed it and that they said as far as they were concerned it was hers. She claimed to have heard her aunts and uncles say at different times that the property was her mother's, but she never identified a time or place or person. In face of the denial of appellants, this is certainly equivocal, unclear, unconvincing and unsatisfactory. No parol gift can be sustained on any such testimony as this. The fact that Maude Roe obtained a redemption deed from the State of Arkansas is much more consistent with the position of appellants that she was to pay the taxes and occupy the property without payment of rent than with the contention of appellees. A redemption deed from the State, of course, is in effect a mere payment of taxes and does not purport to convey any title. *Mabrey* v. *Millman,* 208 Ark. 289, 186 S. W. 2d 28; *Gott* v. *Moore,* 218 Ark. 800, 238 S. W. 2d 754.

We should not overlook the fact that this is a case where tenants in common are claiming adversely to other tenants in common. The trial court and the majority of this court recognized that the possession of one such tenant is the possession of all; that much stronger evidence of adverse possession is required where the tenants are related than would otherwise be the case; and that it is incumbent upon one claiming adversely to a tenant in common to unequivocally bring home to the latter knowledge of his adverse claim.

Failure of proof on the parol gift leads only to the conclusion that the original possession of Mrs. Roe was permissive. Having been permissive, it is presumed to have continued to be so and could never be anything else regardless of duration in the absence of an explicit disclaimer. *Terral* v. *Brooks,* 194 Ark. 311, 108 S. W. 2d 489; *Dial* v. *Armstrong,* 195 Ark. 621, 113 S. W. 2d 503; *Gibbs* v. *Pace,* 207 Ark. 199, 179 S. W. 2d 690.

Where one of the parties in a claim of adverse holdings entered permissively, the statutory period will not begin to run until an adverse holding is declared and notice of such change is brought to the knowledge of an owner. *Bailey* v. *Martin,* 218 Ark. 513, 237 S. W. 2d 16; *Still* v. *Still,* 239 Ark. 865, 394 S. W. 2d 733.

When a tenant in common seeks to oust or dispossess the other tenants and turn his occupancy into an adverse possession and acquire the entire estate by lapse of time under the statute of limitations, he must show when knowledge of such adverse claim, or of his intention to so hold was brought home to them, for it is only from that time that his holding will be adverse. *Singer* v. *Naron,* 99 Ark. 446, 138 S. W. 958; *Gibbs* v. *Pace,* 207 Ark. 199, 179 S. W. 2d 690. Just last May this court held that a cotenant must prove that he asserted a hostile claim and that notice thereof was brought home to his co-owners. *Palmer* v. *Sanders,* 240 Ark. 859, 342 S. W. 2d 300.

Roe admits that he never told his aunts and uncles that he was claiming the property adversely. Mrs. Sowl seems to claim to have told them, but her testimony is so unsatisfactory that it is inconclusive and of no value whatever. This is her testimony on that subject:

"Q. And since you and Billy have gotten the deed did you ever notify these folks that you were claiming to own the property?

A. I think they knew.

Q. I don't know whether they knew or not. I am asking if you personally ever did?

A. Yes.

Q. When and where did that happen?

A. I couldn't pin it down to the exact date.

Q. Where did this conversation take place?

A. I think it was around the time of Mother's funeral.

Q. They were back at that time?

A. Yes, they were all back except Ontie.

Q. Did you notify them at that time you had a deed to the property?

A. There was so much going on we didn't sit down and say we owned this, there is the deed.

Q. Are you saying that you told them at that time that your mother had made a deed to the property to you?

A. We have the deed, yes.

Q. I know you have it. I am asking if you told them that you had it?

A. Yes.

Q. Who did you tell?

A. Different ones of them at different times.

Q. Did you just volunteer the information that you had a deed?

A. It is just a course of conversation when you talk to relatives.

Q. Now, of these people here, which one did you?

A. Different ones.

Q. That hasn't been so long ago. Just which one?

A. Uncle Bob, and I know Uncle Will knew about it.

Q. Did you tell him about it?

A. We talked about it.

Q. You and Uncle Will talked about it?

A. With Billy.

Q. What did they say when you told them you had a deed?

A. They didn't say anything. They didn't say they opposed it, or anything."

Appellees rely on the building of improvements, the payment of taxes, the retention of rents and profits, the selling of timber, and the failure of appellants to claim benefits or make contributions, along with a deed from their mother, to overcome the presumptions and establish their disclaimer.

The conveyance cannot be relied on to establish a disclaimer. As was said of a mortgage in *Tennison* v. *Carroll,* 219 Ark. 658, 243 S. W. 2d 944, a cotenant should not be expected to check a record constantly to determine whether such instruments have been executed. A brother's joint occupancy of a farm with his mother, who was entitled to homestead and unassigned dower, was held insufficient to support a claim of adverse possession against his brothers, even though the mother had conveyed her interest to the former by deed of which the latter had no knowledge. *McGuire* v. *Wallis,* 231 Ark. 506, 330 S. W. 2d 714. Nor were they, in that case, charged with notice of a deed of their brother to his son when they had no knowledge of the deed and it was not followed by any visible change in the possession of the property.

In the case last above cited, this court reversed a decree of the Hot Spring Chancery Court sustaining a claim of adverse possession even though the occupying brother lived in a house that was on the land, built and occupied a house thereon, was in charge of the farm, managing it for his own benefit, paying taxes and paying installments upon a mortgage debt. In addition, the construction of two barns, drilling of a well and putting in a stock pond by this brother's son were not sufficient to persuade this court that this would satisfy the requirement of notorious, unequivocal action necessary.

Living on the property, improving it, paying taxes and collecting rents were held insufficient to overcome the presumption accompanying a permissive entry in *Flunder* v. *Childs,* 238 Ark. 523, 382 S. W. 2d 881, reversing the lower court.

The fact that cotenant's brother paid no taxes, collected no rents or profits, exerted no control and contributed to no improvements while off the land for 18 years was held insufficient to constitute notice that his sister was claiming adversely to him in an action against his sister's grantee. *Baxter* v. *Young,* 229 Ark. 1035, 320 S. W. 2d 640.

Continued review of cases would only extend this opinion. I find it impossible to distinguish this case from *Gibbs* v. *Pace,* 207 Ark. 199, 179 S. W. 2d 690, applying almost every principle involved here. There a parol gift from the cotenant was claimed. The claimant also asserted adverse possession evidenced by physical possession, enjoying profits, cutting timber, paying taxes, and making improvements. There the cotenant, claiming adverse possession, wrote one of the heirs of his cotenant seeking to purchase whatever interest the heirs might have. The similarity even goes to the extent that interest was activated in that case by an attempted sale of fee simple title to a stranger to the tenancy and here by an oil lease. It cannot be said that the difference lies in the decree of the chancellor having been favorable to the absent cotenants in the *Gibbs* case and unfavorable in the present case. It is clearly stated in the opinion in the former case that the cause was tried *de novo* and nowhere is there any mention of any weight being given the lower court's decree.

I am willing to concede that there is a basis for sustaining the trial court's findings as to W. R. (Will) Ueltzen and R. T. (Bob) Ueltzen by estoppel.

Proof of a transaction constituting an estoppel must also be clear and convincing. There must be cer-

tainty to every intent and the party setting it up must prove it strictly. *Arkansas National Bank* v. *Boles,* 97 Ark. 43, 133 S. W. 195; *James Talcott, Inc.* v. *Associates Discount Corp.,* 302 F. 2d 443 (1962).

I think that proof is satisfactorily clear to sustain the lower court's holding that they are estopped from any claim in this land by failure to speak when they should have spoken. Billy Roe's testimony about his Uncle Will's advice concerning division of the property was positive and unequivocal. Roe said he once suggested a place for a division line. He further stated that Will Ueltzen did not claim any interest when Roe advised him of the oil lease. Will Ueltzen's denials are at least tempered by tacit admissions on cross-examination. He could have at least advised the attorney for Roe about his claim when the lease came up, but excused himself by saying, "I didn't know you wanted to know." Roe also testified that W. R. Ueltzen said that he would sign a quitclaim deed when the matter of the oil lease first came up.

The evidence as to estoppel of R. T. Ueltzen is even more convincing, in view of Amos Watkins' testimony about the conversation at the store at Graphic.

It must be remembered that the other heirs of R. R. and Laura Ueltzen were living out of the state and quite a distance from the property. They are not bound by any statements of their tenants in common. 31A C. J. S., 814, Evidence, § 318. Nor do I see any inconsistency in their being agreeable to having the property occupied and used by the children of their sister, Maude, but not being willing for them to sell, lease, or convey the property or interests therein to outsiders. Undivided absentee ownership of property presents many practical difficulties in management which does make the position of these heirs reasonable and tenable.

I would affirm the chancery court's decree as to W. R. and R. T. Ueltzen but reverse it as to the other

heirs of R. R. and Laura Ueltzen. I fear the result reached by the majority is an erosion of rules of property by improper application.

I am authorized to state that Byrd, J., joins in this dissent.

JULIAN MILLER AND NEDRA MILLER, D/B/A HOME FINANCE COMPANY *v.* PAT BALLENTINE

5-4125 411 S. W. 2d 655

Opinion delivered February 27, 1967

William I. Prewett, for appellant.

Clint Huey, for appellee.

LYLE BROWN, Justice. Julian and Nedra Miller d/b/a Home Finance Company, brought this action to

recover under a conditional sale contract. Defendant, Pat Ballentine, executed the contract in favor of Nevels Furniture Company and the latter in turn assigned and sold the contract to Home Finance Company. On its face the instrument appeared in proper form, containing a list of furniture, the time price, monthly payments, etc., payable at the office of Home Finance Company. Ballentine defended on the ground that he received no merchandise or money in consideration of his executing the contract, and that he executed it in blank as an accommodation to permit Nevels to raise some needed cash. He further alleged that Nevels was at all times an agent for Home Finance. Trial resulted in a verdict discharging Ballentine from liability.

Pat Ballentine began buying furniture on credit from Nevels in 1962. At that time Nevels was using Home Finance Company to finance credit purchases. He had been furnished Home Finance's printed forms. During 1962, Ballentine made three separate purchases and in each instance he executed a conditional sale contract, each of which was processed through Home Finance. The third contract was for a total of $1,197.60. Instead of sending his monthly payments direct to Home Finance in El Dorado, Ballentine made his payments at Nevels Furniture Company in Warren. Apparently Ballentine paid out this contract because he obtained a receipt, and later an affidavit, from Nevels to that effect. On these latter instruments Nevels further certified that he was agent for Home Finance Company. Nevels also testified that Ballentine paid his account in full.

The contract sued on is dated January 15, 1964. Home Finance claims it never received all the payments under the last 1962 contract, that Ballentine apparently bought some additional items in 1964, and the 1964 contract represented the balance of the 1962 note, along with the cost of the additional purchases.

Ballentine's explanation of the 1964 contract is en-

tirely different from the claim of Home Finance. Briefly it is this; his friend Nevels approached him for an accommodation; Nevels needed to raise some money—"two or three hundred dollars"—and asked Ballentine to sign a conditional sale contract for that purpose; he signed it in blank; Ballentine was aware that Nevels would fill in the contract, showing the purchase of furniture and the consideration, and Nevels would in turn sell the contract to Home Finance Company.

Under the evidence recited, together with other proof and circumstances in evidence, the jury could have found in favor of Home Finance under the theory that Ballentine became an accommodation endorser on the instrument, well knowing that Nevels would deliver it to Home Finance, which in turn would pay out the money; that Nevels was not Home's agent but one of many merchants who used its financing services. On the other hand, if the jury believed that Nevels was an agent and employee of Home Finance, with authority to execute contracts in its behalf, handle the collections in the Warren area, etc., and so closely connected with Home Finance that the latter was chargeable with the knowledge of the acts of its agent, then a verdict for Ballentine might be justified.

Keeping in mind the respective theories of the litigants and the possibility of a recovery for either, we examine certain instructions to which proper objection was made. Instruction No. 9 reads as follows:

> "If you find from a preponderance of the evidence that the defendant, Pat Ballentine, did not receive the items of furniture as set out in the conditional sales contract, then, you are instructed there was a failure of consideration and the contract is not enforceable against the defendant, Pat Ballentine."

This is clearly a binding instruction. It makes no mention of the theory under which Home Finance could

recover, even though Ballentine did not receive the furniture. It is not unreasonable to believe that the jury gave considerable weight to this instruction. During its deliberations the foreman returned to the courtroom and requested a copy of court's instruction number 9, whereupon all the instructions were turned over to the jury.

It is inherently wrong to give an instruction which ignores a material issue in the case and allows the jury to find a verdict without considering the omitted issue. Such error cannot be cured by correct instructions separately given. *Davis* v. *Self,* 220 Ark. 129, 246 S. W. 2d 426 (1952).

Because of what we have held with regard to instruction number 9, we feel the trial court, in the event of retrial, will re-evaluate instructions numbered 6 and 7 in the same light.

Under instruction number 8 the court purports to tell the jury that under certain conditions a unilateral contract cannot be enforced. We discern no connection between a unilateral contract and the facts of this case.

An examination of the record reveals a very unusual situation in that trial counsel for Home Finance (not the same counsel on this appeal) offered no instructions. This fact could well have contributed to cause the trial court to be led into error in the instructions given.

Reversed and remanded.

DAN CUMMINGS and BESSIE CUMMINGS *v.* JIM O. BOYLES, PAUL ROGERS AND METTIE ROGERS

5-4113 411 S. W. 2d 665

Opinion delivered February 27, 1967

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

Moses, McClellan, Arnold, Owen & McDermott; By: *James R. Rhodes* for appellee.

J. FRED JONES, Justice. This case involves title to a part of what is known as "Beaver Dam Island" in the Arkansas River.

The appellants Dan and Bessie Cummings, own section 32 and the S½ of the NW¼; the NE¼ of the SW ¼; the NW¼ of the SW¼ and the NW¼ of the SE¼ of Section 33, Township 4, North, Range 14 West in Pulaski County, Arkansas, and all accretions thereto. They deraign their title through mesne conveyances from the United States Government. Most of the evidence at the trial of this case concerned the lands described in section 33.

All of appellants' land lies south of the main channel of the Arkansas River and the east and west bound-

ary lines of appellants' land in section 33 if extended north, would cross Beaver Dam Island and the Arkansas River. The north boundary line of the S ½ of the NW ¼ of section 33, passes through, or crosses, the south portion, or side, of Beaver Dam Island. The Arkansas River flows from west to east in the area of appellants' land and a part of it crosses the S ½ of the NW ¼ of section 33, on the south side of Beaver Dam Island. Another portion of the river, now constituting the main channel, flows from west to east along the north side of Beaver Dam Island, and that portion of the river on the south side of the island is called a "chute" which is almost dry when the river is at low stage and is never as deep as the main channel of the river.

Appellants claim title to all of Beaver Dam Island within their east and west boundary lines extended north to the main channel of the Arkansas River. They base their claim on the contention that Beaver Dam Island was completely washed away in 1927 and that a sand bar gradually built out into the river north from their property, and that by slow accretion the land now constituting Beaver Dam Island built out north from the main body of their land and slowly crowded the main channel of the river north to its present location. They contend that in about 1957 the river again reached flood stage and that when the water had receded, a "chute" was formed in its present location across their accreted land, and thus the present Beaver Dam Island, if it can correctly be classified as an island, was formed.

Appellants allege, in their complaint, that appellees have wrongfully and without right, gone into possession of a portion of their property under claim of interest, the nature of which is unknown to appellants, and have cut and sold timber therefrom of the value of $1,000.00. Appellants pray treble damages in the amount of $3,000.00 for the timber cut; for possession of the property and for a restraining order against appellees to prevent further trespass.

Appellees answered by general denial and alleged adverse possession for more than seven years as an affirmative defense.

The trial court held that Beaver Dam Island did not form within the boundaries of the property owned by the appellants, either by accretions or avulsion occurring since 1927, and that appellants had proven no adverse possession to any of the lands in dispute, and appellants' complaint was dismissed.

We find that the greater weight of the evidence does not bear out appellants' contention as to the manner in which Beaver Dam Island was formed since 1927, and we find that there was ample evidence to support the chancellor's findings, as far as they went in this case, but on the trial of this case de novo, we go a little further than the chancellor did.

Ark. Stat. Ann. § 10-202 (Repl. 1956) reads as follows:

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

We are of the opinion that this statute applies to the facts in the case at bar, and that the portion of Beaver Dam Island lying north of the north boundary line of appellants' S½ of the NW¼ of section 33 never was an accretion to appellants' original tract.

The ancient U. S. engineer's map on field work done in 1870, (Ex. 2) although not showing section, township and range boundary lines, does clearly show "Beaver Dam Reefe" and an island in the river near

the reef, and we are convinced from this map and the other exhibits, as well as from the testimony adduced at the trial, that this Beaver Dam Island has existed as such, for at least the past ninety-seven years.

Much of the testimony of witnesses at the trial of this case, was directed at the meandering of the main channel of the Arkansas River through, and adjacent to, the land involved in this case. When that portion of the river considered to be the main channel, was on the south side of Beaver Dam Island, the portion of the river remaining on the north side of the island was called a "chute", and when the main channel moved to the north side of the island, the part remaining on the south side was called the "chute." These chutes would carry more water when the river was high and less water when the river was low. The main channel of the river is now located on the north side of Beaver Dam Island, and a "chute" is located on the south side. Apparently the Army engineers are in the process of confining the Arkansas River to its present main channel on the north side of Beaver Dam Island and closing or eliminating the "chute" on the south side of the island.

We find little evidence that accretions have affected the rights of the parties here involved, and we find no actual problem brought about by accretions or avulsions in this case.

By reducing chains to feet in the metes and bounds description in the Circuit Court order of March 10, 1923, referred to in appellants' brief, and marked as "Exhibit 12" in the transcript, we find that only ¼ mile east of appellants' east boundary line, the distance from the southeast corner of section 33 north to the south bank of Beaver Dam Island was 2,762.10 feet, and the distance on to the south bank of the *Arkansas River*, was an additional 785.40 feet. In 1950, by simple calculation from the metes and bounds description in the tax deed to appellees, (Ex. 9), it is found that the distance along

appellants' east boundary line from the south boundary line of section 33 to the south bank of the Arkansas River is 3,196.52 feet, then another 924 feet across the "chute" to the south side of Beaver Dam Island. This description varies from the survey plat appearing as exhibit 6 in the transcript, and would indicate accretions from the island south toward the mainland, rather than from the mainland north toward the island. In the case *Nix* v. *Pfeifer*, 73 Ark. 199, at page 203 this court said:

> "When the formation begins with a bar or an island detached and away from the shore, and by gradual filling in by deposit, or by gradual recession of the water, the space between bar or island and mainland is joined together, it is not an accretion to the mainland in a legal sense, and does not thereby become the property of the owner of the mainland." Citing, *Holman* v. *Hodges,* 112 Ia. 714, s. c. 84 N. W. 950; *Perkins* v. *Adams*, 33 S. W. 778; *Victoria* v. *Schoot,* 29 S. W. 681; *People* v. *Warner,* 74 N. W. 705; *Cooley* v. *Golden,* 23 S. W. 100; *Buse* v. *Russell,* 86 Mo. 211.

So it appears from the preponderance of all the evidence in this case, that there has been little change in the property here involved, either by accretion or avulsion through the years, and we conclude that appellants still own all the land embraced within the description of their deeds, together with whatever accretions that may have occurred within the north, south, east and west boundary lines of their land. That is to say, whatever accretions that may have occurred south from their true north boundary line on Beaver Dam Island and within their east and west boundary lines, together with whatever accretions that may have occurred north from the main body of their land extending into the "chute" toward Beaver Dam Island belong to the appellants.

The record before us is not clear as to where on Beaver Dam Island the appellees cut and removed timber. If appellees cut and removed timber from appellants' above described land, appellants would be entitled to damages for same; the measure of such damages, and the amount thereof to be determined by the chancellor from the evidence presented.

The findings of the chancellor are affirmed, but this cause is remanded for a determination of damages, if any, for any timber cut on the land of appellants, as herein defined, and for entry of a decree not inconsistent with this opinion.

Affirmed and remanded.

HARRIS, C. J., and GEORGE ROSE SMITH, J., concur.

BYRD, J., not participating

WILBURN DAVIS *v.* STATE OF ARKANSAS

5196 411 S. W. 2d 531

Opinion delivered February 27, 1967

[Supplemental opinion on rehearing.]

[Original opinion delivered Dec. 12, 1966, 241 Ark. 646.]

Sam Montgomery, for appellant.

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

CONLEY BYRD, Justice. The appellant, Wilburn Davis, was convicted by a jury of the crime of false pretense, Ark. Stat. Ann. § 41-1901 (Repl. 1964). The judgment was affirmed by this court on December 12, 1966, *Davis* v. *State,* 241 Ark. 646. On this rehearing, we deal only with the reprimand given by the trial court to appellant's attorney before the jury for having talked with the prosecuting witness during the noon hour.

The record shows that Mr. Sam Montgomery, attorney for appellant, had talked to Mrs. Scott-Tucker during a noon recess of the trial, and on cross-examination he was asking her about the conversation when the presiding judge, on his own motion, said:

> "I don't know what you were doing talking to the State's witness, during the noon hour. Did you have Mr. Coxey'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.
>
> "MR. MONTGOMERY: I think you can talk to any witness if you can get the truth of the matter.
>
> "THE COURT: I will see about that. Go ahead. You've got to have some regulations."

In this, the court was in error. Section 39 of the Canons of Professional Ethics, adopted by this court, provides as follows:

> "A lawyer may properly interview any witness or

prospective witness for the opposing side in any civil or criminal action without the consent of opposing counsel or party. In doing so, however, he should scrupulously avoid any suggestion calculated to induce the witness to suppress or deviate from the truth, or in any degree to affect his free and untrammeled conduct when appearing at the trial or on the witness stand."

We had before us, in *McAlister* v. *State*, 206 Ark. 998, 178 S. W. 2d 67 (1944), an unmerited rebuke of counsel in the presence of a jury, and we there held that remarks of the trial court which could be construed as a reflection upon counsel's knowledge and skill as a lawyer and as a suggestion that counsel was guilty of improper conduct constituted prejudicial error. In so holding, we said:

"Although it may be assumed that the trial judge did not intend that his remarks should in any way prejudice the rights of appellant, or influence the jury, still his choice of words was unfortunate. The words to grant your motion 'would just be silly' doubtless was construed by the jury to mean that the motion itself was silly, and they could have gathered the impression that the court was intentionally belittling it, and holding counsel up to ridicule for having made it. Viewed in this light, the court's remarks could have been construed as a reflection upon counsel's knowledge and skill as a lawyer, and, perhaps, even as a suggestion that counsel was guilty of improper conduct. Not only this, but when counsel objected to the remarks of the court, which he unquestionably had a right to do, he was informed that the court would not 'put up with any more of this foolishness.' This constituted an unmerited reprimand and prejudicial error calling for reversal. In the case of *Adams* v. *Fisher*, 83 Neb. 686, 120 N. W. 194, it was held that

> it is prejudicial error for the court to reprimand counsel for interposing a proper objection."

When we consider that justice ought not only to be fair, but *appear to be fair,* we find that the rebuke given to counsel here is prejudicial error. To the same effect see *Jones* v. *State,* 166 Ark. 290, 265 S. W. 974 (1924).

Nothing said herein is intended to any way limit the right of a trial court to discipline lawyers or witnesses. However, it would appear that in most instances the better practice, except in extreme cases, would require the trial court to do so out of the presence of the jury.

Reversed and remanded.

HARRIS, C. J. and FOGLEMAN, J., dissent.

JOHN A. FOGLEMAN, Justice, dissenting. The majority reverse this case upon a ground which I deem to be inappropriate. It is for actions of the trial judge which were in nowise prejudicial. I hope that we do not, by practice, adopt a rule that judgments may be reversed on non-prejudicial error. I see no rebuke or reprimand in the language addressed to appellant's attorney. While the court was in error as to his statements about interviewing witnesses, the trial judge admitted that he might be when he said to the attorney: "I will see about that. Go ahead, you've got to have some regulations." The judge did not discipline the attorney in any way and did not prohibit any action the attorney sought to take. After the trial judge told him to go ahead, the attorney followed up his previous examination and inquired of the witness about their noon recess conversation, without any objection, interruption or limitation. The judge's statement was a far cry from saying that he would not put up with any more of counsel's foolishness, from reprimand for interposing a proper objection, from re-

flecting upon counsel's knowledge and skill, or that he was "facilitating a trial like a crawfish does backward", as occurred in the cases cited as authority by the majority.

I am authorized to state that Harris, C. J., joins in this dissent.

ESSIE ALSTON *v.* MRS. A. H. KAHN SR. ET AL

5-4138 411 S. W. 2d 659

Opinion delivered February 27, 1967

Loftin, Herrod & Cole, for appellant.

Wright, Lindsey & Jennings; By: *William R. Overton,* for appellee.

CONLEY BYRD, Justice. This is a suit by a tenant's guest against the landlord and the landlord's agent for injuries sustained in a fall through a rotten board on a porch. Appellant Essie Alston was the guest. Hattie Lewis was the tenant, and appellee Mrs. A. H. Kahn was the landlord. Appellee United Corporation was the landlord's agent. At the conclusion of appel-

lant's testimony the trial court directed a verdict in favor of the landlord and her agent.

Appellant states that the sole question on this appeal is, "Did the landlord (or his agent) in making repairs (prior to the accident), make them in a careful and diligent manner?" In making this contention, appellant relies upon *Sparks* v. *Murray,* 120 Ark. 17, 178 S. W. 909 (1915), where we stated:

> "(2) The law appears to be settled that notwithstanding the landlord is under no implied obligation to make repairs or improvements upon leased premises, in the absence of a covenant or agreement to do so, still if he undertakes to make such improvement or repairs and makes them in such a negligent and careless manner, as to injure the tenant, the tenant may recover damages therefor.
>
> " 'Where the landlord undertakes to make repairs upon the demised premises, he is liable for injuries resulting from the negligence of himself or his servants in making such repairs, and this is true even where the landlord is under no obligation to make such repairs, but undertakes to make them gratuitously.' "

The testimony, when viewed in the light most favorable to appellant, shows that Mrs. Hattie Lewis has been renting the premises for approximately twenty-five years. The rental value since 1952 has been $20 per month. Mrs. Lewis stated that approximately three years ago, United Corporation repaired the front steps leading to the porch, and also repaired some boards on the south end of the porch. No repairs were made at that time to the north end of the porch between the steps and the door, where this accident occurred. On cross-examination, Mrs. Lewis was not definite as to the time when the repairs were made, but was quite certain that the boards repaired at that time had already decayed at the time of the accident. In response to ques-

tions on cross-examination, Mrs. Lewis stated that you couldn't tell that the board through which appellant fell was rotten or decaying, and that she used the front porch every day—on the surface it looked just fine.

Appellant, Mrs. Alston, testified that she had been across this porch several times and that the rotten condition of the porch was not obvious.

In the light of the foregoing testimony, the repairs made by the landlord had themselves decayed at the time appellant fell through the porch. We can find no evidence indicating that either the landlord or her agent was negligent in the manner in which the porch was repaired. There is absolutely no testimony showing that at the time the landlord made the repairs she either knew or should have known that the board through which the appellant fell had deteriorated to the point that it needed replacement.

Therefore, we hold that the trial court correctly directed a verdict in favor of the landlord and her agent.

Affirmed.

TUCKER PAVING CORPORATION AND MARYLAND CASUALTY COMPANY *v.* ARMCO STEEL CORPORATION

5-4115 411 S. W. 2d 888

Opinion delivered March 6, 1967

Smith, Williams, Friday & Bowen, for appellants.

James M. McHaney of *Owens, McHaney & McHaney,* for appellee.

Carleton Harris, Chief Justice. Appellants, Tucker Paving Corporation (hereafter called Tucker), and Maryland Casualty Company, have appealed from a summary judgment in favor of appellee, Armco Steel Corporation (hereafter called Armco), an Ohio corporation authorized to do business in Arkansas. Tucker was principal and Maryland Casualty, surety, under two performance and payment bonds which were furnished in connection with two contracts entered into by Tucker with the Metropolitan Trust Company for certain grading, drainage and paving improvements in North Little Rock and Sherwood. Tucker subcontracted with D. H. Garner and Company for work on both jobs, and appellee sold Garner corrugated steel pipe, which was used in performing the contracts. Armco was unsuccessful in collecting its account from Garner, and accordingly, on August 25, 1965, brought action under the bonds given by Tucker, the condition (in such bonds) being that Tucker would pay all indebtedness for labor or material furnished. Armco filed a motion for summary judgment, supporting same with affidavits of Justin Matthews III, an officer of Metropolitan Trust Company and J. P. Parr, Credit Adviser, Metal Products Division of Armco. Tucker and Maryland responded to this motion by filing the affidavits of Hartley Tucker, President of Tucker Paving Corporation, and Max A. Mehlburger and Charles E. Deitz, registered professional engineers. After briefs were submitted, the court entered its judgment in favor of appellee in the amount of $7,827.13, together with costs and interest at the rate of 6% per annum from October 1, 1964. Armco was further given

judgment against Maryland Casualty Company in the additional amount of $1,023.72 as penalty, and $1,750.00 for attorney's fee. From this judgment appellants bring this appeal. For reversal, it is simply urged that the court erred in granting the motion for summary judgment, because the affidavits presented a question of fact.

Ark. Stat. Ann. § 51-636 Supp. (1965) provides, with reference to the type of bond[1] herein used:

"All persons, firms, associations and corporations who have valid claims against the bond may bring an action thereon against the corporate surety, provided that no action shall be brought on said bond after six [6] months from the date final payment is made on the contract, nor outside the State of Arkansas."

The bonds themselves likewise provide that actions (except by the owner) shall not be brought on the bonds "after six months from the date final payment is made on the contract.* * *" It is the statute and bond provisions just quoted that occasion this litigation. Appellants contend that appellee's suit was not instituted within six months from the date of final payment, and is thus barred.

The affidavits offered by appellees related the following facts:

J. P. Parr simply stated that corrugated steel pipe had been sold to Garner, subcontractor for Tucker, to be used on what we term the North Little Rock and Sherwood jobs; his company was due the sum of $7,827.13, and written demand had been made upon appellants for payment, but payment had been denied. Justin Matthews III, Vice-President and Treasurer of Metropolitan Trust Company, stated that the company had

[1]Section 51-635 provides for a surety bond which "shall be conditioned that the contractor shall faithfully perform his contract, and shall pay all indebtedness for labor and materials furnished or performed in the repair, alteration or erection."

entered into a contract with Tucker for grading, drainage and paving improvements on the two projects heretofore mentioned, and he stated that the North Little Rock job was completed on February 8, 1965; that on the following day his company paid to Tucker a sum of money which, together with previous payments, represented 95% of the contract price. The affiant further stated that his company, on June 7, 1965, paid to Tucker the 5% retainage which it had held back on February 9. As to the Sherwood job, Matthews stated that on January 5, 1965, all work was completed, and on January 11, 1965, his company paid Tucker a sum of money which, together with previous payments to that company, totaled 95% of the contract price. Five percent was retained by Metropolitan until April 8, 1965, at which time this money was paid over to that appellant.

Hartley Tucker stated that the payment made to his company on the North Little Rock job on February 9, 1965, under customary procedure in the construction industry, was considered a final payment; the same was also true of the January 5 payment, received on the Sherwood job.

From his affidavit:

"* * * In the industry, retainages after final payment are considered necessary merely for the protection of the owner to take care of minor claims and any differences as to final amounts that might arise between the contractor and the owner. However, as previously stated, it is customary in the industry to consider the payments received on January 5 and February 9, 1965, respectively, as final payments because the jobs were accepted by the owner at that time as being completed.

"Further, it is understood by Registered Engineers and Architects in the construction industry that final payment means the date the job is accepted by the owner

and the final estimate is paid. The retainage of a certain percentage thereafter is merely a safeguard to the owner, but after the final payment is made on the job accepted, no additional work is customarily performed."

The affidavits of Max A. Mehlburger and Charles E. Dietz (taken in question and answer form) were to the same effect. In other words, it is the contention of appellants that a fact question has been presented as to the meaning of the term, "final payment," it being the view of appellants that this term actually means "final estimate." It is pointed out that the 5% was retained solely for the purpose of being used for any possible minor claims of the owner or the repair of defects which the contractor had not remedied after due notice from the owner; that this money actually belonged to the contractor, though it was not received until several months later. Appellant cites two cases from other jurisdictions, one dealing with the interpretation of the words, "final settlement," appearing in a public contractor's payment bond, and the other dealing with an interpretation of the words, "final acceptance." Appellant argues that a genuine question of fact exists in the instant litigation as to the meaning of the phrase, "final payment." We do not agree. To say that the February and January payments on the two jobs (wherein Tucker received 95% of the contract price) constituted final payments is, to us, simply to say that "black" is the same as "white." Admittedly, these did not actually constitute final payments, for Tucker was subsequently paid (in April, 1965, and June, 1965) the 5% that had been withheld. We daresay that if Metropolitan had subsequently refused to pay the amounts represented by the 5%, and which had been withheld, Tucker would have instituted suit, alleging that it had not been fully paid. In the generally accepted use of the word, "final," the meaning is simply "last"—"nothing remains to be done"—"the matter is concluded." We think that the adoption of appellants' argument would do violence to our statute, and that such a holding would create uncertainty as to

the beginning of the period of limitations where it presently appears to be quite clear.

Authorities are cited by appellee construing the term, "final payment," and the constructions are entirely in line with our own interpretation. For instance, 16A Words & Phrases, "Final Payment," Page 690, states that "A final payment is the last payment."

Likewise, in *National Tea Company* v. *Patrick J. McDonough et al,* 178 Minn. 388, 227 N. W. 205, the court held that the last payment made is the final payment.

We are of the opinion that no genuine question of fact existed as to the meaning of the term, "final payment;" that it simply means the last payment, and the suit was therefore commenced within the period of limitations. It follows that there was no error in granting the summary judgment.

Affirmed.

BYRD, J., disqualified and not participating.

GREEN STAR SUPERMARKET, INC. *v.* HARRY STACY JR., A. B. CORDER AND J. T. MCKINNON

5-4122 411 S. W. 2d 871

Opinion delivered March 6, 1967

Henslee & Patty; By: *William E. Henslee,* for appellant.

Warren & Bullion, for appellees.

CARLETON HARRIS, Chief Justice. Appellant, Green Star Supermarket, Inc., operates retail grocery stores in the city of Little Rock. Appellees are three citizens of Pulaski County who instituted suit under Little Rock Municipal Ordinance No. 11-198, as amended, same being Section 25-115.1 of the City Code, to enjoin appellant from violating this ordinance, and from selling or offering for sale any of the articles prohibited under the provisions of the ordinance. Appellant filed a demurrer to the complaint, which was overruled by the Chancellor, and Green Star Supermarket electing to stand on its demurrer, the court entered a decree whereby the appellant, "is hereby restrained and enjoined from violating

the provisions of City Ordinance 11-198 same being Section 25-115.1 of the Code of the City of Little Rock, more popularly known as the Sunday Closing Ordinance and the defendant, its agents, servants and employees are restrained and enjoined from offering for sale or selling on Sunday any of the articles prohibited by said Sunday Closing Ordinance hereinabove stated."

From the decree so entered, comes this appeal. For reversal, four points are relied upon, *viz,* the ordinance is invalid because it is arbitrary and unreasonable, prohibits instead of regulates, and thereby exceeds a municipal corporation's statutory authority to regulate; second, the ordinance is invalid because it declares something to be a nuisance which is actually not a nuisance; third, the Chancery Court is without jurisdiction to enjoin the commission of a criminal offense when the complaining parties do not allege any injury, and fourth, the ordinance is void because it is too vague and uncertain to be effective. We proceed to a discussion of these points in the order listed.

Appellant argues that the classification of items, permitting some to be sold and prohibiting all others from being sold, is unreasonable and arbitrary; that there is no reasonable relationship between proper regulation of the operation of Sunday business and the arbitrary and unreasonable classification of the items permitted, and prohibited, for sale on Sunday. Without setting out the items, we deem it sufficient to state that this argument was fully considered in the case of *McGowan* v. *Maryland,* 336 U. S. 420, 6 L. Ed. 2d 393. This case involved the constitutionality of the Maryland Sunday Closing Laws. There, the appellants were indicted for selling a three-ring, loose-leaf binder, a can of floor wax, a stapler and staples, and a toy submarine in violation of Md. Ann. Code, Art. 27, § 521. That section, like the ordinance involved in the present litigation, in general, prohibited the Sunday sale of merchandise, but excepted numerous specific items which could be sold. Appellants contended, *inter alia,* that the Maryland

statutes, under which they were convicted, were contrary to the Fourteenth Amendment, but our highest court, in affirming the Maryland court, disagreed, stating:

"Appellants argue that the Maryland statutes violate the 'Equal Protection' Clause of the Fourteenth Amendment on several counts. First, they contend that the classifications contained in the statutes concerning which commodities may or may not be sold on Sunday are without rational and substantial relation to the object of the legislation. Specifically, appellants allege that the statutory exemptions for the Sunday sale of the merchandise mentioned above render arbitrary the statute under which they were convicted. Appellants further allege that § 521 is capricious because of the exemptions for the operation of the various amusements that have been listed and because slot machines, pin-ball machines, and bingo are legalized and are freely played on Sunday.

"The standards under which this proposition is to be evaluated have been set forth many times by this Court. Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. (Citing cases)

"It would seem that a legislature could reasonably find that the Sunday sale of the exempted commodities was necessary either for the health of the populace or for the enhancement of the recreational atmosphere of the day—that a family which takes a Sunday ride into the country will need gasoline for the automobile and

may find pleasant a soft drink or fresh fruit; that those who go to the beach may wish ice cream or some other item normally sold there; * * *

"The record is barren of any indication that this apparently reasonable basis does not exist, that the statutory distinctions are invidious, that local tradition and custom might not rationally call for this legislative treatment."

We think this case completely answers the contention made.

It is further asserted that, while the city may have authority to properly regulate the operation of businesses on Sunday within the city limits, the complete prohibition of sales of all but certain items on this day of the week does not constitute regulation, but actually constitutes prohibition. We disagree, and here again, the contention is rejected in *McGowan*. Ark. Stat. Ann. § 19-2335 (Supp. 1965) provides:

"Hereafter, city council or board of managers of any city or incorporated town in this State shall have the authority, by ordinance, to regulate the operation of businesses within such cities or towns on Sunday."

We consider this statute as sufficiently broad and definite to grant the municipality full and complete authority to enact the present ordinance, and we might also call attention to Ark. Stat. Ann. § 41-3812—41-3823 (Supp. 1965), which is Chapter 38, entitled, "Sunday Laws," (Act 135 of 1965). This act reaffirms the power given a municipality to enact ordinances *prohibiting* sales, and the statute itself prohibits the sale of certain specified items. There is no merit in this contention.

As to the second contention, the answer is simply that the ordinance in question declares a violation of same to be a public nuisance; state statutes also declare

illegal sales on Sunday to be a public nuisance. Ark. Stat. Ann. § 41-3818 (Supp. 1965). In *Dardanelle* v. *Gillespie,* 116 Ark. 390, 172 S. W. 1036, this court pointed out that a city or town has no authority to declare something a nuisance, which is not a nuisance *per se, unless that authority was conferred by express legislative enactment.* Here, that authority has been conferred, and we accordingly find no merit in this contention.

It is next asserted that the Chancery Court is without jurisdiction to enjoin the commission of a criminal offense when the complaining parties do not allege any injury. We do not agree with that argument. It has already been pointed out that this ordinance was properly authorized, and the city statute does not go beyond the authority bestowed by the General Assembly. Sub-section (c) declares that the sale of any prohibited article "is declared to be a public nuisance, and any store or other establishment wherein such sales or offers of sales are made in violation of this section is hereby declared to be a public nuisance, and *any citizen* (our emphasis) of this city may enjoin said nuisance in the Chancery Court of this district. The issuance of an injunction shall not relieve a person from criminal prosecution for violation of the provisions of this section, but such remedy of injunction shall be in addition to liability to criminal prosecution." We have held on several occasions that the fact that the violation of an act constitutes a criminal offense does not affect the power of a court of equity to grant injunctive relief. In *Ritholz* v. *Arkansas State Board of Optometry,* 206 Ark. 671, 177 S. W. 2d 410, we said:

"The action is not one to enjoin the commission of a crime, as such. Its purpose, primarily, is to prevent the illegal practice of optometry, rather than to penalize the practitioner. If the latter alone were the object, Chancery would be without jurisdiction. The rule, as stated in 28 American Jurisprudence, Injunctions, § 148 at page 338, is that acts amounting to a public nuisance

will be restrained if they affect the civil or property rights or privileges of the public, or endanger the public health, regardless of whether such acts are denounced as crimes."

Also, in *James* v. *James,* 237 Ark. 764, 375 S. W. 2d 793:

"The fact that an act enjoined also happens to be a criminal offense does not affect the power of a court of equity to enforce its order and the criminal aspects of an act neither give nor oust equity of jurisdiction. *Meyer* v. *Seifert,* 216 Ark. 293, 225 S. W. 2d 4; *Hickinbotham* v. *Corder,* 227 Ark. 713, 301 S. W. 2d 30. If it should be held that the imposition of a criminal penalty for violation of a law would deprive a court of equity of jurisdiction to enforce its orders than a person desiring to proceed or continue in violation of the law might be able to pay a maximum fine and, thus, make himself immune from a valid chancery court injunction. This is not and should not be the law."

Finally, it is urged that the ordinance is void because it is too vague and uncertain to be effective. Here again, the contention is contrary to the holding in *McGowan* v. *Maryland, supra,* where the United States Supreme Court stated:

"Another question presented by appellants is whether Art. 27, § 509, which exempts the Sunday retail sale of 'merchandise essential to, or customarily sold at, or incidental to, the operation of' bathing beaches, amusement parks et cetera in Anne Arundel County, is unconstitutionally vague. We believe that business people of ordinary intelligence in the position of appellants' employer would be able to know what exceptions are encompassed by the statute either as a matter of ordinary commercial knowledge or by simply making a reasonable investigation at a nearby bathing beach or amusement park within the county."

Actually, the ordinance involved is not nearly so indefinite as that in *McGowan,* for Section 25-115.1 of the Code of the City of Little Rock lists rather specifically many items that may be sold; for instance, we find "milk, bread, cakes, pastries, fresh fruits, bacon, eggs," etc. Those mentioned only in general terms, we think, would be understood by anyone with, as stated in *McGowan,* "ordinary commercial knowledge." Examples are "drugs and medical supplies, and all other such items as are customarily used for the relief of pain * * * baby foods; school supplies * * * Gasoline, oil, greases, and motor vehicle parts or equipment necessary to the operation of a motor vehicle * * *" etc.

Finding no merit in any of the points raised by appellant, the decree entered by the Chancery Court is herewith affirmed.

FOGLEMAN, J., dissents.

JOHN A. FOGLEMAN, Justice, dissenting. I am compelled to disagree with my brethren of the majority. In the first place, I can find absolutely no authority for appellees to bring this action, even if it be conceded that injunction is an appropriate remedy in a case of this sort, which I do not. The majority find authority for appellees to seek equitable relief in their status as citizens only in, of all places, a city ordinance. This is a new departure for it has always been considered that a city ordinance could not confer a right of action on anyone.

We must not lose sight of the limitation on the powers and authority of municipalities. 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 purpose of, or incident to, these express powers and (3) those indispensable (not merely convenient) to their objects and purposes. *City of Little Rock* v. *Raines,* 241

Ark. 1071, 411 S. W. 2d 486, and cases cited therein. Nor can we forget that 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; *City of Little Rock* v. *Raines, supra.*

It seems to be settled law that a city has no general, special or implied powers to create any right of action between third persons. *Bain* v. *Ft. Smith Light & Traction Co.,* 116 Ark. 125, 172 S. W. 843; McQuillin, Municipal Corporations, 3rd Ed., § 22.01. Possibly that power could be conferred upon cities by the State, but I cannot find where this has been done. It is nowhere mentioned in Act 135 of 1965 [Ark. Stat. Ann. §§ 41-3812—41-3823 (Supp. 1965)]. If we are to permit this to be done we are imposing an impossible burden on the judicial department.

The majority opinion itself, in quoting from *Ritholz* v. *Arkansas State Board of Optometry,* 206 Ark. 671, 177 S. W. 2d 410, recognizes the rule that acts amounting to a public nuisance will be restrained *if* they affect the civil or property rights or privileges of the public, or endanger the public health, regardless of whether such acts are denounced as crimes. See, also, *Hickinbotham* v. *Corder,* 227 Ark. 713, 301 S. W. 2d 30. I have been unable to find where appellees even claim that any of the civil or property rights or privileges of the public are affected or the public health endangered, even if the acts complained of constitute a public nuisance. So this is different from the *Hickinbotham* case.

A court of equity will not abate a public nuisance at the suit of a private party unless he shows that he has sustained and will sustain individual damage. *Ward* v. *City of Little Rock,* 41 Ark. 526. The impropriety of injunctive relief against an illegal act in the absence of allegations of injury and damage to the petitioner was again declared in *Arkansas State Board of Architects* v. *Clark,*

226 Ark. 548, 291 S. W. 2d 262. The court there cited what it called the well considered case of *Smith* v. *Hamm,* 207 Ark. 507, 181 S. W. 2d 475, wherein it was held that even if a criminal act were of a character to constitute a nuisance, one seeking an injunction must clearly show facts and circumstances to justify the court in granting him relief for injury to property or pecuniary rights. Even though appellees alleged that the acts of appellant were in flagrant disregard of the personal or property rights of appellees, they did not allege what personal or property rights were disregarded, or the manner in which they were injured or damaged. The statements of appellees are not statements of fact but are general allegations and conclusions of the pleader. As such they are not admitted by appellant's demurrer. *Herndon* v. *Gregory,* 190 Ark. 702, 81 S. W. 2d 849; *Ready* v. *Ozan Inv. Co.,* 190 Ark. 506, 79 S. W. 2d 433; *Wood* v. *Drainage Dist. No.* 2 *of Conway County,* 110 Ark. 416, 161 S. W. 1057; *Self* v. *Road Improvement Dist. No.* 1 *of Greene County,* 145 Ark. 87, 223 S. W. 402; *Purtle* v. *Wilcox,* 239 Ark. 988, 395 S. W. 2d 758. I do not see how any argument could be advanced that appellees' allegations in this regard are more than conclusions. A general allegation of fraud without a statement of facts upon which the allegation was based has been held insufficient as a statement of a legal conclusion. *Ready* v. *Ozan Inv. Co., supra; Finch* v. *Watson Inv. Co.,* 184 Ark. 312, 42 S. W. 2d 214; *Sibley* v. *Manufacturers' Furniture Co.,* 220 Ark. 234, 247 S. W. 2d 20. An allegation that goods were exempt in an action in replevin to recover goods levied upon under execution was held to be the statement of a conclusion of law, *Donnelly* v. *Wheeler,* 34 Ark. 111. A complaint alleging that a telephone company had discriminated against a defendant without stating the facts constituting the discrimination states merely a conclusion of law and is demurrable. *Phillips* v. *Southwestern Telegraph & Telephone Co.,* 72 Ark. 478, 81 S. W. 605. Allegations that a debtor's conveyance was made with the purpose and

intent to hinder, delay and defraud creditors were held to be conclusions. *Finch* v. *Watson Inv. Co.,* 184 Ark. 312, 42 S. W. 2d 214. An allegation that plaintiff's land received no benefit was said to be too general and a mere conclusion. *Higginbotham* v. *Road Improvement Dist. No.* 3 *of Lonoke Co.,* 154 Ark. 112, 241 S. W. 866. An allegation that assessments of benefits were arbitrary and unreasonable was a mere conclusion. *Henderson* v. *Road Improvement Dist. No.* 1 *of Hot Spring Co.,* 171 Ark. 8, 283 S. W. 39. Many other examples could be cited but these should be sufficient to illustrate that appellees' allegations are conclusions merely.

I would reverse this case for want of any cause of action by appellees.

Furthermore, insofar as the ordinance declares the acts therein prohibited to be a public nuisance, it is invalid because it is in excess of the powers of the municipality. It has long been settled in Arkansas that a city has the power to declare to be public nuisances only those things which constitute nuisances per se. The nearest to sources of authority in a city to declare acts to be a public nuisance are Ark. Stat. Ann. §§ 19-2303—04 (Repl. 1956). The former gives municipal corporations the power to prevent injury or annoyance within the limits of the corporation from anything dangerous, offensive or unhealthy and to cause any nuisance to be abated within the jurisdiction given the Board of Health. It has been a part of our statutory law since 1875, insofar as this language is concerned. The following section was enacted in 1885 and authorizes cities of the first class to prevent, abate or remove nuisances of every kind, and to declare what are such and punish authors and continuers thereof by fine or imprisonment. It also provides that no previous declaration shall be necessary as to any matter, act or thing that would have been a nuisance at common law and that all nuisances may be proceeded against either by order of the city council or

prosecution in the Police Court. In spite of these statutes, this court has steadfastly held that the city's powers to declare nuisances are limited to nuisances per se. This rule has been invoked by this court to strike down many ordinances. Some of them declared the following to be public nuisances:

> The working of convicts upon its streets, *Ward* v. *City of Little Rock,* 41 Ark. 526; owning, keeping or raising bees, *City of Arkadelphia* v. *Clark,* 52 Ark. 23, 11 S. W. 957; pool halls in which gambling was not permitted, *Town of Dardanelle* v. *Gillespie,* 116 Ark. 390, 172 S. W. 1036; the business of soliciting orders for photographs by door to door canvass, *Wilkins* v. *City of Harrison,* 218 Ark. 316, 236 S. W. 2d 82; the keeping of chickens, *City of Springdale* v. *Chandler,* 222 Ark. 167, 257 S. W. 2d 934; the construction of a building without connecting with the sanitary sewer system, *Bennett* v. *City of Hope,* 204 Ark. 147, 161 S. W. 2d 186; use of pinball machines by minors, *City of Piggott* v. *Eblen,* 236 Ark. 390, 366 S. W. 2d 192.

I do not believe that the majority intends to say that the sale of the articles specified by the ordinance on Sunday constitutes a public nuisance per se.

The opinion of the majority may intend to imply that Act 135 of 1965 [Ark. Stat. Ann. § 41-3812 to § 41-3823 (Supp. 1965)] gives the city some additional power to declare Sunday sales of specific articles to be a public nuisance, for there it is said that this statute is sufficiently broad to give the city full and complete authority to enact the questioned ordinance. A careful review of the Act nowhere reveals such a grant, whether or not we construe the grant strictly against the city, as we should. The only language from which any grant might, under the most liberal construction, be inferred is in § 11 [Ark. Stat. Ann. § 41-3822 (Supp. 1965)] which reads:

> "The offenses and penalties herein provided shall be in addition to those provided by previously existing municipal and state laws, and nothing contained in this Act shall be construed to prohibit the city council or the board of managers of any city or town from enacting an ordinance or ordinances implementing or expanding the provisions of this Act in its application to businesses or occupations within the limits of such city or town, provided such ordinance or ordinances do not permit the sale of any articles on Sunday prohibited by this Act and are not otherwise in conflict herewith."

This section does nothing more than leave the city with whatever powers it had prior to enactment of Act 135 of 1965. Saying that a city is not prohibited by the Act from doing something is a far cry from a grant of authority which the city did not previously have. Even if this language could be construed to be a grant of power, nothing in it implies any power to declare something to be a public nuisance which is not a nuisance per se.

Nor is it sufficient that the Act declares the sale of any articles prohibited by "*this Act*" a public nuisance because the city ordinance prohibits the sale of many articles not prohibited by "this Act". [Italics ours]

I would also reverse on the merits on the basis that the portions of the ordinance declaring a public nuisance are invalid.

BENTON COUNTY WATER COMPANY, INC. *v.*
MAUPIN CUMMINGS, JUDGE

5-4130 411 S. W. 2d 890

Opinion delivered March 6, 1967

Wade & McAllister, for appellant.

Little & Enfield, for appellee.

GEORGE ROSE SMITH, Justice. The city of Sulphur Springs filed its complaint in the Benton Circuit Court, seeking to acquire by condemnation the waterworks system of the petitioner, Benton County Water Company, Inc., which was serving the city. By demurrer the water company questioned the court's jurisdiction. The court overruled the demurrer. The petitioner then filed the present application for a writ of prohibition, contending that the only way for a city to condemn an existing waterworks system is to proceed before the Public Service Commission pursuant to Act 324 of 1935. Ark. Stat. Ann. § 73-247 (Repl. 1957).

Several statutes are pertinent to the question presented. Section 1 of Act 131 of 1933 declared that "any

city . . . may purchase or construct a waterworks system. . . . as in this act provided." Ark. Stat. Ann. § 19-4201 (Repl. 1956). Section 9 of that act vested in municipalities the power of eminent domain "[f]or the purpose of acquiring any waterworks system under the provisions of this act." Before the wording of Section 9 was changed by amendment we held that the city, in acquiring an existing waterworks system, might proceed either in the circuit court or before the Department of Public Utilities (now the Public Service Commission). *City of Helena* v. *Ark. Utilities Co.,* 208 Ark. 442, 186 S. W. 2d 783 (1945).

Ten years after the decision in the *Helena* case the legislature changed the first sentence of Section 9 of the 1933 act to read as follows: "For the purpose of acquiring any lands or property for the operation of the municipal waterworks system authorized by law, a municipality shall have the right of eminent domain as provided in Act 53 of the Acts of the General Assembly of the State of Arkansas for the year 1955." Act 321 of 1955; Ark. Stat. Ann. § 19-4209. See also Act 269 of 1957; Ark. Stat. Ann. §§ 35-908 *et seq.* (Repl. 1962). The petitioner now contends that the 1955 amendment was intended to take from municipalities the power to condemn an existing waterworks system by a proceeding in the circuit court, leaving only the authority to proceed before the Public Service Commission.

Even if the petitioner is correct in its interpretation of Act 321 of 195, there is other statutory authority for the present circuit court proceeding. Act 1 of 1875, a comprehensive statute governing municipalities, conferred upon municipal corporations the power of eminent domain for the construction of certain improvements and for the present circuit court proceeding. Act 1of 1875, a comprehensive statute governing municipalities, conferred upon municipal corporations the power of eminent domain for the construction of certain improvements and condemn private property for the construction of wharves, levees, parks, squares, market places, or other

lawful purposes. The term, or other lawful purposes, as used in this section, shall include a waterworks system in its entirety, or any integral part thereof, or any extension, addition, betterment, or improvement to an existing waterworks system operated by such municipal corporation." Act 155 of 1935; Ark. Stat. Ann. § 35-902.

The petitioner argues that the language just quoted is limited to the taking of private property "for the construction" of the enumerated improvements and that therefore it does not embrace the condemnation of an existing waterworks system. We think there are at least three reasons for disagreeing with this argument.

To begin with, when the language in question was adopted in 1935 there was on the statute books Act 131 of 1933, *supra*, which explicitly empowered municipalities to exercise the right of eminent domain either to purchase or to construct a waterworks system. We find nothing in the 1935 act to indicate that the legislature intended for that act to take away any authority already vested in municipalities. To the contrary, both the body of the statute and its emergency clause suggest a legislative intention to enlarge the cities' powers.

Secondly, the phrase "for the construction of" does not literally apply, of course, to "lawful purposes," since one cannot construct a lawful purpose. The improvements specifically mentioned, with the possible exception of market places, are of a type ordinarily created by some branch of the government rather than by private capital. Hence before the act was amended there was little need for it to refer to a purchase in addition to a construction, because such improvements could not ordinarily be bought. In a very similar situation, involving an analogous amendment to a constitutional provision, we held that the phrase, "construction, re-construction, or extension," was broad enough to include the purchase of an existing structure. *Garner* v. *Lowery*, 221 Ark. 571, 254 S. W. 2d 680 (1953). The condemnation of

an existing waterworks system is in reality a method of purchasing it—a fact recognized by Act 131 of 1933.

Finally, the 1935 act refers to "a waterworks system in its entirety, *or any integral part thereof.*" The italicized clause is useless and meaningless if the act contemplates the acquisition of property for construction only, because the act goes on to refer to "any extension, addition, betterment, or improvement to an existing waterworks system operated by such municipal corporation." We think it evident that the delegated power to condemn an integral part of an existing waterworks system envisaged the acquisition of that part of a system serving the particular municipality, even though the water company might serve other municipalities as well. That precise situation was presented in 1936, when the city of Little Rock bought that part of the Arkansas Water Company's system that was serving Little Rock but did not buy that part serving North Little Rock. See *North Little Rock Water Co.* v. *Water Works Commission of Little Rock,* 199 Ark. 773, 136 S. W. 2d 194 (1940). Even construing the statute strictly, as we do in cases of this kind, we are convinced that the legislature intended for cities to have the power to condemn either a waterworks system in its entirety or an integral part of one.

Writ denied.

FOGLEMAN, J., concurs.

JOHN A. FOGLEMAN, Justice, concurring. I concur with the result reached by the majority but upon the basis of a different section of the statutes and a different construction of those to which they refer. They rely on Act 155 of 1935 [Ark. Stat. Ann. § 35-902 (Repl. 1962)] as the source of the city's power by giving it a strained construction rather than a strict one as is required.

In determining whether the city has the power to condemn the waterworks system, it should be kept in

mind that grants from the sovereign are to be construed strictly against the grantee; that the authority for taking private property should be clearly expressed; that statutes relating to the delegation of the state's power of eminent domain should be strictly construed in favor of the property owner and against the condemnor and any fair, reasonable and substantial doubt about the existence of a power in a municipal corporation must be resolved against it. *City of Little Rock* v. *Raines,* 241 Ark. 1071, 411 S. W. 2d 486; *City of Osceola* v. *Whistle,* 241 Ark. 604, 410 S. W. 2d 393; *City of Little Rock* v. *Sawyer*, 228 Ark. 516, 309 S. W. 2d 30.

The majority holds that the power exists because it cannot be said that "a lawful purpose" can be constructed. It is no more logical to say that "a lawful purpose" can be condemned, but giving the Act the interpretation they have requires that construction. As they construe the section, it would read:

> "The right and power of eminent domain is hereby conferred upon municipal corporations to enter upon, take and condemn * * * other lawful purposes. The term, or other lawful purposes, as used in this section, shall include a waterworks system in its entirety, * * *"

Applying the rules of strict construction, the statute should be construed as relating to waterworks systems as if it read:

> "The right and power of eminent domain is hereby conferred upon municipal corporations to enter upon, take and condemn private property * * * for * * * a waterworks system in its entirety, or any integral part thereof, or any extension or betterment or improvement to an existing waterworks system operated by such municipal corporation."

Under this construction, authority to condemn an existing waterworks cannot be found in this section alone.

Nor do I agree with them that condemnation is a method of purchase. A condemnation is a taking. Even if full compensation must be made, the exercise of the power of eminent domain is no less a taking.

This does not mean that the city cannot proceed in this action under the very section of the statute wherein the majority finds authority. Ark. Stat. Ann. § 19-2317 (Repl. 1956), as amended, is basically § 14 (as amended) of Act 1 of 1875, the comprehensive "Municipal Code" then adopted. This section gives municipalities the "power to provide a supply of water by constructing or requiring [acquiring] by purchase or otherwise, wells, pumps, cisterns, reservoirs or waterworks * * *". The bracketed word is supplied by the compiler of the statutes. His action in so doing was proper. It is a well-settled rule of statutory construction that statutes should receive a common-sense construction and where one word has been erroneously used for another and the context affords the means of correction, the proper word will be deemed substituted when the intent is plainly deducible from other parts of the statute. *Graves* v. *Burns,* 194 Ark. 177, 106 S. W. 2d 602; *Daniels* v. *Johnson,* 216 Ark. 374, 226 S. W. 2d 571; *Howze* v. *Hutchens,* 213 Ark. 52, 209 S. W. 2d 286. The intention of the General Assembly to have used the word "acquiring" is obvious.

An analysis of Act 1 of 1875 indicates the explicit legislative intention that § 74[1] be the section governing proceedings for the condemnation of property for proper municipal purposes authorized by the Act. § 7 gave authority to cities and towns to supervise and control streets, highways, bridges and alleys. § 8 gave authority to establish and construct landing places, levees, wharves, docks, piers and basins. § 15 authorized the provision of cemeteries. § 18 authorized establishment of streets, alleys, public grounds, wharves, landing

[1]Ark. Stat. Ann. §35-902 is part of this section as amended.

places, market places, and construction of sewers and drains. § 30 prohibited any improvement requiring proceedings to condemn private property without the concurrence of two-thirds of the whole number of members of the council. The sub-title of the Act which precedes sections 74 and 75, both inclusive, is: "APPROPRIATION OF PRIVATE PROPERTY." The title of § 74 is "Proceedings to appropriate private property to public use." A reading of that section in its original form clearly shows that this section was intended to provide the means and procedure for a city to acquire property for any of the municipal purposes provided for in the entire Act. Wharves, levees, parks, squares and market places are enumerated. The phrase "other lawful purpose" was used in the original Act. It could refer to nothing other than the lawful purposes of municipal government as therein provided, but not specifically enumerated in that section itself. I have not been able to find other authority existing upon adoption of the Act for the exercise of the power of eminent domain by municipal corporations for many of these purposes.

The intention of the General Assembly to enact a comprehensive statute covering all phases of municipal government is clear. The title of the Act is, "AN ACT to be entitled an act for the incorporation, organization and government of municipal corporation." § 95 was a general repealer. Ark. Stat. Ann. § 19-2317 and § 35-902 are simply §§ 14 and 74, respectively, of the 1875 Act and when read together clearly give a municipal corporation the power to acquire a waterworks by the exercise of the power of eminent domain, this being one of the "other lawful purposes" contained in the Act as amended.

MRS. DORIS MCCASTLAIN, COMM. *v.* R. & B. TOBACCO CO.

5-4140 411 S. W. 2d 882

Opinion delivered March 6, 1967

Lyle Williams, A. W. Nisbet, Hugh L. Brown and *Catlett & Henderson,* for appellant.

Knox Kinney and *Neill Bohlinger,* for appellee.

LYLE BROWN, Justice. This appeal by the State Revenue Commissioner comes from a successful attack by R. & B. Tobacco Company on the constitutionality of Regulation I, promulgated by the Commissioner of Revenues for the State of Arkansas. As a prerequisite to the granting of a cigarette wholesaler's permit, the regulation requires the appellant to produce letters of credit from three-fourths of the manufacturers of cigarettes having general distribution in Arkansas.

R. & B. Tobacco Company is a partnership engaged in the wholesale tobacco business in Forrest City. On or about September 25, 1964, R. & B. made application to the State Commissioner of Revenues for a permit to distribute cigarettes at wholesale in the State. Under authority of Ark. Stat. Ann. § 84-2302 (Repl. 1960), the Revenue Commissioner called for R. & B. to produce letters from all cigarette manufacturers having general distribution in Arkansas, containing the assurance that they would sell to R. & B. on open account.

Efforts to obtain these letters were unsuccessful and the permit was denied. R. & B. filed suit in the Pulaski Chancery Court against the Commissioner, successfully attacking the constitutionality of that portion of Ark. Stat. Ann. § 84-2302 which required letters from cigarette manufacturers as a prerequisite to the granting of a permit. However, the permit was denied because one of the partners had not been a resident of Arkansas for the required length of time. Neither the Revenue Commissioner nor R. & B. appealed from the rulings of the Chancellor.

On November 29, 1965, the Commissioner promulgated Regulation I, purporting to proceed under the authority of Act 416 of the Acts of 1941, as amended. Regulation I reads as follows:

> "Regulation I. An applicant for a Cigarette Wholesaler Permit shall attach to the application letters from not less than three-fourths of the cigarette manufacturers who have general distribution of cigarettes in Arkansas that such manufacturers will ship on open account on approval of the application. This regulation promulgated under authority of and in compliance with Act 183 of 1953."

Within a few months thereafter, and upon completion of the requirement for residence, R. & B. resub-

mitted its application. The Commissioner declined to issue a permit for lack of compliance with Regulation I. R. & B. filed suit, challenging the constitutionality of Regulation I. From the finding of the chancellor that the regulation was unconstitutional comes this appeal by the Revenue Commissioner.

The first point advanced for reversal is that the sale of cigarettes at wholesale is a privilege, having been so declared by legislative enactment; that our court has recognized the selling of real estate, the operation of a coin-operated jukebox, the act of fortune telling, and the taking of photographs as privileges. Appellant theorizes that there is more reason for the regulation of the sale of cigarettes as a privilege than for the regulation of the enumerated ventures. The Commissioner supports the need for Regulation I on the basis that annually the State derives fourteen million dollars from the cigarette tax and this lucrative revenue requires careful control. Regulation I—so says the Commissioner—serves a two-fold protection for the State's revenues: first, it assures the State that the distributor is financially responsible; and, second, it gives the State a "source control" because the manufacturer furnishes the State a copy of all purchase orders, which in turn assures the State that it gets a proper return of its tax.

R. & B. counters that Regulation I will not necessarily accomplish the alleged purposes expressed by the Commissioner, and secondly, that the regulation in effect delegates to the cigarette manufacturers, some eight in number, the power to determine whether a distributor's permit will be issued. The latter argument is the basis for R. & B.'s contention that Regulation I constitutes an unlawful delegation of power.

Ark. Stat. Ann. § 84-2325 (Repl. 1960) empowers the Commissioner to make such rules and regulations "as he deems requisite and advisable" for the admin-

istration of the licensing Act. However, such regulations must be tested in light of their reasonableness. The fact that they facilitate, in some measure, the enforcement of a valid tax—that fact, standing alone—is not sufficient.

Will letters from the manufacturers to the Commissioner, stating that they will ship R. & B on open account, furnish the assurance that R. & B. is financially responsible? The distributor might well be financially responsible as of the dates of the letters; yet, as to *future* financial responsibility, the situation might well change. This could occur without the knowledge of the manufacturer, and, if the manufacturer had the knowledge, it is under no obligation to transmit such information to the Commissioner.

Witness E. E. McLees testified that Regulation I would give the State "a source control absolutely." He justified this statement on the basis that the letter of assurance would cause a manufacturer to furnish the State a copy of all purchase orders by the distributor "which would insure that the State gets the proper return of its tax." We find nothing in the record to establish this obligation on the part of the manufacturer. Furthermore, let us assume that R. & B. obtained the required letters from three-fourths of the manufacturers. How would this insure the State "control absolutely" over the balance of the manufacturers?

There is yet another reason, and probably more paramount, for holding Regulation I invalid. It makes possible the denial to a citizen of Arkansas, otherwise qualified, of the right to operate a lawful business in this State. This can be effectuated by a small group of out-of-state manufacturers, who—for reasons they are not required to reveal—do not desire to place a new distributor in competition with their established customers.

R. & B. has been engaged in the tobacco and notions business since 1964, with headquarters in Forrest City, merchandising their wares in several surrounding counties. Its annual sales approximate three hundred thousand dollars. It shows a net worth of $102,660.00. One of the partners owns substantial real estate. It has open accounts with major companies and discounts all bills. Credit has never been refused. Prior to this partnership being formed, one of the partners was a factory representative for two major tobacco companies, and also a district manager for a cigarette company. An investigation of the partnership by the Commissioner's office revealed nothing that would indicate the partners were anything other than business men of the highest caliber. Mr. McLees testified that the Commissioner did not question their integrity or their financial standing. The sole reason for the denial of the permit, according to Mr. McLees, was the failure of R. & B. to furnish the required letters.

We point up the foregoing facts to emphasize the danger of Regulation I. These partners had the finances, established business and credit connections, experience, and unquestioned integrity; yet they are denied the privilege of adding cigarettes to their lines, and solely because these out-of-state manufacturers choose, for reasons known only to them, to prevent it.

Finally, an examination of the record discloses a very peculiar situation. R. & B. purchases chewing tobacco from a subsidiary of Liggett & Meyers; it purchases tobacco, other than cigarettes, from U. S. Tobacco Company and Phillip Morris Company. These purchases are made on open account, all of which R. & B. keeps current. Yet, these major cigarette manufacturers choose not to sell R. & B. their cigarettes. The Commissioner of Revenues and R. & B. are powerless to determine the reason. By Regulation I, the Commissioner has surrendered all discretion in this respect, leaving the matter of R. & B.'s credit rating in the hands of these foreign corporations.

We hold Regulation I to be an unreasonable exercise of the rule-making power of the Commissioner of Revenues. It is in violation of Art. 2, § 2, of the Constitution of Arkansas, in that it imposes an unusual and unnecessary restriction on a lawful occupation. See *Noble* v. *Davis,* 204 Ark. 156, 161 S. W. 2d 189 (192).

Affirmed.

CHARLES L. RAY *v.* LEE MAYS

5-4152 411 S. W. 2d 865

Opinion delivered March 6, 1967

Cockrill, Laser, McGehee, Sharp & Boswell, for appellant.

Jack Sims and *Don Ryan,* for appellee.

LYLE BROWN, Justice. The only question on appeal is whether the defendant-appellant, Charles L. Ray, is liable for entrusting a vehicle to a driver whose negligence caused injuries to plaintiff-appellee, Lee Mays.

The jury awarded Lee Mays damages on the theory of negligent entrustment, and Charles L. Ray appeals.

The collision which caused injuries to Lee Mays occurred on October 3, 1964. Mays was struck by a truck being operated by Percy Lee Sebren, the truck having been entrusted to Sebren by appellant, Ray. For approximately three months prior to early September 1964, Percy Lee Sebren and Charles L. Ray were engaged on the same work project. They were hauling road construction materials, working out of a quarry in the area of Sweet Home. Approximately one month before the accident in which Lee Mays was injured, Charles L. Ray left this job and returned to his home in Harrisburg. Before Ray left, the two men—Sebren and Ray—consummated some type of arrangement whereby Sebren obtained from Ray the truck Sebren was driving when he struck Lee Mays.

Evidence introduced on behalf of the injured party, Lee Mays, was pointed toward his theory that the driver, Sebren, was in the habit of becoming intoxicated and driving a car in this condition, and that Ray, the owner of the truck, knew or should have known of this habit. Sebren was intoxicated at the time Mays was injured.

At the close of all the testimony appellant Ray unsuccessfully moved for a directed verdict, alleging that evidence introduced was insufficient to cause the doctrine of negligent entrustment to be invoked.

We permit proof of the habit of driving while intoxicated to be established by specific acts or by general reputation in the community where the driver resides. *Rook* v. *Moseley,* 236 Ark. 290, 365 S. W. 2d 718 (1963).

Plaintiff sought to prove by three witnesses that Sebren had a general reputation in the city of his residence for driving while intoxicated. We agree with appellant that the evidence on this point was insufficient.

In fact, we gather that the trial court was of the same opinion. So we turn to a careful examination of the evidence to determine whether plaintiff made a jury question grounded on specific acts of drunken driving, of which the defendant Ray had knowledge, actual or constructive.

Joe Elmer Johnson was truck foreman on what we will call the Sweet Home haul. He directed the truckers where and what to haul and did the hiring and firing. Haulers Sebren and Ray worked under Johnson. It was witness Johnson's information that Sebren's wife had at times ridden with Sebren to keep him on the job and out of taverns. On occasions he could smell alcohol on Sebren's breath. Johnson testified that on the day of the accident, Sebren was so intoxicated that he was in no condition to drive.

Plaintiff introduced the discovery deposition of the defendant, Ray. He testified that he would "guess" Sebren to be a chronic drinker. When pressed for a reason, his reply was that it was because of Sebren's actions and "the way people talked on the job."

"Q. Did the talk go around to the effect that he does drink quite a bit?

"A. Well, yes.

"Q. Is that talk to the effect he drinks and drives?

"A. Well, some of them say he was drinking. Yes. He would come up to the quarry and sit there, you know, through the night, and [you could] see a couple of six-pack beer cans.

"Q. In other words different ones mentioned he does drink while he works. Is that it?

"A. Yes, sir."

At another point in his deposition, Ray made a significant statement about his source of knowledge regarding

Sebren's drinking and driving habits. "He [Sebren] was on the road. This is one thing we do—if a guy acts funny among us truckers we pass the word along, and then you know to watch the truck." The jury could very well have interpreted this statement to mean that the word had been passed to the truckers that Sebren was driving while drinking to such an extent that the other truckers were watching out for him. It should be remembered that this witness is the defendant, Charles L. Ray.

On cross-examination, Ray stated that his information about Sebren's drinking and driving came to Ray *after* the collision. On the other hand the jury could well have concluded that Ray's information came to him *before* the collision. This is because Ray testified he left the Sweet Home job some thirty days before the accident and returned to work in his home town of Harrisburg. Also, some of Ray's other testimony herein recited does not comport with the contention of after-acquired knowledge.

On the question of the known drinking habits of Sebren, Mrs. Charles Ray was called as a witness for the defendant. She lived at a trailer court with her husband near Pine Bluff during the months when Mr. Ray was hauling from the quarry. She testified she neither saw nor heard anything with reference to Sebren being a drinking man. The defendant took the stand and was questioned regarding his knowledge of the drinking and driving habits of Sebren. We are justified in saying that his testimony was inconsistent with the statements introduced by plaintiff from Ray's discovery deposition. In another respect, some of his testimony was damaging to his own contention. For example, he testified on cross-examination that he heard other drivers talk about Sebren's drinking on the job. He further testified that everything he saw and heard with respect to Sebren's drinking, in point of time, was *before* he left the job and returned to Harrisburg. Suffice it to say that there was sufficient evidence to submit to the jury the question

whether Ray knew of Sebren's drinking and driving habits at the time he made the truck available to him. Furthermore, had this information come to Ray's knowledge after Ray placed Sebren in possession of the truck and prior to the accident, it would have then become Ray's duty to exercise a reasonable effort to void the possessive arrangement with Ray.

Affirmed.

STERNS M. LAW, JR. *v.* SCOTTIE COLLINS, ET UX

5-4144 411 S. W. 2d 877

Opinion delivered March 6, 1967

Mobley & Bullock, for appellant;

Williams & Gardner, for appellee.

JOHN A. FOGLEMAN, Justice. Appellant asks us to reverse the action of the trial court granting appellees a new trial upon the grounds of inadequacy of the jury verdict in favor of appellees and newly discovered evidence.

The parties were involved in an automobile collision on October 13, 1965. Appellee Scottie Collins and appellant Sterns M. Law were the drivers of the respective vehicles involved, both of which were proceeding in an easterly direction on Highway No. 64 immediately prior to the collision. Mrs. Collins was returning to her home from her work as a housekeeper, driving a pickup truck which belonged to her husband, appellee Earnest Collins. She either stopped or slowed her vehicle to make a left-hand turn onto Mill Creek Road and was struck by the vehicle driven by Law who was approaching from her rear. There was a dispute as to whether a proper signal was given by Mrs. Collins before the collision.

Appellees' complaint charged that appellant was negligent in several particulars, most of which related to the disregard of the superior right of the forward vehicle to the use of the highway. Both Law and Mrs. Collins suffered injuries and the Collins vehicle was damaged. In his answer, appellant included a counterclaim for medical expenses on account of injuries received by his wife and minor children who were passengers in the vehicle driven by him.

Trial was had on April 19, 1966, resulting in a jury verdict for appellee Scottie Collins and assessing her damages at $750.00. A verdict was directed in favor of Earnest Collins on the counterclaim of Law. The jury

was instructed that if it found Scottie Collins free of negligence as a proximate cause of the collision, it should award the full amount of any damages she sustained by reason of the negligence of appellant, but that if it found Law free of negligence, then he was entitled to recover from Mrs. Collins the full amount of his damages proximately caused by any negligence on her part. The instruction (AMI 2104) then went into application of the comparative negligence statute. The court then gave AMI 2201 telling the jury that if it found for Mrs. Collins on the question of liability, it must fix the amount of her damages and gave them the measure thereof. The jury was also instructed that if it found for appellant Law on the question of liability, it must fix the amount of his damages.

> The court submitted the following forms of verdicts:
> We, the jury, find for Scottie Collins on her Complaint, and against Sterns M. Law Jr., the defendant, and assess her damages at ——— dollars.
>
> We, the jury, find for Earnest Collins on his Complaint, against Sterns M. Law Jr., the defendant, and assess his damages at ——— dollars.
>
> We, the jury, find for Sterns M. Law Jr., on his Counterclaim, and against the plaintiff, Scottie Collins, and fix his damages at ——— dollars.
>
> We, the jury, find against Sterns M. Law Jr., on his Counterclaim, and for the defendant, Scottie Collins.
>
> We, the jury, find for Sterns M. Law Jr., the defendant, and against Scottie Collins, the plaintiff, on their Complaint.

The court instructed the jury that its verdict would be in *one* of the forms submitted. No objection was made by either party.

After deliberation, the jury first returned into court a verdict finding for appellee Scottie Collins on her complaint and fixing her damages at $750.00. This was the only verdict returned at this time. The trial judge then,

with consent of counsel, directed the jury to retire and assess the damages of Earnest Collins since there was no negligence on his part. Thereafter they returned with such a verdict fixing his damages at $200.00.

While it seems that this is a case which might better have been submitted to the jury on interrogatories, or at least that there might better have been more explicit instructions about the use of the forms of verdicts, we think that the only proper conclusion to be reached is that the jury found that Law was guilty of negligence in a greater degree than was appellee Scottie Collins.

The granting of a new trial to Earnest Collins was not an abuse of discretion. We have always followed the rule that the action of the trial judge on a motion for new trial upon a statutory ground should not be reversed in the absence of abuse of his discretion. The claim of Earnest Collins was only for property damage. He was the only witness on the amount of his damages. He testified that his vehicle was worth $600.00 less after the collision than it was before. He offered a repair bill totaling $599.85. There is some question whether the jury ever saw or had the repair bill read to them, but Collins did admit that some of the items thereon may not have resulted from the collision. These items, however, would account for a reduction in damages in an amount far less than $400.00. Error in the assessment of the amount of recovery, whether too large or too small, where the action is for the injury of property, is one of the statutory grounds for a new trial. Ark. Stat. Ann. § 27-1901 (Repl. 1962). While the testimony of a party is not to be treated as uncontradicted in testing sufficiency of evidence to support a verdict, the trial judge who saw and heard the witnesses apparently found that his testimony was such that a $200.00 verdict was erroneous.

Quite a different situation presents itself in the case of Mrs. Collins. Since the trial judge instructed the jury on the law of comparative negligence and told them to return their verdict on one of the forms submitted, it is

proper to assume that they found both parties negligent, but appellant more negligent than Mrs. Collins. It would follow that they made an appropriate deduction from the damages awarded her in accord with the court's instruction. The record, of course, is silent as to the amount of damages they found before the deduction and as to the percentage of negligence they attributed to her. Mrs. Collins testified that her medical expenses consisted of:

St. Mary's Hospital	$178.90
Millard-Henry Clinic	114.00
*Jones-Murphy Clinic	125.00
Freiderica Pharmacy	13.50
C & D Drug Store	113.25

*($25.00 was deducted for a medical report by direction of the court.)

She also testified that she lost twenty weeks work at one time and six and one-half weeks at another, but that she had earned $84.00 during the latter period. She said that she earned $40.00 per week when working.

It was admitted that Mrs. Collins had been nervous and unable to sleep following major surgery sometime previous to the collision, and that she was taking medication on account of that condition. She said that the nerve pills she took for the pre-existing condition, and continued taking after the collision, cost fifteen cents per day.

The action of the court in granting a new trial to Mrs. Collins on the basis of inadequacy of damages must be viewed in the light of the prohibition in Ark. Stat. Ann. § 27-1902 (Repl. 1962) [Civil Code, § 372] which states:

> "A new trial shall not be granted on account of the smallness of damages in an action for an injury to the person or reputation, nor in any other action where the damages shall equal the actual pecuniary injury sustained."

While this precise section has not been construed by us, courts of other states having the identical language have

held that this statute prohibits the granting of new trials in any action for personal injuries. See *Sharpe* v. *O'Brien,* 39 Ind. 501; *Blakely* v. *Omaha & C. B. Street R. Co.,* 94 Neb. 119, 142 N. W. 525; *O'Reilly* v. *Hoover,* 70 Neb. 357, 97 S. W. 470; *Murray* v. *Decker,* 132, Okla. 188, 270 P. 38. i

It has even been held that this section prevents the granting of a new trial when the verdict is for nominal damages only in spite of evidence of substantial damage. *Norton* v. *Lincoln Traction Co.,* 92 Neb. 649, 138 N. W. 1132; *Langdon* v. *Clarke,* 73 Neb. 516, 103 N. W. 62; *Woodard* v. *Sanderson,* 83 Okla. 173, 201 P. 361.

Although the statute has not been mentioned, this court has refused to follow this latter most narrow construction. Our cases indicate an inclination to permit a new trial for inadequacy of damages where evidence clearly establishes pecuniary injury in excess of the damages. *Dunbar* v. *Cowger,* 68 Ark. 444, 59 S. W. 951 (motion ordered granted as being contrary to law and evidence); *Carroll* v. *Texarkana Gas & Electric Co.,* 102 Ark. 137, 143 S. W. 586 (as having been in disregard of undisputed evidence); *Martin* v. *Kraemer,* 172 Ark. 397, 288 S. W. 903 (as not being supported by substantial testimony). This conforms with the construction given to statutes of other states which differ from ours only in that the word "or" is used in place of "nor". See *Drury* v. *Franke,* 247 Ky. 758, 57 S. W. 2d 969, 88 A.L.R. 917 and annotation, 88 A.L.R. 948. The distinction made in some of the opinions seems to be upon the basis that by use of the word "or" actions for injury to the person, actions for injury to reputation and any other actions are alternates, each limited by the words "where the damages shall equal the actual pecuniary injury sustained." The use of the word "nor" seems to be taken in these opinions to separate the clauses so that only actions other than those for injury to the person or reputation are affected by the quoted words as to pecuniary damage. The latter construction would prohibit the granting of a new trial for smallness of damages in any action for

personal injury. This would be difficult to harmonize with our decisions above cited. It has been held in some states whose statutes contain the word "nor" that the statute permits the granting of new trials where the damages awarded are not equal to the pecuniary loss which was capable of accurate computation. *Bailey* v. *Cincinnati,* 1 Hand. 438, 12 Ohio Dec. Reprint 225; *Landneier* v. *Cincinnati,* 7 Ohio N. P. 188, 4 Ohio Dec. N. P. 265; *Carpenter* v. *City of Red Cloud,* 64 Neb. 126, 89 N. W. 637; *Spirk* v. *Chicago, B. & Q. R. Co.,* 57 Neb. 565, 78 N. W. 272.

The proper construction of this statute is complicated by reason of the fact that our Civil Code was adopted from the Kentucky Code [See Crawford, Civil Code of Arkansas, Ann.,] yet the Kentucky Code uses the word "or". Thus, the Kentucky cases (which ordinarily are at least persuasive in Arkansas) holding that a new trial may be granted where damages awarded in a personal injury action were not equal to the actual pecuniary injury sustained, are of questionable assistance. The most favorable construction given these acts would only permit the granting of a new trial where the damages were not equal to the total expenditures of the injured party for medical bills, incidental expenses and loss of time proven with reasonable mathematical certainty. This would not take into consideration pain and suffering, mental anguish, impairment of earning capacity and such other items as could not be accurately computed.

Even if we give this statute the construction most favorable to appellee, we do not believe the granting of a new trial on this ground can be sustained. Mrs. Collins' testimony showed medical expenses of $544.65 and loss of time totaling $976.00, or total pecuniary loss of only $1,520.65. On the other hand, appellant contends that only $392.65 of this was attributable to her present injury, and the jury was justified in deducting $28.05 for nerve pills (at fifteen cents per day from the date of the

collision to the time of trial). It might have been justified in deducting $100.00 for an examination only by Jones-Murphy Orthopedic Clinic. In any event, it seems certain that the jury found pecuniary loss totaling less than twice as much as the verdict. In that case, the jury's verdict for more than one-half of the pecuniary loss of Mrs. Collins could not be said to be an award of damages less than her actual pecuniary injury. This compels us to find that the trial judge, who stated that entitlement to a new trial on this ground was debatable, abused his discretion in this regard.

Appellees, however, contend that a new trial was properly granted on account of newly discovered evidence. In support of their motion on that ground, they present the affidavit of one Edward Thompson. Thompson claims to have seen the collision and, after having proceeded immediately to the scene, to have heard appellant say, "I was in the wrong and I have insurance to cover it." Of course, in order to be the proper basis for a new trial, the evidence must not be cumulative. *Kearns* v. *Steinkamp*, 184 Ark. 1177, 45 S. W. 2d 519. The fact that the additional testimony would be cumulative only to the testimony of a party to the action does not afford any better basis for the granting of a new trial. *Robertson* v. *Chicago, R. I. & P. Ry. Co.*, 121 Ark. 233, 180 S. W. 507. Thompson's testimony as to the manner in which the collision occurred and as to the giving of a left-turn signal by Mrs. Collins is purely cumulative to the testimony of witnesses to the same facts, other than Mrs. Collins. As to the admission of being in the wrong, the testimony would only be cumulative to the testimony of Earnest Collins about appellant's statements which was:

> "Well, I went back over there where the boy was at, they showed me who he was, and I said to the boy—I said, 'How come you to hit my wife in the back end of the truck,' and he said, 'Well, there was just one thing about it, I either had to hit your wife—I seen her hand out and the blinker, but I was going fast

enough I couldn't stop.' He said, 'If I had went to the right, I'd throwed my family in the river, and I seen I was meeting another car, and there wasn't but one thing for me to do'—said, 'It was better to kill one—knock one off the road then it was to kill the five in my family, and I let her have it.' That's the words he said."

We do not believe that appellees would contend that the portion of Thompson's statement about insurance coverage would be admissible in evidence, separate and apart from the admission of liability. This court has said that such unnecessary reference to insurance is improper and when pursued, highly prejudicial. *Peay* v. *Panich,* 191 Ark. 538, 87 S. W. 2d 23. It is true this court held that such a statement made in connection with an admission of liability as part of the res gestae was admissible in *Jackson* v. *Ellis,* 213 Ark. 826, 212 S. W. 2d 715, by a divided court. It was justified by the majority on the basis that there was no planned and independent purpose by counsel to emphasize insurance or to draw from the witness any statements made with conscious reflection influenced by considerations other than the impulse to translate action into words. While Thompson's statement may have been part of the res gestae, it would be difficult to say that this portion of the statement now revealed could be offered without conscious purpose.

The order of the trial court granting a new trial is affirmed, insofar as it relates to appellee Earnest Collins. The cause is reversed and remanded insofar as it relates to the appellee Scottie Collins and the trial court is directed to enter judgment in her favor based upon the jury verdict.

MACK EARNEST LEE EVANS *v.* STATE

5249 411 S. W. 2d 860

Opinion delivered March 6, 1967

A. Jan Thomas Jr., for appellant.

Joe Purcell, Attorney General; *Don Langston,* Asst. Atty. Gen., for appellee.

CONLEY BYRD, Justice. This is an appeal by appellant, Mack Earnest Lee Evans, from a proceeding under Criminal Procedure Rule No. 1. Per Curiam Order, 239 Ark. 850a. In the trial court, petitioner relied upon the same two grounds that are presented here for setting aside his grand larceny conviction and sentence of twenty-one years, namely:

1. He was originally charged with CAR THEFT, but after being found guilty he was sentenced and committed for GRAND LARCENY.

2. There was a suppression of evidence on the part of the prosecution in that no witnesses were allowed to testify in his benalf.

Section (A) of Criminal Procedure Rule No. 1 sets up the grounds on which a conviction and sentence may be attacked in a post-conviction proceeding. Sections (C) and (E) set out the duties of the court with respect to holding a hearing. These sections are as follows:

> "(C) If the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the trial court shall make written findings to that effect, specifying any parts of the files or records that are relied upon to sustain the court's findings.

* * * * * *

> "(E) When a motion is filed in the circuit court, mentioned in Paragraph (A) above, and the court does not dispose of the motion under Paragraph (C) above, the court shall cause notice of the filing thereof to be served on the prosecuting attorney; and on the motion the court shall grant a prompt hearing with proceedings reported. The court shall determine the issues and make written findings of fact and conclusions of law with respect thereto. If the prisoner desires to be present at the hearing for taking of testimony the court shall order his presence."

The trial court, after appointing counsel as provided in Section (D) of Criminal Procedure Rule No. 1, proceeded under Section (C) above. At this proceeding there was introduced the criminal docket sheet in case No. 9545, out of which appellant's conviction and sentence arose; the penitentiary commitment; a subpoena issued on behalf of the prosecution to the sheriff of Pulaski County for Parvin Romines; a subpoena issued to the sheriff of Crittenden County on behalf of the prosecution for Charley Byrd, Bill Billings, James G. Moore, Parvin Romines, E. W. Cramberg, Everett Jarmon, Douglas Bray, Bobby Keen, and Herman Lee Morris; the form of verdict signed by Carl D. White, foreman; the capias upon which the appellant was arrested

for grand larceny; and the information charging appellant with the crime of grand larceny in that he did "steal and drive away a 1953 Ford automobile, the property of one Herman Lee Morris, of a value of $400.00 with the intent to deprive the said owner of his property and the value thereof." The docket sheet and the penitentiary commitment show that appellant was represented in that trial by Cecil Nance, a reputable attorney.

Based upon the foregoing record, the trial court, in the absence of petitioner but in the presence of his current court-appointed counsel, dismissed appellant's petition. In so doing, the trial court found as follows:

> "That the petition was not verified as required by the Per Curiam Order of the Supreme Court of Arkansas, dated October 18, 1965, Section A; but notwithstanding this finding, the Court also finds that the allegation of the defendant stating that this defendant was charged with car theft and thereafter found guilty, sentenced and committed for Grand Larceny, is without merit for the reason that the docket sheet in Cause 9545 and the original files therein, introduced by the prosecuting attorney of this district with permission to withdraw and substitute certified copies thereof, which is the original cause complained about, charges this defendant with the crime of Grand Larceny in that he on or about November 5, 1960, in Crittenden County, Arkansas, did unlawfully, wilfully and feloniously take, steal and drive away a 1953 Ford Automobile, the property of one Herman Lee Morris, of a value of $400.00, with the intent to deprive the said owner of his property and the value thereof; etc.
>
> "The Court further finds that this defendant was charged by Information of the prosecuting attorney with the crime of Grand Larceny filed February 9, 1961, in Cause 9545; that on February 10, 1961, the defendant was arraigned and entered a plea of Not Guilty, and that being without counsel,

the Court appointed Honorable Cecil Nance (Sr.), an attorney of the highest standing before the bar of this Court, with many years of experience in both criminal and civil practice, to represent this defendant; that on February 20, 1961, on motion of the defendant, the cause was continued for the term; that on September 25, 1961, the defendant announced ready for trial and a jury was empaneled and sworn and a trial had, the jury returning a verdict of Guilty and fixing punishment at Twenty-one years in the Arkansas State Penitentiary.

"The Court further finds that there was no suppression of evidence on the part of the prosecution and that the defendant received the best counsel obtainable before this bar, received a fair and impartial trial before a jury of his peers, and a verdict of Guilty was rendered against him and he was sentenced thereunder."

The action of the trial court with respect to the first contention of appellant was certainly in accordance with the procedure set out in Criminal Procedure Rule No. 1. There can be no doubt that the defendant was charged with grand larceny and that he knew of the crime with which he was charged. The docket sheet shows an arraignment and a plea of not guilty. Furthermore, our statute, Ark. Stat. Ann. § 41-3901 (Repl. 1964), defines larceny as "the felonious stealing, taking and carrying, leading, riding or driving away the personal property of another." Ark. Stat. Ann. § 41-3907 (Repl. 1964) provides that where the value of the property stolen exceeds the sum of $35.00 the punishment shall be imprisonment of not less than one or more than twenty-one years.

Appellant's second contention, however, contains an issue of fact not shown by the record. Under Section (E) of Criminal Procedure Rule No. 1 above, the trial court should have held a hearing or pursued the matter

further by ascertaining through pretrial procedures that no bona fide issue existed.

A certain amount of discretion in the matter of post-conviction proceedings must be left to the trial court, especially with respect to pre-trial procedures. *Townsend* v. *Sain;* 372 U. S. 293, 9 L. Ed. 2d 770, 83 S. Ct. 745 (1963). For instance, in this case the trial court, could properly have asked appellant to advise the court, by pleading or otherwise, the names of witnesses who were not allowed to testify in his behalf. In addition, the trial court could also have required appellant to state the substance of what the witnesses would say if called to testify in his behalf. In this manner, the trial court, without having put the county to the expense of transporting appellant from the penitentiary to the place of trial, could have ascertained whether there was any substance to the allegation and whether the testimony proposed to be offered by appellant was relevant. Of course, if the testimony should appear relevant to the issue and should appear to affect the outcome of the proceeding, the trial court should hold a hearing and at such hearing appellant should be permitted to be present.

It was not the purpose of Criminal Procedure Rule No. 1 to give a person convicted of a crime a holiday from the penitentiary for the purpose of a hearing, but to conscientiously protect his constitutional rights. If trial courts will therefore insist upon proper verification of pleadings and pre-trial statements, any abuse of the privilege of post-conviction proceedings can be remedied through prosecution for perjury.

For the reasons stated herein, we are therefore reversing and remanding this cause for proceedings in accordance with this opinion.

FOGLEMAN, J. disqualified.

ROBERT T. WALKER *v.* WITTENBERG, DELONY & DAVIDSON, INC.

5-4008 412 S. W. 2d 621

Opinion delivered March 6, 1967

[Original opinion delivered December 5, 1966, 241 Ark. 525.]

CONLEY BYRD, Justice. The original opinion in this case was delivered December 5, 1966, *Walker* v. *Witten-*

berg, Delony & Davidson, Inc., 241 Ark. 525. Appellee, Wittenberg, Delony & Davidson, Inc., hereinafter referred to as "architect," is the only petitioner for a rehearing. The only issue[1] before us is whether there was a contractual obligation upon the architect to be present continuously during construction of the funeral home where appellant, Robert Walker, a brickmason, was injured. We hold that the architect had no such contractual duty and that he had no duty to prescribe safety precautions for the contractor or to enforce performance of the safety provisions contained in the contract between the owner and the contractor, to which he was not a party.

The trial court, at the conclusion of appellant's evidence, directed a verdict in favor of the architect, hence the facts, viewed in the light most favorable to appellant, will be stated as if they were true even though some of them were controverted.

The facts giving rise to this litigation show that Ruebel and Company employed the architect to design a funeral home on West Markham Street in Little Rock. The design for the outer walls called for precast concrete panels ten feet high, eight feet wide and three inches thick, to be backed on the inside by light aggregate blocks. This design was adopted after the architect submitted his preliminary drawings and comments to the manufacturer of the panels because of the latter's superior knowledge, and then revised the design pursuant to the manufacturer's suggested changes. Upon the architect's plans and specifications, Ruebel and Company let the contract for construction to Cone & Stowers, appellant's employer.

At the time of the accident, appellant was laying

[1]Appellant has waived the contention that architect negligently failed to provide for adequate support of the precast panels by his failure to argue same on appeal. *Fancher* v. *Baker,* 240 Ark. 288, 399 S. W. 2d 280.

light aggregate blocks behind the precast concrete panels. After the blocks had been laid on the east wall of the building to within two courses of the top, the braces holding the panels upright were removed to permit the top two courses to be laid. While the braces were being removed, appellant was standing on top of the wall, plumbing it. As the last brace was removed, the wall fell outward, causing appellant's injuries.

Appellant and his immediate supervisor both stated they did not know that the wall, without the braces, was dangerous or unstable. The west wall, identical to the east wall and from which the braces were removed before the accident involved here, stood a matter of days without falling. The architect admits the wall on which appellant was standing was a free standing wall without the braces, *i. e.,* not stable, and that it would have a tendency to fall toward the outside. The wall was designed to be later tied into the roof for stability.

It is not contended that the architect knew the braces were being removed from the wall. The architect admittedly performed no supervisory activities in connection with the building of the funeral home. Apparently, the architect did inspect the premises from time to time.

It is the contention of appellant that the architect agreed with the owner to supervise and inspect the building, was paid a fee for it, and had a definite duty to supervise the work, including the responsibility of taking steps to secure the safety of workmen such as appellant. The architect's contention is that his duty was to supervise and inspect only to the end that when completed the building would conform to the plans and specifications and the Little Rock Building Code, and there was no duty upon him to exercise control over means and methods adopted by the contractor which did not affect the end result, *i. e.,* there was no duty upon him to direct or control the contractor in reference to

the temporary support of the precast panels during construction.

The actual agreement between the owner and the architect was oral. Gordon Wittenberg, a member of the architectural firm of Wittenberg, Delony & Davidson, Inc., and a brother to George Wittenberg, an officer and part owner of Ruebel and Company, testified there was no formal written agreement between the architect and the owner for furnishing architectural services. He stated that the architectural services included preparation of plans and specifications and periodic inspection while the building was under construction, and that while his firm prepared the plans and specifications, the building contract was let by the owner. The architect was to receive six per cent of the contract price, of which one and one half per cent was allocated to the special engineering supervision required by Section 204 of the Building Code of the City of Little Rock.

George Wittenberg, of Ruebel and Company, when asked whether Ruebel and Company had employed an architect to comply with Section 204 of the Building Code, stated:

> "We employed Wittenberg, Delony & Davidson, to perform all of the duties of an architect for us and in our behalf."

Section 204 of the Building Code provides:

> "Section 204. *Inspection and Special Engineering Supervision.*
>
> "The building Inspector shall inspect or cause to be inspected at various intervals during the erection, construction, enlarging, alteration, repairing, moving, demolition, conversion, occupancy and underpinning all buildings and structures referred to in this Code and located in the City of Little Rock, and a final inspection shall be made of every build-

ing and structure hereafter erected prior to the issuance of the Certificate of Occupancy as specified in Section 206.

"No building construction, alteration, repair or demolition requiring a building permit shall be commenced until the permit holder or his agent shall have posted the building permit card in a conspicuous place on the front premises. The permit card shall be maintained in such position by the permit holder until the Certificate of Occupancy has been issued by the Building Inspector.

"The Building Inspector upon notification from the permit holder or his agent shall make the following inspections of buildings and either shall approve that portion of the construction as completed or shall notify the permit holder or his agent wherein the same fails to comply with the law.

"*Foundation Inspection*: To be made after trenches are excavated and the necessary forms erected, steel placed and when representative samples of all materials for the foundation are delivered on the job.

"*Frame Inspection*: To be made after the roof, all framing, fire-blocking and bracing is in place and all pipes, chimneys and vents are complete.

"*Final Inspection*: To be made after building is completed and ready for occupancy.

"No work shall be done on any part of the building or structure beyond the point indicated in each successive inspection without first obtaining the written approval of the Building Inspector. Such written approval shall be given only after an inspection shall have been made of each successive step in the construction as indicated by each of the above inspections.

"No reinforcing steel or structural framework of any part of any building, or structure shall be cov-

ered or concealed in any manner whatsoever without first obtaining the approval of the Building Inspector.

"In all buildings where plaster is used for fire protection purposes the permit holder or his agent shall notify the Building Inspector after all lathing and backing is in place and all representative samples of plastering materials are delivered on the job and no plaster shall be applied until the approval of the Building Inspector has been received. "*Special Engineering Supervision*: Any owner or his agent engaged in the erection or causing the erection of a building or structure where the estimated value exceeds $25,000 shall employ a registered architect or a licensed engineer to supervise the construction of the building. Such architect or engineer shall be licensed under the laws of the State of Arkansas and *his service shall extend over all important details of framing, erection, and assembly and he shall render full inspection service and adequate supervision on such buildings.*

"He shall be held directly responsible for the enforcement of this Code, wherever same is applicable to the structure upon which he is engaged. He shall notify the Building Inspector of any attempt to cover, conceal, patch, or repair, any defect in materials or workmanship before such materials have been examined by the Building Inspector, or his representative. He shall be held directly responsible for the infraction of any ruling of the Building Inspector, and shall have the authority to compel the removal of defective materials or to suspend or stop work, pending the ruling of the Building Inspector." (Emphasis supplied.)

Thus it is seen there was nothing in the agreement between the architect and the owner which required the architect to be continuously present during the construction of the building or to enforce the safety provisions

of the contract between the owner and contractor, unless such a provision can be found in Section 204 of the Building Code.

Nor can we extend to the words "supervise" and "supervision," used in Section 204 of the Building Code, the requirement that the architect must exercise control over the means and methods adopted by the contractor which do not affect the end result. When read in its entirety, it is obvious that the purpose of Section 204 was to exact compliance with the Building Code and to hold the architect responsible to the building inspector in connection therewith.

We had occasion in *Moore and Chicago Mill & Lbr. Co.* v. *Phillips,* 197 Ark. 133, 120 S. W. 2d 722 (1938), to comment on the control as to means and methods adopted by a third party in contracts containing language such as "under supervision of owner's agent as he may direct," and in so doing said:

> "There are countless decisions of appellate courts construing stipulations in contracts, such as here involved, relating to the right of the owner 'to give directions'—'orders' and 'instructions' regarding the work as it progresses; and phrases such as 'in accordance with instructions'—'as directed'—'in such manner as shall be directed'—'under supervision of owner's agent, as he may direct'—and 'under the direction and supervision.' In all of the cases examined, some of which are cited, it is held that such phrases do not relate to the method or manner and do not govern the details or the physical means by which the work is to be performed. The Supreme Court of the United States has so held in two cases directly in point. *Casement* v. *Brown,* 148 U. S. 615, 13 S. Ct. 672, 37 L. Ed. 582; *U. S.* v. *Driscoll,* 96 U. S. 421, 24 L. Ed. 847."

Article 38 of the General Conditions of the Contract, A. I. A. Document No. A-201, 1958 Edition of American Institute of Architects, provides:

"ARCHITECT'S STATUS

"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 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.

"As the Architect is, in the first instance, the interpreter of the conditions of the Contract and the judge of its performance, he shall side neither with the Owner nor with the Contractor, but shall use his powers under the contract to enforce its faithful performance by both.

"In case of the termination of the employment of the Architect, the Owner shall appoint a capable and reputable Architect against whom the Contractor makes no reasonable objection, whose status under the contract shall be that of the former Architect; any dispute in connection with such appointment shall be subject to arbitration."

Article 12 provides:

"The Contractor shall continuously maintain adequate protection of all his work from damage and shall protect the Owner's property from injury or loss arising in connection with this Contract. He shall make good any such damage, injury or loss, except such as may be directly due to errors in the Contract Documents or caused by agents or employees of the Owner, or due to causes beyond the Contractor's control and not to his fault or negligence. He shall adequately protect adjacent property as provided by law and the Contract Documents.

"The Contractor shall take all necessary precau-

tions for the safety of employees on the work, and shall comply with all applicable provisions of Federal, State, and Municipal safety laws and building codes to prevent accidents or injury to persons on, about or adjacent to the premises where the work is being performed. He shall erect and properly maintain at all times, as required by the conditions and progress of the work, all necessary safeguards for the protection of workmen and the public and shall post danger signs warning against the hazards created by such features of construction as protruding nails, hoists, well holes, elevator hatchways, scaffolding, window openings, stairways and falling materials; and he shall designate a responsible member of his organization on the work, whose duty shall be the prevention of accidents. The name and position of any person so designated shall be reported to the Architect by the Contractor.

"In an emergency affecting the safety of life or of the work or of adjoining property, the Contractor, without special instruction or authorization from the Architect or Owner, is hereby permitted to act, at his discretion, to prevent such threatened loss or injury, and he shall so act, without appeal, if so authorized or instructed. Any compensation, claimed by the Contractor on account of emergency work, shall be determined by agreement or Arbitration."

When the architect's status under Article 38, providing that he "is the agent of the Owner only to the extent provided in the Contract Documents. . .," is read in connection with the safety provision of Article 12, it is at once apparent the architect was given no authority over the safety provisions except to see that the contractor designated a responsible employee whose duty was prevention of accidents and whose name and position were reported to the architect.

Construing the architect's agreement with the own-

er in the light of the circumstances under which it was made, the contract between the owner and the contractor, requiring the contractor to designate someone in his organization whose duty was prevention of accidents, certainly indicates the owner was not expecting the architect to also supervise day-to-day safety precautions. This is illustrated by the fact that the contract required the name of the person so designated to be reported to the architect, and by the fact that the owner, by requiring the contractor to furnish a person to prevent accidents, had already paid once for the prevention of accidents in his building contract with Cone and Stowers.

The presumption is that parties contract only for themselves, and a contract will not be construed as having been made for the benefit of a third party unless it clearly appears that such was the intention of the parties. *Knox* v. *Ball*, 144 Tex. 402, 191 S. W. 2d 17, 164 A.L.R. 1453 (1945). Before an architect can be said to have agreed with an owner to exercise direct control over a contractor with respect to day-to-day safety supervision of a building contract, such agreement must clearly appear from the terms of the agreement, the conduct of the parties, or the nature of the work being performed.

Appellant argues that this case is controlled by *Erhart* v. *Hummonds,* 232 Ark. 133, 334 S. W. 2d 869 (1960), but we disagree. There we had work involving a special danger to others which was known by the architects to be inherent in the construction of the J. C. Penney and Company building, *Restatement of the Law of Torts,* 2d, § 427; the architects were specificially employed by the owner to guard its interests by supervising construction of the building *in addition to their architectural duties;* and furthermore, the present danger to the injured parties was known to the architects.

Here the contractor's negligence causing the injury was in the manner in which the work was performed,

the risk was not inherent in the work, and the architect had no reason to contemplate the contractor's negligence when the contract was made, *i.e.*, the negligence here was collateral to the risk of doing the work. *Restatement of the Law of Torts*, 2d § 426.

While the *Erhart* case states the correct rule as to the circumstances there prevailing, we think that the correct rule covering the circumstances here prevailing was stated in *Day* v. *National U. S. Radiator Corp.*, 241 La. 288, 128 So. 2d 660 (1961). There the architects had prepared plans and specifications for a building which included a domestic hot water system. After installation of a boiler by the mechanical subcontractor, one of his employees lighted the boiler to test its operation. An explosion resulted, killing one of the subcontractor's employees standing nearby. The contractor had failed to equip the boiler with a thermostat and safety relief valve required by the specifications. The architects' contract required them to exercise "adequate supervision of the execution of the work to reasonably insure strict conformity with the working drawings, specifications and contract documents." This was to include inspection of samples, materials and workmanship and frequent visits to the worksite. The trial court and Court of Appeal (117 So. 2d 104) held that the architect was negligent, both in failing to inspect the hot water system during the course of installation and after completion and in approving the subcontractor's shop drawing which did not have a pressure relief valve for the boiler, and that such negligence was the proximate cause of the explosion. The Supreme Court held that if the case were one where the architects visited the site after completion of the installation and, knowing that the boiler was to be tested, failed to observe that the boiler was not equipped with the specified safety devices, they would not hesitate to say that the architects breached a duty and reasonably should have foreseen that the breach would cause damage. In reversing the Court of

Appeal and directing dismissal of the suit by deceased's personal representative, however, they said:

> "As we view the matter, the primary object of this provision was to impose the duty or obligation on the architects to insure to the owner that before final acceptance of the work the building would be completed in accordance with the plans and specifications; and to insure this result the architects were to make 'frequent visits to the work site' during the progress of the work. Under the contract they as architects had no duty to supervise the contractor's method of doing the work. In fact, as architects they had no power or control over the contractor's method of performing his contract, unless such power was provided for in the specifications. Their duty to the owner was to see that before final acceptance of the work the plans and specifications had been complied with, that proper materials had been used, and generally that the owner secured the building it had contracted for.
>
> "Thus we do not think that under the contract in the instant case the architects were charged with the duty or obligation to inspect the methods employed by the contractor or the subcontractor in fulfilling the contract or the subcontract. Consequently we do not agree with the Court of Appeal that the architects had a duty to the deceased Day, an employee of Vince, to inspect the hot water system during its installation, or that they were charged with the duty of knowing that the boiler was being installed."

For the reasons stated, the directed verdict in favor of the architect is affirmed.

HARRIS, C. J. dissents.

CARLETON HARRIS, Chief Justice, dissenting. The opinion handed down in this case on December 5, 1966,

expressed my views as well as those of the court, and my thinking still conforms to the reasoning therein set out. However, because of some statements made in the present majority opinion, I desire to make a few additional comments.

The majority state that the only issue is "whether there was a contractual obligation upon the architect to be present *continuously* (my emphasis) during construction* * *." I do not agree that this is the issue, though, before commenting further on that question, I would like to point out that the record reflects that not even periodic checks were made, and if this had been done, the architect certainly would have noticed the free-standing west wall. Mr. Tom Gray, an employee of the architectural firm, testifying on behalf of the firm, agreed with other witnesses that a free-standing wall, *i.e.*, a wall that does not have any lateral support, is not stable. The west wall had been standing without support for apparently a period of a week to ten days at the time the east wall fell. If a periodic check had been made (which surely would have included once in a week or ten days) the free-standing west wall would have been discovered, and the architect would have called the contractor's attention to this admittedly dangerous condition.

I think the issue is, "What were the duties imposed upon the architects under the term, 'supervision'?" The A.I.A. (American Institute of Architects) General Conditions were specifically made a part of the contract, and Article 12 of these conditions is set out in full in the majority opinion, from which I quote as follows:

"The Contractor shall take all necessary precautions for the safety of employees on the work, and shall comply with all applicable provisions of Federal, State, and Municipal safety laws and building codes to prevent accidents or injury to persons on, about or adjacent to the premises where the work is being performed. He

shall erect and properly maintain at all times, as required by the conditions and progress of the work, all necessary safeguards for the protection of workmen and the public and shall post danger signs warning against the hazards created by such features of construction as protruding nails, hoists, well holes, elevator hatchways, scaffolding, window openings, stairways and falling materials; and he shall designate a responsible member of his organization on the work, whose duty shall be the prevention of accidents. *The name and position of any person so designated shall be reported to the Architect by the Contractor.* [My emphasis]"

Referring to the italicized portion, I should like to ask *why it was necessary that the name of the man responsible for safety be given to the architect unless the architect was charged with some responsibility for safety?* Under the majority view, the only responsibility of Wittenberg, Delony and Davidson, Inc., "was to supervise and inspect only to the end that, when completed, the building would conform to the plans and specifications and the Little Rock Building Code. * * *" I reiterate that, if safety supervision clearly was the sole responsibility of the contractor, what interest would the architect have in whether necessary safeguards were provided for the workmen? At least, what interest that would demand (as required by the contract) his notification?

Bear in mind that I am not saying that the architects are liable, nor did the original majority opinion so state. I am simply saying that, under the facts cited, a jury question was presented relative to whether the architects were charged with supervision of the work to the end that safety regulations would be observed.

I therefore respectfully dissent.

PATRICIA FAYE JENKINS *v.* HENRY B. MEANS, JUDGE

5-4157 411 S. W. 2d 885

Opinion delivered March 6, 1967

Shackleford & Shackleford, for appellant.

Joe W. McCoy and *Reinberger, Eilbott, Smith & Staten,* for appellee.

CONLEY BYRD, Justice. This race for venue, which is here on prohibition, raises the issue of whether a cause of action can properly be commenced against a decedent's estate before there has been an appointment of a personal representative. These races for venue arise because our venue statute, Ark. Stat. Ann. § 27-610 (Repl. 1962), permits an action for personal injury to be brought either

in the county where the accident occurred or in the county where the person injured or killed resided.

The undisputed facts show that a two-car collision occurred in Grant County in which the sole occupant of each car, being the driver thereof, was killed. One driver, Frank Munn Jenkins, was a resident of Ashley County and the other, Van Gatlin, was a resident of Grant County.

The petitioner, Patricia Faye Jenkins, was appointed and qualified as administratrix of the estate of her deceased husband, Frank Munn Jenkins, in the Ashley Probate Court. On June 7, 1966, Mrs. Jenkins, as administratrix, filed suit in the Ashley Circuit Court against Imogene Gatlin as administratrix of the estate of Van Gatlin, deceased. Summons was duly issued and placed in the hands of the Grant County sheriff for service upon Mrs. Gatlin.

Prior to the appointment of Mrs. Jenkins in Ashley County, Mrs. Gatlin, as the surviving widow of Van Gatlin, filed on June 3, 1966, a petition in Grant Probate Court, seeking her appointment as administratrix of her deceased husband's estate. After the service of summons from Ashley Circuit Court on Mrs. Gatlin, she withdrew her petition to have herself appointed administratrix and on June 18, 1966, filed a petition in Grant Probate Court for appointment of Alvin Gatlin as administrator of Van Gatlin's estate. Alvin Gatlin was that day appointed and qualified as administrator by Grant Probate Court and on the same day filed suit in Grant Circuit Court against Mrs. Jenkins, administratrix of Jenkins' estate. Summons directed to the Ashley County sheriff was properly issued and delivered to him for service.

On July 12, 1966, Mrs. Jenkins, as administratrix, amended her complaint in Ashley Circuit Court, seeking judgment against Alvin Gatlin as administrator of the estate of Van Gatlin, and caused summons thereon to be issued and delivered to the Grant County sheriff.

Motions to quash were promptly filed in Ashley Circuit Court by Mrs. Gatlin and Alvin Gatlin, and in Grant Circuit Court by Mrs. Jenkins. From a denial by Grant Circuit Court of the motion to quash service on Mrs. Jenkins, the matter comes here via petition for prohibition. The petitioner contends that Grant Circuit Court is without jurisdiction for the following reasons:

A. Action in Ashley Circuit Court was commenced prior to action in Grant Circuit Court.

B. When Mrs. Gatlin filed her petition and nothing remained to be done except the signing of the order and issuance of letters, Ark. Stat. Ann. §§ 62-2102 (b), 62-2104 (Supp. 1965) permitted bona fide service upon nominee.

C. The amendment of the complaint in Ashley Circuit Court and subsequent service upon Alvin Gatlin as administrator gave retroactive effect to the previous filing.

Petitioner's contention that she first commenced her lawsuit in Ashley Circuit Court is in reliance upon Act 32 of 1961 (Ark. Stat. Ann. § 27-301 [Repl. 1962]), which provides:

> ". . . If two [2] or more actions are commenced in different courts involving the same subject matter where the venue is proper in each, then that court shall acquire jurisdiction, to the exclusion of the other, wherein a complaint was filed and a summons issued thereon, and first placed in the hands of the sheriff of the proper county or counties, irrespective of the time of service of summons . . ."

In *Storey* v. *Smith,* 224 Ark. 163, 272 S. W. 2d 74 (1954), we had before us a suit by a resident of Desha County against certain named individuals and "....., the personal representative of the estate of Billy R. Storey, deceased." The action there was filed on Febru-

ary 27, 1954, and summons issued. On March 25, 1954, J. Roy Howard, on petition of Storey's creditors, was appointed administrator of Billy R. Storey's estate. That day, the summons issued on February 27 was placed in the sheriff's hands and served on J. Roy Howard. On March 30, Howard was discharged as administrator and Coy Storey was appointed administrator in succession. On March 25 a law suit had been filed in Pulaski Circuit Court by Coy Storey as administrator of the estate of Billy R. Storey. Upon his appointment, summons was issued and served on the plaintiff in the Desha County action. We there held that no legal proceeding actually existed in Desha Circuit Court on the complaint filed and could not exist until the identity of the defendant was known or came into being.

We hold that under the authority of the *Storey* case, petitioner's action was not properly commenced in Ashley Circuit Court, since there was not in being a personal representative of the estate of Van Gatlin at the commencement of the action, and that Grant Circuit Court properly has jurisdiction of the matter since suit was first commenced in that county.

The *Storey* case is also authority for holding that an amendment to the Ashley Circuit Court complaint, naming the proper defendant, would not revert, in this situation, to the date the original action was filed.

Nor can we find any merit in petitioner's contention that the mere filing of the petition by Mrs. Gatlin for her appointment made her subject to service in an action against the estate of Van Gatlin. Ark. Stat. Ann. § 62-2102 (b) (Supp. 1965) specifically provides that proceedings in probate shall be commenced by the filing of a petition, the issuance of letters, and the qualification of the personal representative. Nothing can be read into either Ark. Stat. Ann. § 62-2102 (b), *supra,* or Ark. Stat. Ann. § 62-2104 (Supp. 1965) which would authorize a personal representative to sue or be sued until such time as he has received letters of administration.

For the reasons herein stated, the petition for prohibition is denied.

RICHARD YORK & C. J. YORK *v.*
JOHN H. BRUMMETT ET UX

5-4145 412 S. W. 2d 617

Opinion delivered March 13, 1967

Guy H. Jones, for appellants.

Tom Gentry, for sppellees.

CARLETON HARRIS, Chief Justice. On October 9, 1964, appellant, Richard York, was involved in an automobile accident with John H. Brummett and wife in Pulaski County, Arkansas. Subsequently, suit was instituted in the Pulaski County Circuit Court (Second Division) by

the Brummetts against York and his father, C. J. York, the complaint alleging that, at the time of the mishap, Richard York was operating a vehicle owned by C. J. York, and that the former was the agent, servant, and employee of C. J. York, and acting within the scope of such employment. The Brummetts asserted personal injuries which they alleged were caused by the negligence of Richard York, and they sought judgment for damages. On trial, the jury returned a verdict for John H. Brummett in the amount of $700.00, and returned a verdict for his wife, Alma Brummett, in the sum of $6,000.00. From the judgment so entered, the appellants bring this appeal. Though Richard York is an appellant, he sets out no points for reversal, nor is any reason given why the judgment against him should be reversed. Two points for reversal are set out by appellant, C. J. York, but they really are to the same effect, *viz.,* that this appellant was entitled to a directed verdict, because appellees failed to sustain the burden of showing that Richard York was the agent and servant of C. J. York at the time of the collision.

The evidence reflected that five young men, ranging in age from 17 to 22, left the home premises of C. J. York in Mayflower early on the morning of October 9, 1964, in a truck owned by C. J. York for the purpose of traveling to the site of a job, which C. J. York had in North Little Rock. The five boys, three of whom were sons of York, were employees of this appellant. The five testified that they did not receive pay during travel time, but rather, in accordance with the number of hours they actually worked, the pay commencing when they started work on the job that was to be done. Richard York testified that no one told him how to get to and from work, what route to take, or what vehicle to use. According to Raymond York, "Well, if we had to take all of our tools, paint buckets, and stuff, we carried the panel, the old truck. If we didn't, we used Dad's other truck or sometimes we drove our own car." Most of the young men stated that there was no particular time for

them to be at work, though one testified that he was supposed to be there around 7:00.

C. J. York admitted that he owned the truck, and that the boys were on their way to work in it when the collision occurred. From his evidence:

> "Q. And you were furnishing a truck in order to furnish their transportation to work, is that correct?
>
> A. They could use the truck if they wanted; yes, sir."

He then stated that he never knew what vehicle the workers were going to use, since they would leave before he arose in the morning. It is earnestly contended that the evidence was insufficient to make a jury case against Mr. York.

Apparently, these young men had followed the same procedure of getting to the job site for some period of time. Jimmy Booker, one of the young men, and brother-in-law of C. J. York, stated that he made $1.75 an hour; that C. J. York kept the number of hours, and that the workers would tell him when "we came in of an evening how much time we put in." When asked if York ever told him what route to take, or when to leave, he answered, "Very seldom." While whatever transpired on other occasions would have no actual bearing on the events of October 9, it does seem that a pattern of using C. J. York's vehicles for transportation to and from work had been established.

Eddie York, also a son of appellant, testified that they were supposed to be at work around 7:00 A.M., and he stated that there was only one seat in the truck, so they were sitting on mats (in the bed of the truck).

From his testimony:

"Q. Was there anything else in the truck?

A. Buckets and our tools; yes, sir.

Q. Would this be tools for painting, and buckets for painting?

A. They weren't buckets of paint. They were empty buckets.

Q. And what sort of tools were in the truck?

A. Tools we have on the job, to work with.

Q. What would you call them, would you name one or two of them?

A. Well, draw knife...

Q. * * * these are tools used in construction type work?

A. Work we did; yes, sir.

Q. Did you know what sort of work you were going to do that day?

A. Yes, sir.

Q. What was that?

A. Painting and coating."

In *Carter Truck Line* v. *Gibson,* 195 Ark. 994, 115 S. W. 2d 270, quoting an earlier case, we said:

"The act of the servant for which the master is liable must pertain to something that is incident to the employment for which he is hired, and which it is his duty to perform, or be for the benefit of his master."

In *Helena Wholesale Grocery Company* v. *Bell,* 195 Ark. 435, 112 S. W. 2d 416, an employee of the Helena Wholesale Grocery Company, while driving his employer's truck, was involved in an automobile collision. The

company contended that there was no evidence in the record tending to show that at the time of the collision, the driver was engaged in the furtherance of its business, but rather the evidence showed that the employee was using the truck on a mission of his own, and that he had been permitted to take the truck home on a number of occasions as a matter of convenience in getting back to work. It was also pointed out that there was no merchandise in the truck. From a judgment against the company, there was an appeal. We said:

"Appellant contends that the testimony of the driver does not show that appellant permitted the driver of his truck to keep said truck at his home at night for the convenience of the defendant company and, failing to so show, the driver was not engaged in the prosecution of the business of appellant while driving said truck to his home. We think the evidence tends to show that it was for the benefit of appellant for the driver to take the truck to his home and keep it overnight. ***The evidence did not constitute an occasional lending of the truck to go home for a meal or for some other independent purpose of his own. We think the jury were warranted, and reasonably so, in drawing the inference from the evidence that appellant's permission to take the truck to the driver's home every night was for the convenience and benefit of said appellant, and that on account of this convenience and benefit the driver was engaged in the prosecution of the business of appellant while driving said truck to his home. The court declared the law to be that, if the jury found from the evidence that appellant permitted the driver of the truck to keep said truck at his home at night for the convenience of appellant, then the driver would be engaged in the prosecution of the business of appellant while driving said truck to his home. There is no dispute in the evidence that appellee was injured by the truck at a time it was being driven home by the regular employee of appellant."

Also, in *Ball* v. *Hail,* 196 Ark. 491, 118 S. W. 2d

668, Ball, an employee, finished his work for the day at the Rider Motor Company's place of business, and while on his way home, driving a car belonging to Rider Motor Company, a collision occurred. The evidence reflected that Ball had attended a meeting of salesmen of the company which adjourned late on a Saturday night. Rider Motor Company appealed a judgment against it, and this court said:

"Appellants vigorously assail the judgment as not being supported by any substantial evidence. They argue most forcefully that the evidence which they have offered is undisputed and that there was no question of fact to be determined in fixing liability. The positive statements, repeated several times perhaps to give emphasis, are that Mr. Ball attended the meeting of the salesmen of the Rider Motor Company and that after the meeting adjourned late Saturday night, Mr. Ball's employment for the day, or duties thereof were ended and that it was after this closing of the day's business that the accident occurred and that on account of that alleged fact, which it is contended was undisputed, the Rider Motor Company bases its contention that it was not liable.

* * *

"* * * We are forced to decide appellants' conclusions are not arrived at upon sound legal premises.

"Under the circumstances above stated there are certain presumptions that enter into the consideration of the evidence. Mr. Ball and Mr. Rider are the sole or only witnesses testifying for appellants. They are interested parties, both defendants in suit and on that account their testimony will not be taken as undisputed.***

"There was also another presumption present in this case that arises out of Mr. Ball's employment by Mr. Rider and the fact that he was driving or operating Mr. Rider's car at the time of the accident. That presumption is that the servant was acting for the master

while he was operating the master's car. That is a mere presumption. It may be overcome by evidence.***

* * *

"From the foregoing the only conclusion that can be reached is that the facts are not clear and undisputed as argued.

* * *

"***Furthermore, we see little difference in a contention that he was discharged and acting outside the scope of his employment, because he started home, than we would if the accident occurred in the early morning when he was driving from his home to the place of his employment. *It might as sanely be argued that on such an early morning trip he had not yet engaged in the duties of the day and was, therefore, not acting for the master*[1]. These different conclusions that may be arrived at, one as well supported in reason as the other, raise questions to be determined by the jury and may not be determined as matters of law."

Under the principles of law set out in the above quoted cases, we think that clearly a jury question was presented. There is no doubt but that the transportation of the workers to the job was for the benefit of York—not only that, but the evidence reflects that tools to be used on the job were being transported at the time of the collision. The evidence makes it obvious that the transportation of these workers was not something that happened only occasionally, but that the boys were accustomed to meeting at York's home and using one of his vehicles for transportation. It will be noted that transportation to the job was not only given to those who lived "at home," but also to others who met there for the purpose of being transported to the locale of the work. We do not agree with appellants' argument that the evidence was sufficient, as a matter of law, to overcome the presumption that Richard York was acting for the master while operating the master's car. Likewise,

[1]Emphasis supplied.

as stated in *Ball* v. *Hail*, *supra*, "From the foregoing the only conclusion that can be reached is that the facts are not clear and undisputed as argued." We hold that the evidence presented a jury question as to whether Richard York was engaged in his master's business at the time of the collision.

Affirmed.

H. DEAN BROWN ET UX *v.* CARL LEE

5-4149 412 S. W. 2d 273

Opinion delivered March 13, 1967

Eugene Coffelt, for appellant.

Little & Enfield, for appellee.

GEORGE ROSE SMITH, Justice. In 1965 H. Dean Brown, a housebuilder, constructed a residence for W. J. Davis and his wife for a contract price of $20,192.00. Thereafter Carl Lee, a real estate broker, brought this suit against Brown for $1,000.00, asserting that Lee had found the Davis job for Brown under an oral agreement by which Brown was to pay Lee a 5 per cent commission upon any building contracts that Lee might obtain for Brown. Brown denied the existence of the oral agreement. That issue of fact was settled by the jury's verdict in favor of Lee, for $333.33. (That the amount of the verdict is not consistent with either party's theory of the case is unimportant. *Fulbright* v. *Phipps,* 176 Ark. 356, 3 S. W. 2d 49 [1928].)

Brown, citing *Elkins* v. *Nelson,* 196 Ark. 209, 118 S. W. 2d 287 (1938), and other cases having to do with the sale of property, contends that the oral agreement is within the statute of frauds and is therefore unenforceable. We are unable to say that the statute is applicable. Only two sections of the statute might be considered pertinent. One relates to contracts for the sale of goods at a price of $500 or more, Ark. Stat. Ann. § 85-2-201 (Add. 1961), but this agreement did not involve a sale of goods. The other relates to contracts for the sale of an interest in land, § 38-101 (Repl. 1962), but no such interest was affected by the oral contract between Brown and Lee.

Brown also argues that Lee was acting as an employment agency without having obtained a license, as required by law. Ark. Stat. Ann. § 81-1001 (Repl. 1960). This argument is not well-founded. The statute defines an employment agency as one engaged in the business of furnishing employment or help or of giving informa- Section 81-1004. The same section defines an applicant tion about where employment or help may be secured. for employment as a person seeking work and defines an applicant for help as a person seeking help in any legitimate service. It is clear that a construction con-

tract, by which a builder undertakes to furnish labor and materials, is not the type of agreement falling within the province of an employment agency.

Upon the record in this case we find no tenable basis for holding that the contract in question is invalid. The judgment must therefore be affirmed.

LINCOLN INCOME LIFE INSURANCE COMPANY
v. CALLIE M. MILTON

5-4153 412 S. W. 2d 291

Opinion delivered March 13, 1967

Crumpler, O'Connor, Wynne & Mays, for appellant.

Jabe Hoggard, for appellee.

GEORGE ROSE SMITH, Justice. This is an action brought by the appellee to recover $125 under a sickness and accident policy. The insurance company contends that the insured's condition existed before the policy

was issued and was therefore excluded from coverage by this clause in the contract: "'Sickness' as used in this policy means sickness or disease which first commences or first becomes evident, after the effective date hereof and which causes loss commencing while this policy is in force." The trial court, hearing the case without a jury, entered judgment for the plaintiff, finding that she did not know the cause of her physical disorder when she applied for the policy.

There is no real dispute about the material facts. The policy was issued on July 19, 1965, without a medical examination. Mrs. Milton was then 36 years old. In applying for the policy she informed the soliciting agent that she was in good health as far as she knew.

In November, after the issuance of the policy in July, the insured consulted the late Dr. B. L. Moore, Sr., who was practicing medicine with his son. Dr. Moore's records, as explained by his son at the trial, disclosed that the chief complaint was "that she feels bad. The first notation is that her last menstrual period was September, 1964." A vaginal examination and urinalysis were negative. Dr. Moore placed his patient in the hospital for five days, apparently for tests and x-rays. That period of hospitalization resulted in the present claim.

It was found that Mrs. Milton's thyroid gland was underactive, producing insufficient hormones to regulate the bodily functions controlled by the thyroid gland —including the ovarian functions that give rise to menstruation. Dr. Moore prescribed thyroid pills. With that medication the patient's menstrual periods began again in December and were found to have continued normally when she was examined some seven months later by Dr. Moore, Jr.

Among the cases discussed by counsel these two bear most directly upon the issues now presented: State *Nat. Life Ins. Co.* v. *Stamper*, 228 Ark. 1128, 312 S. W.

2d 441 (1958), and *American Ins. Co. of Texas* v. *Neal*, 234 Ark. 784, 354 S. W. 2d 741 (1962). Each case affirmed a judgment for the plaintiff. In the Stamper case the insured, during most of her life, had had a small bony growth on the back of her head. It caused no trouble until more than a year after the issuance of the policy sued upon. The growth then increased in size and gave rise to the hospital and medical expenses incurred by the plaintiff. In sustaining the trial court's judgment for the insured we said that "the weight of authority is 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 reasonable accurate diagnosis of the case, so that recovery can be had, even though the disease, germs or infection was present in the body prior to the excluded time, if the condition was latent, inactive, and perhaps not discovered." That case was followed, on similar facts, in the *Neal* case, *supra*. See also *Old Equity Life Ins. Co.* v. *Crumby*, 241 Ark. 982, 411 S. W. 2d 292 (1967).

In those cases, and in many others to the same effect, the insured had some supposedly trivial infirmity or abnormality when the policy took effect. Later on, however, the condition changed for the worse and for the first time either actually became, or became diagnosable as, a sickness or disease falling within the coverage of the policy. The insured's right to protection under the contract was properly upheld.

The situation here is significantly different. There is no indication that Mrs. Milton's affliction changed for the worse between the issuance of the policy in July and her hospital confinement in November. She candidly admits that she had not had a menstrual period for ten months before she purchased the insurance. She went to see Dr. Moore because she felt bad. Her testimony: "I had complaint of my head and neck; so I went to Dr. Moore." The first notation in the doctor's record was that the patient's last period had been fourteen months earlier. After an unenlightening office examina-

tion Dr. Moore put Mrs. Milton in the hospital, where it was found that she suffered from a thyroid deficiency. Pills were prescribed and brought about a return to normal health.

We can find no reasonable basis for declaring that the appellee's hospital expense was attributable to a sickness or disease which, in the language of the policy, first commenced or became evident after the effective date of the contract. To the contrary, the examinations and tests merely confirmed the fact that Mrs. Milton had suffered for fourteen months or more from a thyroid deficiency. There is no evidence that the condition had worsened or had for the first time become subject to diagnosis. It is true, as the trial judge observed, that the insured did not know when she applied for the policy that her trouble was attributable to an underactive thyroid gland. It is clear, however, that such an underactivity did exist and that it led to the hospital expenses now in issue. That Mrs. Milton did not know the medical explanation for her condition when she applied for the policy is not a reason for holding that the condition first commenced or became evident after the effective date of the contract.

Reversed and dismissed.

FOGLEMAN, J., concurs.

JOHN A. FOGLEMAN, Justice, concurring. I concur fully in the opinion in this case. A statement in my concurring opinion in *Old Equity Life Insurance Company v. Crumby,* 241 Ark. 982, 411 S. W. 2d 292 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, had reference to the facts of that particular case and the terms of that policy. Even so, the principle also has application here. The policy in that case had to do with the origin of the "sickness". In this the critical time is the time when the "sickness" became evident. Under the facts of this case appellee's

condition was certainly such as would make her aware well before the policy was issued that a medical diagnosis should be sought.

JOSEPH BROOKS ET AL *v.* W. G. BAKER ET AL

5-4162 412 S. W. 2d 271

Opinion delivered March 13, 1967

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

Williams & Gardner, for appellee.

PAUL WARD, Justice. This litigation concerns the allowance of a belated claim against the estate of William Brooks (called deceased) who died February 17, 1950, leaving a widow and three children. The order of the Probate Court allowing the claim here involved was entered more than fifteen years later—on April 7, 1966. This is the belated order from which this appeal is taken.

The decisive issue is discussed by both sides as being involved in a complicated set of facts and events covering a period of sixteen years. For a better understanding of our conclusion hereafter reached it should be helpful to briefly summarize the facts and events just mentioned.

On March 1, 1950 letters of administration were issued to the deceased's widow, Fannie E. Brooks. About two months later it was learned the deceased had left a Will, and on May 9, 1950 the widow was appointed Executrix of the estate with Will annexed. In 1958 (while the administration was pending) the State paid into the estate the sum of $65,000 (the proceeds of a pending claim of the deceased for cotton seed). On April 24, 1961 W. G. Baker et al (appellees) filed a claim against the estate for $16,202.75 (based on notes executed by deceased in 1943). It being learned that the widow had died recently, appellees had the court to appoint M. J. Hickey, administrator in succession of the estate. On April 7, 1966 Hickey, as administrator in succession, allowed the claim, and on the same day the claim was allowed by the court. Then, on June 2, 1966, the court ordered that certain lands belonging to the estate be sold to pay the said claim. Thereupon the heirs of the deceased filed a Motion asking the court to vacate its orders previously mentioned on the ground that appellees' claim "was not presented within the time allowed by law and should be barred". Appellants' Motion was denied, and this appeal follows.

For reasons hereafter stated, it is our opinion that the trial court erred in denying appellants' Motion.

Ark. Stat. Ann. § 62-2601 a. (Suppl. 1965), in all parts material here, reads:

> "a . . . all claims against a decedent's estate . . . whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract or otherwise, *shall be forever barred* as against the estate, the personal representative, the heirs and devisees of decedent, *unless* verified and presented to the personal representative or filed with the court within *six months after the date of the first publication of notice to creditors.*" (Emphasis ours.)

> "d. . . *All claims* barrable under the provisions of subsection (a) hereof *shall, in any event, be barred at the end of five years after the date of the death of decedent,* unless within said periods letters have been issued and notice to creditors published as provided by Section 50 [§ 62-2111]." (Emphasis ours.)

One. Appellees' claim was barred by subsection "a." above. The record discloses the following.

(1). Fannie E. Brooks, on March 1, 1950, filed a verified Petition for appointment of Administratrix of the Estate of the deceased. Letters were authorized on the same day by the judge.

(2). On the same date a bond was filed and approved.

(3). On the same date "Letters of Administration" were issued to Fannie E. Brooks by the Clerk.

(4). On March 2, 1950 Fannie E. Brooks, as Administratrix, signed a "Notice" stating "All persons having claims against the estate must exhibit

them, duly verified, to the undersigned within six months from the first publication of this notice, or they shall be forever barred and precluded from any benefit in the estate."

(5). The "Notice" was published in the Courier Democrat on March 3, 10, 17, 24, of 1950—a copy of the "Notice" being attached.

Ark. Stat. Ann. § 62-2116 d. (Supp. 1965) reads, in material part:

"When a will is presented for probate under the provisions of this section, the proceedings shall be deemed a part of the proceedings for probate or for administration already initiated."

Under the plain wording of the above quoted provisions of statutes and the record herein we have no alternative other than to hold appellees' claim was barred, and that the trial court should have so held. There is no contention on the part of appellees that they filed their claim "within six months after the date of the first publication of notice to creditors".

Two. Appellees' claim is also barred under subsection "d" of said § 62-2601 previously quoted, because their claim (filed on April 24, 1961) was not filed within "five years after the death of the decedent. . . ." It is undisputed that William Brooks died on February 17, 1950.

Appellees attempted to avoid the obvious results which we have above reached on the grounds that (a) the administratrix did not sign an acceptance of her appointment and (b) the order allowing their belated claim amounted to a judgment and appellants gave no reason for setting it aside. We see no merit in either ground stated.

(a) Certainly the widow was considered to be the

administratrix by the court because she acted as such over a period of some ten years, and by appellees because they asked to have Hickey appointed as administrator in *succession*. In 33 C. J. S. Executors and Administrators, § 71, there appears this statement:

> "The presumption that an administrator had duly qualified arises after the lapse of a considerable period of time where there is evidence that he acted as administrator and was recognized as such by the court, and it may be presumed that an administrator qualified at the time of the appointment."

To the same effect see 12 Ark. Law Review 1 at page 12.

(b) The heirs did not appeal from the court's order allowing appellees' claim, but this would make no difference since they have a right to move to vacate at any time before a final order is entered. Ark. Stat. Ann. § 62-2015 (Supp. 1965), in material part, reads:

> "*For good cause*, at any time within the period allowed for appeal after the final termination of the administration of the estate of a decedent or ward, the court may vacate or modify an order, or grant a rehearing thereon; . . ." (Emphasis added.)

There can be no doubt, in view of what we have previously said, that "good cause" did exist in this instance, and the trial court had no alternative other than to set aside its previous order to sell property of the estate.

There being no contention that appellants did not perfect their appeal within proper time the cause must be, and it is hereby, reversed.

Reversed.

MARVIN CLARK, GUARDIAN OF THE ESTATE OF THOMAS HARVEY CAGE, A MINOR *v.* ARKANSAS DEMOCRAT COMPANY

5-4110 413 S. W. 2d 629

Opinion delivered March 13, 1967
[Rehearing denied May 1, 1967.]

Ben. D. Lindsey and *Spencer & Spencer* by *Don Gillaspie,* for appellant.

Robert C. Compton and *Austin McCaskill* for appellee.

LYLE BROWN, Justice. This appeal involves an action for personal injuries to Tommy Cage, age thirteen years, who was injured while working his newspaper route on a motor scooter in El Dorado. Tommy's guardian brings this appeal from a jury verdict in favor of the defendant, Arkansas Democrat Company. The appeal questions the propriety of an instruction which told the jury that the Democrat had the legal right to contract with Tommy Cage, notwithstanding he was under fourteen years of age. Tommy, with the approval of his parents, had executed a written agreement with Arkansas Democrat Company.

The instruction questioned by Tommy's guardian on appeal, given at the request of the Democrat, is as follows:

> "Court's Instruction No. 8: You are also instructed that the Arkansas Democrat Company had the legal right to contract with Tommy Cage for the distribution of newspapers as an independent contractor even though it should be determined that he was under fourteen years of age."

The Democrat responds to the attack on this instruction by asserting that Act No. 96, March 21, 1883, § 2 (Ark. Stat. Ann. § 51-504 [1947]), authorized them to contract with the minor. The pertinent part of this section says that the contract of a minor, when approved by the parent having control of the minor, shall be binding. Cases coming to this court in which provisions of Act No. 96 have been applied have been concerned with sharecropping contracts.

We have no hesitancy in holding that such part of Act No. 96 as deals with minors under fourteen years of age has been superseded by Initiative Act No. 1 of 1914. See Ark. Stat. Ann. § 81-701 (Repl. 1960), which reads as follows:

> "No child under the age of fourteen [14] shall be employed or permitted to work in any remunerative occupation in this State, except that during school vacation children under fourteen [14] years may be employed by their parents or guardians in occupations owned or controlled by them."

Initiative Act No. 1 repeals "all acts or parts of acts inconsistent with any of the provisions of this Act ..."

As they relate to minors under fourteen years of age, the two Acts are inconsistent and the repealing clause speaks for itself.

The Democrat next asserts that Ark. Stat. Ann. § 81-701 does not apply in this case. This contention is grounded on the theory that the statute does not prevent a child under fourteen years from operating his own business. In other words, the Democrat contends this minor was an independent contractor and that his contract is not void but merely voidable.

Even if the boy were placed in that classification, the Democrat has contracted with him to work in a remunerative occupation. This is prohibited by the statute and Court's Instruction No. 8 is therefore an incorrect statement of the law. Vacation employment under control of the parent excepted, we hold that the type of contractual arrangement herein utilized—whereby a child under fourteen years is employed or permitted to work in a remunerative occupation—violates the letter, the spirit, and the clear purposes of Initiative Act No. 1 of 1914. The purpose of the Act was set forth in *Terry Dairy Co.* v. *Nalley*, 146 Ark. 448, 225 S. W. 887 (1920):

> "The object of the statute was to prevent boys under fourteen years of age from obtaining employment of any kind. Doubtless the Legislature had in view that boys under that age might seek employment of the kind in question in which they would

be subject to dangers in driving about the streets and delivering goods which their immaturity could not guard against. The danger of the delivery wagon driven by the boy coming into collision with other vehicles and street cars was ever present while he was delivering goods; ..."

Here it should be pointed out that the right of the State to deny the parent the authority to bind a child of tender years to a labor contract—as did Act 96 of 1883—is unquestioned. In the *Terry Dairy Company* case, our court quoted from Tiedeman on State and Federal Control of Persons and Property, as follows:

"So far as such regulations control and limit the powers of minors to contract for labor, there has never been, and never can be, any question as to their constitutionality. Minors are the wards of the the nation, and even the control of them by parents is subject to the unlimited supervisory control of the State."

Our court gave Initiative Act No. 1 a liberal construction in *Cox Cash Stores, Inc.* v. *Allen,* 167 Ark. 364, 268 S. W. 361 (1925):

"To carry out the beneficent purposes of the Legislature, child labor acts should be given such broad and liberal meaning as can be read therefrom as to mitigate the evils or prevent the mischiefs which they are intended to obviate. In pursuance of its plan in the matter, the Legislature provided that no child under the age of fourteen shall be employed in any remunerative occupation, except that, during school vacation, they may be employed by their parents or guardians in occupations owned by them."

Under the Democrat's so-called "independent contract," work was made available to this child which involved delivering three newspaper routes on a motor

scooter in the city of El Dorado. He was also called upon by the Democrat to solicit insurance, and canvass for new customers at night. It would indeed be a most narrow construction to deny the boy the protection given him by the Child Labor Act of 1914 on the ground that he and his parents had contracted away that protection. Here, it should be noted that the child has no coverage under our Workmen's Compensation Act, Ark. Stat. Ann. § 81-1302 (c) (1) (Repl. 1960).

Appellee argues that our Child Labor Act, passed in 1914, never contemplated the situation now before us; that at that time children were being exploited by employing them at low wages in occupations detrimental to their health, education, morality, and general welfare. In support of this argument, appellee cites the *Cox* case. That same case holds that another end to be accomplished by the Act was to prevent the injury and maiming of children in hazardous occupations. The Act may not have been important to the protection of newsboys in 1914, but in 1967 it should be considered very important. A plat of young Cage's newspaper routes reveals that he served a well populated area of El Dorado. In his area of service appear State Highway 15, Main Street, Warner Brown Hospital, the Youth Center, El Dorado-to-Camden Highway, Union Memorial Hospital, and numerous residential streets. Because of heavy vehicular traffic and his use of a motor scooter, it would be absurd to say that injury to this child should not have been reasonably anticipated.

Under the holding in *Terry Dairy*, and reiterated in *Cox*, this case should be reversed, with directions to the trial court to ascertain the damages. It was held in the *Cox* case that when the undisputed evidence shows the child to have been injured in the course of his employment, the trial court takes the question of proximate cause from the jury. The only other element necessary to complete the chain of proximate cause is that some injury should have been reasonably anticipated from hiring the child contrary to the provisions of the

statute; this element is established by the law itself. In the case at hand, it was undisputed that Thomas Harvey Cage was thirteen years of age, that he was injured at a time when he was delivering newspapers for the Democrat and under a relationship created by the Democrat whereby Cage was engaged in remunerative work.

Reversed.

HARRIS, C. J., and JONES, J., concur.

CARLETON HARRIS, Chief Justice, concurring. I concur with the majority in its holding that this case should be reversed, but I would reverse it solely on the basis that Tommy Cage was an employee of the Arkansas Democrat. I do not think it necessary in this case to reach the question of what constitutes, "permitting" a child to work. This is a broad term (and a broad holding) with more than one interpretation, and the majority holding today can extend much further than simply prohibiting a child less than 14 years old from selling newspapers. Likewise, I do not consider it essential to this decision to examine the question of whether an independent contract can be legally entered into between a publisher and a newsboy of this age, and not being vital, should not be passed upon.

As stated, in my view, based on the provisions of the Agreement between the Arkansas Democrat and Tommy, together with the acts of the parties established by the evidence, the boy was not an independent contractor, but was an employee of appellee, *i.e.*, a master and servant relationship existed.

Let us look at some of the definitions and decisions with reference to the term "independent contractor." Volume 1, Bouvier's Law Dictionary (Third Revision), Page 1533, defines an independent contractor as:

"One who, exercising an independent employment contracts to do a piece of work according to his own

methods, and without being subject to the control of his employer, except as to the result of his work.

* * *

"A still broader definition has been given as follows: 'Where a person is employed to perform a certain kind of work, *** the execution of which is left entirely to his discretion, without any restriction as to its exercise, and no limitation as to the authority conferred in respect to the same, and no provision is especially made as to the time in which the work is to be done***.'"

This court, in *Barr* v. *Matlock,* 222 Ark. 260, 258 S. W. 2d 540 said:

"***One of the tests used to determine whether the relationship, in a case such as this, is master-servant or independent contractor is the control of the workman, the right to direct his work, and the right to discharge him from the work."

In *Hollingsworth* and *Fraizer* v. *Barnett*, 226 Ark. 54, 287 S. W. 2d 888, we stated:

"The power of an employer to terminate the employment at any time without liability is incompatible with the full control of the work which is usually enjoyed by an independent contractor and is a strong circumstance tending to show the subserviency of the workman.

"The fact that the employment contract was for no specified time and could be terminated at will by appellant without liability, and that he reserved the right to make suggestions as to how the work should be done, are indicative of the relationship of employer-employee between appellant and appellee."

With these rules and tests in mind, let us briefly examine the testimony in this case.

Tommy Cage testified that he was hired by Charles N. Gentry, District Adviser for District No. 1 (which

includes El Dorado) for the Arkansas Democrat. The boy testified that he was given specific delivery routes... he was directed to throw the papers in wax paper on rainy days...he could not take subscriptions on other routes, and if any subscriptions were taken on routes other than his own, the carrier boys of those routes would be credited with the subscriptions...Gentry would pick up the newsboys once or twice per month in the evening, and they would work two or three hours at obtaining new subscriptions...he (Tommy) received directions (or training) in selling accident and health insurance which was offered only to subscribers of the Democrat...he delivered papers to prepaid subscribers (those who paid directly to the Democrat office). The testimony of Tommy as to his activities as a paper boy was pretty well substantiated by Mr. Gentry.

V. M. Sorrells, Circulation Manager for the Arkansas Democrat, who signed the contract for appellee, testified that he was also resident agent for Continental Assurance Company, which was the company offering the health and accident insurance to Democrat subscribers, and he stated that appellee company received a small portion of the premiums paid for the insurance. Sorrells testified that the purpose in selling the policies was to hold readership, and they were sold only to subscribers.

Under the provisions of the contract itself, Tommy was required to give two weeks written notice of the time he desired to terminate the contract, and he agreed that he would diligently maintain delivery service until the date of termination. The publisher, however, was given the right to cancel the agreement "with or without cause, at any time and without previous notice." Furthermore, the written agreement recites that the distributor "will not distribute or sell either directly or indirectly, any other newspaper in the area in which he operates, during the period of this agreement *and during the period of three months immediately following*

the termination thereof." (Emphasis supplied.) This last, of course, is actually a restrictive covenant, being, in effect, an agreement not to compete with the Arkansas Democrat. The usual consideration for such a covenant is simply the employment of the individual. In *Bailey* v. *Kin*, 240 Ark. 245, 398, S. W. 2d 906, this court said:

"Appellant contends that there is no mutuality (of consideration), and the contract is thus void. He argues that, under the agreement, appellee did not have to employ Bailey for any particular length of time; appellee did not have to pay any specific amount of money; and could fire Bailey without cause. We do not agree with appellant's contention. Numerous cases support the enforceability of protection covenants where the consideration is based simply upon employment. (Citing cases)"

A study of the testimony relating to Tommy's activities, and the contract itself, under our holdings and recognized definitions of independent contractor, convinces me that a master-servant relationship existed between this boy and appellee. I would therefore, as stated at the outset, so hold, and reverse this case without considering the question of what constitutes "permitting" a child under 14 to engage in any employment for remuneration, nor would I pass on the question of whether a valid relationship of independent contractor could be established.

I am authorized to to state that Jones, J., joins in this concurrence.

Opinion delivered March 13, 1967

Charles H. Eddy, for appellant.

Joe Purcell, Attorney General; *William R. Hass,* Asst. Atty, Gen., for appellee.

JOHN A. FOGLEMAN, Justice. Appellant Billy Gross was convicted of murder in the first degree in the Circuit Court of Conway County on March 5, 1964 and sentenced on March 19, 1964 to life imprisonment. He was charged with having killed one Frank Birch, alias Dutch Charton. No appeal was taken from that conviction and sentence. On July 9, 1965, appellant filed a pleading he designated Petition for Writ of Habeas Corpus, alleging that his conviction was void because of violation of his constitutional rights and offering newly discovered evidence. This evidence was alleged to be a statement of one Reverend Dewey Dill and wife that the deceased was alive several hours later than appellant claimed the evidence showed Birch was supposed to have died at appellant's hands.

On August 27, 1965 appellant filed a petition for writ of error "Cora Nova" (coram nobis). In this pleading he alleged error on the part of the trial court in denying a mental examination of appellant before trial, in permitting an alleged relative of the deceased to sit on the jury, the failure of his appointed attorney to subpoena certain unnamed witnesses, the denial of his right of appeal by his attorney, and new evidence, the latter being that of Reverend O. D. Dill and wife. Attached was a statement signed by Reverend O. D. Dill relating an occasion of his having seen Frank Birch alive. On Decem-

ber 7, 1965 appellant filed a motion for post-conviction hearing and review, purportedly under Criminal Procedure Rule No. 1. In addition to repeating most of the contents of his previous pleadings, appellant alleged other errors based on jury selection, separation of witnesses, admission of testimony, credibility of witnesses, misconduct of officials toward the jury, refusal by prison officials of permission to write courts, denial of counsel, and withholding of evidence by the sheriff.

Hearing on the various motions and petitions of appellant was held by the trial court on March 7, 1966 at which time the court, after hearing the testimony of O. D. Dill, Marlin Hawkins, Joe Quinn, L. M. Reid, Harry Locke and Joe Brewer, denied appellant a new trial on the ground of newly discovered evidence, that being the only ground of appellant's various motions then presented, appellant's counsel having said that the testimony of O. D. Dill was all the proof on behalf of appellant. From the order denying a new trial comes this appeal.

No evidence was offered in the trial court on any ground of appellant's motions except that of newly discovered evidence, and the brief on his behalf is also confined to this ground. Therefore, we have no basis for consideration of any other ground on this appeal.

As a motion for new trial, appellant's pleadings, being filed after the expiration of the term at which he was convicted, came too late. Ark. Stat. Ann. § 43-2202 (Repl. 1964); *Thomas* v. *State,* 136 Ark. 290, 206 S. W. 435; *State* v. *Martineau,* 149 Ark. 237, 232 S. W. 609, cert. dismissed, *Martineau* v. *State,* 257 U. S. 665, 42 S. Ct. 52, 66 L. Ed. 424. Being thus tardily filed, it might properly have been stricken out. *Delaney* v. *State,* 212 Ark. 622, 207 S. W. 2d 37.

A writ of error coram nobis does not lie to review an issue of fact or to contradict an adjudicated issue of fact. It is never a means of remedy upon the ground of newly

discovered evidence. *Howard* v. *State,* 58 Ark. 229, 24 S. W. 8. Consequently, we will consider this appeal on the motion for post-conviction relief under Criminal Procedure Rule No. 1. In doing so, we will consider appellant's contention that he was entitled to a new trial for newly discovered evidence (if indeed newly discovered evidence can actually be a proper basis under this rule). At best, we can only consider this ground for post-conviction relief on the same basis that we would consider a timely filed motion for new trial on the same ground.

Newly discovered evidence is one of the least favored grounds of a motion for new trial. See 4 Ark. Law Review 60. Such a motion is addressed to the sound legal discretion of the trial judge and an appellate court will interfere only in case of an apparent abuse of discretion or injustice to the movant. *Ward* v. *State,* 85 Ark. 179, 107 S. W. 677; *Osborne* v. *State,* 96 Ark. 400, 132 S. W. 210; *Russell* v. *State,* 97 Ark. 92, 133 S. W. 188; *Huckabee* v. *State,* 174 Ark. 859, 296 S. W. 716. One who merely states that new evidence in his favor has been discovered subsequent to his trial has failed to meet the requirements for a new trial on this basis. *Taylor* v. *State,* 230 Ark. 809, 327 S. W. 2d 6. He must show clearly that the evidence has been discovered since the trial. *White* v. *State,* 17 Ark. 404; *Reeder* v. *State,* 181 Ark. 813, 27 S. W. 2d 989; *Thurman* v. *State,* 211 Ark. 819, 204 S. W. 2d 155. Such a motion is also properly overruled if the applicant therefor does not state acts on his part which constitute reasonable diligence to discover the evidence before trial. *Ward* v. *State, supra.* He should state why he had not discovered the evidence earlier. *Young* v. *State,* 99 Ark. 407, 138 S. W. 475. In this regard, the only evidence offered was the testimony of O. D. Dill, although it is intimated in appellant's pleadings that Dill's knowledge came to the former's attention by virtue of a letter from Dill dated March 4, 1965. While Dill first testified that he had never mentioned his seeing the deceased after Birch was supposed to have been dead, he admitted on

cross-examination that he told certain named neighbors that he had seen "Dutch" alive on the morning following the time these neighbors suggested he had been killed. This conversation took place before the trial when the parties were cleaning up the house of the deceased. Dill then states that he did not have an opportunity to tell appellant's mother about this until the time of her husband's funeral, but that Mrs. Gross had already received the information from Mrs. Wilma Hall. Dill's excuse for not disclosing his information to any official or to the appellant was that because of a bleeding ulcer he did not figure he needed to be a witness. Later, on further cross-examination, Dill admitted that he was one of the closest neighbors of the deceased, that he told various neighbors that if Birch was killed on Saturday night, witness had seen him Sunday morning, that he first told a Mr. Bachman about a week later, and that *he had made the information available to appellant's mother on the same date deceased's body was discovered.* It may be that Dill was talking about the body of the father of appellant, but he might well have been talking about the body of Birch. Although Dill was a pallbearer at the elder Gross's funeral, he could place the date only as being in 1963, but could not state the day of the week, date, or month. He also placed the trial of Billy Gross as being early in 1963, although he had fixed the time that he had seen Birch alive as being on the 5th Sunday in September, 1963.

Neither appellant nor his mother testified, but his motion states that he, his attorney and his parents, on March 2, 1964 joined in a request for a mental examination of appellant, justifying the inference that he and his attorney were in communication with his mother. Mrs. Hall did not testify either, but appellant's motion alleged that Mrs. Hall had advised the sheriff of Dill's having seen Birch on the date in question before Gross's trial. After a careful review of the record we find no showing of reasonable diligence on the part of appellant to discover the evidence relied upon, or of evidence of that nature.

There are other grounds, however, upon which the trial judge in the exercise of sound judicial discretion might properly have denied appellant's motion. The mere fact that the purported evidence would be contradictory to that offered at the trial by the State is insufficient. *Osborne* v. *State,* 96 Ark. 400, 132 S. W. 210. It must also be shown that, because of the proffered evidence, a different result upon a new trial is probable. *Bixby* v. *State,* 15 Ark. 395; *Missouri Pacific Transp. Co.* v. *Priest,* 200 Ark. 613, 140 S. W. 2d 993. See 66 C.J.S., 472, New Trial, § 196 (3).

The determination of whether the application for a new trial because of newly discovered evidence is in good faith and the weight and sufficiency of the evidence in support of the motion are within the discretion of the trial judge. *Bixby* v. *State, supra*; *Arkadelphia Lumber Co.* v. *Posey,* 74 Ark. 377, 85 S. W. 1127; and see 4 Ark. Law Rev. 63; 39 Am. Jur. 197, New Trial, § 198; 66 C. J. S., 470, New Trial, § 196 (2). In order to justify the granting of a motion for new trial, the evidence in support thereof should be clear and satisfactory, and the trial court's action thereon should not be disturbed unless a manifest injustice has been done. 39 Am. Jur. 197, New Trial, § 198.

At the hearing, objection was made to the testimony of Joe Quinn and Harry Locke. Their testimony was about appellant's admissions of guilt voluntarily made to them (a deputy sheriff and state policeman, respectively) while they were transporting him to the state penitentiary immediately after he was sentenced. In order for the court to determine whether the motion was made in good faith and the probability of a different result upon a new trial, it was proper for the court to hear witnesses. It was also proper for the court to consider any evidence contradictory to that offered by appellant. Any admission of guilt on the part of appellant would certainly be in contradiction of testimony of Dill that Frank Birch was alive later than his death was supposed to have resulted from acts of appellant and

would tend to render a different result on a new trial unlikely. It would also indicate a lack of good faith on the part of appellant in making his motions. The same may be said of the admission of photographs of the deceased taken on the date Dill claimed to have seen Birch and showing the body of the deceased with clothing appearing to be in colors greatly different from those described by Dill. In *Jones* v. *State,* 224 Ark. 134, 273 S. W. 2d 534, this court affirmed the action of the trial court denying a new trial on oral testimony contradictory of evidence in support of the motion.

It would unduly extend this opinion to dwell upon other uncertainties and contradictions in the testimony of Dill, the only witness offered by appellant at the hearing. Although it was alleged that Dill's wife was along and saw Birch at the same time he did, she did not testify. There is no contradiction of the testimony of the officers as to appellant's admission of guilt.

The trial court is required to determine the issues by Criminal Procedure Rule No. 1. It was that court's opinion that the testimony of appellant's only witness would not justify a new trial. We cannot say that there was any abuse of discretion in so finding.

The order of the trial court overruling the motion is affirmed.

BILLY JOE CASSELL, RICHARD VAN THORN, BILLY JOE THORN AND ROBERT THOMAS THORN *v.* STATE

5244 412 S. W. 2d 610

Opinion delivered March 13, 1967

[Rehearing denied April 10, 1967.]

Harkness, Friedman & Kusin, for appellant.

Joe Purcell, Attorney General; *Don Langston,* Asst. Atty. Gen., for appellee.

J .FRED JONES, Justice, The appellants were arrested for speeding about 3:00 a.m. on the morning of May 5, 1966, in the City of Texarkana, Arkansas. A search of their automobile revealed an assortment of tools and they were arrested, tried and convicted on a charge of possession of burglar's tools and sentenced to two years each in the state penitentiary. They have appealed their conviction to this court.

When arrested on the speeding charge, two walkie-talkie radios were visible through the rear window of

the automobile, three of the occupants were lying down inside the car, gloves were scattered around in the automobile and the driver had a pair of wire pliers protruding from his pocket. During the investigation of the speeding charge, another officer was summoned and subsequent searches of the car's trunk and interior revealed a quantity of tools consisting of forty-seven different items including tire tools, saws, electric drill, hammers, walkie-talkies, several pairs of gloves, extra license plate, pry bars, punches, chisels, sledge hammer, pliers, and four extra pair of shoes.

The police officers testified at the trial that the search was with the consent of the driver, who claimed to be the owner of the automobile. The defendants offered no evidence to refute this testimony.

The appellants have designated the following eight points upon which they rely for reversal:

"1. The Court erred in overruling Defendant's motion to suppress State's testimony concerning arrest.

"2. The Court erred in overruling Defendant's motion to suppress or limit evidence.

"3. The Court erred in overruling Defendant's motion for severance on behalf of Billy Joe Thorn.

"4. The Court erred in overruling Defendant's motion for severance on behalf of Billy Joe Cassell.

"5. The Court erred in overruling Defendant's motion for severance on behalf of Richard Van Thorn.

"6. The Court erred in overruling the objection to the answer given by Officer Copelin on page 43 of the transcript as being not responsive.

"7. The judgments of the trial court are contrary to the evidence.

"8. The judgments of the trial court are contrary to law."

This court has held that a motion for new trial is still required in criminal cases and that Act 555 of 1963 applies only to civil cases. *McConnell* v. *State*, 227 Ark. 988, 302 S. W. 2d. 805. The record before us in this case contains only the trial court's order overruling a motion for new trial and a docket entry specifying that such a motion was made, overruled and an exception taken, but the motion if made, and the grounds upon which it was based, have not been made a part of the record on this appeal.

The appellants contend that the court's ruling in allowing the three investigating officers to testify, and also that the introduction of the tools in evidence was error, but there is no record of a motion for a new trial before us and no bill of exceptions or assignment of error relating to the testimony of those witnesses who introduced the tools into evidence.

In the recent case of *Randell* v. *State*, 239 Ark. 312 389 S. W. 2d. 229, the defendants were arrested and convicted under a charge of possession of burglar's tools. The defendants raised the issue that the court had erred in admitting evidence of certain tools discovered by the sheriff after the defendant's arrest, and on that point this court said:

"To duly preserve a point for presentation to this court in a felony case, like the one here, there must be: (1) an objection; (2) an exception; and (3) the point must be carried forward in the motion for new trial."

As the attorney for the State points out in the case at bar, the third element was and is missing in this case, as it was in the Randell case, supra.

In the earlier case of *Yarbrough* v. *State*, 206 Ark. 549, 167 S. W. 2d, 142, this court had occasion to explain

the necessary procedure in preserving a point on appeal, and we did so in these words:

> "On appeal from the circuit court, this court only reviews errors appearing in the record. The complaining party must first make an objection in the trial court, and this calls for a ruling on his objections. An exception must be taken to an adverse ruling on the objection, which 'directs attention to and fastens the objection for a review on appeal.' The matter complained of, together with the objections and the exceptions to the ruling of the court, must be brought into the record by a bill of exceptions; and the motion for a new trial can serve no other purpose than to assign the ruling or action of the court as error."

This view was reaffirmed in *Chandler* v. *State*, 205 Ark. 74, 167 S. W. 2d. 142, where in reviewing a felony conviction, we said:

> "These assignments of error relate, of course, to matters occurring during the progress of the trial and can only be brought into the record for our review by a bill of exceptions."

The appellants also argue that the trial court erred in overruling the motions for severance made by three of the defendants. This ground has not been brought forward in a bill of exceptions or on a motion for new trial.

The granting of severance is a matter within the sound discretion of the trial court, and the trial court's orders in relation thereto will not be disturbed on appeal unless there is evidence in the record indicating an abuse of discretion. The record before us reveals no such abuse. The judgment of the trial court is affirmed.

Affirmed.

Brown, J. disqualified and not participating

Byrd, J., dissents.

CONLEY BYRD, Justice, dissenting. I dissent from that part of the majority opinion that holds that they will not pass upon the alleged errors relating to unlawful search and seizure of an automobile because no motion for a new trial appears in the record. The majority opinion admits, however, that an order was made overruling a motion for a new trial.

In *Henry* v. *State of Mississippi,* 379 U. S. 443, 85 S. Ct. 564 (1965), the court had before it an alleged unlawful search and seizure of an automobile in which the Supreme Court of Mississippi had held that the petitioner had waived his objection to the alleged illegal search because of a procedural requirement that an objection to illegal evidence be made at the time the evidence was introduced. In distinguishing between state substantive grounds and state procedural grounds for purposes of review of federal rights, the United States Supreme Court said:

> "... These cases settle the proposition that a litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest. In every case we must inquire whether the enforcement of a procedural forfeiture serves such a state interest. If it does not, the state procedural rule ought not be permitted to bar vindication of important federal rights.
>
> "The Mississippi rule requiring contemporaneous objection to the introduction of illegal evidence clearly does serve a legitimate state interest. By immediately apprising the trial judge of the objection, counsel gives the court the opportunity to conduct the trial without using the tainted evidence. If the objection is well taken the fruits of the illegal search may be excluded from jury consideration and a reversal and new trial avoided. But on the record

before us it appears that this purpose of the contemporaneous-objection rule may have been substantially served by petitioner's motion at the close of the State's evidence asking for a directed verdict because of the erroneous admission of the officer's testimony. For at this stage the trial judge could have called for elaboration of the search and seizure argument and, if persuaded, could have stricken the tainted testimony or have taken other appropriate corrective action...."

The requirement in our adjudicated cases that the matters brought forward on appeal must be set forth in the motion for a new trial appears to be a carry-over from the procedure in effect at the time the Criminal Code was passed in 1869. It is not supported by the Criminal Code § 332 (Ark. Stat. Ann. § 43-2725 [Repl. 1964]), which specifically provides:

"A judgment of conviction shall only be reversed for the following errors of law to the defendant's prejudice appearing upon record:

First. An error of the circuit court in admitting or rejecting important evidence.

Second. An error in instructing or in refusing to instruct the jury.

Third. An error in failing to arrest the judgment.

Fourth. An error in allowing or disallowing a peremptory challenge.

Fifth. An error in overruling a motion for a new trial."

Furthermore, under Criminal Procedure Rule No. 1, 239 Ark. 850a, appellants, immediately upon affirmance of this decision, will be entitled to apply to this court for

permission to go before the trial court for purposes of having their constitutional rights adjudicated.

Not only does the procedure employed by the majority raise a question as to the constitutional validity of our state procedure under the due process clause, but it in effect sends appellants on a round robin to accomplish what is before the court at this time on a record sufficient to present the issues upon which they rely to reverse their convictions. In fact, this is the first ground set forth in section 332, above, for a reversal.

This round robin procedure, however, does make a difference to appellants, for upon affirmance of the judgment they will be incarcerated in the state penitentiary without right of bond, and under Criminal Procedure Rule No. 1 no provision is made for a bond. Furthermore, they are not entitled to apply to the federal courts for habeas corpus relief on their alleged federal constitutional rights until after they have exhausted their state court remedies. Since they have been sentenced to only two years, our procedure may result in their serving a substantial portion of their sentences before they have obtained a final determination of their constitutional rights. If we should rule on the alleged illegal search and seizure, and should the ruling be contrary to appellants' position, they could remain on bond pending a petition for certiorari to the United States Supreme Court or immediately apply for habeas corpus in the federal district court.

For these reasons, I dissent to that part of the majority opinion which refuses to pass on these questions.

WORTH JAMES CONSTRUCTION COMPANY, A CORPORATION *v.* JEAN HERRING

5-4135 412 S. W. 2d 838

Opinion delivered March 13, 1967

[Rehearing denied April 17, 1967.]

Smith, Williams, Friday & Bowen by *Boyce R. Love*, for appellant.

Patten & Brown by *Gerland P. Patton*, for appellee.

J. FRED JONES, Justice. We are called on here to determine whether the trial court abused its discretion in setting aside a verdict and granting a new

trial on motion of the appellee who had been awarded $2,500.00 in an action for personal injuries. Indeed we are *called on* to determine whether or not the trial court even had any discretion in the matter where the action is for injury to the person, but having concluded that the verdict should have been set aside and a new trial granted for error in instruction, the trial court's discretion becomes a minor issue.

Mrs. Jean Herring filed suit in the Pulaski County Circuit Court against Worth James Construction Company alleging damages for personal injuries as a proximate result of the negligence of defendant's truck driver in driving defendant's truck into the rear of plaintiff's automobile as she slowed down to make a right hand turn from the highway.

The case was tried to a jury and a verdict was returned for plaintiff in the amount of $2,500.00. The verdict was set aside by the trial court and a new trial granted on motion of the plaintiff, for the reason that the verdict was contrary to the law, contrary to the evidence, contrary to the law and the evidence, and for the further reason that an instruction given by the court over the objection of the plaintiff, was error. The defendant has appealed and relies on one point:

> "It was error for the trial court to set aside the verdict and judgment in favor of appellee and grant her a new trial."

On November 23, 1964, the appellee and the appellant's driver were driving their respective vehicles the same direction on Rodney Parham Road in Pulaski County with appellant's truck behind appellee's automobile. Appellant's truck driver "speeded up" to cross a bridge before an oncoming automobile came onto the bridge and after observing appellee slowing down ahead of him in preparation to turn from the roadway, appellant's driver skidded the truck sixty-six feet in an ef-

fort to stop, but was unable to avoid striking appellee's automobile.

Appellee experienced neck, head and shoulder pains immediately following the collision. She was nervous and upset and the following morning she was vomiting and went to the doctor who prescribed muscle relaxants and medication for pain and to induce rest. This condition persisted and about two and a half weeks later appellee developed a "lump" or choking sensation in her throat which was also associated with vomiting. She also began experiencing low back pain, as well as the continued pain in the shoulders, head and neck.

The appellee in this case had injured her neck in an automobile accident in January 1961. She had injured her back trying to start a power lawn mower on July 19 or 20, 1964, and she had experienced a period of vomiting over a period of a week to ten days during November and December 1961.

On December 27, 1964, appellee was operated on for hiatal hernia and on March 1, 1965, for herniated intervertebral disc in the lumbar area of the back. The medical evidence is to the effect that neither of these conditions was *caused* by the collision of November 23, 1964, but that the symptoms of both conditions were *aggravated* by the collision.

In connection with appellee's operation for the hiatal hernia, an incision was made from beneath the left breast to the right side of the abdomen. An additional incision was made in the left side through which a tube was inserted into the stomach for drainage following the operation, and appellee was fed intraveneously for a period of five days.

About the second or third day following the operation, appellee noticed the loss of sensation in two fingers on her right hand. The evidence is uncontroverted that

this symptom was attributable to an injury in the nature of a bruise to the ulna nerve and the severity of this condition continued to increase until by April 14, 1965, there was an 80 to 100 per cent loss of the function of the ulna nerve in appellee's right arm. Although there had been considerable improvement, the function of this nerve had not been completely restored at the time of trial, and this damage to the ulna nerve was an element of damage alleged by appellee in her amended complaint.

> Appellant answered that the injury to the ulna nerve "was a result of the improper positioning of the plaintiff on the operating table in the recovery room or in her bed all in the course of or subsequent to an operation for a hernia repair which took place on December 30, 1964, and the improper positioning was an intervening event completely independent of any conduct of the defendant or its agents, and no act of the defendant or its agents was a proximate cause of said damage."

Dr. Kenneth Jones and Dr. Jack Downs were the only doctors who had treated the appellee and were the only doctors who testified at the trial.

As to the ulna nerve injury, Dr. Jones testified that he didn't see appellee when she first developed the ulna nerve symptoms and that he didn't know how it came on, but that he couldn't explain it on the basis of a rear end collision; that it came on during the period of time appellee was in the hospital for hernia surgery and that it is reasonable to assume something happened during that period of time. That any patient who is confined to bed may encounter these complications from simply being in bed and pushing themselves about.

As to the ulna nerve injury, Dr. Downs testified that several days, he didn't remember exactly how many days,

"* * *after Mrs. Herring's surgery she complained

of some numbness and loss of sensation of the distribution of her right ulna nerve and that is something that happens on occasions, occasionally in bedfast patients and there is not really anything that can be done about it. It is due to the pressure that is put on the nerve either from lying still with one arm extended for perhaps intravenous medication running in the arm or scooting around on the elbows in bed."

* * *

"I think it is calculated risk or hazard like any other hazard the patient assumes or risks that they assume when under surgery or enter the hospital or become immobile, it is a hazard of having to lie down and be still."

Dr. Downs testified that it would be a fair assumption that the injury to the ulna nerve arose out of the surgery and treatment for the hiatal hernia, and on cross examination, Dr. Downs testified as follows:

"Q All right now just briefly now about this ulna nerve problem. I believe that you told me when I took your deposition that the ulna nerve problem probably dates back to the incident that occurred on the operating table, in the recovery room or within a few days after the operation while still in bed. Is that correct?

A Yes.

Q How would that generally happen, by the elbow getting on a sharp place and putting pressure on the nerve. Is that correct?

A It wouldn't have to be a sharp place. The ulna nerve is very superficial at the back side of the elbow and pressure on a mattress or anything pressure on the nerve in that area for a while. We don't know exactly how long it takes to

bruise the nerve and again there are all degrees of this thing which would cause the injury.

Q You don't mean a flat curve, you mean a corner?

A Well probably a corner.

Q Normal lying in bed would not cause this?

A I think if you had a patient who was scooting around on their elbow in bed as patients certainly do after surgery that might be of sufficient severity to cause it. It is hard to pin the thing down.

Q I know but just the arm lying in normal position on a bed would not cause it?

A I think if that arm was pinned down with intravenous solution running in it for two or three hours it certainly would cause it."

At the close of the evidence, including the above medical testimony, as appellee's requested instruction No. 9, the court gave A. M. I. instruction 501 on "proximate cause" as follows:

"The law frequently uses the expression 'proximate cause,' with which you may not be familiar. When I use the expression 'proximate cause,' I mean a cause which, in a natural and continuous sequence, produces damage and without which the damage would not have occurred.

"[This does not mean that the law recognizes only one proximate cause of damage. To the contrary, if two or more causes work together to produce damage, then you may find that each of them was a proximate cause.]"

And over appellee's objections, the trial court gave

as appellant's instruction No. 4, A. M. I. instruction No. 503, as follows:

> "If, following any act or omission of a party, an event intervened which in itself caused any damage, completely independent of the conduct of that party, then his act or omission was not a proximate cause of the damage."

The appellant first argues that as a matter of law the trial court had no discretion in setting the verdict aside and granting a new trial in this case, and in support of its argument, cite the following cases:

> "*Woodard* v. *Sanderson,* 83 Ok. 173, 201 P. 361; *Sharpe* v. *O'Brien,* 39 Ind. 501; *Metropolitan Street R. Co.* v. *O'Neil,* 68 Kan. 252, 74 Pac, 1105; *Blakely* v. *Omaha & C. B. Street R. Co.,* 94 Neb. 119, 142 N. W. 525."

Ark. Stat. Ann. § 27-1901 (Repl. 1962) defines "new trial" and sets out eight grounds for a new trial, the fifth one being as follows:

> "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."

The next section, Ark. Stat. Ann. § 27-1902 (Repl. 1962) is as follows:

> "A new trial shall not be granted on account of the smallness of damages in an action for an injury to the person or reputation, nor in any other action where the damages shall equal the actual pecuniary injury sustained."

The Oklahoma, Indiana, Kansas and Nebraska statutes under which the cases cited by appellant were de-

cided, contained the same provision as Ark. Stat. Ann. § 27-1902 supra, and the Supreme Courts of those states interpreted this provision exactly as appellant argues that we should interpret it in this case.

This provision in many of the state statutes was a carry over from the common law, and in Oklahoma, Indiana, Kansas and Nebraska, has been changed or repealed by later statutory enactment. (See also *Drury* v. *Franke,* 247 Ky. 758, 57 S. W. 2d. 969).

We are cited no case, and have found none, in which this court has followed or refused to follow the decisions of the Oklahoma, Indiana, Kansas and Nebraska Courts in their interpretation of this provision of their statutes, and because of the rule laid down in our own decisions, where *other error* appears in the record, we find it unnecessary to follow, or refuse to follow, the decisions from other states in this case.

In a case such as this, however, *where no other error appears in the record,* we think out statute § 27-1902 might well be interpreted to mean that

> "a new trial shall not be granted on account of the smallness of damages in an action for an injury to the person or reputation (*where injury is not susceptible of definite pecuniary measurement such as in mental anguish, pain and suffering or damage to the reputation*) nor in any other action where the damages shall equal the actual pecuniary injury sustained."

It does not follow that such interpretation should necessarily apply however, where the injury *is* susceptible of definite pecuniary measurement such as in loss of earnings and medical expense, and where the *amount of the verdict* may be based on comparative negligence. *Sterns M. Law Jr.* v. *Scottie Collins et ux,* 242 Ark. 83, 411 S. W. 2d 877.

This court has held that a verdict for one dollar amounts to a denial of damages in an action for damages to the person where the proven pecuniary damage amounted to much more than that, and that such verdict should be set aside and a new trial granted. *Dunbar* v. *Cowger*, 68 Ark. 444, 59 S. W. 951; see *Carroll* v. *Texarkana Gas & Electric Co.*, 102 Ark. 137 (where, however, property as well as personal injury was involved).

We have consistently held that it is not error to grant a new trial on the motion of a plaintiff who has been awarded damages for injury to the person where other reversible error appears in the record.

In the recent case of *Linxwiler* v. *El Dorado Sports Center, Inc.*, 233 Ark. 191, 343 S. W. 2d. 411, Billy Linxwiler received a gunshot wound through the negligent act of the defendant's employee. The appellant, Billy's father, sued to recover for the medical and hospital expenses incurred as a result of the wound and also for the injuries sustained by his son. There was a jury verdict for Billy's personal injuries in the amount of $1,400.00, but no award was given the father in his own right. Both parties. appealed.

The trial court had erred in its instruction pertaining to the duty by the owner of the premises to one who goes on the premises as a volunteer, and in that case this court said:

> "Upon the direct appeal Linxwiler, both in his own right and as his son's next friend, relies for reversal upon the rule that a plaintiff may complain of an inadequate judgment if the record discloses other error of a substantial and prejudicial nature. *Smith* v. *Arkansas Power & Light Co.*, 191 Ark. 389, 86 S. W. 2d. 411. This verdict must fairly be regarded as inadequate. Young Linxwiler suffered much pain, underwent an operation, and spent two weeks in a hospital. The injury has resulted in a slight but per-

manent malfunctioning of his right eye. It is shown without dispute that the medical and hospital expenses were more than $875. In view of the inadequacy of the verdict the appellant is entitled to assert other errors."

In the case of *Smith* v. *Arkansas Power & Light Company,* 191 Ark. 389, 86 S. W. 2d. 28, the appellant's automobile and appellee's street car collided causing injury to plaintiff's person. The jury returned a verdict for $5,000.00. The plaintiff appealed on the ground that error in the trial court resulted in damages grossly inadequate to compensate for his injuries. The trial court had committed error in failing to give a proper instruction, and this court in that case said:

"When the undisputed evidence shows that plaintiff is entitled to recover substantial damages, a judgment will be reversed which awards only nominal damages, because a judgment for nominal damages is, in effect, a refusal to assess damages. When substantial damages are awarded, a judgment will not be reversed because of inadequacy, if there be no other error than that committed by the jury in measuring the damages. But a judgment even for substantial damages will be reversed where the undisputed testimony shows the damages to be inadequate, if error of a substantial and prejudicial nature was committed at the trial of the case. This is on the theory, as was said in the *Kimbrough* case, *supra,* that but for such error damages might have been properly assessed."

Later in the same case this court stated:

"Yet notwithstanding these facts, we would not, under the authority of the cases above cited, reverse the judgment for its inadequacy of compensation if the record contained no prejudicial error except that of assessing the damages, inasmuch as substantial

damages were awarded. But, if there was other error of a material and prejudicial nature, the judgment must be reversed, notwithstanding the award of substantial, and not nominal, damages."

See also *McAdams* v. *Stevens*, 240 Ark. 258.

So, in the case at bar, we conclude that under the evidence in this case, the injury to appellee's ulna nerve was not an "intervening cause" as contemplated in A. M.I. instruction No. 503, and as given by the trial court as appellant's instruction No. 4. (See 65 C.J.S. 111-113 and the numerous cases there cited).

In the case of *Reggs* v. *Akers Motor Lines*, 63 S.E. 2d. 197, the North Carolina Court said:

"A superseding intervening cause is one which operated in succession to a prior wrong, as the proximate cause on an injury. 38 A.J. 772. The test of the sufficiency of an intervening cause to defeat recovery for negligence is not to be found in the mere fact of its existence, but rather in its nature and the manner in which it affects the continuity of operation of the primary cause, or the connection between it and the injury."

In the California case of *Gibson* v. *Garcia*, 216 Pac. 2d. 119, the court said:

"It is well settled that proximate causation is not always arrested by the intervention of an independent force. If the original negligence continues to the time of injury and contributes substantially thereto in conjunction with the intervening act, each may be a proximate concurring cause for which liability may be imposed."

In the Wisconsin case of *Mertino* v. *Mutual Service Casualty, Ins. Co.*, 127 N.W. 2d. 741, we find this statement:

"Essentially in order for the intervening Act of negligence to constitute a superceding cause it must be such that the conscience of the court would be shocked if the first actor were not relieved from liability."

In the case of *Butler* v. *Arkansas Power & Light Company,* 186 Ark. 611, the plaintiff received injuries while alighting from appellee's street car. The complaint alleged that the street car started up prematurely, and negligence by the motorman for raising the car's step tripping her. This court speaking in regard to intervening cause, said:

"There was testimony tending to show that the passenger's condition had been made worse by her conduct and confinement since her fall. Such testimony might have some relevancy on the question of the measure of damages, but it could not affect the question of the negligence of the carrier. The negligence of the carrier either caused the passenger to fall, or it did not cause her to fall, and the question of its negligence in this respect cannot be determined by a consideration of the subsequent conduct of the injured party."

As stated by the Supreme Court of Oklahoma in the case of *Kansas City, M. & O. Ry. Co., et al* v. *Allums,* 271 Pac. 949:

". . . the showing for a reversal should be much stronger where the error assigned is the granting of a new trial than where it is a refusal."

So, we conclude as in the *Butler* case, *supra,* that appellee's hiatal hernia either was or was not caused or aggravated to the point of hospitalization and surgery by appellant's negligence, and that the question of negligence in this respect cannot be determined by a consideration of the subsequent conduct of appellee in scoot-

ing around on her elbow or lying still in bed, or by having her arm extended for intravenous feeding while undergoing or recovering from surgery for repair of the hernia.

We are of the opinion that A.M.I. instruction 501 on "proximate cause" given by the trial court as appellee's instruction No. 9, thoroughly covered appellee's ulna nerve injury under the evidence in this case.

For error in giving appellee's instruction No. 4, the action of the trial is hereby affirmed.

Affirmed.

STATE OF ARKANSAS, EX REL JOE PURCELL, ATTORNEY GENERAL AND WALTER GREEN, *v.* JIMMY JONES, STATE AUDITOR, NANCY J. HALL, STATE TREASURER, AND CECIL ALEXANDER ET AL LEGISLATORS

5-4260 412 S. W. 2d 284

Opinion delivered March 13, 1967

Joe Purcell, Attorney General; *Thomas A. Glaze,* Asst. Atty. Gen., for appellant.

Walls Trimble and *Bruce T. Bullion,* for appellee.

J. Fred Jones, Justice. This appeal is from an adverse decision of the Pulaski County Chancery Court in a taxpayer's suit to test the constitutionality of Act 85 of the Acts of the General Assembly of the State of Arkansas for 1967.

On January 19, 1967, by proper procedure, the 66th General Assembly extended the regular session of the Legislature beyond the period of sixty days and, thereafter duly enacted Act 85, which appropriated revenues to pay the members of the Legislature for their services

on a per diem basis of $20.00 per day during the extended portion of the session. The germane portion of Act 85 is as follows:

> "SECTION 1. There is hereby appropriated, to be payable from the Constitutional and Fiscal Agencies Fund, for the payment of per diem of members of the House of Representatives of the Regular Session of the 66th General Assembly for additional days served during the extended session of the regular session of the 66th General Assembly, the sum of $4,000.00. The funds appropriated herein shall be distributed in the same manner provided by Act 2 of 1967 concerning disbursement of funds appropriated for the House of Representatives of the 66th General Assembly.
>
> "SECTION 2. There is hereby appropriated, to be payable from the Constitutional and Fiscal Agencies Fund, for the payment of per diem of members of the Senate of the Regular Session of the 66th General Assembly for additional days served during the extended session of the regular session of the 66th General Assembly, the sum of $1,400.00. The funds appropriated herein shall be disbursed in the same manner provided by Act 1 of 1967 concerning disbursement of funds appropriated for the Senate of the 66th General Assembly."

The state of Arkansas through its Attorney General intervened as a petitioner and the members of the Legislature intervened as respondents. The Chancellor held Act 85 to be constitutional and petitioners have appealed to this court.

We have been furnished excellent briefs on both sides of the issues in this case, and both the Attorney General for the State, and the attorney for the members of the Legislature, presented very able oral arguments in support of their opposing views of the issue involved.

Appellants rely on the following two points for reversal:

> "Section 16 of Article 5 of the State Constitution as amended by Amendment No. 5, prohibits the General Assembly from receiving any per diem in an extended session.
>
> "Even if Section 16 of Article 5 of the State Constitution, as amended by Amendment No. 5, was construed as having been repealed in its entirety, Amendment No. 48 does not authorize payment of per diem beyond the Regular Session of sixty (60) days."

Article 5 of the Constitution of the State of Arkansas is entitled "Legislative Department" and contains forty-one sections. Section 5, entitled "Time of Meeting" provides that the General Assembly shall meet at the seat of government every two years on the first Tuesday after the second Monday in November until said time be altered by law. This time has been altered to the second Monday in January (Ark. Stat. Ann. § 4-101 [1956 Repl.]).

We are concerned here with Section 17 entitled "Duration of Sessions," and also with Section 16 entitled "Per Diem and Mileage of General Assembly." Amendment No. 48 is the most recent of five amendments affecting Section 16 of Article 5 since the Constitution was adopted in 1874, and we are especially concerned with what effect subsequent amendments to the Constitution have had on Section 16.

When the Constitution was adopted in 1874, Section 16 of Article 5 read as follows:

> "The members of the General Assembly shall receive such per diem pay and mileage for their services as shall be fixed by law. No member of either

house shall, during the term for which he has been elected, receive any increase of pay for his services under any law passed during such term. The term of all members of the General Assembly shall begin on the day of their election."

By amendment in 1902, the words "per diem," were deleted from Section 16 (Acts 1901 p. 412).

By Amendment No. 5, adopted in 1913, (Acts 1913 p. 1525) Section 16 of Article 5 was amended to read as follows:

"Each member of the General Assembly shall receive six dollars per day for his services during the first sixty days of any regular session of the General Assembly, *and if any regular session shall be extended, such member shall serve without further per diem.* Each member of the General Assembly shall also receive ten cents per mile for each mile traveled in going to and returning from the seat of government, over the most direct and practicable route. When convened in extraordinary session by the Governor, they shall each receive three dollars per day for their services during the first fifteen days and if such extraordinary session shall extend beyond fifteen days, they shall receive no further per diem. They shall be entitled to the same mileage for any extraordinary session as herein provided for regular sessions. The terms of all members of the General Assembly shall begin on the day of their election, and they shall receive no compensation, perquisite or allowance whatever, except as herein provided." (emphasis supplied)

It is the italicized portion of this amendment which petitioners contend voids Act 85.

In 1927 Amendment No. 15 to the Constitution was adopted (Acts 1927 p. 1189, Acts 1929 p. 1519). This amendment is as follows:

"The members of the General Assembly shall receive as their salary the sum of one thousand ($1,000) dollars, except the Speaker of the House of Representatives, who shall receive his salary of eleven hundred ($1,100) dollars for each period of two (2) years; and in addition to such salary the members of the General Assembly shall receive five cents per mile for each mile traveled in going to and returning from the seat of government over the most direct route; and provided further that when said members are required to attend an extraordinary session of the General Assembly, they shall receive in addition to the salary herein provided the sum of $6 per day for each day they are required to attend, and mileage, at the same rate herein provided."

This Amendment No. 15 contained a clause repealing all parts of the Constitution in conflict with it. It will be noted that by this Amendment No. 15, the members of the General Assembly were placed on a biannual salary for the first time since the adoption of the Constitution in 1874, and after the adoption of Amendment 15, the members of the General Assembly were no longer entitled to per diem pay except when required to attend an extraordinary session.

In 1945 Amendment 37 was adopted (Acts 1945 p. 765, Acts 1947 p. 1076). Section 3 of this amendment is as follows:

"The members of the General Assembly shall receive as their salary the sum of twelve hundred ($1,200) dollars, except the Speaker of the House of Representatives, who shall receive his salary of thirteen hundred and fifty ($1,350) dollars, for each period of two (2) years; and in addition to such salary the members of the General Assembly shall receive five cents per mile for each mile traveled in going to and returning from the seat of government

over the most direct and practicable route; and provided, further, that when said members are required to attend an extraordinary session of the General Assembly, they shall receive in addition to salary herein provided, the sum of $6 per day for each day they are required to attend, and mileage, at the same rate herein provided."

This amendment also specifically repealed all parts of the Constitution in conflict with it, and Section 3 of this Amendment 37, simply increased the biannual salary of the members of the General Assembly from $1,000.00 to $1,200.00 except the Speaker of the House, and his salary was raised from $1,100.00 to $1,350.00.

By adoption of Amendment No. 37, the members of the General Assembly were given the first raise in salary they had received since they were first placed on a biannual salary in 1927, and again no per diem pay was provided for in Amendment No. 37 except the six dollars per day for each day they were required to attend extraordinary sessions.

After the adoption of Amendment No. 37, the members of the General Assembly received no further increase in salary for the next thirteen years until Amendment No. 48 was adopted in 1957. (Acts 1957 p. 1488). Amendment No. 48 is as follows:

"The members of the General Assembly shall receive as their salary the sum of Twelve Hundred ($1,200.00) Dollars *per annum,* except the Speaker of the House of Representatives, who shall receive his salary of Thirteen Hundred and Fifty ($1,350.-00) Dollars per annum, with such salaries to be payable in equal monthly installments; *and in addition to such salary the members of the General Assembly shall receive Twenty* ($20.00) *Dollars per day for each day the General Assembly is in regular session,* and shall receive five cents per mile for each

mile traveled in going to and returning from the seat of government over the most direct and practicable route; and provided, further, that when said members are required to attend an extraordinary session of the General Assembly, they shall receive in addition to salary herein provided, the sum of Six ($6.00) Dollars per day for each day they are required to attend, and mileage, at the same rate herein provided." (mphasis supplied)

This amendment also provides that:

"All provisions of the Constitution of the State of Arkansas in conflict herewith are hereby repealed."

Thus it is seen that Amendment No. 48 doubles the "salary" of the members of the General Assembly by changing the amount for each period of "two years" in Amendment No. 37 to the same amount "per annum" in Amendment No. 48. The "salary" is made payable in equal monthly installments by Amendment 48 and for the first time in approximately forty years, per diem pay was reinstated, this time at $20.00 per day for each day the General Assembly is in regular session, and with no additional limitations if such regular session is extended. For extraordinary sessions the sum was continued at $6.00 per day under Amendment No. 48.

We are of the opinion that the first point relied on by the appellants has already been answered adversely to their contentions in the case of *Berry* v. *Gordon*, 237 Ark. 547. In that case the constitutionality of Act 339 of the Arkansas Legislature was under attack in a taxpayer's suit to prevent the payment of certain extra expense funds to the Speaker of the House of Representatives as well as to other state officers under the Act. In connection with the proper disposition of the problem in the *Gordon* case, it became necessary to examine Amendment No. 5 as to its validity since the adoption of later amendments including Amendment No. 48. In that case

we held that Amendment No. 5 has been repealed by subsequent amendments, and that Amendment No. 48 is complete on the subject of compensation for the members of the General Assembly.

Part of the text of the opinion in the *Gordon* case is so germane to the issue here, we can do no better than quote from that decision where Mr. Special Justice Boyd Tackett, speaking for this court said:

> "The two familiar rules or classifications applicable in determining whether or not provisions of the Constitution have been repealed are set forth in the case of *Babb* v. *El Dorado,* 170 Ark. 10, 278 S. W. 649:
>
> "One is that, where the provisions of two statutes are in irreconcilable conflict with each other, there is an implied repeal by the latter one which governs the subject matter so far as relates to the conflicting provisions, and to that extent only.
>
> "The other one is that a repeal by implication is accomplished where the Legislature takes up the whole subject anew and covers the entire ground of the subject matter of a former statute and evidently intends it as a substitute, although there may be in the old law provisions not embraced in the new.
>
> "Where there are two Acts on the same subject, the rule is to give effect to both, if possible, but, if the two are repugnant in any of their provisions, the latter Act, without any repealing clauses, operates to the extent of the repugnancy as a repeal of the first; and, even where two Acts are not in express terms repugnant, yet, if the latter Act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first Act, it will operate as a repeal of that Act.

"The rules of construction governing Constitutional Amendments are the same as the rules governing the construction of statutes—*Bailey* v. *Abington,* 201 Ark. 1072, 148 S. W. 2d. 176. It is a rule of universal application that the Constitution must be considered as a whole, and that, to get at the meaning of any part of it, we must read it in the light of other provisions relating to the same subject. *Cheshir* v. *Copeland,* 182 Ark. 425, 32 S. W. 2d. 301. The Constitution is to be construed according to the sense of the terms used and the intention of its authors. *Rankin* v. *Jones,* 224 Ark. 1001, 278 S. W. 2d. 646.

"Upon applying these applicable rules to determine whether the early Constitutional provisions have been repealed, considering all of the Constitutional provisions and Amendments as a whole, it is clear, concerning expense entitlements of the Speaker of the House, that Paragraph 3 of the Constitutional Amendment 15 repealed Constitutional Amendment 5, except the beginning date of terms of Members of the General Assembly, which was repealed by Section 6 of the Constitutional Amendment 23; that Section 3 of Constitutional Amendment 37 repealed Paragraph 3 of Constitutional Amendment 15; and that Constitutional Amendment 48 repealed Section 3 of Constitutional Amendment 37. Constitutional Amendment 48 is full and complete and covers the pertinent subject matter of Constitutional Amendment 5, Paragraph 3 of Constitutional Amendment 15, and Section 3 of Constitutional Amendment 37. It embraces new provisions, plainly showing that it was intended as a substitute for the former pertinent Constitutional Amendments. There were three Constitutional Amendments covering the subject matter of Constitutional Amendment 5 from 1913 until the adoption of Constitutional Amendment 48 in 1958—a period of 45 years—and had there been a desire to continue the pertinent prohibition contained in Constitutional Amendment 5, same would

have been included in these Constitutional Amendments."

The first sentence of Amendment 5 is the controlling part of that amendment, and is as follows:

> "Each member of the General Assembly shall receive six dollars per day for his services during the *first* sixty days of any regular session of the General Assembly, and if any regular session shall be extended, such member shall serve without further per diem." (emphasis supplied)

This amendment clearly recognizes the *first* sixty days of a regular session of the General Assembly to be no different from any additional days of a regular session, but only provides per diem pay for the members of the General Assembly for the first sixty days of the regular session and no longer. There is no argument but that Amendment 48 repealed the *first part* of this compound sentence in Amendment No. 5, and we are of the opinion that it repealed the second part also.

Now as to the second point designated by appellants in their brief:

Sections 5 and 17 are the only sections of Article 5 of the Constitution providing for the meetings of the General Assembly. Section 5 of Article 5 only provides for the time of meeting of the General Assembly every two years at the seat of government, and Section 17 limits these biennial sessions to sixty days in duration, unless extended by a vote of two-thirds of the members elected to each House of said General Assembly.

Section 5 of Article 5 refers to "meeting" of the General Assembly, and Section 17 refers to such meeting as the "regular biennial session." By a vote of two-thirds of the members elected to each House of said General Assembly, the regular biennial session does not

stop and another session begin. But rather the regular biennial session under Section 17 simply fails to continue on for more than sixty days as a meeting of the General Assembly unless two-thirds of the members elected to each House of said General Assembly have voted to continue it.

There is only one kind of session of the General Assembly provided for under "Legislative Department" in Article 5 of the Constitution, and that is "the regular biennial session."

The only other kind of session of the General Assembly is provided for under the "Executive Department" in Article 6 of the Constitution. Section 19 of Article 6 authorizes the Governor to convene the General Assembly "on extraordinary occasions" under strict limitations as to matters to be acted on and the time and manner of remaining in session after the business set forth in the proclamation shall have been disposed of, as set out in Section 19.

Thus we now have, and have always had, only two types of sessions of the General Assembly in Arkansas—the regular biennial sessions, which have come to be known as "regular session," and sessions in which the Governor, by proclamation, convenes the General Assembly on extraordinary occasions, which have come to be known as "special sessions."

We are concerned in this case with the *regular* session of the General Assembly for 1967.

The regular biennial session of the present 1967 General Assembly could not exceed sixty days in duration, unless extended by a vote of two-thirds of the members elected to each House of said General Assembly. Two-thirds of the members elected to each house of said General Assembly have so voted, so now the regular biennial session of the present 1967 General Assembly is not limited to sixty days.

Having already held that Amendment No. 5 has been repealed by subsequent amendments, including Amendment No. 48, we now reach the question of whether or not the members of the General Assembly can legally draw per diem pay of $20.00 per day under authority of Amendment No. 48 for the period of time the General Assembly may be in session in excess of sixty days.

The Chancellor held that Amendment No. 5 was repealed by Amendment No. 48, and that Act 85 of the Acts of the 1967 General Assembly is constitutional and valid. We agree with the Chancellor on both points.

As already pointed out, we have concluded that there are only two classifications for legislative sessions in Arkansas—Regular and Special. We are not concerned here with a special session, and there is no doubt that a regular session may exceed sixty days by a vote of two-thirds of the members elected to each House of the General Assembly.

The per diem provision of Amendment No. 5 was actually repealed by paragraph 3 of Amendment No. 15, and Amendment No. 37 as well as Amendment No. 48.

Amendment No. 48 is the last expression of the people on the point here involved, and in addition to the annual salary to be paid in equal monthly installments "the members of the General Assembly shall receive Twenty ($20.00) Dollars per day for each day the General Assembly is in regular session." This amendment also provides for the payment of Six ($6.00) Dollars per day, in addition to the annual salary, for each day the members of the General Assembly are required to attend special sessions. Amendment No. 48 makes no distinction in the amount of per diem pay for the first sixty days of a regular session and any additional days of a regular session.

Consequently, under Amendment No. 48, the mem-

bers of the General Assembly are entitled to the same per diem pay of $20.00 per day for a regular session regardless of whether it is of sixty days, or more than sixty days duration.

The appellants have pointed out in their brief an interesting bit of legislative history concerning the extended session in 1911 as bringing about the adoption of Amendment No. 5 limiting the pay for the members of the General Assembly to sixty days. We can only surmise that whatever confidence of the people the General Assembly may have lost in 1911, was fully restored by 1958 when Amendment No. 48 was adopted.

That portion of the Chancellor's decree limiting the right of pay to specific legislative days when the members are in actual attendance, and denying the right of pay during "any extension under the guise of a recess during which time the members do not assemble and attend during the extended part of the regular session," was not presented by the pleadings in this case and is not the question before this court on appeal.

The decree of the Chancery Court is modified to that extent, and as modified, is hereby affirmed.

Affirmed.

FRANK YOUNG *v.* WILLIE OPAL SMITHSON, EXECUTRIX

5-4123 412 S. W. 2d 278

Opinion delivered March 13, 1967

Ralph E. Wilson, for appellant.

William V. Alexander of *Swift & Alexander*, for appellee.

CONLEY BYRD, Justice. Appellant Frank Young prosecutes this appeal from a wrongful death judgment in the amount of $5,507 in favor of appellee, Willie Opal Smithson, surviving widow and executrix of the estate of John Willis Smithson. For reversal, appellant contends that the lower court, at the close of plaintiff's testimony, should have directed a verdict in appellant's favor because plaintiff failed to prove either that appellant was negligent or that appellant's action was the proximate cause of the death of John Willis Smithson.

The facts show that on October 30, 1965, appellant had been raccoon hunting in the company of James Elrod, Elrod's small son and Tony Ashley Jr., on Towhead Island 35 in the state of Tennessee. Some time before midnight, James Elrod had driven his small son home and was returning to coon hunt with appellant and Tony Ashley Jr., when he came upon two sets of headlights in the road in front of appellant's brother's house. Appellant's pickup truck was parked behind deceased's Nash automobile and at the time deceased was lying along the left side of his automobile with his feet toward the front and his head toward the rear. The left front door of the automobile was over deceased's legs. Appellant told Elrod that they had had an accident and the gun had gone off. He did not say how it had been fired. He said the man had jumped out on him and had scuffled and the gun had gone off.

The testimony showed that deceased had been shot in the back with appellant's double-barreled, 12-gauge

shotgun immediately below the right shoulder blade near the right side of the body. Leroy Meadows, a deputy sheriff of Mississippi County, testified that the deceased's clothing did not appear to be disarrayed and that the footprints observed around the body and the car were just normal footprints and did not indicate a struggle. After qualifying as an expert on shotguns, witness Meadows testified that appellant's shotgun was a double-barreled, 12-gauge; that the safety appeared to be working; and that it required the use of a thumb and two fingers to discharge both barrels of the shotgun. After inspecting the clothing worn by deceased at the time of the accident, witness Meadows testified that, because of the lack of powder burns on the clothing and because of the size of the wound caused by the pellets, the shotgun could not have been nearer than two feet or more than six feet from deceased at the time it was fired.

Sheriff Newton Wright, of Tipton County, Tennessee, testified that appellant had admitted that the 12-gauge shotgun was the gun that had killed John Willis Smithson, and that appellant had told him he had been coon hunting and had driven back to his brother's house, where a car was parked on the road; that when appellant had investigated to see what deceased was doing there, deceased had grabbed the gun, they had scuffled and the gun had fired.

Plaintiff showed that Tony Ashley, Jr., had avoided service of the subpoena on him to testify at the trial.

At the close of plaintiff's testimony, appellant, without having taken the witness stand in his behalf, moved for a directed verdict in his favor, which was overruled. Thereupon appellant elected to present no testimony and the matter was submitted to the jury upon instructions which were not here questioned.

We affirm the judgment of the lower court. There appears to be ample testimony to show the negligence of

appellant and that the negligence was the proximate cause of Smithson's death. In the first place, no explanation is given as to why the safety was not on the shotgun at the time appellant approached deceased's automobile, nor is any explanation given to show how a person can be shot in the back with a double-barreled, 12-gauge shotgun during a scuffle. In the next place, it is possible the jury could have found that the physical facts surrounding the scene of the accident belied appellant's explanation of the scuffle.

Affirmed.

EAGLE PROPERTIES, INC. *v.* WEST & *Co.* OF LA., INC.

5-4146 412 S. W. 2d 605

Opinion delivered March 20, 1967

Leon B. Catlett. for appellant.

Lesly W. Mattingly and *John T. Campbell,* for appellee.

CARLETON HARRIS, Chief Justice. Eagle Properties, Inc., appellant herein, instituted suit in the Pulaski Chancery Court (First Division) against West and Company of Louisiana, Inc., appellee herein, praying the court to remove an alleged cloud on its title to certain real property located in Pulaski County. The property is the site of a proposed shopping center being developed by appellant. The alleged cloud is an instrument entitled "Lease Agreement (Short Form)," executed by the parties, and recorded in Pulaski County. The recorded lease was a brief memorandum of a lengthy instrument entitled "Lease Agreement." These instruments had reference to the proposed lease of a store building to be constructed by Eagle Properties, Inc., for the use and occupancy of West and Company. In its suit, appellant alleged that the lease was void, and had never become effective; that appellee had refused to execute an instrument acknowledging that the lease was void, and thus refused to remove the cloud from appellant's title. It was asserted that this refusal had damaged appellant in the amount of $95,000.00.[1] After the filing of several preliminary pleadings, appellee answered, contending that it had complied with the lease agreements, and that the same were still in full force and effect. On trial, the court found that the lease was null and void, and of no effect, and that it should be removed as a cloud upon appellant's title to the real estate involved. The prayer for damages against appellee was denied. Appellant appeals from that portion of the decree denying damages, and appellee cross-appeals from the finding holding the lease to be null and void. We proceed to a discussion of these contentions.

The evidence reflects that Eagle Properties, Inc., acquired some forty-one parcels of land, over a period of two years, at the southeast corner of Interstate 30

[1]In its proof, appellant contended for damages in the sum of $26,500.00.

and Geyer Springs Road for the purpose of developing a shopping center, which, to begin with, was to have 100,000 to 120,000 square feet in gross leasable area. In May, 1964, a representative of appellee company contacted William V. Richards, President of appellant company, with regard to obtaining a possible location in the proposed shopping center, and in October, Richards was contacted by Mr. H. O. West, Chairman of the Board of the West Company, relative to obtaining space. After quite a bit of correspondence between Richards and West, and a visit to Little Rock by West and associates, Richards made a trip to Minden, Louisiana on December 1, 1964, where he met with H. O. West and his son, Claude West, and a discussion was held preparatory to reaching an agreement between the parties. Upon his return to Little Rock, Richards received from West a memorandum of what had transpired at the December 1 meeting. Appellant's attorney prepared a lease, incorporating certain provisions agreed upon during negotiations, and also incorporating some provisions of a blank lease submitted by West, which the appellee company had used when placing stores in other shopping centers. This lease was signed by West on April 7, 1965, and was thereafter executed by the Eagle Company, a short form being recorded in the office of the Pulaski County Recorder. The complete instrument is composed of 37 sections, but only a few of those sections are actually pertinent to this litigation, and argued by the attorneys in their briefs. Among other provisions are the following:

"5. Lessor, before submitting the final plans and specifications to the Department of Housing and Building, or other proper authority, shall submit them to Lessee for its approval and such approval must first be obtained, otherwise this lease shall be null and void.

"6. All said plans and specifications, both preliminary and final, are to be considered as a part of this agreement as if incorporated herein, the said work of actual construction to be commenced on or before April

15, 1965, and the building completed on or before January 1, 1966."

* * *

"7. *** If, for any reason beyond its control, Lessor fails to deliver possession of the demised premises, properly completed and made ready for occupancy in conformance with the final approved plans and specifications, to Lessee within the said thirty (30) days, Lessee shall take possession of property within six (6) months after completion, and rental to start as outlined in Paragraph 3. If building is not completed in two (2) years, this lease is cancelled."

* * *

"9. Before this lease shall become effective, Lessor shall furnish to Lessee without cost to Lessee: (a) proof satisfactory to Lessee that Lessor's title is good and merchantable; and (b) an agreement executed by the mortgagee in form satisfactory to Lessee, subordinating each mortgage affecting said premises to this lease."

"31. It is agreed and understood that the legal effectiveness of this lease is predicated upon Lessor's consummation of leases with a supermarket, a chain variety store, a drug store and other stores with a total floor space (including the demised premises) of four times the space signed by Lessee in the shopping center prior to July 1, 1965. In the event the Lessor fails to consummate such leases by said date, it shall give Lessee notice thereof by registered mail and thenceforth this within lease may be cancelled at the option of Lessee. Lessee must give notice of its decision in sixty (60) days from receipt of notice."

Almost from the beginning, the parties seemed to have difficulty in reaching actual agreement on the building that was to be constructed. For instance, on June 7, 1965, West wrote Richards as follows:

"We received a skeleton copy of the architects drawing of our building in the Windamere Shopping

Center and it is no different from a sketch that he sent us previously and we had written him to tell him how we wanted the building fixed, sending him a drawing, but he insists on fixing it like he wants it.

"I don't believe it is your intention to require us to take a building like the architects wants us to, but we want it like our plans we sent him sometime ago, and we would appreciate your talking to the architect about this as we do not want the building fixed as he has it outlined.

"If there is any additional information you want on this, please let us hear from you, but we expect the building to be built in accordance with the way we had it drawn on the sketch we sent him. The difference is, the building we sent was for a 12,000 foot building and yours is for a 15,000 foot building. The only thing that would be different would be the width of the stockroom and the double deck stockroom floor."

Richardson replied that he would make a trip to Minden within a few days to see if the matter could be straightened out. Appellant's president, however, testified that the parties were unable to agree as to the building, the chief difficulty being that West insisted on a balcony, which Richardson said had never been discussed, and which the president emphasized could not have been installed to suit West without destroying the entire concept of the center.

"You would either have to raise the roof, or dig down and lower the floor, which that soil out there has a high water table and it is just prohibitive, the cost, and it would ruin the whole concept and design of the center itself."

On July 28, appellant's architect received a letter from West complaining that the office was on the opposite side of the building from which he (West) wanted it; that it would not be satisfactory to omit the double

deck stockroom area; that appellee wanted the show windows just as they had stated in their original plan; that the front doors were 19½ feet apart, while West wanted them to be 10 feet apart; he stated that these changes would have to be made in order to make the building satisfactory. Following receipt of this letter from West, no additional plans were submitted, and, on December 11, 1965, appellant advised appellee that it would be unable to complete the shopping center project; and that all leases in the center were being cancelled. Soon thereafter, an instrument cancelling the lease was forwarded to West, but the latter did not execute it.

It is the contention of appellee that the lease is still in effect, while appellant contends that its cancellation was entirely proper and in conformity with Section 5. It is true that no *final* plans and specifications were submitted to appellee, but appellant maintains that this would have been a useless act, since it was quite obvious, from prior conversations and correspondence, that the parties were "poles apart," and would never be able to reach an agreement as to the kind of building to be constructed.[2] Appellant's witnesses (officers and architect) were adamant in their view that to meet West's request would simply destroy the type of shopping center they proposed to construct. We have held that the law does not require the performance of a useless act. *Doup* v. *Almand*, 212 Ark. 687, 207 S. W. 2d 601. After a study of the record, and the lengthy testimony therein, we are convinced that, under the views maintained by the respective parties, no agreement could have been reached, and the preparation, and transmittal to West of further plans would have been to no avail. We have accordingly concluded that the court was justified in cancelling and setting aside the instrument here involved.

[2]Appellant did not comply with Sections 9 and 31, and this fact is mentioned by appellant itself, but, in its brief, appellee states that it "could not complain of Appellant's failure to meet the conditions set forth in Article 9 or 31 until the lease became effective. Thus, any claim with respect to either Article 9 or 31 is at this time premature." This statement by appellee is somewhat in conflict with its contention that it has an effective lease.

We likewise agree with the Chancellor that appellant was not entitled to damages. For one thing, damages were not properly proved. Mr. Richards appraised the value of the shopping center at $780,000.00, and his damage, since December 15, 1965 (apparently using this date as the date West refused to cancel the lease on record), as follows:

"Conservatively estimated at six per cent interest, which is very conservative in today's money market, on such a value as I mentioned, $780,000.00, $23,000.00 in interest alone that we have had to pay since it has been tied up, and one-half year's taxes. I had them computed on all the pieces of property.

* * *

Q. Then you are testifying with reference to the damage resulting by virtue of the fact that you can't use or sell the property?

A. Yes, sir. Also the taxes which I prorated for six months, $3,500.00. Now this doesn't take into consideration any time or loss of revenue because the Center hasn't been under way.

Q. The total of those two figures is how much?

A. Well, that would be $26,500.00."

However, the figure used ($780,000.00) was not the purchase price of the property, but only Richards' idea as to the value. "That is the value of this property and it is *very near* (emphasis supplied) the purchase price of it." Of course, the 6% interest figure was likewise simply a figure that Richards considered "conservative." Subsequently, Richards testified:

"Normally, if you were to appraise the property, of course, you would use two basic approaches. Your income approach, which would be based upon a rental value of the property, which I would say would be six

percent net on the total investment. The total investment being $750,000.00, six percent net on that. The taxes and rest of it would be paid above that. The only other way that you could appraise it would be on comparable basis of market values of centers such as this and they have been going anywhere from $20,000.00 to $40,000.00 an acre."

It will be noted that there is nothing definite about the figures given, nor does this testimony conform with his earlier evidence. The witness testified that two Little Rock businessmen had expressed an interest in purchasing a 75% interest in the land, but would take no definite steps as long as the lease was on record, and that these two businessmen had an option to purchase this interest.[3] Of course, the mere fact that a person or concern has an option to purchase property does not mean that the option will be exercised. In fact, frequently options are not exercised. Not only that, but Richards' testimony on this point was indefinite in other respects, and it appears that there were other conditions to be met before the Little Rock businessmen would consider consummating the transaction. In other words, the testimony as to the contemplated sale was vague, and the outcome doubtful. Damages cannot be allowed "where they are speculative, resting only upon conjectural evidence or the individual opinions of the parties or witnesses." *Harmon* v. *Frye,* 103 Ark. 584, 148 S. W. 269. It might also be mentioned that, while we agree, as heretofore stated, that the sending of final plans by appellant would have constituted a useless act, still, the lease provided that this be done, and West testified that he had consulted his attorneys, and had been advised that his lease was still in effect. Under these circumstances, it can hardly be said that appellee's refusal was malicious, arbitrary, unreasonable, or even unjustified.

Finding no error on either direct or cross-appeal, the decree of the Pulaski Chancery Court (First Division) is affirmed.

[3]These businessmen did not testify.

BERNIE PARKER *v.* RUBY BOWLAN, EXECUTRIX OF THE ESTATE OF NELLIE JARVIS, DECEASED

5-4170 412 S. W. 2d 597

Opinion delivered March 20, 1967

J. B. Reed for appellant.

Chas. A. Walls, Jr. for appellee.

CARLETON HARRIS, Chief Justice. Mrs. Nellie Jarvis a widow, died on May 24, 1963, leaving surviving her six children, including one minor, Dwight Jarvis, who was living with her when she passed away. At the time of her demise, Mrs. Jarvis owned 80 acres of land, which is the subject of this litigation.[1] On October 4, 1963, Jeff Jarvis, Jr., one of the children, was appointed administrator of the estate. Nearly two years later, on September 2, 1965, Jeff Jarvis, Jr. (also known as Thomas J.

[1]One acre, upon which the house is located, is not involved in this litigation.

Jarvis), executed a deed in his individual capacity to Bernie Parker, appellant herein, purportedly conveying an undivided one-sixth interest in and to the real estate herein mentioned. Mona Jarvis, wife of Jeff, released her rights in the property. On Ocotber 2, a petition was filed, asking the court for an order directing the administrator to account for funds in the estate, and also requesting his removal as administrator, this petition being filed by Ruby Bowlan (a sister to the administrator and the minor), as guardian of Dwight Jarvis. Jeff Jarvis, Jr., had left the state soon after he executed the above mentioned deed to Parker. Thereafter, a writing purporting to be the last will of Nellie Jarvis was found; this was admitted to probate on October 7, 1965, and Ruby Bowlan was named executrix (actually administratrix with the will annexed). The instrument purports to leave the property to the minor, Dwight, and does not mention the names of any of the other children. Subsequently, appellant filed a petition entitled "Petition for Contest of Will," alleging that he was "an interested person" in the estate of Nellie Jarvis, and that he had a vested interest in the real property being administered. Parker asserted that he, by virtue of the deed he had received from Jeff Jarvis, Jr., was the owner, along with the other five surviving children, of an undivided one-sixth interest in the lands. Further:

"The instrument filed herein on October 7, 1965, purporting to be the last will and testament of Nellie Jarvis is ineffectual as to the said son of the said decedent, the said Thomas J. Jarvis, also known as Jeff Jarvis, Jr., for the reasons that:

(a) Nellie Jarvis, in the instrument filed herein which purports to be her last will and testament, did not name her children separately, and,

(b) She did not provide for them as a class."

Ruby Bowlan, as executrix, responded to Parker's petition, and asserted that appellant was an improper

party to maintain a petition for contest of the will. It was further alleged that any interest held by Jeff Jarvis, Jr., in the estate was subject to his actions as administrator, no inventory, or accounting having been filed. Mrs. Bowlan prayed that Parker's petition be dismissed. On trial, the court held that appellant was an improper party to contest the will, and thereupon dismissed the petition. From the order so entered, appellant brings this appeal.

We think the trial court reached an erroneous conclusion, and this was probably predicated on the fact that the petition filed was considered a will contest, and, of course, as previously set out, appellant's petition is entitled "Petition for Contest of Will." However, the mere fact that it is so titled is not controlling, and it is necessary to look to the allegations of the petition, particularly the prayer for relief, in order to make a determination. In the petition, appellant stated that he was the owner, by right of purchase, of an undivided one-sixth interest to the property here in question, and his prayer is as follows:

"WHEREFORE, the petitioner prays that the Court make a finding of heirship in this estate; that the instrument purporting to be the last will and testament of the decedent be declared ineffectual as to her son, Thomas J. Jarvis, also known as Jeff Jarvis Jr., and ineffectual as to the petitioner's interest in the lands acquired by the petitioner from the said Thomas J. Jarvis, also known as Jeff Jarvis, Jr.***"

It will be at once noted that there is no allegation that the will was not entitled to probate, either on the basis that it was not legally executed, or because of mental incompetency or undue influence. Generally speaking, a will contest is based on the allegations and contentions that *no will exists, i.e.,* statutory requirements for execution of the instrument were not complied with—or, because of mental infirmities, the party was not mentally capable of making a will—or, in case of

undue influence,[2] the purported instrument was not the testator's will but that of someone else. Appellant does not ask that the instrument be denied probate; he only asks that it be declared ineffectual as to Thomas J. Jarvis (Jeff Jarvis, Jr.), because Jarvis was not mentioned in his mother's will.

As far as this record is concerned, there is no doubt but that Parker legally acquired the interest of Jeff Jarvis, Jr., in the lands, there being no controversy but that Jarvis and wife conveyed their interest to Parker by deed. In *Dean* v. *Brown*, 216 Ark. 761, 227 S. W. 2d 623, this court said:

"Our statute provides that *immediately upon the intestate's death, the title to real estate descends to the heirs at law, subject to the widow's dower and the payment of debts.* See § 61-101 Ark. Stats. 1947. The two sections (§ 62-411 and § 62-911, Ark. Stats. 1947), concerning lands as assets in the hands of the administrator, have been uniformly construed to mean that the title to the lands passed direct to the heirs on the death of the intestate, subject to the rights of the administrator to have the Probate Court sell the lands if such be necessary to pay the debts of the deceased."

In *Calmese* v. *Weinstein, Administrator,* 234 Ark. 237, 351 S. W. 2d 437, this holding was reiterated, the court stating:

"Prior to Act 140 of 1949 (the Probate Code), § 66 of Pope's Digest was the governing Statute and said: 'Lands shall be assets in the hands of the executor or administrator, and shall be deemed in their possession and subject to their control for the payment of debts.' § 94 of the Probate Code (as now found in § 62-2401, Ark. Stats.) says: ' * * * real property shall be an asset in the hands of the personal representative when so

[2]There is an interesting annotation at 69 A.L.R. 1129, relative to attacks on particular portions of a will because of alleged undue influence.

directed by the will, or when and if necessary for the payment of debts, or expenses of administration.' The quoted language of the Probate Code was not designed to make the administrator automatically entitled to the real estate of a deceased intestate. The quoted language of the Probate Code continues the rationale of our cases decided under § 66 of Pope's Digest; and these cases hold that the legal title of an intestate's land, upon his death, descends and vests in his heirs at law, subject to the widow's dower and the payment of debts through his administrator. (Citing cases.) Sec. 62-2701, Ark. Stats., in abolishing the priority between personal property and real property for the payments of the debts of the deceased, applies *after* it has been determined that the lands are necessary for the payment of debts. That section does not change the long established rule of our cases, as above cited."

At the time of the execution of the deed from Jeff Jarvis, Jr., to appellant, the elderly Mrs. Jarvis had apparently died intestate. Jarvis had been named administrator, and the time for filing claims against the estate had expired. The record does not reflect that it will be necessary to sell the real estate in order to pay debts of the deceased. It was not until after the conveyance that the purported will was found. Of course, the vesting in an heir of an interest in real estate owned by an intestate decedent is not only subject to a widow's dower and payment of the debts of the estate, but it is likewise subject to the provisions of a subsequent will which are held to be valid. Accordingly, the interest in the property acquired by Parker (by virtue of his deed from Jarvis) is subject to debts, and also to any lawful provisions in the will which are adverse to the interest he (Parker) acquired. Whether appellant was an "interested party" to the extent that he could file a will contest is unimportant in this litigation, for he actually filed an intervention setting up his interest, and he did have a sufficient interest to file this pleading and assert his rights during

the administration of the estate.

Appellee relies upon the language of Ark. Stat. Ann. § 60-507, Sub-section b (Supp. 1965), which reads as follows:

"If at the time of the execution of a will there be a living child of the testator, or living child or issue of a deceased child of the testator, whom the testator shall omit to mention or provide for, either specifically or as a member of a class, the testator shall be deemed to have died intestate with respect to such child or issue, and *such child or issue shall be entitled to recover from the devisees* [our emphasis] in proportion to the amounts of their respective shares, that portion of the estate which he or they would have inherited had there been no will."

Appellee points to the italicized language, and argues that the statute precludes anyone except a pretermitted child from bringing a petition, and further, that any action brought must be instituted against the devisee, instead of being contended for during the administration of the estate. We do not agree with this interpretation. After all, Section 60-507 deals only with the rights of those who are entitled to *inherit* when they are omitted from a will, *i.e.,* inheritance under the laws of descent and distribution; the Legislature was not concerned (in this section) with what the heir did with the property inherited; there was no occasion, nor necessity, to include any provisions relating to the grantees or assignees (of a pretermitted child). As to appellee's contention that the suit must be instituted against the devisee, instead of the executrix of the estate, let it be pointed out that the statute does not read in the manner suggested by appellee; rather the statute states that such "child or issue

---

[3]Even if it be considered that the deed from Jarvis and wife to Parker was only an assignment of Jarvis' interest in the realty, appellant would have been entitled to assert his claim through the pleading filed, for the general rule is that any estate or interest in lands and tenements is assignable. 6 C.J.S., Page 1054.

shall be entitled to recover from the devisees." The "Committee Comment,"[4] with reference to this section (set out beneath the section), makes this perfectly clear. The comment is as follows:

"This is a restatement, with an effort at clarification of Sections 14524 and 14525, Pope's Digest [§ 60-119, 60-120.][5] Section 14526, Pope's Digest [§ 60-121],[6] is omitted because the committee feels that it is not necessary to designate the court or courts in which the pretermitted child may have his remedy *if the administration of the estate has been completed, or so nearly completed as not to allow him a complete remedy in the distribution of that portion of the estate remaining undistributed* [our emphasis] at the time his rights are adjudicated."

It is thus entirely obvious that the pretermitted child is entitled to his remedy during the administration of the estate, and the provision for recovering from the devisee is only brought into being after the estate has been closed, or after sufficient funds have been paid out of the estate to prevent the pretermitted child from acquiring his full statutory share.[7]

---

[4]This has reference to the committee which prepared Act 140 of the Acts of 1949, the Probate Code.

[5]These sections relate to the rights of pretermitted children.

[6]This section reads as follows: "If the devisees or legatees refuse to pay the same, the party for the recovery thereof shall have a writ of scire facias against them, and, on the return of the same, the court shall enter judgment against such devisees or legatees, and award execution thereon."

[7]In *Graham* v. *Hill*, 226 Ark. 258, 289 S. W. 2d 186, Virgil Finley Graham died testate, leaving his entire estate to certain friends and relatives, and naming two friends executrices. Virgil Hill, who had not been mentioned in the will, claimed to be an adopted son of Graham, and when the will was offered for probate, Hill intervened, along with the widow, and claimed his portion of the estate. The trial court held with him, and the Supreme Court affirmed on appeal. There, Hill was a pretermitted child, but brought his petition against the executrices of the estate, and during the time when the estate was being administered.

Appellant states in her brief:

"The relief he [appellant] seeks is that under the pretermitted child Statute (Section 60-507 b, Ark. Statutes 1947 Supra). Under the facts reflected by the pleadings, the appellant must attempt relief other than under this statute. If he admits or pleads as he did, the pretermitted child statute then he must maintain the action against the minor, Dwight Jarvis. By instituting the action against the minor, the minor would then be able to plead and recover from the said Jeff Jarvis, Jr., as an offset or counterclaim, the funds and property unaccounted for by Jess Jarvis, Jr., while he was the administrator of the estate. *** To permit this type of action, under these circumstances, would not only violate all of the common law and statutory rights of the minor, but would promote and cultivate a method where an heir, as administrator, could misappropriate the property and assets of the estate then render himself judgment proof by conveying his interest, without accounting and removing himself from the action."

Appellee's fears are groundless, for Parker only acquires such interest in the property as Jeff Jarvis, Jr., himself would have received when the estate was closed. If the allegations of misconduct and misappropriation are substantiated, and Jarvis' interest in the real estate lessened thereby, Parker's interest is likewise lessened, since he is entitled to no more interest in the lands than that to which his grantor would have been entitled.

The trial court erred in treating appellant's petition as a will contest, and the judgment is reversed with instructions to proceed in a manner not inconsistent with this opinion.

T. G. WATKINS *v.* MADGE WATKINS

5-4159 412 S. W. 2d 609

Opinion delivered March 20, 1967

Shackleford & Shackleford, for appellant.

Beryl Anthony Jr., for appellee.

GEORGE ROSE SMITH, Justice. The only question upon this appeal is whether a bill of review to obtain a modification of a divorce decree can be filed after the expiration of the time for appeal. The chancellor dismissed the bill, holding that it was filed too late.

The appellee obtained a divorce on September 8, 1965. The parties owned two tracts of land as tenants by the entirety. The decree awarded one to the appellee and the other to the appellant. On April 19, 1966, the chancellor, in response to a petition for clarification filed by the appellant's original attorney, entered a supplemental decree directing the parties to put the initial decree into effect by an exchange of deeds. There was no appeal from either decree.

On June 9, 1966, the appellant, by his present counsel, filed a bill of review asserting that the court had acted beyond its authority in awarding to the appellee a tract owned by the entirety. The bill, as later amended, asked that the two decrees be amended by the deletion

of the provision in question. The chancellor, as we have said, dismissed the bill of review.

Under our holding in *Pyles* v. *Holland,* 187 Ark. 550, 60 S. W. 2d 1029 (1933), the chancellor was right. There we held that a bill of review such as this one, for error supposedly apparent on the face of the record, must be filed within the time allowed for an appeal. We pointed out that if the rule were otherwise, "it would follow that an original decree might in effect be brought before the Supreme Court for re-examination after the period prescribed by law for an immediate appeal. . . In other words, the party complaining of the original decree would, in this way, be permitted to do indirectly what the statute has prohibited him from doing directly." The time allowed for filing the notice of appeal is now thirty days after the entry of the decree. Ark. Stat. Ann. § 27-2106.1; *Pinnacle Old Line Ins. Co.* v. *Ellis,* 228 Ark. 458, 307 S. W. 2d 882 (1957). Hence the present bill of review was filed out of time.

Affirmed.

BILLY C. HALL *v.* STATE OF ARKANSAS

5247 412 S. W. 2d 603

Opinion delivered March 20, 1967

Carmack Sullivan, for appellant.

Joe Purcell, Attorney General; *Don Langston,* Asst. Atty. General, for appellee.

PAUL WARD, Justice. Billy C. Hall (appellant) was charged with Grand Larceny for stealing a 1957 Dodge automobile (the property of Gaylon Ellis) of the value of more than $35. A jury trial resulted in a conviction and his punishment was fixed at one year in the penitentiary.

On appeal, appellant urges five separate assignments of error which we will discuss in the order they are argued.

One. Appellant offered testimony to prove the market value of a "starter" on the car in question. The trial court refused such offer, and we think the court was correct in doing so.

Larceny, as defined in Ark. Stat. Ann § 41-3901 (Repl. 1964), is the felonious stealing the personal property of another. Subsequent § 41-3907 fixes the punishment at one or more years in the penitentiary if the value of the property stolen exceeds the sum of $35. As previously stated, appellant was charged with stealing

the *car* not the *starter*. Therefore, the offered testimony was irrelevant and immaterial, and not admissible in evidence.

Two. Here appellant contends the trial court erred in refusing to give his requested instruction nos. 1, 2, and 3, contending "that the intent in this case was crucial and if defendant took the automobile only with the intent to deprive the owner *temporarily* of the possession of the vehicle without the intent to steal the same, he could be guilty only of a misdemeanor".

In offering the three instructions mentioned appellant apparently sought to take advantage of Ark. Stat. Ann. § 75-170 (Repl. 1957) which makes it a misdemeanor to deprive a person of his vehicle temporarily without intent to steal the same. For reasons presently mentioned, we find no merit in this contention.

The undisputed proof shows appellant took the car in question from the premises of its owner, drove it six miles and hid it in a wooded area. Days later after he was apprehended he claimed he intended to remove and take the starter from the car for use on his own car. It is also undisputed that he did not remove the starter. There is no testimony in the record to support appellant's purported intention. Consequently the trial court was justified in refusing the requested instructions. This same question was considered in the early case of *Pickett* v. *State,* 91 Ark. 570 (p. 574), 121 S. W. 732, where we said, quoting from *Allison* v. *State,* 74 Ark. 444, 86 S. W. 409:

> "In each case, then, the question of whether it is proper to submit to the jury the question of defendant's guilt of any particular grade of offense included in the indictment must be answered by considering whether there is evidence which would justify a conviction for that offense."

In the case before us here the trial court gave (without

objection) Instruction No. 8 which told the jury they must find appellant must have had the *felonious* intent to deprive the owner *permanently* of the car, and that if they had any doubt to acquit him.

Furthermore the instructions offered by appellant are indefinite, and could have been confusing to the jury. For that reason only the court was, we think, justified in refusing to give them.

Three. Appellant also contends there was reversible error because of the manner in which his confession was presented to the jury, but we do not agree.

When the question arose the judge, together with the attorneys, retired to chambers and discussed the matter. The court thereupon found that the confession was voluntary. When the trial was resumed the court also submitted the question to the jury. Ark. Stat. Ann. § 43-2105 (Supp. 1965) provides:

> "Issues of fact shall be tried by a jury, provided that the determination of fact concerning the admissibility of a confession shall be made by the court when the issue is raised by the defendant; that the trial court shall hear the evidence concerning the admissibility and the voluntariness of the confession out of the presence of the jury and it shall be the court's duty before admitting said confession into evidence to determine by a preponderance of the evidence that the same has been made voluntarily."

The procedure in the case here under consideration was followed in the case of *Brown* v. *State,* 239 Ark. 909 (p. 918), 395 S. W. 2d 344, based on *Jackson* v. *Denno,* 378 U. S. 468.

Four. It is further contended that appellant's constitutional rights were violated because he "was not properly advised of his rights to have counsel" before he was interrogated. The record reflects that he was so

advised, and appellant does not here contend to the contrary. However, appellant does contend he was so advised by a Special Agent of the FBI who was making an investigation of a Federal Statute. We think this fact is immaterial since appellant confessed to a state crime after being fully advised of his rights.

Five. Finally, appellant contends that "considering the alleged confession as a whole, same must be considered involuntary". In view of what we have heretofore said, we see no merit in this contention.

Affirmed.

PIGGOTT JUNIOR CHAMBER OF COMMERCE, INC., *v.* CHARLEY HOLLIS ET AL

5-4164 412 S. W. 2d 595

Opinion delivered March 20, 1967

C. W. Knauts, for appellant.

E. L. Holloway and *T. A. French,* for appellee.

LYLE BROWN, Justice. Piggott Junior Chamber of Commerce sought, and was denied, an order *nunc pro tunc.* The Chamber sought to establish of record an order allegedly made by the county court in 1964 but which was lost before being recorded. Appellees intervened as taxpayers and persuaded both the county court, and the circuit court on appeal, to deny the Chamber's petition for the order *nunc pro tunc.* The Chamber has appealed.

Appellees urge dismissal of this appeal on technical grounds, and those points can be quickly laid aside. First, the appeal from the county court to the circuit court was timely filed. The time for appeal is governed by Ark. Stat. Ann. § 27-2001 (Repl. 1962), and not by Ark. Stat. Ann. § 17-314 (Repl. 1956). Secondly, the transcript was timely lodged in this court. Judge Light granted "an *additional* sixty days beginning June 8" to lodge the transcript. It was clearly his intent to add sixty days to the statutory ninety days. To interpret it otherwise would shorten the statutory period. Thirdly, appellees urge us to strike Volume II of the transcript. They contend this volume was not filed with, or certified by, the clerk of the circuit court, and bears no filing date by our clerk. It is admitted Volume II is a transcript of the evidence adduced in circuit court. The trial judge certified it and ordered it made a part of the record in the case. It bears our court number identical with the number on Volume I, which volume bears the filing

date. Other endorsements by our clerk show the transcript to be in two volumes and filed on the same date. The facts recited reflect substantial compliance.

This brings us to the single major issue in the case, and that is whether the Chamber of Commerce was entitled to have its petition for an order *nunc pro tunc* granted. The testimony of two witnesses was given, both in county court and circuit court. They were former County Judge Ernest Thomas and Attorney Guy Brinkley. Judge Thomas presided over the county court in 1964 and Attorney Brinkley represented the Chamber at the 1964 hearing. Intervenors, appellees here, were represented at both hearings and cross-examined, but offered no evidence.

The evidence adduced at the hearing in circuit court establishes the pertinent events at the hearing before Judge Thomas. The subject matter was a petition filed by the Chamber pursuant to Ark. Stat. Ann. § 17-313 (Repl. 1956), which sought a lease from the county of certain lands "for educational purposes." When the testimony was concluded, Judge Thomas orally announced his findings to the effect that the petition was granted and the lands would be leased for $1.00 a year for a term of 99 years. Attorney Brinkley was instructed to draw the order and the lease. The court kept no docket and the clerk—if he attended—made no memorandum of the findings. The first precedent for order presented was not satisfactory and Attorney Brinkley redrafted it. A few days after the hearing, the redraft was presented, examined, found satisfactory, and signed by Judge Thomas. He signed it in the office of the county clerk and he is certain he left it on the clerk's desk because that was his custom. The order was never placed of record and was apparently lost. Exhibit "E" was introduced, it being identified by both witnesses as a substantial reproduction of the order signed by Judge Thomas. The source of this carbon copy is not apparent from the record, but it was not attacked and was placed in the record without objection.

In denying the Chamber's position for an order *nunc pro tunc,* the circuit court in nowise questioned the facts just recited. In substance, the court ruled that failure to enter the order voided the proceedings. The formal order makes no mention of the validity or invalidity of the lease, and we are not here concerned with it.

We have many decisions from this court touching on the authority of the courts to enter *nunc pro tunc* orders. One of the earlier cases which has been frequently cited with approval throughout the years is *Bobo, Admr.* v. *State, use, etc.,* 40 Ark. 224 (1882). We cite this case because the fact situation is very similar to the case at hand. In *Bobo,* the State called the defendant's case for trial, and the defendant failed to respond. A bond forfeiture was orally declared. The court made no docket entry and the clerk failed to make an entry in his court minutes. The error was discovered at a subsequent term. The court heard the testimony of the prosecuting attorney and the clerk. Counsel for the bondsmen asked the court to declare the law to be that some entry or memorandum in writing must exist before parol testimony can be introduced to show the nature of the judgment. This court approved the response of the trial court on that point:

> 'Orders and judgments *nunc pro tunc* may be entered upon proof that such order or judgment was made and not entered, and such fact may be proven by oral evidence or written memoranda like any other fact might be proven."

The unanimous opinion in *Bobo,* written by Chief Justice English, contains an exhaustive treatise on the subject. The following concise statement of the law also contains facts which are similar to the case at bar:

> " 'It is often the case that the Court announces in open court the decision which it has made, without furnishing the clerk with any writing on the subject. Were the latter to make a mistake in en-

tering up the judgment, the injured party would be remediless unless the mistake could be corrected upon the testimony of the Judge who made the decision, and the counsel and others who were present and heard it announced.'

"In this case it was clearly and distinctly proved by the prosecuting attorney and the clerk, who were present, that Etheridge failed to appear at appearance time, when called to answer the criminal charge against him, and that his bail failed to produce him, and that the Court ordered the clerk to enter a forfeiture of his bail bond, which he omitted to do, and there was no evidence to the contrary, and this was satisfactory to the Court, and a *nunc pro tunc* entry of the order of forfeiture was directed. The same Judge who presided when the forfeiture occurred heard the evidence and ordered the *nunc-pro tunc* entry in question to be made.

"Bearing in mind the rule that such an omission in the record should be corrected after the term with caution, and upon satisfactory evidence, the judgment must be affirmed."

The personal recollection of the judge who pronounced the initial finding which granted the order is recognized as having strong probative value. This is particularly true when there is an absence of evidence to the contrary. *Lowe* v. *Hart*, 93 Ark. 548, 125 S. W. 1030 (1910). Also, to the same effect, see *Eiland, et al.* v. *Parkers Chapel Methodist Church,* 222 Ark. 552, 261 S. W. 2d 795 (1953).

Finally, it should be noted that no rights have been vested, in the interim, in third parties who could be prejudiced by the entry of the order at this time.

Reversed and remanded with direction that the order *nunc pro tunc* be entered.

FRANKLIN ANDREW DUNFEE, MARY LOUISE DUNFEE, PAT HOPE AND GENEVA HOWE *v.* STATE OF ARKANSAS

5229 412 S. W. 2d 614

Opinion delivered March 20, 1967

Eugene Coffelt and *Jeff Duty*, for appellant.

Joe Purcell, Attorney General; *Don Langston*, Asst. Atty. General, for appellee.

CONLEY BYRD, Justice. Appellants, Franklin Dunfee, his wife, Mary Louise, his sister, Geneva Howe, and her husband, Pat Howe, appeal from a conviction of assault with intent to kill. For reversal they rely upon certain comments of the court during the cross-examination of Klela Dunn, one of the prosecuting witnesses; remarks of the prosecuting attorney in his opening statement to the jury relative to the characters of appellants;

and a remark of the prosecuting attorney in his closing argument.

The facts show that on December 26, 1965, the four appellants and a young man named Barnes were riding in a jeep on lands of the prosecuting witness, Joe O'Neal, where they had gone ostensibly for the purpose of target practicing with their rifles. When the prosecuting witnesses, Joe O'Neal, his wife, his daughter, Klela Dunn, and his son-in-law, Ralph Dunn, observed appellants in the jeep, they started yelling, 'Stop, stop, stop!'' At this point the jeep was backed up, struck a tree, was turned around and was driven down through the woods with the prosecuting witness, Ralph Dunn, in pursuit thereof on foot. Mr. Dunn fell over a log, got up and fired at least one shot with a derringer. Because the muffler was knocked loose on the jeep while appellants were driving through the woods, the prosecuting witnesses were able to ascertain that the jeep had been driven back onto the county road bisecting the property either owned or managed by the prosecuting witnesses. After the muffler was repaired, appellants started back east and as they topped the hill came upon the prosecuting witnesses.

The prosecuting witnesses and the appellants gave differing versions of what happened after the jeep topped the hill. The prosecuting witnesses testified that they were walking along the road toward the place where the jeep had stopped for the purpose of ascertaining where it had knocked the fence down. They stated that Mr. Dunn had the derringer in his pocket and that Mrs. Dunn was carrying a .22 rifle, intending to shoot a squirrel for her father, Mr. O'Neal. Appellants' testimony was that when they topped the hill, Mr. Dunn had the derringer in his hand and Mr. O'Neal had the .22 rifle, and both guns were pointed at appellants. All parties agreed that the jeep had run the prosecuting witnesses off the road, that some shooting and hair-pulling had occurred, and that Mr. O'Neal had been wounded.

There is testimony in the record indicating that Mr. John Dunfee, father and father-in-law of appellants, had leased the lands, which the prosecuting witnesses had either owned or had under their management, upon a written lease that had expired January 1, 1965, and that he was a holdover tenant of the lands on a year-to-year basis at the time the prosecuting witnesses either bought the land or took over the management thereof. At any rate, after the prosecuting witnesses took charge of the property, they posted the lands. At least one of the posted signs read, "Posted—No trespassing. Survivors will be prosecuted."

Klela Dunn was called by the prosecution as a witness after her husband had already testified. Her testimony, on direct, corroborated her husband's testimony as to who had the .22 rifle and what was the purpose of walking along the road toward the place where the jeep had been stopped. During cross-examination of Mrs. Dunn, the following occurred:

"BY MR. COFFELT:

Q. You had that pretty well memorized, didn't you?

MR. COXSEY: Now, that's not fair—.

THE COURT: Now, everybody is presumed to be telling the truth, Mr. Coffelt, each side.

MR. COFFELT: Well, it's cross examination.

THE COURT:. There is no information that anybody has memorized anything. That is not right before the jury. That's for the jury's conclusion.

MR. COFFELT: Save my exceptions. Save my exceptions to the remarks of the court.

THE COURT: Now, you are supposed to treat everybody with courtesy on both sides. When you say she's got it memorized, that is a reflection on her.

MR. COFFELT: Just take everything that is stated—.

THE COURT: Yes, indeed, take everything.

MR. COFFELT: The defendants at this time object to the remarks of the court: this being cross examination, the defendants have a large range of latitude on cross examination.

THE COURT: Yes, but everybody is a gentleman and a lady.

MR. COFFELT: I'll treat her as a lady. I haven't failed yet.

THE COURT: I know, but they are presumed to be telling the truth, too. Everybody on the stand is presumed to be telling the truth.

MR. COFFELT: Object to the remarks of the Court.

THE COURT: All right.

MR. COFFELT: Save our exceptions."

We hold that the trial court's comment was prejudicial error. It is in violation of our constitution, article 7, § 23, which provides:

"Judges shall not charge juries with regard to matters of fact, but shall declare the law, and in jury trials shall reduce their charge or instructions to writing on the request of either party."

In *Williams* v. *State,* 175 Ark. 752, 2 S. W. 2d 36 (1927), we set out in the following language the reasons why a trial judge should preside with impartiality:

> "...'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 hand 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 . . . ' "

Upon the second point, with reference to the prosecuting attorney's opening statement, the record shows that the following occurred:

> "....I think you will find before this case is concluded that the Dunfee people are very contentious people. I think you will find that they are overbearing people and that they have run over many people. I think you will observe from facts that they were a belligerent type of people—."

After objection was made, the prosecuting attorney continued:

> "I am referring to the defendants and the close relatives of these defendants."

The trial court should have sustained the objection to the opening statement of the prosecuting attorney. However, we need not here decide that it was prejudicial error, for the error will not likely reoccur upon a new trial. See *McFalls* v. *State,* 66 Ark. 16, 48 S. W. 492 (1898).

The third point raised by appellants is without merit. It is entirely proper for the prosecuting attorney to tell the jury that in his opinion the defendants should be put in the penitentiary.

Reversed and remanded.

SEABIE JERREL MEDLEY *v.* DAN D. STEPHENS, SUPERINTENDENT OF ARKANSAS STATE PENITENTIARY

5245 412 S. W. 2nd 823

Opinion delivered March 27, 1967

H. Murray Claycomb, for appellant.

Joe Purcell, Attorney General; *Rodney Parham,* Asst. Atty. Gen., for appellee.

CARLETON HARRIS, Chief Justice. Seabie J. Medley, appellant herein, was charged with the crime of Armed Robbery, the Information alleging that Medley, by force and intimidation, and armed with a revolver, took $80.00 in money from T. J. Bolin. Medley was also charged with Kidnapping. On January 4, 1963, Medley entered a plea of guilty to robbery, and was sentenced to 15 years imprisonment. On October 28, 1965, appellant filed a petition for a Writ of Habeas Corpus, alleging, *inter alia,* that he had been stopped by officers at a road block, arrested, his car searched without a warrant, and two pistols discovered in the glove compartment, one of these having allegedly been used in the robbery; further, that he made a statement of officers without being advised of his constitutional rights, and specifically without being given the right to legal counsel. On December 14, 1965, the petition was heard by the Jefferson Circuit Court, and at the conclusion of the hearing, the court, finding no merit in the petition, dismissed same, and Medley was returned to the Arkansas Penitentiary. From the judgment denying relief, appellant brings this appeal.[1]

For reversal, three points are relied upon, but we deem it unnecessary to discuss but one of these points, which, we think, determines the matter. Appellant asserts, "The statement of the appellant, and the plea entered thereafter by him, were obtained involuntarily, so that the judgment against him is void, and should be vacated." We do not agree. The Court, very properly, on January 4, 1965 (date of appellant's plea of guilty), had all court proceedings relating to the charge against Medley reported by the official court reporter. We think it appropriate to commend the Jefferson Circuit Court for adopting this procedure in receiving pleas of guilty.

[1]We treat this as an appeal under Criminal Procedure Rule No. 1.

It will at once be recognized that, in subsequent hearings on on petitions for post-conviction relief, after a plea of guilty (wherein allegations are contained that such plea was entered through mistake—or duress—or without being advised of the right to counsel), nothing is left to guesswork. The complete record is available. There is no need for the judge—or the prosecuting attorney—nor any other person—to testify from memory, and we recommend that, where possible, all trial courts, in accepting pleas of guilty, direct that a record be made of all proceedings therein. In the instant case, the record reflects, as follows:

"January 4, 1963, before the Court in open court. SEABIE J. MEDLEY.

THE COURT: You do not have to plead in this case if you don't think you should. You may get you an attorney, get you a jury trial, if you haven't anything with which to employ an attorney the Court will appoint you one. You are charged by information filed in the Jefferson Circuit Court of the crime of robbery alleging that you on the 3rd day of January, 1963, in Jefferson County, Arkansas, did then and there wilfully, unlawfully, feloniously, violently and by force and intimidation, armed with a revolver, take Eighty Dollars in money, gold, silver, and paper money, good and lawful money of the United States of America, the property of T. J. Bolin, from the person of the said T. J. Bolin, and against the will of said T. J. Bolin, contrary to the Statute in such cases made and provided, and against the peace and dignity of the State of Arkansas. Signed E. W. Brockman, Jr., Prosecuting Attorney. What is your plea?

A. Guilty sir.

THE COURT: You are guilty?

A. Yes sir.

THE COURT: You are also charged with kidnapping, alleging that on the 3rd day of December, 1963, in Jefferson County, Arkansas, forcibly and against his will, unlawfully, feloniously steal, take, arrest and carry away T. J. Bolin, from his service station at Sherrill, Arkansas, to the South side of the Free Bridge in Jefferson County, Arkansas, forcibly and against his will, contrary to the Statute in such cases made and provided, and against the peace and dignity of the State of Arkansas. Signed E. W. Brockman, Jr., Prosecuting Attorney. What is your plea to that?

A. Not guilty.

THE COURT: You didn't do that?

A. No sir.

THE COURT: Mr. Brockman, what is your recommendation?

MR. BROCKMAN: Your Honor, on the kidnapping, I recommend that he be given the maximum sentence of 21 years on robbery and dismiss the kidnapping. That will make him eligible for parole.

THE COURT: What trouble have you been into?
A. I will tell you everything I have been into. I got three years in the State of Alabama for grand robbery in 1959. March of 1960 I got 18 months for the Dyer act. (The defendant is sentenced by the Court to the State Penitentiary for a period of 15 years.)[2]

It is apparent that no advantage was taken of Medley; that his plea of guilty was entirely voluntary, and that, in entering the plea of guilty, he waived his right to counsel, and his right to a jury trial.[3] These rights

[2]The charge of kidnapping was subsequently dismissed.

[3]The only suggested improvement in the procedure followed by the court would have been for the court to specifically ask Medley, "Do you waive your right to counsel and a jury trial?"

can be waived. *Gideon* v. *Wainwright,* 83 S. Ct. 792 (1963); *Johnson* v. *Uerbst,* 304 U. S. 458. Of course, since appellant pleaded guilty, the statement or confession that he alleged (in his petition) to have been involuntarily obtained, never reached any jury, and it can hardly be contended that any prejudice resulted. It might be mentioned, however, that *Escobedo* v. *Illinois,* 378 U. S. 478, relied upon by Medley in his contention that his statement was made without benefit of counsel, cannot be of aid to appellant, for without distinguishing the instant case from that of *Escobedo,* it is enough to say that that holding affected only those cases in which the trial began after June 22, 1964. *Johnson et al* v. *New Jersey,* 384 U. S. 719. Medley was sentenced on January 4, 1963.

Likewise the contention of illegal search of his car (at which time the pistols were found) is without merit, for, as pointed out, the plea of guilty was entered, and the record does not reflect that the pistols were ever offered in evidence. Accordingly, no prejudice could have resulted.[4]

We find no violation of any of appellant's constitutional rights, either federal or state.

Affirmed.

[4]A "sheriff's report," which appears in the record, explains very thoroughly why Medley was stopped at the road block and arrested, and also makes it evident that the officers made the arrest with reasonable cause, thus making the search of the car incident to the arrest. However, the report cannot be considered as admissible evidence, and accordingly cannot be discussed.

CARMIE DESALVO ET AL *v.* ARKANSAS LOUISIANA GAS CO.

5-4171 412 S. W. 2d 822

Opinion delivered March 27, 1967

[redacted]

George J. Cambiano, for appellant.

Gordon & Gordon, for appellee.

PAUL WARD, Justice. This litigation began when the Arkansas Louisiana Gas Company (appellee) filed a suit to condemn a right-of-way (for the purpose of installing a gas line) eight feet wide across 120 acres of land belonging to Carmie DeSalvo and A. B. DeSalvo, and their wives (appellants).

The jury verdict, in favor of appellants, was for the amount of $1,250, and for a reversal appellants rely solely on the following point:

> The court erred in denying appellant's Motion to set aside the verdict and for a new trial.

The Motion, in pertinent part, reads:

> "It is the contention of defendants that said verdict is wholly inadequate to compensate the defendants for the damages to their land and crops, and that the verdict is not consistent with the evidence. . ."

At the beginning of their brief it is stated that "The main question appears to be what are the damages to the lands of the defendants".

In view of the manner in which this case comes to us for a decision, there being no question raised about the competency of evidence introduced or the instructions given by the court, we must affirm the judgment unless we can say, as a matter of law, it is inadequate.

We note that this case was apparently not tried by the usual rule announced in the case of *Ark. State Highway Comm.* v. *Webster,* 236 Ark. 491 (p. 493), 367 S. W. 2d 233, where we quoted with approval:

> "'By a long line of decisions we have established that the determination of the damage, in cases like these, is to be measured by what the property was reasonably worth before the taking, and what the remainder of the property is worth after the taking."

The testimony relative to the damages suffered by appellants is set out at length by several witnesses in a record consisting of more than 375 pages, and it is abstracted at length in the briefs. Considering the sole

issue involved we deem it sufficient to set out only a brief summary of the pertinent testimony.

There was a taking of approximately 3.70 acres of wood and pasture land, and approximately two acres of a vineyard. There was testimony fixing the damages in excess of the verdict but there was also contradicotry testimony. The major item of damages related to the vineyard. Damages to this item depended largely on the cost of restoration and the anticipated profits derived from the sale of grapes, about which there was a wide difference of opinions. There was, in this connection, a question whether the cost of production was being taken into consideration.

A consideration of all the testimony leads us to conclude that these matters presented fact questions for the jury to decide, and, viewing the testimony in the light most favorable to appellee, we cannot say the jury verdict was arbitrary as a matter of law. In the *Webster* case, *supra,* we said:

> "We have consistently held that in determining the sufficiency of the evidence to support a verdict we must view the evidence, with every reasonable inference arising therefrom, in a light most favorable to the appellee and if there is any substantial evidence to support the verdict rendered by the jury, the triers of the facts, we will not disturb it on an appeal."

Affirmed.

FOGLEMAN, J., disqualified.

DIERKS FOREST, INC. *v.* ELWOOD GARRETT ET UX

5-4172 412 S. W. 2d 849

Opinion delivered March 27, 1967

Wood, Chesnutt & Smith, for appellant.

Fred E. Briner, for appellee.

LYLE BROWN, Justice. This suit was brought by Elwood Garrett and Myrtle Garrett, husband and wife, against Dierks Forest, Inc. The trial court quieted title in the Garretts on their claim of adverse possession and awarded judgment for a small amount of timber cut and removed by Dierks.

Without stating the basis of their title, the Garretts simply alleged ownership in them, asserted that Dierks was trespassing, and asked that Dierks be enjoined.

Dierks filed a denial and a counterclaim, alleging entry under color of title and payment of taxes continuously for 22 years. Although the complaint merely stated an action for trespass, the litigation was treated by all participants as an action to quiet title. Thus Garretts and Dierks introduced their purported records of title and their tax payments, and the Garretts introduced evidence on the contention of adverse possession.

We reach the conclusion that neither party established good record title; that Dierks established entry, in 1941, into unimproved and unenclosed lands under color of title; and that plaintiffs, the Garretts, did not meet the burden of proof with respect to adverse possession.

Record Title. Dierks obtained a deed in 1941 from the heirs of Mrs. Dyer, and the deed contained a definite description. However, when Mrs. Dyer obtained her deed in 1896, the land was described as "Part N½ SW¼, Sec. 2, Twp. 1 S., R. 17 W., 73 acres." Dierks contends the seven acres excepted from Mrs. Dyer's deed is identified by a deed conveying the excepted acreage by metes and bounds. In other words, Dierks asks us to hold that since the location of the excepted acreage is readily apparent, we should hold that the deed to Mrs. Dyer conveyed the rest of the eighty acres. If this were a suit between the Dyer heirs and Dierks, we might so hold, but otherwise not. Jones, *The Arkansas Law of Title to Real Property* § 309 (1935). "Part" or "Pt." generally invalidates a description for indefiniteness.

Appellees, the Garretts, find themselves in a wilderness of errors as concerns their record title. It would serve no useful purpose to recite them. The Garretts obtained their deed from W. R. Dunn in 1942, one year after Dierks obtained its deed. There was no record of any grant ever having been made to Dunn. In fact, if Dunn intended to convey the acreage in dispute to the Garretts, he failed to do so, because the description in

the deed called for fifteen acres in an adjoining quarter section.

Tax History. Dierks paid taxes on the N½ SW¼, 73 acres (including the land claimed by the Garretts), under proper description and continuously from the date of its deed to the present. Taxes on an indefinitely described fifteen acres were paid by Mr. Dunn from 1940 through 1943, and by Elwood Garrett from 1944 through 1958. The Dunn and Garrett payments were made under a "Pt." description. Garrett failed to pay taxes in 1959, 1960, and 1961, but he redeemed. Under his tax receipt description, the fifteen acres could have been anywhere in the E½ of the SW¼.

From the record title and tax history we find that Dierks began paying taxes on the land in litigation for the year 1942, under color of title, and has timely paid taxes continuously since 1943. Garrett has paid taxes on fifteen acres—somewhere in the E½ of the SW½—but his deed called for acreage in another quarter section. Thus he was paying taxes without color of title, and upon lands which were not susceptible of physical location by examination of the record. In 1963 and 1964, the Garretts obtained a correction deed and two quitclaim deeds. Even if these were valid deeds, they could not serve to disrupt a title already vested. Two of the deeds were in fact obtained after the filing of this suit.

Dierks placed its deed of record on November 18, 1941. At that time the lands were unimproved and unenclosed, except for some evidence of old fencing. No other person was in actual possession at the time, nor had the lands been occupied since 1929. The lands were placed on the tax records in Dierks' name, under a valid description, for the year 1942. Dierks paid, and continued to pay, the taxes, for more than seven consecutive years. Dierks' claim ripened into good title, and that title was held at the time this suit was filed. See Ark. Stat. Ann. § 37-102 (Repl. 1962).

Under the circumstances of Garrett's entry upon the land in 1942—that is, without color of title, and with an obscure record of tax payments by his grantor, Dunn—Garrett could defeat Dierks' claim only by adverse possession. The Garretts' evidence in this respect is wholly insufficient, especially in view of their having the burden of proof. *Clem* v. *Mo. Pac. Rd. Co.*, 223 Ark. 887, 269 S. W. 2d 306 (1954).

Some of Elwood Garrett's relatives had lived on the property many years ago, but the time and dates are not established. The last known occupant, prior to Garrett, appeared to be Bill Dunn, who left the land in 1928 or 1929. After that time the property was not occupied or cultivated, and it grew up in timber. Then in 1942, or shortly thereafter, Garrett purported to take charge. There were remnants of a fence, partially on the front and on one side of the property. This fencing was broken down but Garrett said he "could see where the fence was, had been." Using "hog wire," he proceeded to fence fifteen acres, except the part in the creek and "down the straight part of the road, not down where it turns." He tried to dig a water well but was unsuccessful. He lived in a two-room house which he placed on the property and after a few months moved back to Arizona, where he had employment. Thereafter, a relative lived in the house for about one year. Garrett would return to Arkansas intermittently and would pay taxes, either personally or through a relative. The little house eventually collapsed.

What we have said is a fair summary of the extent of Garrett's dominion over the property. It falls far short of being possession that is actual, open, notorious, peaceable, continuous, hostile, and exclusive for a period of seven years. See, *Supplement to Jones' Arkansas Titles,* § 1498 (1959).

Reversed and remanded with directions that title be quieted to the lands in controversy in appellant,

Dierks, and that the complaint in damages for trespass be dismissed.

JONES and BYRD, JJ., dissent.

CONLEY BYRD, Justice, dissenting. I dissent from that part of the majority opinion which directs that title to the lands in controversy be quieted in appellant, Dierks Forests, Inc., by virtue of seven years' payment of taxes under color of title, as provided in Ark. Stat. Ann. § 37-102 (Repl. 1962).

The facts show that when Dierks obtained its color of title in 1941, the premises in controversy were fenced with hog wire. When the Garretts obtained their deed and went into possession in 1942, they repaired the fences with barbed wire and built a house on the property. Obviously, Dierks could not acquire title under § 37-102 as long as the premises were enclosed. *Schmeltzer* v. *Scheid,* 203 Ark. 274, 157 S. W. 2d 193 (1941). Therefore, Dierks could not have obtained any title under § 37-102 until seven years after the premises returned to a state of being wild and unenclosed.

In *Schmeltzer* v. *Schied, supra,* in considering Ark. Stat. Ann. § 37-102, *supra,* we held that the obvious and declared purpose of § 37-102 was to encourage the payment of taxes and to protect persons who pay them.

In *Spradling* v. *Green,* 226 Ark. 420, 290 S. W. 2d 430 (1956), we had before us Mr. Spradling, the owner of a five-acre tract in the SE¼ of the NE¼, who had been erroneously paying taxes under a description in "the SW-pt. of the NE of the NE," from 1902 until 1945, when the description was corrected to read "the SW-pt. of the SE of the NE." The taxes on the 40 acres described as the SE of the NE forfeited to the state for the tax year 1935, and the state's title thereto was confirmed in 1941. Thereafter Mr. Green purchased the SE of the NE from the State Land Commissioner. In holding Mr.

Green's state land deed ineffective as against Spradling's payment of taxes under the erroneous description, which amounted to a double taxation, we there said:

> " '... The right to sell is founded on the nonpayment of the tax. If the tax be paid before the sale, the lien of the State is discharged, and the right to sell no longer exists. Where the owner has performed all of his duties to the government, no court will sanction, under any circumstances, the forfeiture of his rights of property. The law was intended to operate upon the unwilling and negligent citizen alone. The legislative power extends no further. The sale involves an assertion by the officer that the taxes are due and unpaid, and the purchaser relies upon this, or on his own investigations, and his title depends upon its truth . . .' "

Here it is admitted that appellees and their predecessors have been paying taxes upon the disputed tract under a part description from 1901 to date. Since under our adjudicated cases a tax forfeiture upon the description used by Dierks would not defeat appellees' title because of the double tax payments, I cannot interpret § 37-102 as creating a greater forfeiture against a property owner.

For these reasons I would affirm the action of the trial court in quieting title in appellees, since their predecessors in title had apparently acquired the lands either by purchase or adversely from Dierks' predecessors in title.

JONES, J., joins in this dissent.

DUNCAN WALTER MCINTYRE *v.* STATE

5250 412 S. W. 2d 826

Opinion delivered March 27, 1967

Jesse B. Thomas, for appellant.

Joe Purcell, Attorney General; *Don Langston,* Asst. Atty. Gen., for appellee.

JOHN A. FOGLEMAN, Justice. Duncan Walter McIntyre, the appellant, was sentenced to 18 years in the Arkansas Penitentiary by the Circuit Court of Garland County on August 4, 1961, upon a charge of burglary alleged to have been committed on the first day of August, 1961. He was committed to the penitentiary and, on the 29th day of November, 1965, filed a motion in forma pauperis to vacate the sentence under Criminal Procedure Rule No. 1. He alleged that his rights under the United States Constitution were violated in that he was deprived of the assistance of counsel in his defense by reason of the fact that he was not advised of his right to counsel at any stage of the proceeding against him.

The motion was heard by the Garland Circuit Court on the fourth day of April, 1966. At this hearing the court heard the testimony of appellant and Ray Davis, an officer of the Arkansas State Police. McIntyre testified that he did not have a lawyer when he entered his plea of guilty and that he was never advised that he was entitled to a lawyer. He denied having waived his right to counsel and said that the question was never brought up. He admitted that he had been convicted of crime before, but stated that he had never had a trial, having always entered a plea of guilty. On examination by the court, he admitted that he did not ask for an attorney. The State introduced a statement of appellant's obtained by police officers immediately after his

arrest. This statement showed no felonious intent on the part of appellant. The prosecuting attorney described it as not having admitted anything. The state police officer only introduced the criminal record of appellant.

The court denied the motion and filed its finding of fact. The findings state that appellant entered a plea of guilty and that the State had offered testimony that appellant "had been advised of his rights before entering a plea, and that he knew his sentence would be eighteen years". There is no evidence to contradict that of appellant as to his waiver of the right to counsel, nor is there any finding by the trial court that there was such a waiver. In this respect, the present case is readily distinguished from the case of *Deckard* v. *State*, 241 Ark. 504, 408 S. W. 2d 604, where the court, after a formal hearing and comprehensive review of the record, made detailed written findings of fact adverse to the accused's contentions before denying the motion. In the *Deckard* case, this court found the trial court's findings of fact to be sustained by the record. Likewise in *Wells* v. *State*, 241 Ark. 1067, 411 S. W. 2d 529, the record disclosed a waiver of the right to counsel after defendant was advised of this right by the trial court.

It has been made absolutely clear by the Supreme Court of the United States that an accused is entitled to relief from a conviction, under the due process clause of the Fourteenth Amendment to the Constitution of the United States, whenever the proceedings indicate the unfairness of trial without the help of a lawyer. *Carnley* v. *Cochran*, 369 U. S. 506, 8 L. Ed. 2d 70, 82 S. Ct. 884; *Gideon* v. *Wainwright*, 372 U. S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792, 93 ALR 2d 733. In view of the fact that the charge against appellant appears to have been based upon his statement, it seems beyond question that appellant stood in need of the assistance and advice of counsel. Under federal constitutional standards prescribed by the United States Supreme Court, the acceptance of appellant's plea of guilty without a conscious waiver of his right to assistance of counsel violated the Fourteenth

Amendment. *Carnley* v. *Cochran, supra; Gideon* v. *Wainwright, supra.* It was held in the Carnley case that, under circumstances where the assistance of counsel is a constitutional requisite, any waiver thereof must be intelligently and understandingly made, failure to request assistance of counsel is not a waiver and, in order to justify finding a waiver, the record must show or there must be evidence that shows that an accused was offered counsel but intelligently and understandingly rejected the offer. The only effect of appellant's plea of guilty in this regard is to raise a question of fact requiring a hearing. *Rice* v. *Olson, Warden,* 324 U. S. 786, 789-791, 89 L. Ed. 1367, 1369-1371, 65 S. Ct. 989, *Carnley* v. *Cochran, supra.*

In order to meet the constitutional requirements set out in these and similar decisions of the United States Supreme Court, this court adopted Criminal Procedure Rule No. 1 to provide for state post conviction relief. Since the files and records of the case would not show that McIntyre was not entitled to relief, the trial court properly conducted a hearing under Paragraph (E) of the Rule. This paragraph requires that the trial court shall determine the issues and make written findings of fact and conclusions of law with respect thereto. There is no finding of fact in this case that appellant was advised of his right to counsel, or that he was offered counsel or that he waived this right. Nor is there any evidence in the record upon which the trial judge could have based such a finding. The docket sheet in the case reveals nothing in this respect. No witness to the proceedings when appellant's plea was accepted was offered and there is no statement by the trial judge who appears to have been the same judge who accepted the plea of guilty.

In the face of these deficiencies in the findings of the trial court and the evidence at the hearing, we have no alternative except to reverse the order of the lower court denying the motion to vacate the sentence and to

remand this case for a new trial of the appellant on the charge of burglary.

Reversed and remanded.

JAMES C. CHERRY & FRANCIS D. CHERRY *v.* JAMES MONTGOMERY

5-4119 412 S. W. 2d 845

Opinion delivered March 27, 1967

Dulaney & Dulaney, Gentry & Gentry, and *Shaver & Shaver,* for appellant.

Harold Sharp and *James Robertson,* for appellee.

JOHN A. FOGLEMAN, Justice. The question to be determined on this appeal is whether there was error in failure of the trial court to direct a verdict for appellants. The only inquiry necessary on this question is whether there is evidence that appellee produced a purchaser ready and willing to purchase lands of appellants listed for sale with appellee Montgomery on terms specified by appellants. We find conflicting testimony on all other fact questions sufficient to justify submission of those questions to the jury. They were resolved by the jury verdict, there being no question about the propriety of the instructions given. The only complaint about jury instructions is appellants' contention that the court should have given a binding instruction which was refused, and on which we find it unnecessary to pass. Appellee contends that Jonesboro Investment Corporation was ready and willing to buy the lands of appellants listed for sale with appellee, a real estate broker, upon the terms of the listing.[1] In stating facts, we will remember that the jury made certain factual determinations contrary to evidence offered by appellants which was contradicted and that, in considering the question to be resolved, the evidence and all proper inferences therefrom are to be viewed in the light most favorable to appellee.

The exclusive listing contract under which appellee seeks recovery of a real estate commission gave him an exclusive agency for one month from the date thereof—December 11, 1963—at a price of $900,000.00 "to be paid according to price and terms herein given". The terms were not stated anywhere in this agreement. Appellee

[1]A suit by Jonesboro Investment Corporation for specific performance was dismissed upon demurrer invoking the Statute of Frauds because the listing contract did not show the terms and conditions of sale. *Jonesboro Investment Corporation* v. *Cherry,* 239 Ark. 1035, 396 S. W. 2d 284. This action arose from a cross complaint by appellee against appellants in that suit both having been parties defendants therein.

contends that he performed his undertaking by obtaining Jonesboro Investment Corporation as a purchaser for $900,000.00 cash. Appellants contend that even if this prospective purchaser was ready and willing to purchase at that price, its "offer" or "acceptance", whichever it is called, was conditional in that it was made upon the express condition that the lands have a cotton allotment of 700 acres and a rice allotment of 100 acres. They further contend that this proposal was not pursuant to the terms of the listing in that it did not except from the proposed purchase a certain mantel piece built into the fireplace in the dining room of the Cherry dwelling house on the land. It is undisputed that one of the specific terms upon which the listing was given was that this mantel was to be kept by appellants, regardless of any other terms. Mrs. Cherry said that this mantel had been owned by her family for over 100 years and, in addition to its sentimental value, had a monetary value of several thousand dollars.

The evidence on this point shows that the prospective purchaser was informed by appellee that the mantel was to be excluded in the very earliest negotiations with it. The officers of Jonesboro Investment Corporation, as agents for X corporation (not then formed), made an offer of $830,000.00 for the land, to be paid over twenty-five years, in which they made no mention of any condition with reference to acreage allotments but clearly specified that the marble mantel would be reserved to appellants who would have been given six months after closing to remove it. The offer, of course, was not at the price specified in the listing. The offer upon which appellee relies was contained in a letter from Jonesboro Investment Corporation dated December 19, 1963 (after Mr. Cherry advised that the first offer was unacceptable) addressed to *James Montgomery* stating that the corporation *accepted* his offer[2] of the Cherry farm, that they enclosed a $25,000.00 check for earnest

[2]While appellants do not raise the issue, the right of a broker

money, and that "700 odd acres" of cotton allotment and "100 odd acres" of rice allotment were understood to be on the farm. No mention whatever is made of the mantel and the payment of the $900,000.00 purchase price was specified upon presentation of warranty deed and satisfactory title.

The appellee had, on the night of December 18th, arranged by telephone for an appointment with Mr. Cherry and appellants' attorney for December 21st. The earnest money cashier's check introduced was dated December 20th, having been delivered after December 21st to appellee in lieu of a company check. An endorsement on the check refers to a "December 19th contract of acceptance," the date having obviously been changed from December 18th—the date of the first offer. The officers of the prospective purchaser, appellee, Mr. Cherry and appellants' attorney all met on December 21st as arranged. All parties admit that the "acceptance" of December 19th was not mentioned at this conference by anyone, although there was discussion about terms of sale, and a later conference was agreed upon, and was later held on December 27th. No explanation was given for not mentioning this "acceptance" at the meeting of December 21st. Appellee had not advised appellants of the earnest money check on December 21st. On December 23rd the prospective purchaser asked appellee to put the check in the bank. The ticket for the deposit indicates the date of deposit to be December 22nd (a Sunday). The bank's endorsement of the check is dated December 24th. Jonesboro Investment Corporation first advised appellants that they had bought the land by this "acceptance" sometime between the two conferences. Appellee advised Mr. Cherry of the earnest money check sometime before the latter conference. At

to a commission upon an offer of a purchaser to enter into a contract upon a vendor's terms, made to the broker, and not the vendor, has been questioned. *Mattingly* v. *Pennie*, 105 Cal. 514 (1895); *Hicks* v. *Christeson*, 174 Cal. 712, 164 P. 395; *Frank Meline Co.* v. *Kleinberger*, 246 P. 136 (Cal. 1926).

the meeting of December 27th the officers of Jonesboro Investment Corporation advised Cherry that they had bought the farm for $900,000.00.

We find no evidence making a question of fact as to whether the prospective purchaser was willing to purchase the land and exclude the mantel, or from which an inference that they were may be justified. Appellee relies on testimony by Parker of Jonesboro Investment Corporation that it didn't make any difference to him whether they got the mantel or not. The testimony of appellee on which reliance is placed on this point is as follows:

"Q. Show you a copy of a letter of the 19th you were talking about, signed by Mr. Spurlock and Mr. Parker, anything in there about the marble mantel?

A. No, sir. Said they could have it.

Q. It isn't in there?

A. Would give it to them.

Q. You call this an acceptance?

A. Yes, sir. That was an acceptance.

Q. Wouldn't they be insisting they were entitled to everything in the house?

A. Might have forgot and left that out.

Q. Isn't in there?

A. Would have put it in there."

Spurlock testified that he and Parker were ready, willing and able to purchase the farm on the terms and conditions he and Parker "described". Our review of the

record reveals no testimony whatever that anyone ever informed the Cherrys that Parker and Spurlock were willing to accept a conveyance excluding the mantel. We think that the only inference which can reasonably be drawn from the December 19th letter is that Jonesboro Investment Company was unwilling to accept the Cherry property without the elaborate marble mantel, or without an assurance of crop allotment acreages, if they were to pay $900,000.00 cash rather than $830,000.00 by payments scattered over twenty-five years. A witness's affirmative answer to the question whether he was ready, willing and able to purchase realty is a mere conclusion, insufficient to make out a prima facie case for a broker in an action for a commission and is of no probative force in the light of undisputed contrary facts. *Apple-Cole Co., et al* v. *Shackel, et al,* 324 Ill. App. 230, 57 N. E. 2d 758 (1944).

This case is very similar to *Sharrar* v. *Nestle*, 193 N. W. 239, (Mich. 1923) wherein it was held that the trial court properly directed a verdict against a broker suing a landowner for a commission. The listing specified that all lumber and barn frame and some of the rosebushes and peonies on the lands were to be reserved. The written offer submitted by the prospective purchaser contained no statement about the reserved property. The record showed that the lumber and barn frame were so attached to the realty that a deed of the farm would convey title to them. This was a basis for holding that the broker had failed to show compliance with his contract with the landowner. There can be no doubt from the evidence in this case that a deed to the farm of appellants would have conveyed the marble mantel if there were no clause in the deed to exclude it.

All parties concede that appellee would be entitled to recover only if the evidence shows that he produced a purchaser ready, willing and able to buy upon the terms and conditions specified in the agreement between the broker and the landowners. An offer to purchase

or "acceptance", as the case may be, which did not exclude the marble mantel was not on the terms and conditions of appellee's contract. Another condition of the prospective purchaser was that there be over 700 acres cotton allotment and over 100 acres rice allotment. Parker stated unequivocally that the acreages were a condition of his company's acceptance. This was not a part of the terms specified by Mr. Cherry. The only evidence that the land actually carried those acreage allotments was the statement of appellee that Cherry told him that the 1964 allotments were 705 acres of cotton and 109 acres of rice. Appellee stated that he gave these figures to Parker and Scurlock. Appellee argues that this does not render the purchaser's offer conditional because there is no evidence that there is not more than 700 acres of cotton allotment and 100 acres of rice allotment. The burden of proof was on appellee to show that he produced a purchaser who was ready, willing and able to purchase on the terms and conditions specified by the owner. *Gladys Bell Oil Co.* v. *McGee,* 172 Ark. 1176, 291 S. W. 72. Consequently, the absence of proof would militate against appellee.

In *Weldon* v. *Lashley,* 214 Ga. 99, 103 S. E. 2d 385 (1958) it was held that proof of an offer by a purchaser containing a provision that the number of acres in the tract on which the sale price would be calculated be determined by a survey of the property provided and paid for by the purchaser showed a material variance from the broker's listing in which the sale price was $2,500.00 per acre, so that it was error to deny a directed verdict in the broker's suit for compensation.

A judgment in favor of a broker employed to secure a loan was held erroneous for failure to secure a lender ready, willing and able to make a loan on borrower's terms, when the offer was conditioned upon an examination of borrower's property. *Robertson* v. *Carvey,* 9 Alaska 488 (1939). It has also been held that a directed verdict was proper in a suit by a broker for a com-

mission for the sale of a garage when the purchaser was not willing to take the property as he found it, but agreed to buy providing the premises would show a specified net profit. *Stuart* v. *McEttrick*, 136 N. E. 395 (Mass. 1922).

The trial court erred in denying a directed verdict. The judgment of the lower court is reversed and the case having been fully developed, is dismissed.

BYRD, J, dissents.

HANFORD PRODUCE CO. *v.* C. A. CLEMMONS, LUCILLE K. HOWARD AND BILL LANEY, COMMISSIONER OF LABOR

5-4016 412 S. W. 2d 828

Opinion delivered March 27, 1967

Williams & Gardner, for appellant.

Luke Arnett, for appellee.

J. Fred Jones, Justice. This is an appeal from a judgment of the Johnson County Circuit Court affirming an order of the Board of Review awarding unemployment compensation benefits to appellees.

The appellees, C. A. Clemmons and Lucille K. Howard, were employed by the appellant, Hanford Produce Company, at its hatchery in Clarksville, Arkansas, and as such employees, their work was confined to the hatchery where baby chicks were hatched by artificial

incubation. These employees lost their employment and filed claim for unemployment compensation benefits under the Arkansas Employment Security Act, Ark. Stat. Ann. § 81-1101 (Repl. 1960). The Administrative Commission allowed the claims, both the Board of Review and the Johnson County Circuit Court affirmed the findings and decision of the Commission, and the produce company has appealed, relying on two points for reversal:

> "1. The agency and the lower court erred in holding that appellant is not exempt from Arkansas Employment Security Act under Section 81-1103 (i) (6), Ark. Stats. 1947 as amended, exempting employment in connection with raising, feeding, or management of poultry.
>
> "2. The agency and the lower court erred in holding that appellant is not exempt from the Arkansas Employment Security Act by Section 81-1103 (0), Ark. Stats. 1947 as amended, which provides for the exemption of all employment exempt under the Federal Unemployment Compensation Tax Laws."

These two points are so closely related we consider them together.

This case and the case of *Arkansas Valley Industries, Inc.* v. *Bill Laney, Commissioner of Labor et al,* appear here at the same time, and both present the same question of law on different facts. The attorneys in both cases have favored us with excellent briefs, and have orally argued both cases together on appeal.

The appellant's hatchery is located in the city of Clarksville, Arkansas, in a building which is used for no other purpose. The appellant owns no farms, nor does it lease any farms. As a part of appellant's operation, it furnishes chickens and the feed to farmers under contract, and the farmer furnishes poultry housing, equip-

ment, provides the care for the chickens, and delivers the hatching eggs to the hatchery. Neither of the appellees performed any services on the farm.

We are called on in this case to interpret for the first time, "exempted employment" under the Arkansas Employment Security Act as it relates to agriculture as defined in Ark. Stat. Ann. § 81-1103 (i) (6) (B) (Repl. 1960) and as affected by the same statute subsection (i) (6) (0).

Ark. Stat. Ann. § 81-1103 (5) (i) defines employment as follows:

"'Employment' means any services performed * * *." and § 81-1103 (i) (6) insofar as it relates to the problem here, is as follows:

"(6) Exempted Employment. The term 'employment' shall not include—

(A) Domestic service in a private home.

(B) Services performed in the employ of an owner or tenant operating a farm, in connection with the cultivation of the soil, the harvesting of crops, or the raising, feeding, or management of livestock, bees or poultry, or in connection with the processing, packing or marketing of the produce of such farms as an incident to ordinary farming operations, and services performed in the ginning of cotton.
* * *

"(0) Service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

"Also any service or employment now exempt under terms of Federal Unemployment Compensation laws so long as the same is exempt under Federal law."

Appellant argues that it comes within the exemption under (6) (B) *supra,* but that if it is not exempt under the language of (6) (B), it is exempt under the "terms of Federal Unemployment Compensation Laws" (§ 26 U. S. C. A. 3306 (K) (1)) as specifically provided by the state law in the second paragraph of Ark. Stat. Ann. § 81-1103 (6) (0) *supra.*

Section 26 U. S. C. A. 3306 (8) (C) defines employment as follows:

"For the purposes of this chapter, the term 'employment' means any services performed * * * except—(1) Agriculture labor (as defined in subsection (K)."

26 U. S. C. A. 3306 subsection (K) is as follows:

"(K) Agricultural labor.—For purposes of this chapter, the term 'agricultural labor' includes all service performed—

(1) on a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife."

In interpreting Ark. Stat. Ann. § 81-1103 (i) (6) (B) as related to the Federal Act, it is necessary to construe the legislative intent especially as it relates to subsection (0) of Ark. Stat. Ann. § 81-1103 (i) (6), and to do this we look to the language of the statute,

the subject matter, the object to be accomplished, the purpose to be served, the remedy provided, contemporaneous legislative history or other appropriate matters that throw light on the matter. (*Chaney, Commissioner* v. *Georgia-Pacific Paper Corp.*, 237 Ark. 161, 371 S. W. 2d 843).

The Federal unemployment tax Act was passed by Congress in 1935 and imposed an excise tax on every employer of eight or more persons, the amount of three per cent of wages paid annually. Certain services or employments were exempted from the definition of "employment" within the meaning of the Act, and to encourage the various states to enact and administer their own employment security Acts, the Federal Act provided for a credit on the Federal tax of 90 per cent of any amount paid under the unemployment compensation law of a state, and provided for an annual certification by the Secretary of Labor in connection with changes permissible under the State law, to effectuate the purpose of the Federal Act.

The 1935 Federal Act provided as follows:

"* * *

(c) The term 'employment' means any service, of whatever nature, performed within the United States by an employee for his employer, except—

(1) Agricultural labor;

(2) Domestic service in a private home;

(3) Service performed as an officer or member of the crew of a vessel on the navigable waters of the United States;

* * *

(7) Service performed in the employ of a corporation, community chest, fund or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or

for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual; (8) Service performed in the employ of an employer as defined in sections 351-367 of Title 45 and service performed as an employee representative as defined in said sections."

Thus it is seen that under the Federal Act as originally enacted "agricultural labor" was exempted from the provision of the Act.

The original 1935 Federal Act did not attempt to define "agriculture labor," but authorized the making of administrative regulations and "agricultural labor" was treated under Administrative Regulation 90 until the Federal Act was amended in 1939, 26 U. S. C. A. 3306 (*Scofield, Collector of Internal Revenue* v. *Tinnin,* 171 F. 2d. 227).

There was nothing in the Federal Act that prevented a state from expanding the Social Security Program in the field of exemptions, and as a matter of fact most of the states did so.

Each of the states was anxious to obtain the full benefit of the Federal law and to keep as much of the tax money in the state as possible through the 90 per cent credit provision of the Federal Act. Consequently, many of the states enacted statutes with broader coverage and narrower exemptions than were provided in the Federal Act.

The Federal Act originally covered only employers of eight or more persons, and at the same time approximately one-half the states covered employers with fewer employees. Several states covered laborers and domestic servants, both groups exempted under the Federal Act. (*Standard Dredging Corp.* v. *Murphy,* 319 U. S. 306 at 311).

Many of the states, including Arkansas, simply adopted most of the provisions of the Federal Act, with such minor changes as were necessary to fit the economic situation of the particular state and region.

Arkansas was one of the first states to enact employment security legislation, and did so by Act 155 of the Acts of Arkansas for 1937, and in this Act, Arkansas simply followed the Federal Act and exempted "agriculture" from the provisions of the Act.

The 1937 Arkansas Act provided as follows:

"* * *

(6) The term 'employment' shall not include—

(1) Agricultural labor;

(2) Domestic service in a private home;

(3) Service performed as an officer or member of the crew of a vessel on the navigable waters of the United States;

* * *

(7) Service performed in the employ of a corporation, community chest, fund or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual;

(8) Service with respect to which unemployment compensation is payable under an unemployment compensation system established by an Act of Congress; Provided, that the Commissioner is hereby authorized and directed to enter into agreements with the proper agencies under such Act of Congress, which agreements shall become effective ten days after publication thereof in the manner provided in section 11 (b) of this Act for general rules, to provide reciprocal treatment to individuals who have, after acquiring potential rights to benefits under this Act, acquired rights to unemployment

compensation under such Act of Congress, or who have, after acquiring potential rights to unemployment compensation under such Act of Congress, acquired rights to benefits under the Act."

The purpose of the enactment of employment security legislation, both Federal and State, and the economic conditions it was intended to relieve, are matters well known, but are set out in the original Arkansas Act 155 of 1937 as follows:

Declaration of State Public Policy

As a guide to the interpretation and application of this Act, the public policy of this State is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this State. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this general hazard of our economic life. This can be accomplished by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment from which benefits may be paid for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. The legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this State require the enactment of this measure, under the police power of the State, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own.

The Arkansas Act, Ark. Stat. Ann. § 81-1102 (Repl. 1960) specifically provides:

"* * * The legislature hereby declares its intention to provide for the carrying out of the purposes of this Act in cooperation with the appropriate agencies of other States and of the Federal Government, as part of a nationwide employment security program to secure for this State and the citizens thereof the grants and privileges available thereunder."

Most of the exemptions in the original Federal Act were because of the expense and difficulty that would be involved in the administration of the Act to the exempted employment. *Latimer et al* v. *United States,* 52 Fed. Supp. 228. So after considerable experience, Congress amended the Federal Act in 1939, and for the first time attempted to define agriculture as exempt under the original Act, as including "all services performed on a farm, in the employ of any person, ..." (26 U. S. C. A. 3306 (K), *supra*).

Arkansas followed close on the heels of Congress and by Act 391 of 1941 brought the State Act up to date, but this time, the Arkansas Legislature did not follow the Federal amendment, but narrowed the agricultural exemptions from just "agriculture employment" to "services performed in the employ of an owner or tenant operating a farm." (Ark. Stat. Ann. § 81-1103 (i) (6) (B), (*supra*). Whereas the Congress, by its amendment to the Federal Act, narrowed the Federal exemption to the same services performed "on a farm, in the employ of any person." The Arkansas Legislature, by its amendment, narrowed the State exemption to the same services performed "in the employ of an owner or tenant operating a farm."

We place no strained construction on the wording of the statute in holding that each activity set apart by commas in subsection (i) (6) (B) of § 81-1103 relates to services performed in the employ of an *owner or tenant operating a farm.*

The State of Maine has had considerable experience

with the problem we have here. The Supreme Court of that state had occasion to consider two cases with very similar fact situations as in the case at bar. One of the Maine cases, *Maplewood Poultry Company* v. *Maine Employment Security Division,* 121 A. 2d. 360, was decided under a statute similar to the present Federal statute, and the other case was, *C. M. T. Company* v. *Maine Employment Security Commission,* 163 A. 2d. 369, decided under the Maine statute after it had been changed by amendment similar to our own Ark. Stat. Ann. § 81-1103 (i) (6) (B).

In the Maplewood case, the Maplewood Poultry Company was engaged in the production of poultry and claimed exemption under the Maine Employment Security Act.

When this case was decided by the Maine Court, the State statute was an exact copy of the Federal Act as follows:

> "I. 'Agricultural labor' includes all services performed:
>
> "A. On a farm, *in the employ of any person,* in connection with cultivating the soil, or in connection with raising or harvesting agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training and management of livestock, bees, poultry and fur-bearing animals and wild life." (Emphasis supplied)

Although the Maine Court held this activity exempt under this particular Maine Act, the Court said:

> "[1, 2] Much is said in the respondent's brief as to the interpretation of the statutes involved here. The rule to be followed by this court has long since been established, and often reiterated, that, 'If the meaning of the language is plain the Court will look

no further; it is interpreted to mean exactly what it says.' *Sweeney* v. *Dahl,* 1943, 140 Me. 133, 34 A. 2d 673, at page 676, 151 A. L. R. 356. The language of the statute is plain and there is no need or necessity for the court to look any further as it is to be interpreted to mean exactly what it says. There is nothing vague, ambiguous or uncertain about it.

* * *

"Again in the respondent's brief the argument is advanced that the services 'must be an integral part of farming operations performed for the farmer and not for a third person.' *California Employment Comm'n* v. *Butte County Rice Growers Ass'n,* 1944, 25 Cal. 2d 624, 154 P. 2d 892, 898.

"Our law, which defines 'agricultural labor,' specifically includes services performed in the employ *of any person.* The court, in the California case *supra,* held that the service performed by employees of a warehouse were not 'agricultural labor' and one reason advanced was that the warehouse was a general one opened to the public.

"*If the law provided that such employees must be in the employ of the owner, tenant or operator of the farm then the problem involved here would be easy of solution.* On the contrary, such 'agricultural labor' may be performed by one 'in the employ of *any person.*' (Emphasis supplied)

"[3] The services performed by the several crews whose duties are briefly described in this opinion, were necessary and essential for the 'raising, * * * feeding, caring for * * * and management of * * * poultry.'

"The facts that these services were provided by the petitioner does not change the picture in the least. *It may be necessary that because of the tremendous*

growth of this industry in Maine, in a comparatively few years, and the necessary employment of possibly hundreds of persons, that the law should be changed to cover them. However, that is not for this court; that duty devolves on the Legislature to amend the law, if it sees fit, by what it may deem to be appropriate legislation." (Emphasis supplied)

This case was decided by the Supreme Judicial Court of Maine in 1956, and Maine *did* change its statute by amendment in 1957 to read as follows:

"'Agricultural labor' includes all services performed *on a farm in the employ of the operator of such farm,* in connection with * * * the raising of * * * poultry * * * the term 'farm' shall include * * * poultry * * * farms * * *." (Emphasis supplied)

This amended statute was construed in the C. M. T. Company case, supra. In that case, the appellant, C. M. T. Company, Inc., was engaged in the business of producing broiler chickens from the egg to the processed bird ready for the market. The company leased a hen house in which it produced about ten per cent of the eggs required in the company's operation and about 90 per cent of the hatching eggs were purchased from independent producers. The hatchery was located on a six acre tract and no other farming operations were carried on on the real property. The company owned several farms on which about ten per cent of the hatched chickens were raised to broiler size. About 90 per cent of the chicks were raised on the farms of other persons under contract with the company. There were a number of employees of appellant who operated the company's hatchery and the issue was whether or not *their* employment constituted "agricultural labor" exempt from the provisions of the Maine employment security law. The period covered was a part of 1958 and 1959, and in that case the Supreme Court of Maine said:

"Until an amendment was enacted in 1957, the term 'agricultural labor' was defined by the applicable portions of R. S. 1954, chapter 29, § 3, subsection (I) as including 'all services performed: A. On a farm, in the employ of any person, in connection with * * * the raising * * * of * * * poultry. * * * C. In connection with * * * the hatching of poultry * * *.'"

Obviously, "hatchery" employees were not engaged in taxable employment under the express terms of this definition of "agricultural labor" which was made exempt by other provisions of the law. The 1957 amendment, however, provided a new definition of "agricultural labor," the pertinent provisions of which were:

"'Agricultural labor' includes all services performed on a farm in the employ of the operator of such farm, in connection with * * * the raising of * * * poultry * * * the term 'farm' shall include * * * poultry * * * farms * * *.

* * *

"The legislature in 1957 could have had no other purpose than to restrict the scope of the agricultural exemption to rather narrow limits. The language employed closely limited exempt employment to services performed 'on a farm in the employ of the operator of such farm,' and quite significantly eliminates the specific exemption previously given to services in connection with the 'hatching of poultry' wherever performed. In 1956 we held that the exemption afforded by the then existing law extended to service of employees of a concern like the appellant when rendered on the farms of the contract growers. *Maplewood Poultry Company* v. *Maine ESC,* 151 Maine 467, 121 A. 2d. 360.

* * *

"Whatever the legislative motivation may have been, the language of the 1957 amendment was cartainly calculated to remove many employees of the industry from the scope of the exemption. We are

satisfied that until the exemption was again broadened in 1959, the legislature intended that the words 'on a farm in the employ of the operator of such farm' should be given the somewhat restricted meaning which we have attributed to them in this opinion."

Ark. Stat. Ann. § 81-1103 (6) (B) provides that the term "employment" shall not include services performed in the employ of an owner or tenant operating a farm, and we are of the opinion that the term "employment" under the provisions of (i) (6) (B), *supra,* does include services performed "in the employ of any other person," unless exempt under some other provision of the Act.

In *Bland, Adm'r.* v. *Belle Point Lodge No.* 20, 235 Ark. 331, 359 S. W. 2d 804, we said that the concluding sentence in subsection (i) (6) (0) refers to the exemption terms of the Federal statute under which there are listed seventeen numbered paragraphs concerning exemptions. But we are of the opinion that the second paragraph of Ark. Stat. Ann. § 81-1103 (i) (6) (0), *supra,* does not nullify, broaden or change the definition of "exempted employment" under (i) (6) (B), *supra.*

The Arkansas Legislature had the newly amended Federal Act before it when it amended the Arkansas Act in 1941, and it designed the Arkansas Act to fit the situation in Arkansas.

The specific exemptions in the 1937 Arkansas Act were divided into separate categories numerically arranged and numbered one through eight. (Acts of Ark. 1937, Act 155).

When the Arkansas Legislature amended the Act in

1941, it divided the specific exemptions into categories alphabetically arranged from A through P, and carefully added seven categories H, I, J, K, L, M and N not designated and set apart in the original 1937 Act. (Acts of Ark. 1941, Act 391).

Paragraph 7 of the 1937 Act became paragraph 0 of the 1941 Act, and these two paragraphs remained the same in both Acts except an additional sentence was added to subparagraph (0) in the 1941 Act as follows:

> "Also any service or employment now or hereafter exempt under terms of Federal Unemployment Compensation laws so long as the same is exempt under Federal law."

The words "or hereafter" were deleted from this sentence by amendment in 1955. (Acts of Ark. 1955, Act 395).

Had the legislature intended that this sentence have the broad effect the appellant attributes to it, the 1941 Act could have been shortened considerably by simply exempting "any service or employment now exempt under terms of Federal Unemployment Compensation laws so long as the same is exempt under Federal law."

Applying to the adverb "also" its usual and customary use and meaning, as it appears in the last sentence and paragraph of subsection (i) (6) (0), it is only logical to assume that it was intended to apply to the category of exemptions to which it is attached in § 81-1103 (i) (6) (0), and was intended to exempt services performed in connection with such present or future charitable or non-profit activity conducted in Arkansas, which the legislature may have overlooked in drafting the Act and failed to specifically designate and set out under subsection (0), when the same activity is exempt under the Federal statute.

Regardless of whether the second paragraph of Ark.

Stat. Ann. § 81-1103 (i) (6) (0), *supra,* relates to similar services as those enumerated in subsection (0) or relates to *any* service, including those performed in the employ of an owner or tenant operating a farm, or relates to any of the other designated exempt classifications under the Federal Act, we are of the opinion that it could only relate to such service or employment not specifically defined and specifically set out as exempt, or not exempt, in the Arkansas Act.

"Agricultural labor" as such, is no longer totally exempt under either the State or Federal law, and certainly it is our opinion that this last paragraph in subsection (0) was not intended to substitute the broad definition of agriculture labor contained in the Federal Act for the more restricted definition in the State Act. Certainly we cannot conceive of a legislative intent to very clearly limit and define by affirmative action, agricultural exemptions in subsection (i) (6) (B), *supra,* to *services performed in the employ of an owner or tenant operating a farm,* and then at the same time, and in the same Act, extend the exemption to the same services performed *on a farm in the employ of any person* in adopting by reference, the broader definition in the Federal Act by an "also" paragraph in subsection (6) (0) having to do with an exemption of services performed in the employ of a corporation, community chest, fund or foundation organized and operated for religious and other charitable purposes.

The judgment of the trial court is affirmed.

Affirmed.

FOGLEMAN and BYRD, JJ., dissent.

JOHN A. FOGLEMAN, Justice, dissenting. I respectfully dissent because I think that the majority has misconstrued Ark. Stat. Ann. § 81-1103 (i) (6). In my opinion this section exempts these employees of appellant

from the application of the Act in that their services were performed in connection with the raising, feeding or management of poultry. I submit that the section, in view of its punctuation, should not be read as the majority reads it. They construe this section as if there were no comma after the word "farm" and as if it read:

(6) Exempted employment. The term "employment" shall not include—

(A) Domestic service in a private home.

(B1) Services performed in the employ of an owner or tenant operating a farm in connection with:

(1) the cultivation of the soil;

(2) the harvesting of crops; or

(3) the raising, feeding, or management of livestock, bees or poultry; or

(4) the processing, packing or marketing of the produce of such farm as an incident to ordinary farming operations; and

(B2) Services performed in the ginning of cotton.

I submit that if the comma after the word "farm" is considered as properly used, the section should be construed as if it read:

(6) Exempted employment. The term "employment" shall not include—

(A) Domestic service in a private home.

(B) Services performed:

(1) In the employ of an owner or tenant operating a farm;

(2) In connection with the cultivation of the soil, the harvesting of crops, or the raising, feeding or management of livestock, bees, or poultry; or

(3) In connection with the processing, packing or marketing of the produce of such farm as an incident to ordinary farming operations; and

(4) In the ginning of cotton.

I believe this to be a sensible construction, clearly in keeping with the purpose of the amendatory act which provided the present section.

I cannot help but wonder if the majority really intends to remove pecan orchards from the exemption. Perhaps even apples and peaches from orchards cannot be classified as crops. What is the status of a dairy under their construction? Milking a cow is not harvesting a crop, nor would I call it management of livestock. It cannot successfully be urged that the majority's construction is needed to limit processing, packing and marketing so that all commercial operators in this field are not exempt, because that clause contans its own limitation to those acts which "are incident to ordinary farming operations."

Their construction would also mean that occasional slack season use by a farmer of farm labor to cut timber or firewood for market, to clear land, to recover sand or gravel from his land, or to engage in other activities not unusual on a farm would make the employment subject to tax under the Employment Security Act because it was not connected with the cultivation of the soil, harvesting of crops, the raising, feeding or management of livestock, or the processing, packing or marketing of the produce of the farm as an incident to ordinary

farming operations. I cannot believe that this was the intention of the General Assembly.

While this court is properly committed to the principle that rules of punctuation will not be permitted to overturn the plain and obvious intent of the Legislature, as gathered from the language of the Act as a whole,[1] there is no reason why punctuation should otherwise be disregarded. It has been said by this court that in cases of doubtful interpretation, the punctuation may be looked to as having some weight in determining the real meaning of the lawmakers. *Starett* v. *McKim*, 90 Ark. 520, 119 S. W. 824. While punctuation does not control construction, it is an aid thereto. *Gray* v. *General Construction Co.*, 158 Ark. 641, 250 S.W. 342. An Act should be read as punctuated unless there is some reason to the contrary. Horack's Sutherland, Statutory Construction (3rd Ed.) Vol. 2, § 4939. Punctuation should be given weight, unless from inspection of the whole statute it is apparent that the punctuation must be disregarded in order to arrive at the legislative intention. Crawford, Statutory Construction (1940). When there is no inconsistency, absurdity or ambiguity in a statute as officially printed and punctuated, the court will not give it a different meaning by changing the punctuation. 50 Am. Jur. 250, Statutes, § 254. Punctuation will not be disregarded unless it is necessary to do so and a clear and grammatical statute will not be changed in meaning by repunctuation. 82 C. J. S. 685, Statutes, § 341.

The majority rely upon two Maine cases, the first of which held employment similar to that of appellees exempt under an earlier statute, and the latter held it non-exempt after the Act had been amended. I have no quarrel with the holdings in those cases. A reading of the two statutes shows a very different wording. It is interesting to note that the Maine Legislature amended the Act under which the hatchery was held not to be

[1]See, e.g., *Koser* v. *Oliver*, 186 Ark. 567, 54 S. W. 2d 411; *Jones* v *State*, 104 Ark. 261, 149 S. W. 56.

exempt and restored the earlier statute under which it was held exempt.

My construction of the statute is in keeping with the policy of this state to promote the poultry industry in Arkansas as evidenced by the Acts of the General Assembly in granting broad exemptions from the gross receipts tax on gross receipts derived from the sale of poultry and poultry products. Section 4, Act 386 of 1941. It was provided that this exemption did not apply to chicken hatcheries until the passage of Act 15 of 1949 when this proviso was eliminated and the sale of baby chickens was exempted. Still later the General Assembly, by Act 94 of 1955, exempted all feedstuffs used in growing or producing poultry from both the gross receipts tax and the compensating tax. It was also admitted in oral argument that the tax had never before been collected by the Employment Security Division in situations such as those presented here. Administrative construction of a statute is entitled to consideration and is highly persuasive. *Brawley School Dist. No.* 38 v. *Kight,* 206 Ark. 87, 173 S. W. 2d 125; *Moses* v. *McLeod,* 207 Ark. 252, 180 S. W. 2d 110. Official conduct long pursued will be given great weight. *Adams* v. *Hale,* 213 Ark. 589, 212 S. W. 2d 330.

I agree with the majority that no exemption can be based upon Ark. Stat. Ann. § 81-1103 (i) (6) (0), but for entirely different reasons which are stated in my dissenting opinion in *Arkansas Valley Industries, Inc.* v. *Bill Laney, Commissioner of Labor, et al,* 242 Ark. 261, 412 S. W. 2d 817, handed down on this date.

I would reverse the judgment of the circuit court, the Board of Review and the Appeals Referee.

I am authorized to state that Mr. Justice Byrd joins in this dissent.

ARKANSAS VALLEY INDUSTRIES, INC. *v.* BILL LANEY, COMMISSIONER OF LABOR; LOIS L. SCOTT; AND RAYMOND STANDRIDGE

5-4147 412 S. W. 2d 817

Opinion delivered March 27, 1967

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

Herrn Northcutt and *Luke Arnett,* for appellee.

J. FRED JONES, Justice. This is an appeal by Arkan-

sas Valley Industries, Inc. from a decision of the Pulaski County Circuit Court affirming a ruling of the Board of Review of the Arkansas Employment Security Division holding that appellees, Louis L. Scott and Raymond Standridge, former employees of Arkansas Valley Industries, Inc., are entitled to unemployment benefits under the Arkansas Employment Security Act, and that Arkansas Valley Industries, Inc. is liable for contributions under the Act on wages paid to the appellees.

This case and the case of Hanford Produce Co. v. C. A. Clemmons, Lucille K. Howard and Bill Laney, Commissioner of Labor, appear here at the same time. The appellant in the Hanford case claimed exemption under Ark. Stat. Ann. § 81-1103 subsection (i) (6) (B) (Repl. 1960), as well as § 81-1103 subsection (i) (6) (O), and the appellant in the case at bar claims exemption from coverage under § 81-1103 subsection (i) (6) (O) only.

Appellant relies on two points for reversal, as follows:

> "1. The Arkansas Employment Security Act exempts from coverage any service exempt under the terms of the Federal Unemployment Tax Act, 26 U.S.C.A. 3306.
>
> "2. The services and work performed by Appellees, Scott and Standridge, constitute agricultural labor and, are, therefore, exempt from coverage under the Arkansas Employment Security Act. Acts 1941, No. 391."

The points relied on in this case were actually disposed of more in detail in the Hanford Produce Co. case, supra, so the legislative history of the Arkansas Employment Security Act will not be reitereated here.

The facts of this case and the contention of the appel-

lant are clearly set out in its brief, and we adopt them as our own for the purposes of this opinion.

> "AVI is engaged, among other things, in the production of poultry. It owns a few farms on which poultry is raised. Most of the poultry it produces, however, is through the contract grower system. Under this system, the poultry is raised by independent growers under contract wtih AVI. To insure that the poultry will be of the highest grade, certain services are supplied to the growers by AVI. These services generally consist in checking the health, feed, and housing of the flock and in supplying managerial advice to the growers. AVI supplies these services through its employees who visit the contract growers' farms where the necessary services are provided.
>
> "The Appellees were employed by AVI to supply these services. Their specific duties were as follows:
>
> "*Louis L. Scott*—Until April 15, 1964, Scott was a farm manager who supervised the raising of cattle, and the planting and harvesting of crops on AVI owned farms. After April 16, 1964, he was a broiler serviceman, whose duties included the checking of broilers each week, the vaccination of the chickens, the testing and treating of the chickens for any disease, and the overall management of the broilers. Scott, on occasion, provided water for the chickens and other services necessary for the successful raising of the chicken. Most of these services were performed on farms other than those owned by AVI. The last day on which Mr. Scott worked for AVI was February 5, 1965.
>
> "*Raymond Standridge*—From March 22, 1964 to October 9, 1964, Standridge was employed as a member of a broiler service crew. He ran blood tests on chickens, transferred flocks from one farm to another, repaired chicken houses on the farms, did some cleanup

work in the chicken houses, and caught and cooped chickens when they were to be transferred from one farm to another. Most of these services were performed on farms owned by persons other than AVI.

"Appellant contends that Appellees were engaged in 'agricultural labor' which is exempted from coverage under Ark. Stat. Ann. § 81-1103 (i) (6) (O) (Repl. 1960) by reference to the Federal Unemployment Tax Act, 26 U.S.C.A. § 3306 (c) (1) Int. Rev. Code of 1954 § 3306 (c) (1), and therefore, that appellant is not liable for contributions with respect to wages paid to the appellees."

We agree that appellees were engaged in "agricultural labor" under the decision of *Maplewood Poultry Co.* v. *Maine Employment Security Commission,* 151 Me. 467, 121 A. 2d 360, cited by the appellant. However, appellees are not precluded from receiving benefits under Ark. Stat. Ann. § 81-1103 (i) (6) (B) under the decision of *C. M. T. Company* v. *Maine Employment Security Commission,* 163 A. 2d 369, where the Supreme Court of Maine again construed its statute after it had been amended to conform substantially with our own.

Appellant's only contention here is that the employment or service in which the appellees were engaged was exempt under the Federal Unemployment Tax Act, 26 U.S.C.A. 3306 (c) (1) as referred to in the last one sentence paragraph of Ark. Stat. Ann. § 81-1103 (i) (6) (0)

Ark. Stat. Ann. § 81-1103 (5) (i) defines employment as follows:

" 'Employment' means any services performed * * *." and 81-1103 (i) (6) insofar as it relates to the problem here, is as follows:

"(6) Exempted Employment. The term 'employment' shall not include—

(A) Domestic service in a private home.

(B) Services performed in the employ of an owner or tenant operating a farm, in connection with the cultivation of the soil, the harvesting of crops, or the raising, feeding, or management of livestock, bees or poultry, or in connection with the processing, packing or marketing of the produce of such farms as an incident to ordinary farming operations, and services performed in the ginning of cotton.
* * *

"(O) Service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

"Also any service or employment now exempt under terms of Federal Unemployment Compensation laws so long as the same is exempt under Federal law."

Section 26 U. S. C. A. 3306 (8) (c) defines employment as follows:

"For the purposes of this chapter, the term 'employment' means any services performed * * * except—* * * (1) Agriculture labor [as defined in subsection (k)]." Section 26 U.S.C.A. 3306 subsection (k) is as follows:

"(k) Agricultural labor,—For purposes of this chapter, the term 'agricultural labor' includes all service performed—

(1) on a farm, in the employ of any person, in

connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife."

So the question here, reduced to its lowest denominator, is whether the appellees are entitled to unemployment benefits because their services in agricultural labor *were not* performed in the employ of *an owner or tenant operating a farm* under the State law, or whether they *are not* entitled to unemployment benefits because their services in agricultural labor *were* performed on a farm, *in the employment of any person* under the Federal law.

Appellant seems to concede that the Federal Congress has not pre-empted the State Legislature in the matter of coverage and exemptions in the field of employment security legislation.

Through the legislative process, Arkansas has enacted its own statutory provisions for agricultural exemptions under its employment security laws as above set out. The coverage is broader and the exemptions narrower under the State law than under the Federal law, 26 U.S.C.A. 3306 (8) (c) and (k), supra.

When first enacted, both the Federal Statute, U. S. Stat. at Large 74th Cong. 1935-1936, Title IX, § 907 (c) (1), and State Statute, Acts of Arkansas 1937, Act 115, exempted all "*agricultural labor*", but by legislative amendments only "services performed in the employ of an owner or tenant operating a farm" are now exempt from the term "employment" under the State law, Ark. Stat. Ann. § 81-1103 (i) (6) (B), supra, and "all services performed on a farm, in the employment of any person" constitute the "agricultural labor" now excepted from the term "employment" under the Fedral law, 26 U. S. C. A. 3306 (8) (c) (1) (k), supra.

Appellant argues that by the last, one sentence paragraph, in § 81-1103 (i) (6) (0), supra, the Arkansas Legislature adopted the broader exemption provision of the Federal law, and the more narrow exemption specifically provided in the State law no longer applies. We do not agree that such was the intent of the Arkansas Legislature in amending the 1937 Act by Act 391 of 1941, and we are so holding in the case of *Hanford Produce Co.* v. *C. A. Clemmons, et al,* 242 Ark. 240, 412 S. W. 2d 828.

The judgment of the trial court is affirmed.

Affirmed.

FOGLEMAN and BYRD, JJ., dissent.

JOHN A FOGLEMAN, Justice, dissenting. I respectfully dissent from the opinion of the majority in this case for the reason that proper construction of Ark. Stat. Ann. § 81-1103 (i) (6) (B) exempts the activities of these employees from the application of the Act. What I contend is the proper construction of that Act is set out in my dissenting opinion in *Hanford Produce Company* v. *C. A. Clemmons, et al* 242 Ark. 240, 412 S. W. 2d 828, handed down on this date. I agree with the majority that no exemption can be based upon Ark. Stat Ann. § 81-1103 (i) (6) (0), but for an entirely different reason. If the last sentence of that sub-section of the Act is given the construction placed upon it by the majority, our General Assembly has never engaged in a greater exercise in futility than by adding this sentence. I agree that the word "also" means something has been added. According to Black's Law Dictionary, it means "besides, as well, in addition, likewise, in like manner, similarly, too, withal, some other thing, including, further, furthermore, in the same manner, moreover, and nearly the same as the word 'and' or 'likewise'." How could anything be added to further exempt the services set out in the first sentences? If they are exmpt, they are completely exempt and it seems obvious to me that adding the second sen-

tence could not add anything. What could have been overlooked if they were completely exempt? The majority does not even suggst a possibility.

It is my opinion that this sentence does not afford an exemption to appellant because it is clearly unconstitutional, being in violation of Article 5, § 23 of the Arkansas Constitution, which reads:

> "No law shall be revived, amended, or the provisions thereof extended or conferred by reference to its title only; but so much thereof as is revived, amended, extended or conferred shall be reenacted and published at length."

In *Watkins* v. *Eureka Springs,* 49 Ark. 131, 4 S. W. 384, this court held that another section of the act adopting the same method of *procedure* for calling in city warrants as provided for counties in like cases was constitutional but that § 4 of the Act undertook to extend to cities and towns the positive provisions of the law applicable to counties by a general reference to the prior law and was unconstitutional.

This problem is treated extensively in *State* v. *Armstrong,* 31 N. M. 220, 243 P. 333 (1924), opinion on rehearing at 243 P. 346, wherein the *Watkins* case is cited as authority. The New Mexico constitutional provision is identical to ours, except for the omission of the words "conferred by". The New Mexico court called the rule announced in the *Watkins* case and followed in *Farris* v. *Wright*, 158 Ark. 519, 250 S. W. 889, the "Arkansas rule" and found that the Arkansas court had adhered to the rule in *White* v. *Loughborough,* 125 Ark. 57, 188 S. W. 10, and *Poe* v. *Street Improvement Dist. No.* 340, 159 Ark. 569, 252 .S W. 616, and not departed from it in *Common School District* v. *Oak Grove Special School Dist.,* 102 Ark. 411, 144 S.W. 224; *State* v. *McKinley,* 120 Ark. 165, 179, S.W. 181; *House* v. *Road Improvement Dist.,* 154 Ark. 218, 242 S.W. 68. They held unconstitu-

tional a New Mexico Act in which "the penal provisions of the National Prohibition Act are hereby adopted" and "all Acts or omissions prohibited or declared unlawful by the Eighteenth Amendment to the Constitution of the United States or by the National Prohibition Act are hereby prohibited and declared unlawful and violations thereof are subject to the penalties provided in the National Prohibition Act".

The rule was also applied in *Rider* v. *State,* 132 Ark. 27, 200 S. W. 275, where the application of Act 310 of 1909 was sought to be extended to two additional townships of a county by reference to the Act only. In *Hollis and Company* v. *McCarroll,* 200 Ark. 523, 140 S. W. 2d 420, this court defined the meaning of the word "extended" in this section and quoted extensively from *State* v. *Armstrong,* 31 N. M. 220, 243 P 333 (1924). The definition is as follows:

"* * * The term 'extended', as used in Section 23 of art. 5 of the constitution has reference to an attempt by the law-making body (a) to add something to the text of a preexisting law, or (b) to impose conditions upon another statute."

It seems to me that the conclusion is inescapable that the Arkansas Legislature, by adding the second paragraph in 2 (6) (0) of Act 391 of 1941 [Ark. Stat. Ann. § 81-1103 (i) (6) (0) (Repl. 1960] sought to add employment exemptions "under terms of Federal Unemployment Compensation laws so long as exempt under Federal law" to the text of the preexisting law and to impose conditions of the Federal laws on the Arkansas Statute, and, thus, let the United States Congress legislate exemptions or remove exemptions for the State of Arkansas. Furthermore, I do not see how it could be said that the General Assembly did not attempt to "confer" exemptions provided for in the Federal laws referred to.

Particularly in view of the blank check to Congress therein provided, this is obviously the kind of "blind leg-

islation" sought to be prohibited. This also violates § 1 of Amendment No. 7 to the Constitution of Arkansas by which the legislative power of the people of Arkansas is vested in the General Assembly except as reserved to them therein. No closer parallel could be found than in the decision of this court holding Act 115 of 1955 an unconstitutional delegation of legislative powers. *Crowley* v. *Thornbrough*, 226 Ark. 768, 294 S. W. 2d 62. This Act required the payment to mechanics and laborers minimum wages based upon wages that will be determined by the Secretary of Labor of the United States to be prevailing for such classes of mechanics and laborers in the particular area in which the work was to be performed. If that Act was an unconstitutional delegation of legislative power, so is the sub-section in question here.

There is a further reason why this sub-section is invalid, which also serves to indicate the hazard of this type of legislation. The reference is to the "terms of Federal Unemployment Compensation laws." What are these? Reference to the "Populer Name Table" in USCA gives references only to "Federal Unemployment *Tax* Act" (1939) and "Federal Unemployment Compensation *Tax* Act" (1954). If either of these can be the law to which reference is intended, which one is it? The one passed before our Act or the one passed after it? If the first, then do the amendments passed in 1944, 1945, 1946 and 1954 apply? How can Title 26, Chapter 23, § 3306 be the law intended to apply here since it wasn't adopted until 1954? A search of "Federal Acts by Popular Names or Short Titles" compiled by Shephard's Citations discloses "Federal Unemployment Insurance Contributions Act" and "Federal Unemployment Tax Act" perhaps the same act originally, the former being carried in Code Title 26, § 3101, et seq, and the latter in § 3301, et seq. Reference to these sections shows various amendments since the adoption of our Act. In short, what are "Federal Unemployment Compensation laws"? [Emphasis ours]

I would reverse the judgment of the circuit court, the Board of Review and the Appeals Referee.

I am authorized to state that Mr. Justice Byrd joins in this dissent.

GEORGE LEE TATUM *v.* K. W. RESTER

5-4106 412 S. W. 2d 293

Supplemental opinion on denial of rehearing delivered March 27, 1967

[Original opinion delivered February 20, 1967, 241 Ark. 1059.]

PAUL WARD, Justice. In a petition for rehearing the appellee insists that, under the rules governing the liability of an owner or occupier of land, he was under no duty to exercise ordinary care for the appellant's safety until he knew or reasonably should have known that the appellant was in a position of danger. On this basis it is contended that our original opinion in the case at bar is in conflict with Paragraph B of AMI 1106, which is said by counsel to be a correct statement of the law.

We adhere to our opinion. When the condition of the premises has no ca sal connection whatever with the injury to the plaintift, the status of the defendant as an owner or occupier of land is irrelevant. We agree with the view expressed by the Supreme Court of Washington in *Potts* v. *Amis,* 62 Wash. 2d 777, 384 P. 2d 825. There the plaintiff was a guest at the defendant's summer home. In attempting to demonstrate the correct use of a golf club the defendant struck and injured the plaintiff. The

condition of the premises obviously had no bearing upon the cause of the plaintiff's injury. Hence the court was, we think, correct in making this declaration of law: "The mere fortuitous circumstance that this injury occurred while the plaintiff stood upon land belonging to the defendant should not relieve the latter of liability." For the contrary view, with which we disagree, see *Cochran* v. *Abercrombie,* Fla. App., 118 So. 636, 79 A. L. R. 2d 986.

In the case at bar the condition of the premises had no *causal* connection with the appellant's injury. His hand was mashed against a man-made post, but the same thing would have happened if the obstruction had been a tree or other harmless object. Hence the court should have instructed the jury upon the rule of ordinary care as in the *Linxwiler* case, cited in our original opinon, where, as here, the condtion of the premises had nothing to do with the accidental injury.

We do not now pass upon the accuracy of Paragraph B of AMI 1106 except to point out that it should not be given when, as in the case at bar, there is no relationship between the plaintiff's cause of action and the condition of the premises. There is no reason for us now to speculate upon whether or not a fact situation might arise which would justify the trial court in giving Paragraph B of AMI 1106.

Rehearing denied.

G. D. NELSON v. BERRY PETROLEUM COMPANY ET AL

5-4136 413 S. W. 2d 46

Opinion delivered April 3, 1967

Kenneth Coffelt, for appellant.

Keith, Clegg & Eckert and *Wright, Lindsey & Jennings* and *Mahony & Yocum* and *Catlett & Henderson* and *Smith, Williams, Friday & Bowen,* for appellee.

CARLETON HARRIS, Chief Justice. Appellant, G. D. Nelson, a citizen and taxpayer of Arkansas, instituted suit against appellee companies, Berry Petroleum Company, Arkansas Bitumuls Company, Lion Oil, Inc., Humble Oil and Refining Company, The American Oil Company,[1] MacMillan Ring-Free Oil Company, Inc., and Bitucote Products Company, alleging, *inter alia*:

"For several years next before the filing of this suit, the defendants have sold to the State of Arkansas and its Highway Department asphalt for the construction of highways in this State, and during said period this plaintiff believes and therefore alleges:

"That said defendants have purposely, intentionally and fraudulently connived together and entered into a conspiracy to fix prices for said asphalt far in excess of the fair market and customary value thereof in this and adjoining territories. That the defendants have systematically over the years, in an effort to carry out their designed scheme as herein alleged, agreed with one another that they would not compete with each other on asphalt contracts and prices fixed thereunder in the various highway districts of Arkansas.***"

The complaint asserts that appellee companies have received unlawfully in excess of $3 million of taxpayers' money; that the grades and quantities of asphalt sold to the taxpayers of this state have been of a lower grade and quantity than paid for. Appellant prayed for an accounting of appellees' dealings and transactions with the state and its highway department, in order that the amount of

[1]By agreement of the parties, and the consent of the court, the cause was dismissed as to Humble Oil and Refining Company, and the American Oil Company.

funds and monies owed the taxpayers by reason of the foregoing allegations might be determined. To this complaint, appellees filed their several demurrers, and these demurrers were sustained by the court. Appellant elected to stand on his pleading, declining to plead further, and the court thereupon dismissed said complaint. From the decree so entered, appellant brings this appeal. The issue is thus simply whether the complaint stated a cause of action.

In *Quinn* v. *Stuckey, Admr.*, 229 Ark. 956, 319 S. W. 2d 839, this court said:

"At the outset it is well to state the rule for testing a case on demurrer. In *Tyler* v. *Morgan,* 214 Ark. 667, 217 S. W. 2d 606, we said:

" 'Appellees demurred to this complaint on the ground that it did not state facts sufficient to constitute a cause of action. The trial court sustained the demurrer and this appeal followed.

" 'The question presented is: Treating all allegations in the complaint, which are well pleaded, as true, and construing them liberally in favor of the pleader, as we must, was a cause of action stated? We hold that there was. "It is not necessary that the complaint should state a cause of action in every particular, for if it contains the substance of a cause of action imperfectly stated, the presumption would be that the defects in the complaint were cured by the proof at the trial." *Clow* v. *Watson,* 124 Ark. 388, 187 S. W. 175.' "

Likewise, in *Dodson* v. *Abercrombie,* 212 Ark. 918, 208 S. W. 2d 433, we stated:

"It is well settled that in testing the sufficiency of a pleading by general demurrer every reasonable intendment should be indulged to support it. If the facts stated

in the pleadings, together with every reasonable inference therefrom constitute a cause of action, or a valid defense, then a demurrer should be overruled. *Ark. Life Ins. Co.* v. *Am. Nat. Ins. Co.,* 110 Ark. 130, 161 S. W. 136; *Neal* v. *Parker,* 200 Ark. 10, 139 S. W. 2d 41."

With the rule as thus stated, we have reached the conclusion that the complaint did state a cause of action, and accordingly our discussion will be directed to the points relied upon by appellees in their argument supporting the action of the Chancellor in sustaining the demurrers. Four different arguments are advanced, and we proceed to a discussion of these points, though not in the order listed.

It is asserted that the court has no jurisdiction of the cause, it being the position of appellees that the instant complaint is no more than an attempt to assert a cause of action based upon the Sherman Anti-Trust Act and the Clayton Act. We agree that state courts have no jurisdiction in federal antitrust actions, and many federal cases so hold. However, we do not agree that the instant suit is simply an attempt to seek recovery under these federal acts. Instead, it appears to be an action instituted pursuant to Article XVI, Section 13, of the Constitution of the State of Arkansas, which reads, as follows:

"Any citizen of any county, city or town may institute suit in behalf of himself and all others interested, to protect the inhabitants thereof against the enforcement of any illegal exactions whatever."

This is a broad provision of our Constitution, and has been utilized in various types of actions. The case of *Starnes* v. *Sadler,* 237 Ark. 325, 372 S. W. 2d 585, contains a comprehensive discussion of the meaning of the term, "Illegal Exaction." There, we said:

"This Chancery Court action was instituted pursuant to Article XVI, Section 13, of the Constitution of the

State of Arkansas, and the Chancery Court had jurisdiction of this Constitutional proceeding. This Constitutional provision is self-executing, and imposes no terms or conditions upon the right of the citizens there conferred. *Samples* v. *Grady,* 207 Ark. 724, 182 S. W. 2d 875; 8 Ark. Law Review 129 (1954).

" 'Illegal Exaction' under the Arkansas Constitution means both direct and indirect illegal exactions, thus comprehending any attempted invalid spending or expenditure by any government official, *Quinn* v. *Reed,* 130 Ark. 116, 197 S. W. 15; *Farrell* v. *Oliver,* 147 Ark. 599, 226 S. W. 529.

" 'Illegal Exaction' means far more than the mere collection of unlawfully levied taxes. With little limitation, almost any misuse or mishandling of public funds may be challenged by a taxpayer action. Even paying too much for cleaning public outhouses has been held by our courts as basis for a taxpayer's right to relief, *Dreyfus* v. *Boone,* 88 Ark. 353, 114 S. W. 718. Any arbitrary or unlawful action exacting taxes or tax revenues may be restrained and annulled by a taxpayer affected by such procedure, *Bush* v. *Echols,* 178 Ark. 507, 10 S. W. 2d 906; *McClellan* v. *Stuckey,* 196 Ark. 816, 120 S. W. 2d 155; *Park* v. *Hardin,* 203 Ark. 1135, 160 S. W. 2d 501; *Brookfield* v. *Harahan Viaduct Improvement District,* 186 Ark. 599, 54 S. W. 2d 689.

"The remotest effect upon the taxpayer concerning any unlawful act by a tax supported program or institution may be enjoined under Article XVI, Section 13, of the Constitution of the State of Arkansas, *Green* v. *Jones,* 164 Ark. 118, 261 S. W. 43.* * *

"Our Court thoroughly discussed 'illegal exaction' in the case of *Arkansas Association of County Judges* v. *Green,* 232 Ark. 438, 338 S. W. 2d 672, wherein jurisdiction of the Chancery Court was questioned and illegal exaction was involved. This Court stated that the theory

of an illegal exaction does not necessarily involve an illegal tax citing the case of *Lee County* v. *Robertson,* 66 Ark. 82, 48 S. W. 901, wherein the Court was not dealing with illegal tax, but with the question of illegal use or appropriation of county funds.* * *

"The case of *Arkansas County Judges Association* v. *Green,* cited the case of *Ward* v. *Farrell,* 221 Ark. 636, 253 S. W. 2d 353, wherein this Court stated concerning the involved Constitutional provision:

" 'There is eminent authority for holding, even in the absence of an express provision of the Constitution, such as referred to above, that a remedy is afforded in equity to taxpayers to prevent misapplication of public funds on the theory that the taxpayers are the equitable owners of public funds and that their liability to replenish the funds exhausted by the misapplication entitles them to relief against such misapplication.' "

In *Revis* v. *Harris,* 217 Ark. 25, 228 S. W. 2d 624, suit was instituted by Owen Revis, a citizen and taxpayer, against Sam Harris for recovery of money, which Revis alleged was illegally paid to Harris while he (Harris) was acting as Municipal Judge. Pursuant to a motion to dismiss the complaint filed by Harris, the court overruled so much of the motion as sought to strike the prayer seeking injunctive relief, but granted the motion as to that part of the complaint seeking recovery of the funds allegedly illegally paid to Harris. On appeal to this court, we reversed this holding, stating:

"In that case [*Sitton* v. *Burnett,* 216 Ark. 574, 226 S. W. 2d 544], Burnett, a citizen and taxpayer, brought suit to recover salary illegally paid Sitton by the second class City of Clinton, while serving as a *de facto* marshal. There it was alleged Burnett was not a proper party to bring the suit and that equity was without jurisdiction. We there held that Burnett, as a resident and

taxpayer, was a proper party to bring this suit since taxpayers are the equitable owners of public funds and may sue to prevent any illegal exactions whatever, within the meaning of Art. 16, § 13, of our Constitution.

"So here, if appellant's allegations in this complaint to the effect that appellee had been paid sums of money illegally by the City of Clarksville while acting as Municipal Judge, and for other services, without right or authority of law, were true, appellant stated a cause of action and was a proper party to initiate the suit.

"Chancery had jurisdiction and the power to grant affirmative as well as injunctive relief in the circumstances. *Grooms* v. *Bartlett,* 123 Ark. 255, 185 S. W. 282."

In *Grooms* v. *Bartlett, supra,* this court stated:

"The taxpayers of a county are the persons from whom the public revenues are obtained and are directly interested in protecting the same. They are proper persons to maintain suits against public officers to prevent or remedy misapplication of the public funds, and in such cases chancery has the power to grant affirmative as well as injunctive relief. Chancery has not only power to prevent such wrongs, but it has power to require reparation for that which has been done."

We think these cases make it clear that the Chancery Court had jurisdiction to hear this suit.[2]

It is also asserted by appellees that the complaint

[2]There is also a state law, Ark. Stat. Ann. § 70-101 (Repl. 1957) prohibiting corporations, partnerships, individuals, "or other association or person whatsoever" from entering into combinations to fix prices, maintain certain prices, or to fix or limit the amount or quantity of certain articles. This is defined as a conspiracy to defraud. Aside from any statutory authority, an attempted monopoly or an agreement in restraint of trade, was a criminal conspiracy at common law. *Hammond Packing Company* v. *State,* 81 Ark. 519, 100 S. W. 407.

does not state facts sufficient to constitute a cause of action. Again, we are unable to agree with the contention made. In the first phase of this argument, appellees mention that there is a complete absence of any allegation in the complaint that appellant, or anyone else, had made demand upon the State Highway Commission or the State of Arkansas, or its attorneys, to institute proceedings against appellee companies. Appellees contend that it is necessary that this suit be brought by the Attorney General, or at least he must have refused to bring it, before a taxpayer may act, and it is pointed out that there is no allegation that the Attorney General refused to bring the suit. Several earlier cases are cited in support of this argument,[3] but the controlling case on this point is *Samples* v. *Grady, supra.* There, we stated:

"Unlike § 23 of Art XIX of the Constitution, § 13 of Art. XVI of the Constitution is self-executing, and requires no enabling act or supplementary legislation to make its provisions effective. This section of the Constitution last mentioned confers the right upon any citizen to institute suits in behalf of himself and all others interested to protect against the enforcement of any illegal exaction whatever.

"This is made a class suit in which any citizen may for the benefit of himself, and all other interested citizens, and any citizen would have the right to be made a party, and this is a right which other citizens should exercise if there were any reason to apprehend that the suit was collusive between the parties, plaintiff and defendant.

"This § 13 of Art. XVI of the Constitution is not

[3]*Griffin* v. *Rhoton,* 85 Ark. 89, 107 S. W. 380; *Gladish* v. *Lovewell,* 95 Ark. 618, 130 S. W. 579; *Oats* v. *Smith,* 194 Ark. 812, 109 S. W. 2d 955; *Etheridge* v. *Riley,* 196 Ark. 713, 118 S. W. 2d 665. The last two cases were suits to collect on the bond of officeholders, and the actions were brought in compliance with specific statutory provisions.

only self-executing, but it imposes no terms or conditions upon the right of the citizen there conferred, and we would be required to write something into the constitution, which does not there appear, if we hold that this right was conditional. However, the General Assembly has the power to prescribe the practice to be pursued in its enforcement.

"We do not hold that the attorney general, where the interest of the state is involved, or the prosecuting attorney, in appropriate cases, might not institute such an action; but we do hold that the right of a citizen is not dependent upon the inaction of these officers, or either of them. We have rather two methods whereby the interests of affected inhabitants may be protected. We find nothing in § 13 of Art. XVI of the Constitution making the refusal of any officer to bring this suit a condition precedent to the exercise of a right given without condition imposed upon its exercise."[4]

Under the same point, it is also asserted that, though alleging that appellees have defrauded the taxpayers of Arkansas, there are no particular facts pleaded to substantiate this statement, and that, standing alone, the facts pleaded constitute no more than a conclusion of the pleader. The simple answer to this contention is found in the recent case of *Brewer* v. *Hawkins*, 241 Ark. 460, 408 S. W. 2d 492 (Nov. 1966). In comparing the complaint in that case (the allegations being set out in full) with the complaint in the instant case, it is immediately apparent that the allegations before us are as specific as those in *Brewer*. For that matter, it is evident that it would have been difficult, if not well nigh impossible, for Nelson to have alleged specific acts relied upon. This information could hardly be obtained until after institution of the suit. Of course, if appellees felt that the allegations were vague and should be plead-

[4]The opinion also distinguishes this case from *Gladish* v. *Lovewell, supra.*

ed more distinctly and clearly, a motion to make more definite and certain could have been filed. This was not done.

It is also contended that Nelson, as a citizen and taxpayer, does not have legal capacity to maintain the action. The cases cited in our discussion of the other points answer this contention, and no additional comment is necessary.

Finally, it is alleged that there is a defect of parties plaintiff, it being asserted that the Arkansas Highway Department was a necessary party. We have already cited sufficient authority to the effect that the taxpayer has a perfectly valid right to institute an action to recover public funds, and this being true, the right is not dependent upon any state agency becoming a party. Of course, there is nothing to prevent the Arkansas Highway Department from intervening in the case, and it might well do so; for that matter, the Attorney General, on behalf of the state, is entitled to intervene. Appellees do not make clear just how appellant could force the Highway Department to become a plaintiff, but, from what has been said, it is evident that the department is not an essential party to the litigation.

We reiterate, in effect, the statement made at the outset, *viz.*, that we are only called upon to determine whether the complaint was good as against the demurrers filed, and, under the cases cited on that point, we unhesitatingly reply in the affirmative.

The decree is reversed, and the cause remanded, with directions to proceed in a manner not inconsistent with this opinion.

LEON B. CATLETT ET AL *v.* THE REPUBLICAN PARTY OF ARKANSAS ET AL

5-4137 413 S. W. 2d 651

Opinion delivered April 3, 1967

[Rehearing denied May 8, 1967.]

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

Wright, Lindsey & Jennings, for appellee.

GEORGE ROSE SMITH, Justice. This is a class suit brought by representatives of the Republican Party of Arkansas against representatives of the Democratic Party of Arkansas, in which the plaintiffs seek (*a*) a declaratory judgment with respect to the constitutionality of two statutes pertaining to elections, (*b*), an injunction to restrain members of the State and Pulaski County Boards of Election Commissioners (who are also

parties to the suit) from complying with those statutes, and (*c*) a declaratory judgment construing a third provision of the election laws. The chancellor granted the relief sought, holding that the first two acts are unconstitutional and that the third act applies only to primary elections.

For an understanding of the issues we need summarize the three statutes only in broad outline. Act 477 of 1963 (Ark. Stat. Ann. § 3-608 [Supp. 1965]), prohibits the minority party member of the County Board of Election Commissioners from naming, at least in certain instances, members of the majority party as election judges and clerks. The chancellor found this act to be unconstitutionally vague and discriminatory.

Secondly, Section 3 of Act 56 of the First Extraordinary Session of 1965 (Ark. Stat. Ann. § 3-273 [Supp. 1965]) prohibits a person who has voted in a particular party primary from being designated by the opposite party to serve as an official at the next general election. The chancellor held that this statute was an attempt to amend an initiated act, Ark. Stat. Ann. § 3-609 (Repl. 1956), and failed to receive the two-thirds vote in the legislature that is required for such an amendment.

Thirdly, Section 1 of Act 57 of the same extra session (§ 3-275) makes it a felony for any person to cast a ballot in more than one party primary election held on the same day. The chancellor declared that this act has no application to persons voting in a general election.

It will be seen that all three of the statutes in issue pertain merely to the procedure to be followed in the conduct of political elections. In view of this fact we cannot reach the merits of the case, for it is too well settled even for argument that a court of equity has no jurisdiction of such questions, even by consent of the litigants. We mention only a few of the many cases so holding.

The landmark decision is *Walls* v. *Brundidge,* 109 Ark. 250, 160 S. W. 230, Ann. Cas. 1915C, 980 (1913), where we held that a chancery court could not review the action of the State Democratic Central Committee in certifying a nominee for the office of governor. This language from that opinion is directly in point here:

> "Wherever the established distinction between equitable and common law jurisdiction is observed, as it is in this State, courts of equity have no authority or jurisdiction to interpose for the protection of rights which are merely political, and where no civil or property right is involved. In all such cases, the remedy, if there is one, must be sought in a court of law. The extraordinary jurisdiction of courts of chancery can not, therefore, be invoked to protect the right of a citizen to vote or to be voted for at an election, or his right to be a candidate for or to be elected to any office. Nor can it be invoked for the purpose of restraining the holding of an election, or of directing or controlling the mode in which, or of determining the rules of law in pursuance of which, an election shall be held. These matters involve in themselves no property right but pertain solely to the political administration of government."

In *Miller* v. *Tatum,* 170 Ark. 152, 279 S. W. 1002 (1926), we held that in an earlier proceeding the chancery court had no jurisdiction to enjoin city commissioners from calling an election. From the opinion: "It was merely a political matter not involving any property rights or any matters of public taxation, and the chancery court had no power to interfere either by injunctive process or otherwise. *Hester* v. *Bourland,* 80 Ark. 145 [95 S. W. 992 (1906)]."

It is immaterial that the parties have not raised the issue of jurisdiction, for, as we held in *Sheffield* v. *Heslep,* 206 Ark. 605, 177 S. W. 2d 412 (1944): "Even

though both sides in the present litigation have asked this court to pass on the eligibility of Heslep, nevertheless we cannot do so in this equitable action, because there is no foundation for equitable jurisdiction." Nor was the situation changed by the passage of our declaratory judgment statute, because that act empowers a court of equity to render a declaratory judgment only when the subject matter is within the jurisdiction of chancery. *Jackson* v. *Smith*, 236 Ark. 419, 366 S. W. 2d 278 (1963).

We conclude that equity is without jurisdiction. This case, like *Rich* v. *Walker*, 237 Ark. 586, 374 S. W. 2d 476 (1964), hardly calls for a remand with directions that the matter be transferred to law. These appellees filed their suit as representatives of the minority political party and asked that the statute be construed in anticipation of the 1966 general election. No justiciable controversy remains, not only because the general election in question has already been held but also because the Republican Party emerged from that election as the majority party, under the statutory definition. Ark. Stat. Ann. § 3-606 (Repl. 1956). It is not the practice of our courts to decide merely academic questions. *Hogan* v. *Bright*, 214 Ark. 691, 218 S. W. 2d 80 (1949).

Reversed and dismissed.

ARKANSAS STATE HIGHWAY COMMISSION *v.* LEWIS HOLT, ER UX

5-4141

Opinion delivered April 3, 1967

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

Ralph W. Robinson, for appellee.

PAUL WARD, Justice. This is a condemnation action. The Arkansas State Highway Commission (appellant) sued to condemn two small parcels of land, one being in front of the residence and the other being part of rental property, belonging to Lewis Holt and his wife (appellees).

Appellant deposited $6,200 in court to compensate appellees for the land taken and for damages to the remaining property. Upon trial, the jury awarded ap-

pellees the sum of $12,500 and appellant appeals, contending the award is excessive. Appellant bases this contention on two grounds. One relates to certain value testimony, and Two pertains to substantiality of the evidence.

Background Facts. The condemned land was to be used by appellant in constructing an overpass on Highway No. 40 in Crawford County. For clarity and brevity, we will refer to the residence property as Tract 1 and to the rental property as Tract 2. Appellees reside on Tract 1 which consists of .78 acres. It fronts 312 feet on Ray Lane Road which is blacktopped and it also borders on Rudy Road. Tract 2, consisting of two and one-half acres, lies a short distance east of Tract 1 and it also borders on the two roads mentioned above.

One. Admissibility of Evidence. Appellant presents three separate assignments of error hereafter considered.

(a) Jay Neal, a witness for appellees, offered to give his opinion as to the before and after value of both parcels of land. Over appellant's objection, the trial court allowed the witness to give his opinion. Under the facts disclosed by the record, we think the trial court was correct.

Neal, who was seventy two years old, has lived all his life in that area. He owns four or five pieces of property in Crawford County, and has bought and sold property for more than sixty years. He stated he had familiarized himself with the fair market value of property in that area during all that time, and that he had previously made appraisals for appellant on different occasions.

Although Neal was a lay witness and not an expert in real estate values, we think he was qualified to testify. In *Lazenby* v. *Ark. State Highway Commission,* 231 Ark. 601, 331 S. W. 2d 705, we find this statement:

> "In numerous cases we have allowed non-expert witnesses ... to testify regarding the market value of land if the testimony shows that they are familiar with such matters."

(b) After witness Neal had given his testimony appellant moved the court to strike same "because he has given no fair basis for his testimony ... he did not qualify as an expert on direct examination." The court overruled the motion and, in view of what we have just said previously, we hold the court was correct.

(c) E. K. Ragge, a witness for appellees, also gave testimony as to the before and after value of the subject property. At the close of his testimony appellant moved to strike because "he has only used sales which occurred after the date of taking and there is no fair and reasonable basis for his opinion ..."

The trial court properly overruled appellant's motion. Ragge qualified as an expert in the real estate business, having been so engaged in Crawford County for five years selling farms and residential property. He also viewed the subject property. He was, therefore, qualified to express his opinion. In *Ark. State Highway Comm.* v. *Johns,* 236 Ark. 585, 367 S. W. 2d 436, we said:

> "An expert witness, after having established his qualifications and his familiarity with the subject of inquiry, is ordinarily in a position to state his opinion."

It was therefore, as also pointed out in the above cited case, incumbent upon appellant to show there was no reasonable basis for Ragge's opinion. We are unwilling to say this was sufficiently shown in this case. Appellant points out only that Ragge used "sales which occurred after the date of the taking". Consequently we think it was proper for the trial court to give the jury an opportunity to consider and evaluate the testimony.

Two. After a careful consideration of the value testimony disclosed by the record as summarized below, we have concluded the jury verdict is supported by substantial evidence.

The value of the land taken together with the damage done thereto (including both parcels) was assessed by appellee Holt and each of his witnesses as follows:

Robert Gelly—$11,500.
Mack Bowling—$11,750.
Jay Neal—$11,500.
E. K. Ragge—$10,500.
Holt—$15,000.

Not counting Holt's testimony, it reasonably appears there was substantial evidence to support a verdict in the amount of $11,750. The question presented, therefore, is whether Holt's testimony presents substantial evidence to support an additional $750 or a total of $12,500—the amount fixed by the jury. We have concluded that it does.

Holt's testimony reveals: He, his wife and two children live on Tract 1 on which is located a four room dwelling, a garage and a utility room; the condemned right-of-way takes in the driveway in front of his home and reaches within six feet and six inches of his front porch—it destroyed large shade trees, shrubbery, a hedge, and flower beds, and there is no space left for a driveway. The right-of-way takes a strip of land approximately seventy five feet wide off of Tract 2 on which is located a rent house (renting for $40 per month), and destroys a hedge, shrubbery, and several large shade trees. Holt also testified at length and in minute detail as to many other items of damage and inconveniences caused by the taking. No other witness had the opportunity to so fully appreciate the damage to the property, especially to residence property. The jury could have reasonably considered this situation in arriving at its verdict.

In *Ark. State Hghway Comm.* v. *Weir,* 237 Ark. 692 (p. 694), 376 S. W. 2d 257, there appears this statement:

> "Appellant contends that the uncorroborated testimony of the owners is not sufficient to sustain the judgment, and as authority cites *Hot Springs County* v. *Prickett,* 229 Ark. 941, 319 S. W. 2d 213. But that case does not stand for the proposition that, as a matter of law, the uncorroborated testimony of a landowner is not sufficient to sustain an award for damages."

In *Ark. Highway Comm.* v. *Gardner,* 228 Ark. 8 (p. 11), 305 S. W. 2d 330, we said:

> "The credibility of the various witnesses who testified concerning the damages sustained by appellees was a matter for the determination of the jury, and it furnishes no ground for reversal that the verdict might appear to us to be contrary to the preponderance of the evidence."

Particularly applicable here are two statements found in *Ark. State Highway Comm.* v. *Muswick Cigar & Beverage Co.,* 231 Ark. 265 (p. 271), 329 S. W. 2d 173:

> "This court has on numerous occasions affirmed the right of the owner of property (and it is pointed out that Hoffman was not the sole owner of subject property) to testify as to its value."
>
> * * *
>
> "Plaintiff resided on the land and was familiar with the conditions, and we think the court was justified in allowing her to state her opinion of the extent of the injury to the land and the depreciation in the value thereof."

In view of what has heretofore been pointed out we are unwilling to say there is no substantial evidence in the record to support the jury verdict.

Affirmed.

PATRICIA MOORE TAYLOR HOLT *v.* JAMES F. TAYLOR

5-4155 413 S. W. 2d 52

Opinion Delivered April 3, 1967

Willis V. Lewis, for appellant.

Phil Hicky and *E. J. Butler* for appellee.

LYLE BROWN, Justice. This appeal questions the order of the trial court, in which the court vested custody of a six-year-old boy in the father, subject to custody by the mother during summer vacation and for one week at Christmas, plus reasonable visitation rights.

James F. Taylor, appellee here, was granted a divorce in the lower court, April 16, 1963, under subsection 5, Ark. Stat. Ann. § 34-1202 (Repl. 1962), from Patricia Moore Taylor, appellant. At the request of the parties, the court incorporated into the decree their agreement as to the custody of their only child, James F. Taylor III, then two and a half years of age. The substance of this agreement was that if the mother entered and remained in college, the father would have custody of the child during the nine school months, and the mother would have custody during the summer months. Otherwise, each parent would have custody of the child six months in the year. It was also agreed that the court would review the matter of custody when the child attained the age of six years. During the three years that followed, there was considerable friction between the parents relative to custody, the details of which are not pertinent to a decision here.

In July 1965, the mother, appellant here, filed a petition seeking to modify the child custody provisions. She asked for permanent custody, subject to the father's right of reasonable visitation, and for child support. Hearing was held on the petition on February 3, 1966. The important changes in the circumstances of the parties, since the granting of the initial custody, were these:

1. The child is almost six years of age and is completing a year in kindergarten in Forrest City, under the custody of his father;

2. Patricia Moore Taylor is married to Maynard Holt, Jr., of Memphis. They are residing in Knoxville, Tennessee, where he is a freshman in law school. The Holts reside in a university housing area. Patricia is some seven months pregnant. Her husband receives $400.00 a month from his family in Memphis. His family appears financially able to continue these contributions.

3. James F. Taylor is remarried and has a child

by his second wife. They own their home near the public schools. Taylor is in the insurance business, and his income averages approximately $550.00 a month. With respect to his residence and income, there has been no material change, except that income from some rent property appears to be down. Also, in his property settlement with the appellant, Taylor gave her $15,000.00 in stocks, and therefore this tended to reduce his income.

Based on these changed circumstances, the chancellor awarded custody of the child to the father during the school months. He decreed that the mother have custody during summer vacation and one week during the Christmas holidays. During the mother's custody period, it was ordered that the father pay $100.00 a month child support.

Our court has consistently been reluctant to deprive a child of tender years of the care and affection of its mother. *Reynolds* v. *Tassin*, 209 Ark. 890, 192 S. W. 2d 984 (1946). Yet the ultimate test is based on this fundamental principle so well stated in *Kirby* v. *Kirby*, 189 Ark. 937, 75 S. W. 2d 817 (1934):

> "It is the well-settled doctrine in this State that the chancellor, in awarding the custody of an infant child or in modifying such award thereafter, must keep in view primarily the welfare of the child, and should confide its custody to the parent most suitable therefor, the right of each parent to its custody being of equal dignity."

This same rule has been incorporated in our statutes since 1921. See Ark. Stat. Ann. § 57-106 (1947).

The preference given the mother who is morally fit to have custody of the child does not shock the basic rule of equal dignity of each parent with respect to custody rights. When the scales are equally balanced,

motherly love and affection tip the scales in favor of the mother's custody. Therefore, because it may be said, in a restricted sense, that the law favors the mother, we have most carefully examined the record to make reasonably certain that the chancellor's award of custody to the father for nine months each year was correct.

In the decree, the chancellor mentioned the remarriage of each of the parties and their respective residences. He also mentioned the bitter feeling between the father and mother. The arguments between them, and between Mr. Holt and Mr. Taylor—all of which occurred over visitation rights with the child are detailed in the record. The chancellor evidently perceived that these difficulties would affect the personality of the child and his attitude toward his parents. The chancellor also had this evidence before him:

1. Appellee, Taylor, was permanently established, both in home and in business in Forrest City;

2. Mrs. Adine Moore, maternal grandmother of the boy, is a lifelong and highly respected resident of Forrest City. The child spends much time with her. Mr. Taylor and Mrs. Moore are apparently not on unfriendly terms;

3. Mrs. Burk Mann, great-aunt of Taylor, helped rear Taylor. She is a close neighbor of Mrs. Moore and the child spends considerable time with Mrs. Mann;

4. The mother, appellant here, is residing in Knoxville, Tennessee. Her residence would be appropriately described as temporary, since her husband is a student. According to Holt's plans, the family would be transferring from Knoxville to Memphis in late 1967. This would mean a transfer of the child from the Knoxville school and to acquaintances in another environment;

5. In Forrest City, the child would enter public school with some of his kindergarten and neighborhood

playmates, whereas in Knoxville he would be among strangers except for his mother and her husband. To a large extent, this experience would shortly be repeated in Memphis.

For a court to choose, in a custody case, between the mother and father, the respective personalities of the parents are vital. It is in this realm that personal observation is of inestimable value. As was stated in *Wilson* v. *Wilson*, 228 Ark. 789, 310 S. W. 2d 500 (1958): "We know of no type of case wherein the personal observations of the court mean more than in a child custody case." The chancellor's experiences with these parents began in late 1962. In the succeeding years he entered at least ten orders touching on matters of divorce, child custody, and support money. These experiences afforded the chancellor opportunities to reach wise conclusions respecting the moral fiber of these parents. We are certainly justified in assuming that the chancellor's knowledge which he gained from the initial divorce proceedings, together with his four years' experience with these people, supports his conclusions with respect to custody. In cases of this nature, particular weight is given to the findings of the chancellor, *Cheek* v. *Cheek*, 232 Ark. 1, 334 S. W. 2d 669 (1960).

The chancellor specifically expressed his continued interest in the welfare of this child in a statement near the conclusion of his decree. There, he was careful to point out that the custody arrangement would "be in effect in each year in the future until and unless a modification of the order be made by this court which retains jurisdiction for such further orders as may be deemed necessary for the best interest of the child."

The prayer of appellee for dismissal of this appeal for failure to abstract the pleadings and testimony is denied. See Rule 9 (e).

Affirmed.

CLARENCE C. COLLIE *v.* MARY ALICE COLLIE

5-4143 413 S. W. 2d 42

Opinion delivered April 3, 1967

Jack L. Lessenberry, for appellant.

House, Holmes & Jewell, for appellee.

JOHN A. FOGLEMAN, Justice. This case originally involved two appeals. The second appeal was from an order by a special chancellor committing appellant to jail until he paid certain arrearages on child support provided for in an agreement between the parties and incorporated in a decree of divorce granted the wife.[1] This appeal has become moot and will be dismissed, it being conceded that these arrearages have been paid.

The first appeal is from the order of the chancellor reducing appellant's child support payments from $583.33 to $400.00 per month. Appellant contends that the trial court erred in dismissing his petition to correct the original decree of divorce, insofar as it relates to child support and in failing to grant a greater reduction in these payments.

The divorce action was instituted by appellant in May, 1965. Appellee, having first answered, filed a cross complaint for divorce. This pleading was filed one day after the parties entered into the property settlement agreement in question. The agreement was approved by the Honorable Royce Weisenberger, Chancellor (apparently serving on exchange or by assignment), and incorporated into the decree which was dated August 30, 1965. This agreement referred to a statement of assets and liabilities of appellant as of May 31, 1965, as an exhibit thereto, but it was not incorporated into the decree. Certain distribution of property was provided for and appellant agreed to convey a residence to the three children of the parties under a trust agreement to which reference was made. Appellant agreed to make all payments required on a $35,000.00 mortgage on the residence, to pay $150.00 per month as alimony and $7,000.00 per year for child support in monthly installments. In addition, he agreed to provide a four-year college education to each of the children, to continue to provide summer camps for each of them during minori-

[1]This order was stayed by this court pending this appeal.

ty, to pay all high school fees and book costs, all medical and dental expenses, and certain premiums on life insurance policies of which the children would be beneficiaries. In addition to the signatures of the parties, the agreement was approved by their respective attorneys. Each party acknowledged therein that he had been fully advised as to his rights.

A pleading designated "Petition for Correction of Divorce Decree" was filed by appellant only seven months after the entry of the decree. His bases for correction of the decree are the remarriage of appellee and the allegation that certain ingredients of the total child support provided for would properly have been alimony, but were considered as child support in order to lower appellant's taxable income. He contended that he actually agreed to pay only $180.00 per month for child support in addition to dental expenses, camp fees and college education costs. He also contended that the agreement had become inoperative because of the impossibility of complying with the trust for the benefits of the children, but he admitted that the parties had consummated an alternate to this provision. Appellee denied the allegation of the petition, except as regards the trust agreement. Appellant later filed an amendment to this petition asking that, in the alternative, his child support payments be reduced because of a change in the circumstances of the parents and children.

Upon hearing, the trial court dismissed the original petition but found that a change in the circumstances of appellant justified a reduction of child support payments to $400.00 per month.

The chancellor was correct in denying the petition to correct the decree. A case appealed from the same chancery court involved a petition by a wife to have title to two tracts of land quieted in her after expiration of the term of court at which a decree of divorce in the case had been rendered, in spite of statements in the pleading of the parties that no property rights were

involved. There [*Fullerton* v. *Fullerton,* 230 Ark. 539, 323 S. W. 2d 926] this court said:

> "* * * The Chancery Court terms for Pulaski County commence the first Monday in April and the first Monday in October. Appellee obtained her divorce decree during the April term, and the order directing appellant to vacate the property was entered during the following October term. We have many times held that a court is without authority to set aside or modify its decrees after the lapse of the term in which they were entered, except upon statutory grounds."

Here a full term of court intervened between the entry of the divorce decree and the hearing on appellant's petition. None of the statutory grounds for vacation or modification of a decree after the expiration of the term at which it was rendered are alleged or shown.

A chancery court may correct its decree after the expiration of the term at which it was rendered to make it conform to the judgment actually rendered but not to change it to one not actually rendered or to correct errors or review actions of the court. *Kelley Trust Co.* v. *Lundell Land & Lbr. Co.,* 159 Ark. 218, 251 S. W. 680; *Hendrickson* v. *Farmers' Bank & Trust Co.,* 189 Ark. 423, 73 S. W. 2d 725. Petitioner, in asking the court to change the amounts fixed as alimony and child support by consent of the parties, was asking the court to make the decree reflect an action different from that taken by the court. Insofar as it was a consent decree, it could not be so changed over the objection of one of the parties, in the absence of fraud or similar ground. *Cornish* v. *Keesee,* 21 Ark. 528; *Peay & Scull* v. *Tannehill & Owen,* 27 Ark. 114; *Blair* v. *Askew-Jones Lbr. Co.,* 186 Ark. 687, 55 S. W. 2d 78. Furthermore, as an alimony and property settlement agreement incorporated in the decree, it is contractual. In the absence of fraudulent inducement affecting its execution, it cannot be modified by judicial action. *McCue* v. *McCue,* 210 Ark. 826, 197

S. W. 2d 938; *Tennison* v. *Tennison,* 216 Ark. 748, 227 S. W. 2d 138; *Godwin* v. *Godwin,* 231 Ark. 951, 333 S. W. 2d 493.

It has been held by this court that when an independent, formal, written contract for alimony and child support has been approved by the chancellor and incorporated in the decree, the trial court has no jurisdiction to reduce the amount of monthly payments provided for or to modify the decree at a later date. *Bachus* v. *Bachus,* 216 Ark. 802, 227 S. W. 2d 439. The cited case recognized, however, that a chancery court might decline to use its powers to enforce such payments where changed circumstances rendered such inequitable, leaving the parties to their remedy at law. Later decisions have held that the court has power to modify a divorce decree as to provisions for support of minor children on the showing of changed conditions necessitating such a modification, by either increasing or reducing such amounts. *Lively* v. *Lively,* 222 Ark. 501, 261 S. W. 2d 409. Any apparent conflict in these cases is probably attributable to the fact that the alimony and child support were not provided for separately in the *Bachus* case, but child support was a separate item in the *Lively* case. See *Reiter* v. *Reiter,* 225 Ark. 157, 278 S. W. 2d 644. At any rate we think that the better rule is that a chancery court may withhold enforcement of the payment of child support payments that have become inequitable by change of circumstances and the court may either reduce or increase amounts of child support payments provided for by such agreements because of changed circumstances. The interests of minors have always been the subject of jealous and watchful care by courts of chancery. *Myrick* v. *Jacks,* 33 Ark. 425; *Crenshaw* v. *Crenshaw,* 203 Ark. 1086, 160 S. W. 2d 37. The public interest in the welfare of children is sufficient reason for the exercise of this power, the interests of the children being paramount. *Daily* v. *Daily,* 175 Ark. 161, 298 S. W. 1012; *Penny* v. *Penny,* 210 Ark. 16, 193 S. W. 2d 811; *Reiter* v. *Reiter,* 225 Ark. 157, 278 S. W. 2d 644.

The expiration of the term is also insignificant insofar as *changed crcumstances* require modification of child support payments. *Rowe* v. *Rowe,* 238 Ark. 423, 382 S. W. 2d 370.

In considering the matter of reduction of payments, we first find that the petition states no grounds for any reduction. Remarriage of appellee and reduction of appellant's income because of a property division with her, provided for in the agreement, are not sufficient. The former, standing alone, is not the kind of change of circumstances contemplated. The latter is not a change of circumstances at all, as it must have been contemplated at the time the agreement was made. The financial statement of appellant as of May 31, 1965 was not an exhibit but appellant referred to it in his testimony. It showed him with a net worth deficit of $205,338.36.[2] When asked to state the changes in his financial statement, appellant called attention to elimination of the following:

1. $20,000.00 equity in residence.
2. $44,000.00 nursing home.
3. Interest in Executive House in Dallas.
4. Property in Fayetteville.

The residence was the one appellant agreed to put in trust for the children. He received a note for $64,000.00 on disposition of the nursing home which he pledged to secure about $60,000.00 in debts. The interest in Executive House was shown on the financial statement to have a negative net worth. He couldn't remember what he got for the sale of the Fayetteville property, but he did hold an $8,000.00 note, two-thirds of which belonged to him. Other changes in his holdings were in performance of his property settlement agreement with his wife. Appellant

[2]In the transcript we find a letter dated July 15, 1965 from the attorney then representing appellant to appellee's attorney at that time. A copy of this letter went to Chancellor Kay L. Matthews who later announced his disqualification. In this letter a postponement of trial was protested for the reason that appellant's business and financial situation was on the brink of disaster and his situation highly precarious.

also lost his equity in an apartment building in Austin to the mortgage holder, but does not show what, if any, effect this had on his financial condition. Appellant had an income of $745.00 per month at the time of the divorce, and only has a salary of $500.00 per month at this time. While the financial prosperity of the venture in which he is employed seems uncertain at this time, if it is successful his contract calls for additional benefits. It cannot now be said that he will not continue to receive this salary. Secured Mortgage, in which he owns all the capital stock, and which had a net worth of $8,000.00, recently collected one commission of $27,000.00 which was applied toward retirement of its debts. Collie was relieved of the payment of $250.00 per month on the residence mortgage and the taxes on the property by the alternate agreement with appellee. Appellee testified that the present cost of maintenance of the children was $501.75 per month. In this she included $125.00 for one-half of the note payment on the residence in which her present husband and his son also reside. If this is deducted, the monthly amount would be $376.75.

The asumption is that the chancellor correctly fixed the proper amount for child support in the original decree. *Clinton* v. *Morrow,* 220 Ark. 377, 247 S. W. 2d 1015. One seeking modification has the burden of proving that there has been a change of circumstances requiring a modification. *Stovall* v. *Stovall,* 228 Ark. 1077, 312 S. W. 2d 337. The amount of child support on modification is a matter within the sound discretion of the trial court under the facts of each case. *Robbins* v. *Robbins,* 231 Ark. 184, 328 S. W. 2d 498.

We are unable to say that, on the showing made by appellant, the finding of the chancellor, who saw and heard the witnesses, was against the preponderance of the evidence or was an abuse of his discretion. This decree is affirmed.

Harris, C. J., would reduce the regular support payments to $300.00 per month.

Byrd, J., disqualified and not participating.

JOHN BARGER *v.* STATE OF ARKANSAS

5240 413 S. W. 2d 54

Opinion delivered April 3, 1967

Gerald T. Ridgeway, for appellant.

Joe Purcell, Attorney General, *Don Langton,* Asst. *Atty. General,* for appellee.

CONLEY BYRD, Justice. This habeas corpus petitioner, John Barger, alleges that his constitutional right to the assistance of counsel was violated in that he was arrested in Pulaski County, Arkansas, in July, 1963; that he entered a plea of not guilty in the Pulaski Circuit Court on September 4, 1963, when his case was passed with his consent to the September, 1963, term (which began on the fourth Monday of September); that no action was taken in the September, 1963, term nor in the March, 1964, term; and that on February 1, 1965, (a day of the September, 1964, term), he entered a plea of guilty to three charges of forgery and received a ten-year sentence on each charge—all without the assistance of counsel. The state admits that petitioner was not represented by counsel and it does not contend that he was advised of his right to the assistance of counsel.

In *McIntyre* v. *State* 242 Ark. 229, 412 S. W. 2d 826, we held that under these circumstances the petitioner had not waived his consitutional right to the assistance

of counsel. Therefore, we hold that petitioner's writ of habeas corpus should have been granted and his Pulaski Circuit Court convictions set aside.

Reversed and remanded.

LESTER WILLIS *v.* RAY ELLEDGE

5-4186 413 S. W. 2d 636

Opinion delivered April 10, 1967

Gannaway & Darrow, for appellant.

Martin, Dodds & Kidd; By *Lowber Hendricks, Jr.,* for appellee.

CARLETON HARRIS, Chief Justice. An automobile driven by appellant, Lester Willis, struck the rear of an automobile operated by appellee, Ray Elledge, on West

Markham Street in Little Rock about 5:30 P.M. in December, 1965, the Elledge vehicle being stopped at the time, awaiting the clearance of westbound traffic. Elledge instituted suit against appellant for damages, alleging personal injuries, and contending that Willis was guilty of negligence, and further asserting that appellant was under the influence of alcoholic beverages, and had voluntarily rendered himself unfit to operate his automobile. The complaint sought the recovery of $25,350.00 for compensatory damages, and also asked punitive damages in the amount of $5,000.00. On trial, the jury returned a verdict awarding compensatory damages in the sum of $2,500.00, and also awarded the additional sum of $5,000.00 as punitive damages. This appeal is taken from that portion of the judgment awarding punitive damages. Only one point is relied upon, *viz.*:

"The verdict awarding punitive damages to Appellee in the amount of $5,000.00 is not supported by the evidence and is excessive, evidencing passion and prejudice on the part of the jury."

Elledge and Officer W. H. Armstrong were the only persons to testify on behalf of appellee relative to appellant's alleged intoxication. Elledge's testimony on this point is as follows:

"Q. Now, getting back to the accident for a moment, Mr. Elledge, did you detect any odor of alcohol on the person of Mr. Willis?

A. Yes, sir, I did.

Q. Did you form any opinion as to the sobriety...

MR. GANNAWAY:

* * * your Honor, I don't believe that would be admissible.

THE COURT:

He can tell what he saw, physical facts, but

he can't give his opinion whether or not he was sober at the time.

MR. HENDRICKS:

Q. All right. Mr. Elledge, in addition to the odor of alcohol that you smelled, was there anything unusual in Mr. Willis' movements, conduct?

A. Yes sir he didn't talk very good.

Q. In what way?

A. Well he was kind of incoherent.

Q. Was his speech slurry?

A. And he leaned up against the car and staggered and his eyes were kind of, I don't know you could tell he was drunk."

Officer Armstrong gave the following testimony on that point:

"Q. Did you detect any odor of alcohol about the defendant, Lester Willis?

A. Yes, sir, I did.

Q. Did Mr. Willis make any statements to you, Officer, regarding drinking?

A. Yes, sir. When I first arrived I talked to Mr. Willis, along with Mr. Elledge, and he stated that he had one beer. At the scene of the accident he was staggering and incoherent and I told Mr. Willis it was to my opinion he had more than one beer and he said that he was out West Markham earlier in the afternoon and that he was having target practice with a 22 caliber rifle he had in the back of his car, and that he had been drinking about all afternoon.

Q. Did you form any opinion as to the sobriety of Mr. Willis?

A. Yes, sir, I kind of felt that he was drunk."

Willis testified that he had been out "target shooting" during the afternoon with a friend, and that he had consumed one quart of beer from 1:30 P.M. through the balance of the afternoon. He denied that he was intoxicated in any degree, and said that he did not see appellee's car until revealed by his own lights.

"Well, I came over the hill, coming east, and I hadn't much more than got straightened out until my light hit this car up in front of me. That's all I saw, this bulk up in front of me and I immediately put on my brakes as hard as I could and it wasn't enough to stop me."

He testified that he was operating his car well within the speed limit (40 miles per hour), and there is no evidence to the contrary. Willis, a carpenter and veteran of World War II (Seabees), apparently as a matter of minimizing the effect of the evidence about his "staggering," stated:

"I am rated 10 per cent disabled, service-connected on my left shoulder due to a neuritis condition and 10 per cent on my feet."

He testified that he wore "built-up" shoes to support his feet, and exhibited the shoes to the jury.

"By the end of the day, when I finish my work, by the time I put in eight hours walking around or working I am limping. It's painful to be on my feet. I will limp after I have been on my feet for around eight to nine hours."

Appellant first argues that there was not enough evidence to submit the issue of punitive damages to the

jury, but we cannot consider this question, since an instruction on punitive damages was given the jury without objection on the part of appellant. The failure to object to an instruction operates as a waiver of any error that might be committed in giving it. *Evins* v. *St. Louis & S. F. Rd. Co.,* 104 Ark. 79, 147 S. W. 452.

It is next argued that the amount recovered was excessive. Four cases are cited by the parties on this point. In *Miller* v. *Blanton,* 213 Ark. 246, 210 S. W. 2d 293, the opinion reflects that the vehicle driven by appellant Miller was coming over a hill and traveling on Blanton's half of the highway. Further, from the opinion:

"When persons living nearby reached the scene the abnormal condition of appellant Miller was apparent. One of these testified that Miller's breath smelled of liquor, and that his tongue seemed to be thick. Another witness noticed the liquor on his breath and said that he staggered when he tried to walk. This witness expressed the opinion that Miller was drunk. Uncertainty about his condition was removed by the testimony of Miller himself. He testified that during a few hours before he left Mena he had consumed 'four or five highballs' and that he was 'half-drunk.' He admitted that he was on the wrong side of the road when his car struck appellee's automobile, and could give no reason whatever for driving over this hill on his left-hand side of the highway."

Miller also testified that he had pleaded guilty to a charge of reckless driving, the court pointing out that this offense is defined as, "Any person who drives any vehicle in such a manner as to indicate either a willful or a wanton disregard for the safety of persons or property." The jury had awarded punitive damages of $500.00 for Mr. Blanton. These judgments were affirmed. It will be at once noted that the testimony as to intoxication is vastly stronger than the evidence in the pres-

ent case, and that the amount awarded to both appellees only totaled $1,000.00.

In *Hall* v. *Young,* 218 Ark. 348, 236 S. W. 2d 431, an award of $100.00 punitive damages was given appellee. The court reviewed the testimony relating to punitive damages as follows:

"***Appellant and four other young men were returning to Marvell from a night club near Forrest City, Arkansas. Appellant and two of his companions had been drinking heavily since early in the afternoon and had stopped at Walnut Corner for the last drink shortly before the collision. It was raining and the highway was only 14 feet wide at the point of the collision. The shoulders of the road had been recently graded and were muddy.

"We will not attempt to detail the testimony. It is sufficient to say that the jury was warranted in concluding that the collision was the proximate result of appellant's gross and wanton negligence in operating his car on a rainy night over the narrow, slippery road at an excessive speed while intoxicated. Under our holding in the recent case of *Miller* v. *Blanton,* 213, Ark. 246, 210 S. W. 2d 293, 3 A. L. R. 2d 203, the evidence, when viewed in the light most favorable to appellee, was sufficient to sustain the verdict for both compensatory and punitive damages."

Again, the evidence of intoxication is considerably greater than in the present instance, and, as stated, the amount awarded was only $100.00. In *Vogler* v. *O'Neal,* 226 Ark. 1007, 295 S. W. 2d 629, the opinion reflects the evidence to be as follows:

"We hold, however, that $10,000 allowed by the jury for exemplary damages was excessive and that this amount should be reduced to $5,000. From the testimony

presented, the jury had this situation before it: Vogler bought two half-pints of whiskey in Walnut Ridge, drank them before he got to Little Rock, was traveling 60 miles per hour across the Main Street Bridge from North Little Rock to Little Rock; drove his car from the extreme west of the bridge across to the extreme east of the bridge and struck appellee; was so drunk he didn't recall any of the details of the accident; was so indifferent to O'Neal's injuries that he didn't bother to see Mr. O'Neal after the accident until the day of the trial. In these circumstances, the jury was warranted in assessing in effect, Vogler's conduct as willful, and that he was exhibiting a wanton disregard for other people's rights. * * *

* * *

"We can well understand that the jury here was justifiably outraged at the reckless and wanton conduct of this drunken appellant, and that it felt warranted in fixing his penalty high, as a warning to intoxicated operators of automobiles, however we have concluded, as indicated, that such penalty should not be greater than $5,000."

The final case cited is *Holmes* v. *Hollingsworth,* 234, Ark. 347, 352 S. W. 2d 96. Both appellant and appellee cite this case in support of their respective positions. There, Mrs. Hollingsworth was awarded $2,500.00 compensatory damages and $2,500.00 punitive damages; her child was awarded $1,500.00 compensatory damages and $2,500.00 punitive damages. On appeal, this court said:

"There was ample evidence to take the case to the jury on the question of punitive damages. It was shown that Mr. Holmes was intoxicated at the time he drove into the rear of the Hollingsworth car; that he got out of his car and went to the Hollingsworth car and insisted that there was nothing wrong with the baby, who at the time was unconscious and barely breathing; and it was shown that Holmes' conversation and locomotion were noticeably affected by the intoxicants."

We reduced the awards of punitive damages to $1,-250.00 for each appellee, or a total of $2,500.00.

The cases all point out that it is difficult to lay down a rule for testing the excessiveness of a verdict for punitive damages, but it is evident that in each of the four cases mentioned, there was more evidence of intoxication, and likewise, more evidence of hazardous driving than in the case before us. In other words, there was a much stronger showing of wrong-doing, so as to justify the awards of exemplary or punitive damages. Yet, in two of the four cases, the awards were reduced 50%, and the other two cases only involved awards of $500.00 and $100.00. Here, there is no evidence of violation of the speed limit, no evidence of driving on the wrong side of the street, and no evidence of a slick highway or other hazardous conditions. Nor is the testimony of the officer unequivocal as to appellant's condition. "Yes, sir, I *kind of* [our emphasis] felt that he was drunk." We have reached the conclusion that an award of $2,500.00 for punitive damages would be fair and reasonable.

If, therefore, within seventeen calendar days, the appellees will enter remittitur for punitive damages in excess of $2,500.00, the judgment will be affirmed. Otherwise, the judgment will be reversed and the cause remanded.

George Rose Smith, Fogleman, and Byrd, JJ., dissent.

Conley Byrd, Justice, dissenting. I dissent from that portion of the majority opinion that reduces the jury's $5,000 punitive damage award to $2,500.

The evidence fails to show any indication of prejudice or passion on the part of the jury, particularly in the awarding of the compensatory damages in the amount of $2,500. Regarding the compensatory damages, the testimony shows that appellee had a pre-existing arthritis of his neck which was aggravated by the hyperextension flexion injury of his neck, and that he also had

a lumbosacral strain or a sprained back. The doctor testified that, although the accident happened on December 4, on December 21 the muscle spasm in appellee's neck could be seen completely across the room. Appellee lost work from December 4 to February 18, incurred doctor bills of $461.50, and has a continuing drug bill of $18 per month. The $2,500 compensatory judgment for these damages is most modest, and in fact appellant does not argue that it is excessive.

In addition to the facts set out in the majority opinion, the record shows that appellant did not see appellee's stopped car until he was within 60 feet of the rear thereof, even though he had an unobstructed view in excess of 150 feet before the point of impact. The facts surrounding appellant's activities on that day, together with his attitude which was observed by the jury, belie his "one-beer" story. It is true that he admits that he bought one quart of beer from a grocery store in the morning, which he says he drank from some time about 1:30 until around 5 o'clock. While so testifying about the one beer, he states that the reason for his having been out to do some target practicing was that he had built up a gun which he wanted to test. On cross examination, however, he admitted that he had split his thumb the day before he went out to test the gun, and because of the sore thumb he was unable to try out the gun.

Many other inconsistencies in appellant's story could be shown from the record, including his failure to respond to pertinent questions put to him on cross examination.

Viewing the record in its total perspective, it is my opinion that there was testimony from which the jury could have found that appellant had been drinking all afternoon immediately preceding the accident; that he was drunk at the time of the accident; that he ran into the rear of appellee's car on one of the busiest streets in Little Rock; and that there was a lack of candor in

his testimony in the court room, particularly with reference to the distance from which he could see the car and the tail lights on the car. In my opinion, a drunk in an automobile on either Markham Street or University Avenue in the vicinity of Park Plaza shopping center on a Saturday afternoon at or near 5 o'clock is as hazardous as would be a lunatic firing a gun. When his drunken condition is considered along with his lack of candor in testifying, in my opinion the jury was certainly justified in awarding a verdict of $5,000 for punitive damages.

For these reasons I would affirm the judgment.

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

LLOYD W. DAVIS *v.* STATE OF ARKANSAS

5260 413 S. W. 2d 634

Opinion delivered April 10, 1967

Jesse B. Thomas, for appellant.

Joe Purcell, Attorney General; *Don Langston,* for appellee.

George Rose Smith, Justice. On October 28, 1965, the appellant was convicted of having received the earnings of a prostitute and was sentenced to five years imprisonment. Thereafter he filed in the circuit court an "Appeal for a Writ of Habeas Corpus," which the trial court correctly treated as a petition for post-conviction relief under our Criminal Procedure Rule No. 1. 240 Ark. 1094. The petition asserted that Davis's constitutional rights had been denied in that he was induced to enter a plea of guilty without knowledge of his right to counsel. The trial court, after a hearing, denied the petition on the ground that the proof showed that the petitioner's right to counsel had been fully explained to him before he elected to plead guilty.

There is an abundance of competent proof to support the trial court's finding of fact. The court's original docket entry, made when the plea of guilty was accepted, included a notation that the accused waived the services of an attorney. The court reporter who made a record of that proceeding testified that her notes reflected a statement by Davis that he did not want a lawyer. An attorney who happened to be in the courtroom when the plea of guilty was entered gave similar testimony. The only proof to the contrary at the hearing under Rule 1 was Davis's testimony that the court reporter misunderstood his statement—not that he did not *want* a lawyer but that he did not *have* a lawyer. We conclude that the record amply supports the finding of the trial court.

It is also contended that the court erred in admitting in evidence the affidavit of a police officer, who stated

that in an interview before the arraignment the prosecuting attorney had informed Davis that the court would appoint an attorney for him if he was unable to employ one. When the affidavit was first mentioned at the hearing under Rule 1 counsel for Davis said: "We will have to object to anything other than direct testimony." Nothing more was said about the affidavit until after the testimony of three witnesses had been heard. When the affidavit was finally offered in evidence there was no objection or exception by defense counsel.

The original objection was not a continuing one and should, in fairness to the trial court, have been renewed when the incompetent document was actually offered in evidence. See *New Empire Ins. Co.* v. *Taylor,* 235 Ark. 758, 362 S. W. 2d 4 (1962). The participants in a post-conviction proceeding under Rule 1 need not be expected to observe the same formal rules that have been developed for jury trials upon the basic issue of guilt or innocence, but orderly procedure nevertheless requires that timely objections be made to the rulings of the trial court. It is clearly not the presiding judge's responsibility to interpose objections that the attorneys have not seen fit to make.

On the other hand, we do not imply that the technical precaution of noting exceptions is necessary in hearings conducted under Rule 1. When a criminal case is first heard the saving of an exception serves a good purpose: The objector thereby indicates that he does not acquiesce in the court's adverse ruling and preserves the point for inclusion in his motion for a new trial. Different considerations come into play when the fairness of the original trial is questioned by a petition under Rule 1. Such a petition is in itself in the nature of a motion for a new trial. The goal is to reach the merits of the petition. If it should be shown that the accused's constitutional rights were disregarded at the trial on the merits, there is scant justification for a refusal to set the matter right on the technical ground that no excep-

tion is noted to the overruling of an objection made at the Rule 1 hearing. See *Henry* v. *Mississippi,* 379 U. S. 443 (1965). Lest there be any uncertainty about the matter we are today entering a per curiam order amending Rule 1 to state expressly that the preservation of exceptions is unnecessary in such a proceeding.

Affirmed.

ROBERT COURTNEY *v.* STATE OF ARKANSAS

5262 413 S. W. 2d 643

Opinion delivered April 10, 1967

[Rehearing denied May 8, 1967.]

L. K. Collier, for appellant.

Joe Purcell, Attorney General; *Don Langston,* Asst. Atty. General, for appellee.

PAUL WARD, Justice. This is a Criminal Procedure Rule No. 1 Case, wherein the trial court revoked a suspended sentence given to appellant, Robert Courtney. The issue arose out of the facts and circumstances presently summarized.

In March of 1956, in Case No. 1337, appellant pleaded guilty to burglary and grand larceny, and was sen-

tenced by the Poinsett County Circuit Court to ten years in the penitentiary. The last six years of the sentence was suspended on good behavior. On March 4, 1963 appellant was charged again, in the same court, with committing burglary and grand larceny to which he pleaded not guilty. On the same day the deputy prosecuting attorney filed a Motion, in the same court, to revoke the six years suspended sentence referred to previously. On March 15, 1963 appellant was tried, convicted and sentenced to twenty one years in the penitentiary, with nine years suspended. On the same day the trial court revoked the six years suspended sentence in Case No. 1337. Appellant was then placed in the penitentiary, no appeal having been taken.

In December, 1965 appellant filed a Motion (in his own handwriting), under Rule No. 1, to vacate the order revoking the six years suspended sentence. In the Motion appellant alleged his constitutional rights had been violated in that he "was not offered an attorney to represent him, nor was he present at the hearing on March 15, 1963, when the sentence was reinstated".

The court denied appellant's Motion, and, on appeal, he relies on the following point:

> "The trial Court erred in failing to find that the Defendant was without counsel at the hearing on the petition to revoke the suspended sentence, thereby violating the Defendant's constitutional rights."

Under the record before us, we find no reversible error. Appellant admits he was notified on March 4, 1963 of the Motion filed to revoke the suspended sentence. It is not disputed that appellant was present in court at the time the suspended sentence was revoked, this being immdiately after he was convicted for burglary and grand larceny. At that time he was represented by his attorney, Burk Dabney. Incident to that occasion Attor-

ney Dabney was asked if he was present, and he testified, in part, as follows:

A. "Yes, sir. Present at that time.

Q. "And representing the defendant?

A. "Yes, sir.

Q. "And the Hon. John Mosby did see fit, after the hearing, to revoke the suspension and make it consecutive to the time that the Court saw fit to render in its judgment in No. 1941?

A. "That is correct."

It is true that Attorney Dabney could not recall all the details of exactly what happened two years before, but he did make this statement:

> "Mr. Collier, as far as paying me a fee, as far as asking me to represent him, did not. However, I have never yet left a client struggling there without representation. If there was anything to be done with any conviction, then I did what I thought was my duty as an attorney to them, him. I did it in Mr. Courtney's case, although I do not have a clear recollection of it."

Dabney was asked by appellant's attorney about the lapse of time "between the jury's verdict and the hearing on the petition". His answer was: "I don't remember there being. . . . ", when appellant's attorney said: "That is all".

In view of the above facts and circumstances we are unwilling to hold appellant "was without counsel at the hearing on the petition to revoke the suspended sentence".

Affirmed.

FOGLEMAN, J. disqualified.

ANDREW WEBB *v.* O. E. BISHOP, SUPT. OF ARKANSAS PENITENTIARY

5230 413 S. W. 2d 862

Opinion delivered April 10, 1967
[Rehearing denied May 15, 1967.]

John W. Walker, for appellant.

Joe Purcell, Attorney General; *Don Langston,* Asst. Atty. General, for appellee.

LYLE BROWN, Justice. This appeal comes from a hearing on appellant's petition for a writ of *habeas corpus*. Appellant was on parole from a three year sentence to the Arkansas Penitentiary and his parole was revoked. He attacked the revocation procedure as being violative of his rights under the due process and equal protection provisions of the Constitution of the United States. Webb's petition for discharge and return to parole status was denied and he appeals.

Appellant Webb and his wife resided in or near Gould, Arkansas, and he was regularly employed by his parole sponsor. Shortly after midnight on Sunday morning, July 17, 1966, the couple and companions were arrested by the chief of police of Gould. Webb was charged with driving while intoxicated, resisting arrest, and altering a driver's license. It is undisputed that he was thoroughly intoxicated. He was held in jail from the time of his arrest until the next Monday morning. The arresting officer called Webb's parole supervisor, reported the incident, and recommended that Webb's parole be revoked. The supervisor requested that Webb be held until the next day, Monday, July 18th, at which time the supervisor would come to Gould.

When the supervisor arrived Monday morning, Webb was taken from the jail to the justice of the peace between nine and ten o'clock a.m. Charges were read to Webb and he was asked to plead to the charge of DWI. Webb wanted to argue before he answered, but the record is silent as to the subject of his argument. The justice of the peace apparently indicated that he wanted no argument and requested Webb to plead. Webb responded by pleading guilty to DWI. Thereupon, the parole supervisor took Webb into custody and returned him to the penitentiary.

It is appellant Webb's contention that the treatment he was afforded from the time of his arrest to and including the time of arraignment, was violative of his

constitutional rights. These allegations are based on four assertions: (1) That on Sunday, Webb's wife informed the chief of police that she wanted to make bond and was advised there would be no bond; (2) that Webb was deprived of a public trial; (3) that he was not represented by counsel or advised that he had a right to counsel; and (4) that he was "whisked away" to the penitentiary immediately after the arraignment and thereby deprived of the opportunity to appeal.

Although it is recognized that the arraignment on a charge of DWI, and the parole revocation, are separate and distinct, appellant earnestly contends that his revocation was caused by an illegally exacted plea of guilty on the DWI charge. Strength for this argument is founded on the testimony of the parole supervisor. He testified that he had authority to revoke paroles. He further stated that Webb's revocation was based solely on the plea of guilty to DWI.

The illusionary grandeur of this officer is quickly dispelled, both in law and in fact. Parole supervisors are creatures of the statutes and their duties are there enumerated. These duties are contained in three different sections of Ark. Stat. Ann., Title 43, Ch. 28 (Repl. 1964), and may be summarized as follows: 1. Arrest and place in jail without warrant any person found to be violating the terms of his parole. 2. Immediately report parole violations to the director of paroles. 3. Make daily reports to the director of paroles. 4. Make such reports as are required concerning persons in their respective districts who are on parole.

These are all the statutory duties assigned the supervisor. If we add the power to revoke parole (simply on the supervisor's assertion that he has such authority), it would be violative of the express direction of the statute which vests such authority in the State Penitentiary Board. Ark. Stat. Ann. § 43-2802 (Repl. 1964).

With respect to parole revocation, the Board pro-

mulgated its rules in 1955. We take judicial notice thereof. *Seubold* v. *Fort Smith Special School Dist.,* 218 Ark. 560, 237 S. W. 2d 884 (1951); *Palmer* v. *State,* 137 Ark. 160, 208 S. W. 436 (1919). There we find the Board has delegated to only one official the authority to revoke a parole, namely, the director of paroles. Any parolee feeling aggrieved by revocation promulgated by the director is entitled to be heard by the Board at its ensuing meeting at the penal institution.

So much for the legal authority for parole revocation. When we examine *all* of the testimony of the supervisor—having in mind these statutory provisions—it is readily discernable that he did not in fact revoke appellant Webb's parole. Laying aside his assertion of authority to revoke, we examine his actual procedure which is explained in his own words:

> "I made a revocation of parole July the 17th [actually meaning the 18th], mailed it to the home office in Little Rock that date. They mailed a parole revocation warrant from Little Rock to the State Penitentiary verifying that *I had asked for the parole revocation.*" [Our italics.]

When the supervisor's statement is examined in light of his statutory duties, it is not difficult to ascertain the correct events. He attended the JP court; he heard Webb plead guilty to DWI; such conduct—even drinking intoxicants—is in violation of the written parole agreement; the supervisor mailed "to the home office in Little Rock" a report of the parole violation, this being the report that is required by statute; he took Webb into custody, as he is authorized to do by statute; he delivered him to the penitentiary, a short distance from Gould, there to be held until the revocation recommendation was approved or disapproved; the director of probations, headquartered in Little Rock, who is the Board's executive secretary, mailed the order of revocation to the state penitentiary.

The phrases, "I made a revocation of parole," and "I . . . asked for the parole revocation," are inconsistent. So, when we turn to the statutes, we find the latter statement to be the one that is correct.

Let us assume, without deciding, that some constitutional right of appellant was violated, as alleged, with respect to the arrest, detention, and hearing on the DWI charge. We are still unable to see how such a violation, particularly in a misdemeanor proceeding, could work to inhibit the right of the State to retrieve the admitted parole violator. As to the DWI charge, he had the right of appeal, and Webb and his attorney were reminded by the circuit judge at the *habeas corpus* hearing that the time for such an appeal had still not expired. As to the parole violation, Webb, at both hearings, admitted his guilt. At the hearing in circuit court, he stated that he went to the twelfth grade in school, he showed a good knowledge of the contents of the parole contract, and he readily admitted that he was drunk and driving. At no time did he offer any proof of physical mistreatment, nor did he express ignorance of the nature of the act of driving while intoxicated.

In the matter of parole revocation, a parolee is not in the same category (as respects constitutional rights) as is a free and unconvicted citizen who is faced with a criminal charge. As was stated in the landmark case of *Burns* v. *United States,* 287 U. S. 216, 53 S. Ct. 154 (1932):

> "Probation is thus conferred as a privilege and cannot be demanded as a right. It is a matter of favor, not of contract. There is no requirement that it must be granted on a specified showing. The defendant stands convicted; he faces punishment and cannot insist on terms or strike a bargain. . . .
>
> "The question, then, in the case of revocation of probation, is not one of formal procedure either with

respect to notice or specification of charges or a trial upon charges."

Then, in *People of the United States ex rel. Harris* v. *Ragen,* 81 F. Supp. 608 (1949):

> "It should be understood at the outset that a parolee possesses no inherent constitutional right which would entitle him to a hearing before his parole could be revoked. If he seeks to assert such a right, he must look to the Statutes rather than the Federal Constitution."

In *Harris* v. *Ragen* it is pointed out that the administration of the parole law is vested in the executive, not the judicial, branch of the government, and it is further held that the claim of the parolee to a right to legal representation at a revocation hearing was without merit.

We hold that when our State Penitentiary Board revokes a parole, that revocation can be set aside in the courts if it be shown that the Board acted arbitrarily or capriciously. Such an attack must be by direct proceeding and not collateral, as was attempted by appellant Webb.

Affirmed.

LOREN W. MYERS *v.* VENCE MAJORS

5-4200 413 S. W. 2d 661

Opinion delivered April 17, 1967

Gus Causbie, for appellant.

Sullivan & Orr, for appellee.

CARLETON HARRIS, Chief Justice. Vence Majors, appellee herein, instituted suit against Loren W. Myers, appellant herein, alleging that he furnished labor and materials for appellant in the total amount of $901.00, said labor being performed, and materials furnished, in drilling a water well on property belonging to Myers; that this amount remained unpaid.[1] An itemized account was attached to the complaint, and appellee had previously, within proper time, served a notice of his claim upon appellant, as required by law. Myers answered the complaint with a general denial, but subsequently amended his answer to allege that appellee, because of faulty workmanship, or some unknown cause, "is attempting to charge against the Defendant an additional 85 feet of 6½ inch casing and a cost of $170.00 which was used entirely because of the fault of the Plaintiff in the alleged

[1]The total amount originally claimed was $1,026.00, but Myers was given credit on the account for $125.00, which had been paid before the suit was instituted.

drilling of the well." It was further asserted that the water in the well was unsafe for drinking purposes, and that the well was unsatisfactory and unsuitable for domestic use. On trial, the jury returned a verdict for Majors in the sum of $901.00, and from the judgment entered on this verdict, appellant brings this appeal. For reversal, it is asserted that the court erred in permitting appellee to testify that he had entered into a contract to drill a well over the objection of Myers, because no contract had been mentioned in the pleadings, and further, the court erred in refusing to grant an instructed verdict for appellant.

Majors testified that he commenced drilling a well for Myers on February 5, 1965, and completed it on March 21, 1965, and that he considered his part of the contract concluded at that time. He testified that the parties orally agreed on a price of $3.00 per foot for the drilling and $2.00 per foot for the casing, which was to be paid when the well was completed. Majors stated that appellant had only paid $125.00 of the agreed price, and that $901.00 remained due. Counsel for Myers objected to any testimony about an agreement on the basis, "there is no contract mentioned in the complaint," but this objection was overruled by the court. This, then, is appellant's argument for reversal, *i.e.,* that there is no allegation in the complaint that the claim for a lien was founded on contract, and this allegation (appellant states) was essential to the validity of the complaint. We agree that our cases hold that this type of lien is based upon contract, but we do not agree that appellee's failure to specifically set out in the complaint that the claim was so based, was fatal. Our statute, Ark. Stat. Ann. § 51-701 (1947), provides that the claimed lien shall be based upon a contract, "express or implied." Of course, Majors' testimony was quite specific and related an express contract, and the complaint itself certainly *implied* a contract. It would be a most unusual occurrence for an individual to expend time and money digging a well on another's land (except through mistake, not here involved), unless he had already entered into an agreement

with the owner to do so. Appellee asserted that he had furnished labor and materials for Myers between certain dates, and further alleged the value of the services and materials. We have stated many times that courts regard the substance of pleadings, rather than form, and we have also said that pleadings under the code are to be liberally construed. *General Motors Acceptance Corporation* v. *Purkins, Judge,* 204 Ark. 229, 161 S. W. 2d 398. At any rate, after filing his answer, appellant amended same, as set out in Paragraph One of this opinion, by asserting that Majors' charges included additional casing, "which was used entirely because of the fault of the plaintiff in the alleged drilling of the well." This assertion, along with other allegations in the amendment, also heretofore mentioned, constitutes an admission that *some type* of contract was entered into.

This, of course, is not a case where appellee pursued a completely different theory on trial from that advanced by the allegations in the complaint; certainly appellant was not surprised, and he was not prejudiced by the court's action in overruling his objection. Nor were any pleadings filed attacking the sufficiency of the complaint.

The jury heard the evidence, including the testimony by appellant, that he did not agree to pay for extra pipe, and further, that he had only agreed to pay Majors, if the latter "drilled a well and got good water." The jury, trier of the facts, found for appellee.

Finding no reversible error, the judgment is affirmed.

FLORENCE CAROLYN BALCH MONTGOMERY *v.* FIRST NATIONAL BANK OF NEWPORT, ADM'R

5-4175 414 S. W. 2d 109

Opinion delivered April 17, 1967
[Rehearing denied May 22, 1967.]

Ward & Mooney, for appellant.

Pickens, Pickens & Boyce, for appellee.

GEORGE ROSE SMITH, Justice. This case went off below on demurrer, the chancellor holding that the plaintiff's complaint showed on its face that her asserted causes of action were barred by laches. This appeal is from the ensuing orders of dismissal.

The complaint names three defendants: The First National Bank of Newport, administrator of the estate of the plaintiff's father, Lucas G. Balch; American Employers Insurance Company, surety on her father's bond when he was serving as her guardian; and the Newport Federal Savings & Loan Association.

In substance the complaint asserts: The plaintiff was born on August 15, 1941. In 1951 she became entitled to $12,500 as the proceeds of an insurance policy upon the life of her brother. Her father was appointed by the probate court as her guardian, with the defendant American Employers as the surety on his bond. Balch, as guardian, collected and invested the insurance money. In October of 1959 he obtained an order of the probate court which recited that he had turned his daughter's property over to her when she attained her majority. The property then consisted of $2,900 in Government bonds, a savings account of $10,000 on deposit with the defendant Newport Federal, and a small bank account that does not appear to be in issue. The plaintiff's father, in obtaining the probate court order (and, presumably, in obtaining his discharge as guardian), presented what purported to be his daughter's receipt, acknowledging the delivery of her property.

That receipt, the complaint goes on to say, either was forged or was procured by fraud. None of the plaintiff's property was ever delivered to her. To the contrary, her father, during the rest of his life, assured her that he held at least $12,500 of her money, which he would account for in due time. It was not until after her father's death on November 21, 1965, that the plaintiff first learned that he had misappropriated the assets of the guardianship. The complaint sought judgments in appropriate amounts against Balch's estate, against the surety company, and against the savings and loan association.

Preliminarily we mention a procedural point. Two of the defendants filed answers merely denying the al-

legations of the complaint. The plaintiff then filed a motion for summary judgment, with a supporting affidavit. She now contends that the chancellor erred in permitting the defendants, while the motion for summary judgment was pending, to amend their pleadings by raising the issue of laches by demurrer.

This argument is without merit. In effect the appellant insists that the following language in the summary judgment statute freezes the state of the pleadings the moment a motion for summary judgment is filed: "The adverse party prior to the day of hearing may serve opposing affidavits. 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." Ark. Stat. Ann. § 29-211 (Repl. 1962).

We are unwilling to say that the legislature, by referring merely to "the pleadings . . . on file," intended to prohibit the trial court from allowing the pleadings to be amended after a motion for summary judgment is filed. Rather, the summary judgment act must be read in harmony with our Civil Code, now almost a century old, which declares that the court may at any time, "in furtherance of justice," permit pleadings to be amended. Ark. Stat. Ann. § 27-1160. We are not persuaded that the summary judgment statute was meant to change our policy to one that would in substance be one in furtherance of injustice.

On the merits, the court was in error in sustaining the demurrers of the bank, as administrator of Balch's estate, and of the insurance company, as surety on the guardian's bond. In equity, limitations (and laches) may be raised by demurrer if the complaint shows the cause of action to be barred and fails to allege facts sufficient to remove the bar. *Mueller* v. *Light,* 92 Ark. 522, 123 S. W. 646, 31 L. R. A. (n.s.) 1013 (1909). But here the complaint, construed liberally on demurrer,

asserts two grounds for suspending the running of the statute: First, that Balch concealed his fraud (*Kurry* v. *Frost,* 204 Ark. 386, 162 S. W. 2d 48 [1942]), and, secondly, that as a guardian Balch was a fiduciary, so that limitations did not begin to run until there had been a repudiation of his trust. *State ex rel. Atty. Gen.* v. *Van Buren School Dist. No.* 42, 191 Ark. 1096, 89 S. W. 2d 605 (1936); *Sconyers* v. *Sconyers,* 141 Ark. 256, 216 S. W. 1045 (1919).

It might be argued that the guardian's surety, not having been an actual party to the fraud, is entitled to rely upon that section of the Probate Code which permits a probate court to set aside a guardian's settlement for fraud only if the petition is filed within three years after the guardian's discharge. Ark. Stat. Ann. § 57-645 (Supp. 1965). That section of the Code, applicable to guardians, parallels a similar section that applies to personal representatives. Section 62-2912. The Probate Code Committee's comment to the latter section suggests that the section was drafted to extend the power of the *probate court*—a power that had formerly been narrowly limited with respect to orders approving final settlements. See, e.g., *France* v. *Shockey*, 92 Ark. 41, 121 S. W. 1056 (1909). There is no indication that the Committee meant to curtail the long-recognized power of the *chancery court* over such settlements. Quite the opposite, the Committee's comment implies that the remedial powers of a court of equity are to continue. Hence the extension of the time within which a probate court may reopen a settlement does not aid the surety company in this suit in equity.

Upon the remaining aspect of the case the chancellor correctly sustained the demurrer of the savings and loan association. There is no allegation of any misconduct whatever on the part of that company. The only permissible inference from the meager facts asserted in the complaint is that the association may have allowed Balch to withdraw the deposit. A depository of trust funds, however, incurs no liability in permitting withdrawals

by the trustee unless in so doing it knowingly participates in a breach of trust. Restatement, Trusts (2d), § 324, and Ark. Annotations. The bare allegation that some of the ward's funds were formerly on deposit with the savings and loan association falls decidedly short of stating a cause of action against the association.

Affirmed in part, reversed in part, and remanded.

Harris, C. J. and Byrd, J., dissent.

CONLEY BYRD, Justice, dissenting. I dissent to so much of the majority opinion as holds that the statute of limitations, Ark. Stat. Ann. § 57-645 (Supp. 1965), has not run against the surety on the guardian's bond. Ark. Stat. Ann. § 57-645 provides as follows:

> "Upon the guardian of an estate filing receipts or other evidence satisfactory to the court, showing that he has delivered to the persons entitled thereto all the property for which he is accountable as guardian, the court shall make an order discharging the guardian and his surety from further liability or accountability with respect to the guardianship. *The discharge so obtained shall operate as a release from the duties of his office which have not theretofore terminated and shall be final, except that upon a petition being filed within three years of the entry thereof, it may be set aside for fraud in the settlement of the accounts.*" (Emphasis supplied.)

Section 57-645, *supra,* is a portion of Act 140 of 1949, which was adopted subsequent to Amendment 24 to the Constitution of Arkansas.

With respect to the jurisdiction given probate courts, Amendment 24 provides as follows:

> "In each county the Judge of the court having jurisdiction in matters of equity shall be judge of the court of probate, and *have such exclusive original jurisdiction* in matters relative to the probate of

wills, the estates of deceased persons, executors, administrators, guardians and persons of unsound mind and *their estates, as is now vested in courts of probate, or may be hereafter prescribed by law...*" (Emphasis supplied.)

Pursuant to Amendment 24, the jurisdiction given to the probate courts under § 4 (b) of Act 140 of 1949 (Ark. Stat. Ann. § 62-2004b [Supp. 1965]) is as follows:

"*The Probate Court shall have jurisdiction of the* administration, *settlement and distribution* of estates of decedents, the probate of wills, the persons and *estates of minors,* persons of unsound mind and their estates, the determination of heirship, adoption, *and* (*concurrent with jurisdiction of other courts*) *jurisdiction to restore lost wills and for the construction of wills when incident to the administration of an estate; and all such other matters as are now or may hereafter be by law provided.* The judge of the Probate Court shall try all issues of law and of fact arising in causes or proceedings within the jurisdiction of said court and therein pending. *The court shall have the same powers to execute its jurisdiction* and to carry out its orders and judgments, including the award of costs *as now exist in courts of general jurisdiction*; and the same presumptions shall exist as to the validity of its orders and judgments as of the orders and judgments of courts of general jurisdiction." (Emphasis supplied.)

Therefore under the majority opinion the probate court's jurisdiction in matters involving estates of minors is not coextensive with that of courts of other competent jurisdiction. Since to me it is obvious that the committee that drafted the Probate Code was intending by § 4 (b) to give the probate court jurisdiction coextensive with other courts, I can not read the three-year statute of limitations as being applicable only to the probate courts, nor interpret the law as intending to give

other courts any greater jurisdiction than that given to probate courts.

Section 4 (b) of the Probate Code appears to have actually given the probate court exclusive jurisdiction of matters involving the settlement and disposition of estates of minors. It is not only subject to that interpretation but the committee comment is as follows:

> "The foregoing section follows each enumeration of jurisdictional functions granted in Amendment No. 24 and adds determination of heirship, adoption, AND CONCURRENT JURISDICTION TO CONSTRUE WILLS, AND ESTABLISH LOST WILLS. Adoption is covered by existing statutes and is not embraced in this code. THE DETERMINATION OF HEIRSHIP AND THE RIGHT TO CONSTRUE WILLS AND ESTABLISH LOST WILLS CONCURRENTLY ARE ADDITIONS TO THE GENERAL GRANT OF JURISDICTIONAL CONTROL OVER ESTATES OF DECEDENTS AND PROBATE OF WILLS PURSUANT TO THE AUTHORITY CONTAINED IN AMENDMENT NO. 24 . . . " (Emphasis supplied.)

However, here the parties have not briefed the issue and I do not raise it on my own except as it affects the interpretation of the three-year statute of limitations set out in Ark. Stat. Ann. § 57-645.

Thus it is seen that the legislature was attempting to give the probate court either exclusive jurisdiction of the estates of minors, in accordance with Amendment 24, or at least concurrent jurisdiction coextensive with courts of general jurisdiction, and for purposes of this opinion under either theory the majority opinion disregards this intent on the part of the legislature in enacting Act 140 and on the part of the people in enacting Amendment 24. It is my view that § 57-645, being the three-year statute of limitations, is here applicable to the surety, since there is no allegation which would toll the statute as to it. Of

course, under the allegation of the promises made by the father during his lifetime, the statute would be tolled as to him or his personal representative, and because of the confidential relationship between the father and the daughter, outside of his legal status as guardian, the chancery court would certainly have jurisdiction to require an accounting of monies received in such fiduciary capacity.

To follow the view of the majority will put all bondsmen of guardians and personal representatives in a position of requiring the actual service of notice in each instance, rather than permitting the expeditious procedure used by many lawyers of submitting a waiver of notice and hearing as is suggested in Ark. Stat. Ann. § 62-2902 (Supp. 1965). In fact, the committee comment under § 62-2902 provides:

> "The committee feels that the order of final distribution should completely bar all persons who may have a right to object to any of the proceedings as to any matter which might be the basis of their objections. It does not bar third persons who would have no right to intervene in the proceedings or to object to the order."

For these reasons, I would affirm as to the guardian's bondsman.

HARRIS, C. J., joins in dissent.

NATIONAL COTTON COMPRESS & COTTON WAREHOUSE ASSN. ET AL *v.* ATLANTIC MUTUAL INSURANCE CO. ET AL

5-4114 & 5-4178 413 S. W. 2d 860

Opinion delivered April 17, 1967

John H. Todd and *Owens, McHaney & McHaney,* for appellant.

Gaughan & Laney, for appellee.

GEORGE ROSE SMITH, Justice. Under the Arkansas Insurance Code an insurance company belonging to a rating organization may apply to the Insurance Commissioner for permission to put into effect a deviation from premium rates fixed by the rating organization. Ark. Stat. Ann. § 66-3122 (Repl. 1966). These two appeals, consolidated here, bring up for review orders of the Commissioner by which the appellees, Atlantic Mutual Insurance Company and Highlands Insurance Company, were permitted to lower their fire insurance rates upon cotton stored in some 500 "igloo-type" warehouses on the premises of the Shumaker Naval Ordinance Depot, near Camden. Under the Code the circuit court reviews the Commissioner's decision by what amounts to a trial

de novo, but in this court the substantial evidence rule is controlling. Section 66-3134.

The appellees, in seeking authority to lower their premiums, based their request upon the exceptionally fire-resistant construction of the igloo warehouses and upon a favorable loss-experience record with respect to similar warehouses in Texas. The application for a deviation was opposed by the appellants, two trade associations that represent the great majority of cotton warehousemen in Arkansas. The protestants contended that the proposed premium rates would be unjustifiably low and would give an unfair competitive advantage to the igloo-type facilities. The Commissioner approved the requested reduction in rates, finding that "by reason of the unique and unusual type and quality of construction of these warehouse facilities and the fire protection equipment and service available to the area of the storage facilities, the applications should be approved."

We lay aside the appellees' reliance upon the loss-experience in Texas. Apparently it did not extend over a period of five years, as required by the Code. Section 66-3104 (1) (c). We also lay aside the appellants' contention that the reduced premium rate permits the proprietors of the igloos to enjoy an unfair competitive advantage in storage rates. The record does not contain sufficient proof to support a finding that the reduction in rates has had or will have the effect of creating an unwarranted disparity in storage charges. As we view the case, the single controlling issue is whether there is substantial evidence to support the circuit court's conclusion that the Commissioner correctly found the igloos to have advantages in construction and in fire protection sufficient to sustain the requested reduction in premium rates.

We find the evidence abundantly sufficient to support the circuit court's judgments. These igloos were originally built for the storage of *explosives* at the ordnance plant. The buildings are made of reinforced

concrete, with thicknesses of six inches for the floors, eight inches for the roofs, and fourteen inches for the walls. The only entrances are steel doors at the front of the buildings. There are small vents for ventilation, but they can be closed to shut off the oxygen supply for any fire that might get started. There is no electric wiring whatever in the buildings, nor any heating or lighting facilities that might create a fire hazard.

The igloos are spaced about four hundred feet apart. Warehouse employees are in and out of the buildings during the daytime, and each igloo is opened and inspected every night by a watchman. The proprietors have contracts with Camden and East Camden for fire-department protection. Moreover, the only cotton stored in the igloos is what is referred to in the warehouse business as "old cotton"—that is, cotton ginned from 48 to 72 hours prior to its being put in storage. That interval goes far toward eliminating the possibility that a fire caused by a spark in the ginning process may still be smoldering inside the bale when the cotton is warehoused.

We gather from the record that cotton warehouses have heretofore been classified, for rating purposes, either as protected by a sprinkler system or as not so protected. The igloos now in question are not so protected, but it cannot be doubted that their construction makes them far more fire-resistant than unsprinklered warehouses of conventional design. In fact, the only two unsprinklered cotton warehouses in the State, other than the igloos, are receiving stations of inferior construction which are used for the temporary storage of "new cotton."

Upon the record as a whole we agree with the Commissioner's conclusion that the extent to which these igloo-type buildings deserve a reduced premium rate is essentially a matter of judgment. No fire has yet occurred in any of them. The appellees declare their willingness to insure cotton in any similar warehouses at the rate proposed by their request for a deviation. It is

perhaps somewhat unusual for a group of ratepayers to be in the attitude of protesting insurance rates on the ground that they are too low, but on the record now before us we are unwilling to say that the Commissioner should have refused to permit the downward deviation.

Affirmed.

SULPHUR SPRINGS RECREATIONAL PARK, INC. *v.* CITY OF CAMDEN, ARKANSAS ET AL

5-4182 414 S. W. 2d 113

Opinion delivered April 17, 1967
[Rehearing denied May 22, 1967.]

G. E. Snuggs, for appellant.

Gaughan & Laney, for appellee.

PAUL WARD, Justice. This appeal comes from an Order of the Chancery Court refusing to strike portions of the defendant's answer.

To understand the issue raised by appellant it is necessary to set out a summary of the facts and pleadings.

Sulphur Springs Recreational Park, Inc. (appellant) was organized for the purpose of constructing, building,

maintaining, and operating a public recreational park and center for the use and benefit of citizens of the City of Camden and of Ouachita County. On January 14, 1965 appellant filed a complaint in chancery court alleging: On September 22, 1949 it obtained a twenty year lease on certain lands, and has spent $6,000 constructing buildings and improvements thereon; certain persons (named as defendants) have, in divers ways, taken over and appropriated to their own use a large portion of the leased lands—to appellant's damage in excess of $35,000. The prayer was for recovery of said damages. Appellees (City of Camden and six individuals) filed an answer on January 25, 1965 denying all material allegations in the complaint. They also pleaded forfeiture of the lease and the Statute of Limitations by laches and estoppel.

On February 15th appellant filed a "Motion to strike Portions of Answer" on the ground that the answer contained "affirmative allegations" and was not served on appellant as required by Ark. Stat. Ann. §§ 27-361 and 27-362 (Supp. 1965).

The trial court overruled appellant's Motion to strike, holding appellees' answer was filed within the time provided by the statutes. The court also found that the case should be "set for trial on the complaint and the answer." Appellant excepted, and filed a notice of appeal to this Court.

The essence of appellant's point for a reversal is that the trial court erred in refusing "to strike affirmative allegations of appellees' answer."

We do not, and cannot, reach the merits of the issue attempted to be raised by appellant, because there is no final order from which an appeal can be taken.

In the early case of *Cambell Et Al.* v. *Sneed,* 5 Ark. 398 this Court said:

> "Consequently, as from the transcript before us, no final adjudication of the circuit court, upon the mat-

> ters in controversy between the parties, appears to have been made, the case must be regarded as still pending for such adjudication in that court; and therefore, as this court has no jurisdiction over it, until such final adjudication is there made, this writ of error must be dismissed."

The above rule has been many times affirmed and never overruled by this Court. See also *Smith* v. *Amis,* 193 Ark. 874 (p. 878) 103 S. W. 2d 349.

There can be no contention that there was a *final* order in this case. The Order of the trial court did not dismiss the cause of action, but, on the other hand, it found that the case should be set for trial on its merits. Moreover appellant, in its brief concedes that if there had been a trial appellees would have had the "right of cross-examination of appellant's witnesses."

The case of *Wicker* v. *Wicker,* 223 Ark. 219, 265 S. W. 2d 6, reiterates the same rule. There we made this statement:

> "An appeal cannot be taken from an order of the chancery court which is not a final order."

It therefore follows that appellant's appeal must be, and it is hereby, dismissed.

DEVAUX LEGRAND OWENS ET AL *v.* AMERICAN BANKERS INSURANCE COMPANY

5-4176 413 S. W. 2d 663

Opinion delivered April 17, 1967.

Walker, Jackson & Smith and *Oliver L. Adams Jr.*, for appellant.

McMillen, Teague, Bramhall & Davis, for appellee.

LYLE BROWN, Justice. This suit was brought by plaintiffs-appellants against American Bankers Insur-

ance Company to cancel an insurance contract and obtain refund of premiums. The complaint was grounded in fraud. Complainants did not recover the full amount sought, and they appeal. The Insurance Company cross-appeals, relying principally on the defense of laches. The Company also contends that the trial court erred in finding it had breached the contract.

Dr. Owens one of the two appellants, purchased a policy of insurance from Equitable Investors Life Insurance Company in December 1948. The named insured was Dr. Owens' granddaughter, Mary Christine Johnston, and he was the beneficiary. The triple features of the policy are significant.

First the policy provided ordinary life coverage in the principal sum of $6,000.00.

Second, the Insurance Company set up a "Mortality Endowment" plan designated as a "Primary Division." Under this feature the Company would place twenty-six policy holders in the "Primary Division," and they would be numbered from one through twenty-six. In this instance Mary Christine Johnston, then two years of age, would be placed in a group of twenty-six persons of corresponding age. In the event of the death of any person in her division, Dr. Owens (as the owner of his granddaughter's policy) would receive a stated amount if at that time Mary's policy was the lowest numbered policy in her division. If it was not then the lowest numbered policy, she would move up to the next favored position, and so on until she was next in line for payment.

The third and final, feature of the policy was designated "Secondary Division." This division worked similarly to the "Primary Division," except that the names in these units worked in inverse order. In other words, those named in this group would progress downward to twenty-six instead of upward to number one position.

The important point to the investor (in this case Dr. Owens) was the filling of the various divisions by the Insurance Company. This could be accomplished only by the sale of similar policies to persons in the same age bracket as his granddaughter. American Bankers Insurance Company assumed this contract in June 1950. By 1952, the efforts of Equitable and the succeeding efforts of American Bankers had not filled any of the divisions. Because of lack of public demand American ceased selling this type of contract. Until that time Dr. Owens had annually received "Certificate of Advance in Position" of his granddaughter. The last of these notices was received in July 1953.

The abundant correspondence between Dr. Owens and American Bankers from 1953 until 1962 was introduced at the trial. In 1956 the doctor inquired about the advancements of his granddaughter in the various positions. He specifically asked whether this type policy was then being sold. Bankers' reply did not answer that question. Again, in 1959 Dr. Owens made further inquiry. For the first time he was advised that the endowment provisions would in time reach the point of no benefit. Bankers' statement read:

> "There is one situation regarding these policies, Dr. Owens that you should know about. This type policy has not been sold for the past several years and naturally no additional members are being added to the divisions. Eventually, because of death, lapse, maturity by endowment, etc., these divisions will get down to where there will be only one person in them and the mortality endowment feature of the policy will not then be of benefit."

From 1959 through 1961 the correspondence reflects Dr. Owens' complete dissatisfaction with the policy. His first demand was for an equitable settlement. The only offer made was payment of cash surrender value ($144.00 as of 1959). During the succeeding years the doctor made repeated demands for settlement. He received the same answer as in 1959. In 1962 he referred

it to his attorney. The attorney's efforts were not successful, and suit was filed in December 1964.

During all these years Dr. Owens timely paid the premiums under protest, apparently in order to prevent forfeiture until such time as he could obtain what he considered an adequate settlement. In fact, he paid the premium due in 1964 into the registry of the court.

The holding of the chancellor was based on his finding that the insurance companies violated an implied obligation to in good faith continue to write the particular type of policy owned by Dr. Owens. From the testimony of an actuary it was determined that of the annual premium of $176.88, the sum of $78.88 was attributable to the cost of the endowment provisions. The balance of the premium represented the cost of the ordinary life provision. The chancellor awarded Dr. Owens judgment for $1,340.96, being that part of the premium payments attributable to the cost of the endowment provisions. This judgment was conditioned that the holder of the policy agree to a deletion of the endowment provision or forfeit the policy for its cash value. No attorney's fee was allowed. No interest on the premium payments ordered refunded was awarded.

We agree with the chancellor's finding that the sale of the policy to Dr. Owens carried an implied obligation on the part of the insurance company to in good faith endeavor to market this type of policy. The filling of the positions under the endowment provisions was vital to the operation of the plan. When efforts to sell this type of policy ceased before the positions were filled, good faith would dictate that such purchasers as Dr. Owens be forthwith notified. The principle adopted by the chancellor serves, generally, as a proper equitable basis for disposition of the case. However, we think equity dictates some modifications of his calculations. The reason for each such modification will be explained.

1. *Dr. Owens is not entitled to a refund of premiums he paid* in 1948, 1949, 1950, *and* 1951. The policy

was received December 21 1948. He carefully studied the policy. Some parts were not understandable, and he immediately wrote Equitable for information. He also advised that the insurance salesman assured him the granddaughter would have a preferred position in the divisions. From the correspondence it appears that the salesman, under instructions from Equitable, called on Dr. Owens with reference to his request for information. There was no further complaint registered with Equitable until December 1949. Dr. Owens received notice of the second annual premium. Dr. Owens protested that he had been assured by the salesman that there would be a pay-off under the endowment before the second premium came due. Equitable replied, calling the doctor's attention to the provisions of the policy. The company clearly indicated that the provisions of the policy governed, and not oral representations made by a salesman.

Equitable's position in this respect is strengthened by the application which Dr. Owens executed. Among other things it provided:

> "I hereby agree: (1) that any statements, promises, or information made or given by or to the person soliciting or taking this application for policy or by or to any other person, shall not be binding on the Company or in any manner affect its rights unless such statements, promises, or information be reduced to writing and presented in this application to the home office of the Company; . . ."

Dr. Owens, a medical doctor, held important offices in the Arkansas Medical Society. He apparently had substantial business interests. In the field of insurance he has served on the board of directors of two insurance companies.

In view of these facts, along with the fact that the insurance companies were apparently endeavoring during these years to market this special policy, we hold it

would be inequitable to order refund of the premiums for these stated years.

2. *Dr. Owens is entitled to a refund of that part of all other premiums which were charged because of the endowment provisions.* American Bankers absorbed Equitable in 1950. American apparently sold this type of policy through 1952. The actuary testified that none of the endowment divisions had been filled to the maximum since the issuance of Dr. Owens' policy. He explained this was caused by lack of public demand. The fact that American Bankers had ceased marketing this type of policy was not made known to Dr. Owens until 1959, notwithstanding his repeated inquiries.

In this situation Dr. Owens was faced with a dilemma. One, he could forfeit the policy and collect the small cash value. Two, he could switch to a standard endowment policy which would likely not be payable during his lifetime. Three, could keep the present policy in force. Four, he could sue for recovery of premiums.

It is urged that Dr. Owens continued to keep the policy in force with full knowledge of the status of the endowment provisions, particularly after 1959. It is true he kept paying the premiums, but such payments were under considerable protest. He wrote seven letters to Bankers over a three-year period and before turning the matter over to his attorney. He emphatically explained his intention to recoup all premium payments and urged a settlement in lieu of litigation. We are impressed by the fact that during those years he was paying a premium for the endowment provisions, which were practically worthless. This condition was due to the fact that so few persons were in the groups with the granddaughter. In fact, the numbers in the respective groups ranged from a low of one to a high of five. To allow Bankers to retain premium monies chargeable to the endowment provisions would constitute unjust enrichment.

With respect to the ordinary life provisions in the

policy, the situation is different. Ordinary life coverage was afforded during these years. It would be inequitable in this case to hold that Bankers be required to refund the charge for that coverage. In situations where an insurance company has wrongfully repudiated a contract, premiums have been ordered refunded as damages. Here, the prime contract is, and always has been, in force.

American Bankers advances the defense of laches. Numerous cases on the subject are cited. Most of these cases are concerned with the requirement that the policyholder examine the policy and return it within a reasonable time. Otherwise, he is deemed to have accepted it and is liable for the premium obligation. The case before us does not fall in that category. For some seven years American Bankers had not lived up to its implied obligation to sell this type of policy—a fact that was not made known to Dr. Owens until 1959. By that time the doctor had invested over two thousand dollars in premiums. If he surrendered the policy, he would be paid $144.00 surrender value. If he accepted Bankers' offer to switch to a twenty-year endowment, he would probably not receive any benefit therefrom during his lifetime. Alternatively, he could pay premiums under protest to keep alive his chance to recoup a more substantial sum. The dilemma was created by American Bankers. Laches is an equitable defense. Before sustaining a defense of laches the court will take a long look at the facts to see if the pleader has in fact done equity.

American Bankers contends Dr. Owens could have sued for recovery of premiums in 1949 if he was not satisfied with the policy. It is then asserted he should have so acted in 1953 when he was writing to Bankers. But Bankers overlooks the fact that its letters to Dr. Owens during this period were reassuring. It was not until 1959 that Bankers revealed the truth.

But there is yet another, and stronger, reason for denying the defense of laches. To sustain that plea the

leader must show that the delay results in a disadvantage. No such disadvantage was suffered by Bankers.

> "Since laches is an equitable doctrine, its application is controlled by equitable considerations. It cannot be invoked to defeat justice; and it will be applied where, and only where, the enforcement of the right asserted would work injustice." 30A C. J. S. Equity § 115.

It should be noted that Bankers pleads the statute of limitations; however, it is not argued as a point for reversal. We therefore express no opinion in this respect.

We are reminded by appellants that this court cannot make a contract for the parties. This is correct; we can only construe and enforce contracts which have been made. The result of our decision will not have the effect of making a contract; we simply find that the endowment provisions of the insurance policy are so nearly worthless as to justify rescission and refund of premiums.

The chancellor made no allowance for an attorneys' fee. Appellants claim a fee under Ark. Stat. Ann. § 66-3239 (Repl. 1966). This statute, being penal in nature, must be strictly construed. Whether we treat this as a suit to recover premiums or to cancel the policy, the statute does not authorize an attorney's fee. See *American Republic Life Ins. Co.* v. *Claybough*, 227 Ark. 946, 302 S. W. 2d 545 (1957).

Dr. Owens is entitled to six per cent simple interest on his recovery, to be calculated from the date he made each payment.

Finally, we dispose of the question of the future status of the policy. The chancellor gave Dr. Owens the option of keeping the policy at a reduced premium and with the endowment provisions deleted, or of surrendering the policy upon receipt of the cash loan surrender value. We hesitate to approve this procedure, because it might be interpreted as making a contract between the parties. Since plaintiffs specifically prayed for can-

cellation and supported this prayer with testimony to the effect that they do not want the policy, we think it better to lay the matter at rest by directing surrender of the policy and payment by Bankers of the cash value.

Remanded with directions that the decree be modified to comport with this opinion.

WARD, J., would affirm the decree.

FOGLEMAN, J., dissents.

JOHN A. FOGLEMAN, Justice, dissenting. I dissent from that part of the decision of this case which permits the recovery of premiums by Dr. Owens. The basis of my disagreement with the majority is the unreasonable and unexplained delay on his part in asserting his rights. He had full knowledge of all the facts and circumstances giving rise to his cause of action at the time of his receipt of appellee's letter of February 27, 1959. This is further evidenced by his own letter of March 4, 1959, in which he demanded a cash settlement and advised of his intention to try to collect from appellee. On March 20, 1959, Owens advised appellee that if he did not have a reasonable settlement offer in fifteen days, he would be forced to turn the matter over to his attorney. Yet, no suit was filed until December 18, 1964, well over five years later. During this time he continued to pay premiums annually, usually complaining about the situation at the time of each remittance. He periodically threatened suit. During this time appellee did nothing whatsoever to discourage appellant from bringing suit.

Whatever label may have been applied to the cause of action, it is for the rescission of a contract. Appellee specifically pleaded the statute of limitations and laches. I agree with the majority that the possible bar of the statute of limitations is no longer in issue, not having been listed as a point on which appellee relies or argued in its brief. Appellee does however, urge the defense of laches here. Regardless of the label given this defense, it relates to the staleness of appellants' demand on which appellants, not appellee, sought equitable relief.

In equity a stale demand is a form of laches. *Sullivant* v. *Sullivant*, 239 Ark. 953, 396 S. W. 2d 279.

This court considered the effect of lapse of time in *Davis* v. *Tarwater*, 15 Ark. 286, wherein rescission of a contract for the sale of lands was sought more than ten years after the date of the contract and more than five years after the discovery of the fraud alleged. In holding that a court of equity would refuse relief because of lapse of time where no excuse or explanation was offered for the delay, the court said that where one was guilty of negligence and slept on his rights, the best interests of society required that causes of action should not be deferred an unreasonable time. This court said that the objection that the claim is stale can be made at the hearing, or that the court might deny relief on its own motion when such a case is disclosed. It then said:

> "Lapse of time is not founded upon statutory provisions, though the statute may be referred to at fixing a reasonable time for its operation. The rule is applied by Courts on a broad view of all the circumstances of the case. And even in case where the demand is not barred by positive limitation, Courts of Equity refuse to interfere after a considerable lapse of time, from considerations of public policy and from the difficulty of doing entire justice. Nothing can call a Court of chancery into activity, but conscience, good faith, and reasonable diligence, and where these are wanting, the Court is passive and does nothing."

The principle was recognized and applied in *Jones* v. *Gregg,* 226 Ark. 595, 293 S. W. 2d 545, where this court held that an action to rescind a contract because of the failure of a seller for a period a little over two years to obtain a release of a vendor's lien which encumbered certain property sold to a buyer not to be timely. The court said:

> "While the law gave them the right to rescind the

agreement upon the failure of the appellants to comply with their part of the contract, this was only one of their remedies and they were not required to exercise it. The law does require, however, that in order to rescind a contract, the rescission itself must be made within a reasonable time after the facts giving rise to the right of rescission arise or become known; and, unless such right to rescission is exercised within reasonable time after the discovery of the facts justifying the rescission, the party otherwise entitled to rescind will be deemed to have waived this right."

Later, in *Koolvent Aluminum Awning Co. of Arkansas* v. *Johnson,* 231 Ark. 517, 331 S. W. 2d 265, the failure of a service station operator to assert a right to rescind for more than one year after work was completed on the installation of a canopy in front of his station was held to be an unreasonable delay amounting to a waiver of his right to rescind. It appeared that the operator complained that the materials used were not fireproof and of inferior grade, and that the canopy leaked, while the work progressed. There the operator had told workmen of the contractor to "tear it down and put it in the junkpile." With respect to this contention of the operator, this court said:

"***If this statement could be considered as notice to the seller of his election to rescind it must fail for the want of adhering to it since he permitted appellant to perform work on the contract after the statement without protest. The record reveals no affirmative act toward rescission was done by appellee until his answer was filed to the lawsuit which was more than a year after the work was completed. We hold that failure to assert the right to rescind for this period was an unreasonable delay which amounted to a waiver of the right to rescind, hence, the trial court was in error in decreeing rescission."

There are other cases wherein the failure to act

promptly in seeking relief from contracts, that have application here, even though the matter of rescission may not have been the actual issue involved. Among them are:

Grayson-McLeod Lumber Co. v. *Slack-Kress Tie and Stave Co.,* 102 Ark. 79, 143 S. W. 581, where it was said that it was the duty of one who discovered an apparent breach of a contract to insist upon a forfeiture at once if he intended to do so and that permitting the continued performance of the contract waived the breach.

New York Life Ins. Co. v. *Adams,* 151 Ark. 123, 235 S. W. 412, wherein it was held that an insurance company like a policyholder, waives the right to rescind a contract of insurance by failure to take advantage thereof within a reasonable time after discovery of the facts constituting grounds for rescission.

In *Newsum Auto Tire Vulcanizing Co.* v. *Shoemaker,* 173 Ark. 872, 294 S. W. 11, the failure to seek to rescind a release obtained by false representations and fraud for a period of more than two years after discovering the circumstances was held to be such an unnecessary delay as to constitute acquiescence and condonation of the fraud and a waiver of the right to rescind.

This is the basis of appellee's contention with reference to the defense of laches and I cannot agree that cases cited in its brief are inapplicable simply because they relate to failure of a policyholder to act promptly to reject an insurance policy not conforming to the agreement of the parties. The principle is the same and appellee appropriately argued this, in my opinion. *Remmel* v. *Griffin,* 81 Ark. 269, 99 S. W. 70, cited by appellee, is also cited by this court as authority for the holding in *New York Life Ins. Co.* v. *Adams,* 151 Ark. 123, 235 S. W. 412. Retention of a policy for more than three months was held to be such an unreasonable delay as would constitute a bar as a matter of law in *Carrigan*

v. *Nichols,* 148 Ark. 336, 230 S. W. 9. Delay of four months in bringing suit after obtaining actual knowledge of the contents of the policy was held to bar rescission in *Smith* v. *Smith,* 86 Ark. 284, 110 S. W. 1038. Delay of one year in repudiating a lease after lessee learned that he was induced to enter into it by fraudulent representations was held to be so unreasonable as to constitute waiver in *La Vasque* v. *Beeson,* 164 Ark. 95, 261 S. W. 49. [*New York Life Ins. Co.* v. *Adams, supra,* was cited as authority.] These cases were appropriately cited by appellee.

I would reverse on cross-appeal.

FLOYD BROOMFIELD & NANCY BROOMFIELD, ET AL *v.* E. L. BROOMFIELD & ELLA MAY BROOMFIELD, ET AL

5-4154 413 S. W. 2d 657

Opinion delivered April 17, 1967

Shaw & Shaw, for appellant.

Shaver, Tackett & Jones, for appellee.

JOHN A. FOGLEMAN, Justice. Appellants are two sons of Millard W. Broomfield joined by their respective wives. Appellees are another son, the son's wife and daughter, and the only daughter of the decedent.[1] Millard W. Broomfield died intestate on January 1, 1964 at the age of 85 years. This litigation commenced as a suit by appellants and other heirs with partition of seventy acres of land[2] being a part of the relief sought. This land was admittedly once owned by the decedent. Appellants contend that he owned the lands at the time of his death. Appellees ask confirmation of title in E. L. Broomfield and his wife and daughter, claiming that they are owners of the tract by virtue of conveyance to them by a warranty deed signed by M. W. Broomfield and bearing date of September 29, 1952. They say that this deed was delivered to appellee E. L. Broomfield in June, 1963, at the home of the decedent. Appellants contend that this deed was without consideration and never delivered by the decedent, and that he never intended to deliver it. They further contend that possession thereof was attained by the grantees by fraudulent and unlawful means. On disputed evidence, by a margin which he characterized as "razor-thin", the chancellor found that the weight of the evidence supported a finding that the deed was delivered by the decedent in his lifetime. A review of some of the evidence is necessary to the determination of this appeal on trial de novo.

It is undisputed that Millard W. Broomfield lived on the property for many years and continued to reside on the land in question and pay the taxes thereon until his death. The 1962 taxes were paid on September 19, 1963.

[1]There were other heirs with their respective wives who were plaintiffs. During the pendency of the action, one of these heirs died and his widow and heirs at law were substituted. None of these parties appealed.

[2]Other property was involved but there is no issue as to it on this appeal.

The deed was not recorded until January 31, 1964. The office manager for the Little River County Agricultural Stabilization and Conservation Office (ASC) for fifteen years testified that the decedent made applications for financial assistance in carrying out ASC farm programs. Two of these applications were signed by the decedent as owner in 1963, one in April and one in July. The records of the office showed that Millard W. Broomfield was the owner-operator of the farm. Appellees admit that the decedent carried on these transactions in this way for more than ten years prior to his death and do not contend that he ever relinquished control of the land during his lifetime. Appellee E. L. Broomfield seeks to explain this by saying that he retained a life estate in the property in his agreement with the E. L. Broomfield family. The deed contains no reservation of a life estate.

Ernie Crow, a witness for whose credibility both E. L. Broomfield and his counsel vouch, testified that he became interested in purchasing the farm in July, 1963. Upon inquiry of Millard W. Broomfield, he was told that he could buy the land for $9,000.00 and the cattle for $3,000.00. Broomfield said he would make a warranty deed to the place. Crow did not follow up because he didn't like the location and didn't think the house was good enough for the price. Appellee E. L. Broomfield tried to explain this by saying:

> "He seemed to be just more or less seeing if he could get an offer of what his property was worth more than anything because he didn't sell it, didn't follow up the sale."

E. L. Broomfield testified that his father had the deed prepared and that he, his wife and daughter agreed to take care of the elder Broomfield, but the father was *to do anything he wished with the farm in his lifetime*—that he was to do what he pleased with the farm and handle it as he pleased. The agreement with his father was to become effective upon the latter's death. He said

that no one but he and his father were present when the deed was delivered in June, 1963, after his father had been to a doctor and thought he would not get well. His father told him not to record the deed until he passed away, and he agreed. He claims the deed, before delivery, was clipped to some papers on the wall in his father's room with a clothespin, but presumed that he kept his other valuable papers in his trunk. He told no one except his wife about the delivery of the deed, feeling that no one else should know of it. If his father had asked him for the deed back, he would have given it to him.

The only evidence of delivery of the deed is the testimony of E. L. Broomfield himself. He seeks to excuse the non-appearance of his wife, a party to the suit, who he said knew he had the deed in his possession, by saying that she had been sick for two days. The record does not reflect any effort to continue the case until she was able to testify, to give her deposition or otherwise offer her testimony, although the chancellor's written memorandum opinion shows that the parties, the attorneys, the judge and the court reporter went past the E. L. Broomfield residence to take the testimony of another witness. The failure of a party to testify in his own behalf is a suspicious circumstance against him when material facts within his own knowledge are charged against him in the pleadings and evidence. *Felton* v. *Leigh*, 48 Ark. 498, 3 S. W. 638. Failure of a party to an action to testify as to facts peculiarly within his knowledge is a circumstance which may be looked upon with suspicion by the trier of the facts. *Fordyce* v. *McCants*, 55 Ark. 384, 18 S. W. 371. Where the parties have it within their power to explain suspicious circumstances connected with a conveyance, the court trying the case may regard their failure to do so as a circumstance against them. *Smith* v. *Wheat*, 138 Ark. 169, 35 S. W. 2d 335. See, also, *Board of Commissioners of S. I. Dist. No.* 359 v. *City of Little Rock*, 190 Ark. 27, 76 S. W. 2d 667. The unexplained failure of a party to produce a witness with special knowledge of a transaction, if within the power

of the party to do so, raises the presumption that he would testify against the party. *Rutherford* v. *Casey*, 190 Ark. 79, 77 S. W. 2d 58; *Jones* v. *Jones*, 227 Ark. 836, 301 S. W. 2d 737. Other cases hold that an inference follows that the testimony would have been unfavorable. See, e. g., *National Life Company* v. *Brennecke*, 195 Ark. 1088, 115 S. W. 2d 855. At any rate, it does not satisfactorily appear that the testimony of Ella May Broomfield could not have been obtained, so this factor weighs heavily against appellees in determining where the preponderance of the evidence lies.

As against the uncorroborated testimony of E. L. Broomfield, a vitally interested party, there is other testimony which, together with the acts of the decedent inconsisent with a delivery of the deed, seems to preponderate. Both Floyd and Wade Broomfield testified about the interest of the former's son in buying the land in November, 1963, and statements of the decedent with reference to such a sale. Both of them and the county welfare director testified that the father had made statements that if he gave anyone a deed to the place they would run him off. The statement to Wade was said to have been made while he was living with his father in 1963, up until October. According to Wade, his father kept his deeds, papers and money in a trunk. This trunk was opened in the presence of most of the family by J. B. Pond, a son-in-law of E. L. Broomfield, by cutting a hasp on the front. Shortly thereafter Pond pointed out to Wade Broomfield that the hinges on the back had been cut. It was admitted that Pond would testify that they appeared to have been freshly cut. There was also testimony that two straps had been put on the back of the trunk and that there were fresh marks on these straps which appeared to have been taken off and replaced.

In order for there to be a delivery of a deed, there must be an intention to pass title immediately and the grantor must lose dominion over the deed. This intention must be manifested by what is said and done by the

grantor and grantee. *Woodruff* v. *Miller,* 212 Ark. 191, 205 S. W. 2d 181; *Hunter* v. *Hunter*, 216 Ark. 237, 224 S. W. 2d 804; *Smith* v. *Van Dusen,* 235 Ark. 79, 357 S. W. 2d 22. Enough must be done to show that the instrument was considered to have passed beyond the grantor's control and dominion. *Graves* v. *Carlin,* 194 Ark. 473, 107 S. W. 2d 542; *Ransom* v. *Ransom*, 202 Ark. 123, 149 S. W. 2d 937.

In determining the intention of the grantor and whether dominion of the deed has been lost, acceptance of a deed with instructions not to record it during the lifetime of grantor and the exercise of dominion over the property by grantor are significant factors. *Woodruff* v. *Miller*, 212 Ark. 191, 205 S. W. 2d 181; *Graves* v. *Carlin,* 194 Ark. 473, 107 S. W. 2d 542. Of course, this would not be true in cases such as *Lindsey* v. *Christian*, 222 Ark. 169, 257 S. W. 2d 935, where the language of the deed had the effect of reserving a life estate.

The acts of a grantor in continuing to occupy the lands and exercising all the rights of unlimited ownership, including the payment of taxes, are contradictory to an intention to pass title immediately, an element necessary to establish delivery. *Smith* v. *Van Dusen,* 235 Ark. 79, 357 S. W. 22; *Ransom* v. *Ransom,* 202 Ark. 123, 149 S. W. 2d 937.

Cases such as *Cribbs* v. *Walker,* 74 Ark. 104, 85 S. W. 244, relied on by appellees, where the grantor provides by express words in the deed that it shall take effect upon his death, have previously been distinguished from a case such as this, where an oral reservation is alleged, in *Woodruff* v. *Miller,* 212 Ark. 191, 205 S. W. 2d 181.

The case of *Johnson* v. *Young Men's Building & Loan Assn.,* 187 Ark. 430, 60 S. W. 2d 925, also relied upon by appellees, has many distinctions. There the deed was attacked as fraudulent by subsequent creditors rath-

er than those who would have inherited the property. The husband and wife grantors had acquired the property as tenants by the entirety, investing funds of both, as well as some belonging to their only son, then a minor. They desired to destroy the effect of these tenancies so that upon death of either, his or her interest would not pass to the other but to the son. The wife had died before the suit was instituted. The father testified that they operated the property for the son for many years. The deed was placed in a safe to which all three had access and the matter was fully explained to the son by the wife. Advice of eminent counsel was had in the preparation of the deed. After the death of the wife, the deed was placed of record and the son gave his father a power of attorney. The father testified that they always conferred with the son about the business interests. The bank account was put in the son's name about the same time the deed was recorded and the power of attorney apparently authorized the father to draw checks thereon. The court accepted the failure to have the deed recorded as being consistent with the purpose of the grantors to retain possession and control of the property until the death of one of them. It also said that a retention of such control under these circumstances was not always inconsistent with the grant or intention of delivery of the deed. We feel that this case is distinguishable upon these peculiar facts. Insofar as it may appear to be in conflict with later cases herein cited, we think the latter state the proper rules applicable to a case such as this.

This case is strikingly similar to *Ransom* v. *Ransom,* 202 Ark. 123, 149 S. W. 2d 937, where counsel for the grantee in a deed purporting to convey title outright conceded that his client did not expect then or thereafter to take possession of any of the land unless something happened to the grantor; that the grantor intended to keep his land as long as he lived and to do what he pleased with it; that grantee would not have interfered with grantor's collection of rents and profits;

and that grantee was not to get the lands until something happened to grantor. There this court reversed the finding of the chancellor that there had been a delivery of the deed in question. There is also a close parallel to *Woodruff* v. *Miller,* 212 Ark. 191, 205 S. W. 2d 181, where a finding against delivery was affirmed. This court has never upheld a deed when (1) the parties did not intend to pass title immediately and (2) the grantor never lost dominion over the deed.

When tested by the established rules of law, hereinabove set out, we think the evidence that there was no delivery of the deed is clear, decisive and convincing and the finding of the trial court clearly against the preponderance of the evidence.

The decree is reversed and the cause remanded for the entry of a decree in conformity with this opinion.

DON BIVENS *v.* STATE

5259 413 S. W. 2d 653

Opinion delivered April 17, 1967

Pryor & Barnes, for appellant.

Joe Purcell, Attorney General; *Don Langston*, Asst. Atty. Gen., for appellee.

JOHN A. FOGLEMAN, Justice. Appellant seeks reversal of his conviction of voluntary manslaughter upon the ground that an admission of guilt by appellant was improperly admitted into evidence and that there was no other evidence that tended to prove his guilt.

On the night of the alleged offense, appellant attended a dance at the Lafayette High School gymnasium and while he was there a fight started. The deceased, one James Carpenter, and appellant were watching the fight from the bleachers when they became involved in a fight themselves and rolled down to the floor at the bottom. There Carpenter was pulled off appellant by Ellis Wilkins, the latter's cousin, and appellant admits that Carpenter had been cut and was bleeding at that time. It was shown that Carpenter died as the result of a stab wound.

Ellis Wilkins said that after the fight, appellant gave him a large knife which he put in his pocket. After

the police came he gave it to one Martha Johnson who took it home with her. Wilkins guessed that appellant started to help one of the participants in the first fight and that the deceased then jumped on appellant. He said that he went over where the fight was going on because one of those in the first fight had previously beaten appellant up.

Martha Johnson, who was sitting with Ellis Wilkins when the fight started, said that she put the knife in her "bosoms", took it home and put it in a box. She said her mother put it down the hole in an "outdoors bathroom", but got it out when the police asked her for it. She had seen something black and brown that looked like blood on the knife.

Dorothy Geneva Morgan said that while she was coming out the door of the "gym" she overheard Bivens say to Wilkins, "I tried to kill the ———".

Sheriff Grover Linebarier, accompanied by his deputy Paul Parrish, arrested appellant at the latter's home in Keystone in the early morning hours after the incident. He testified that on the way in, without questioning by the officers, appellant, on his own accord, said that he knew he cut the boy but he didn't think he cut him that bad. The sheriff said that he had at the time of the arrest told appellant that the boy he had allegedly cut had died and they were going to take him in for further questioning. The sheriff stated that he had not warned appellant of his right to counsel and against self incrimination as they were not questioning him and were not prepared to take a statement, although he was arrested as the only suspect.

No objection was made to the testimony of the sheriff, there was no motion to strike any part of his testimony, and there was no motion for a directed verdict of acquittal. The sufficiency of the evidence and the admissibility of appellant's statement to the sheriff were first questioned in a motion for new trial. In that mo-

tion appellant states that his admission was rendered inadmissible because appellant was not advised of his right to counsel and his right against self incrimination.

Appellant's contention as to insufficiency of evidence for want of corroboration of his extrajudicial "confession" might properly have been raised by motion for a directed verdict. Ark. Stat. Ann. § 43-2117 (Repl. 1964). While it has been held by this court that the sufficiency of the evidence to sustain the verdict of a jury will be reviewed even in the absence of a request for a directed verdict [*Murray* v. *State,* 240 Ark. 32, 397 S. W. 2d 812], the failure to make the motion is some indication that appellant's counsel probably felt at that time there was sufficient corroborating evidence to make a question for the jury. The statute only requires that an extrajudicial confession be accompanied by other proof that such an offense was committed. Ark. Stat. Ann. § 34-2115 (Repl. 1964). The test of the correctness of the verdict is not whether there was sufficient evidence to sustain a conviction, but whether there was evidence that such an offense was committed or, in other words, proof of the corpus delicti. *Charles* v. *State,* 198 Ark. 1154, 133 S. W. 2d 26; *Forester* v. *State,* 224 Ark. 19, 272 S. W. 2d 320; *Hargett* v. *State,* 235 Ark. 189, 357 S. W. 2d 533; *Clay* v. *State,* 236 Ark. 398, 366 S. W. 2d 299; *Stewart* v. *State,* 237 Ark. 748, 375 S. W. 2d 804.

The evidence showing that decedent died as a result of a stab wound, that he and appellant were engaged in some kind of physical altercation and that appellant tried to dispose of a knife of which he had possession is ample proof that a crime was committed and to connect appellant with it, in the absence of his admission or confession. A confession by an accused that he shot the prosecuting witness was held sufficiently corroborated on a charge of assault with intent to murder by testimony by the latter that someone shot him. *Johnson* v. *State,* 135 Ark. 377, 205 S. W. 646. In the absence of evidence suggestive of any means other than violence

as cause of death, identification of a skeleton as that of defendant's wife who was last seen with the defendant before she disappeared following a quarrel with him was held sufficient corroboration of a confession in *Hall* v. *State,* 209 Ark. 180, 189 S. W. 2d 917. The discovery of blood in the deceased's cabin and a trail of blood leading to a river where his body was recovered was held sufficient in *Penton* v. *State,* 194 Ark. 503, 109 S. W. 2d 131. Where death of deceased was caused by gaping head wounds which appeared to have been inflicted with a hammer of the type found at appellant's employer's place of business with blood stains on it, there was sufficient corroboration. *Charles* v. *State,* 198 Ark. 1154, 133 S. W. 2d 26. Evidence that when defendant brought his wife to a hospital, she had multiple contusions, lacerations, bruises and abrasions about the head and face, which appeared to have been recently inflicted and that there were bloody articles of clothing and blood spots and loose hair found about their home, together with a medical opinion that death was caused by a swelling of her brain caused by a blow, was held sufficient evidence of the corpus delicti in *Forester* v. *State,* 224 Ark. 194, 272 S. W. 2d 320. The evidence on behalf of the State hereinabove mentioned was sufficient corroboration of appellant's statement to the sheriff.

The remaining question about admissibility of the statement of appellant to the sheriff is based on a contention that one interrogated while in custody must be warned of his right against self incrimination and that he has a right to counsel, retained or appointed, during interrogation. This contention can be disposed of on the basis that there was a knowing and intelligent waiver of this contention by the failure of appellant to object to the introduction of the testimony, or to move to strike it, or to even move for a directed verdict on insufficiency of evidence. Before an alleged error in a felony case of a degree less than capital may be considered by this court, there must be an objection calling for a ruling by the trial court, an exception to an adverse

ruling, the matter brought into the record by bill of exceptions and carried forward into a motion for new trial which serves only to assign the ruling of the trial court as error. *Ford* v. *State,* 222 Ark. 16, 257 S. W. 2d 30; *Bell* v. *State,* 223 Ark. 304, 265 S. W. 2d 709; *Carter* v. *State,* 230 Ark. 646, 326 S. W. 2d 791.

In *Tiner* v. *State,* 239 Ark. 819, 394 S. W. 2d 608, it was held that alleged error in permitting a sheriff to testify as to statements made to him by a winess, first raised in the motion for new trial, could not be considered by this court. Here appellant was a high school senior whose grade average of C's and B's and age (16) at which he reached this stage of his education would indicate at least average intelligence. It must be presumed that he made a full disclosure of all circumstances, including his statements, to the capable counsel by whom he was represented, an attorney at the bar of the court where appellant was tried. In this regard it is noted that the defendant called the deputy sheriff, Paul Parrish, as his witness. He interrogated him about statements made by appellant during the investigation, at the home in which appellant resided, and before the arrest. A statement of appellant at that time was virtually the same as that later made voluntarily to the sheriff. Under these circumstances, we find no basis for review.

The rule has been applied even when violation of constitutional rights was asserted as the bar to admission of evidence. See *Hardaway* v. *State,* 237 Ark. 966, 377 S. W. 2d 813, and *Crabtree* v. *State,* 238 Ark. 358, 381 S. W. 2d 729, where the fruits of alleged illegal searches and seizures were involved. A party cannot speculate upon what the testimony of the witnesses will be and then at the end of the trial demand as a matter of right that incompetent testimony be excluded. *Turner* v. *State,* 192 Ark. 937, 96 S. W. 2d 455.

This latter contention, even if it had been timely raised, is not well founded. This court has held that spontaneous admission of guilt by one taken in custody

on a warrant of arrest without any process of interrogation was not inadmissible on the grounds asserted here. *Turney* v. *State,* 239 Ark. 851, 395 S. W. 2d 1. *Miranda* v. *State of Arizona,* 38 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A. L. R. 3d 974, does not affect this holding. The statements rendered inadmissible by that decision are those obtained by in-custody interrogation, without adequate warning as to the constitutional rights here asserted. The opinion in the *Miranda* case clearly states that volunteered statements of any kind are not barred by the Fifth Amendment.

The judgment is affirmed.

PAUL BURKE JR. *v.* STATE

5241 413 S. W. 2d 646

Opinion delivered April 17, 1967

Donald Poe, for appellant.

Joe Purcell, Attorney General; *Don Langston,* Asst. Atty. General, for appellee.

J. Fred Jones, Justice. Paul "Sonny" Burke, Jr. was convicted of arson in the Circuit Court of Polk County, and was sentenced to five years in the state penitentiary with three years suspended. He assigned thirty-seven errors in his motion for a new trial which was overruled by the trial court. He has appealed to this court and relies on seven points for reversal.

The facts stated briefly are as follows:

About seven thirty or eight o'clock on December 19, 1963, Buck Cureton's barn and rent house, near Vandervoort in Polk County, were destroyed by fire. The barn was about two hundred yards and the rent house about a quarter of a mile from Cureton's dwelling house. The night was cold and damp, a light mist was falling and freezing as it fell. When Cureton discovered the fires, the barn was ready to collapse. Burning bales of hay were falling from the barn loft, but the fire at the rent house was "a very small fire."

About two years later, on December 23, 1965, appellant was charged with the crime of arson on information filed by the prosecuting attorney. He entered a plea of not guilty at arraignment on January 17, 1966, and was tried to a jury and convicted on July 25, 1966.

At the trial of the case, witnesses testified that the

appellant, in the company of Baram Powell and Harold Gentry, was seen in the vicinity of the Cureton property on the evening before the fire. Harold Gentry testified that he was with the defendant and Baram Powell in the vicinity of the Cureton property, but he didn't remember the date nor did he know the exact location of the Cureton property. A part of Gentry's testimony is as follows:

> "Q. Tell us what you recall about what happened there arounl Vandervoort. That is, where did you go?
>
> A. Well, now, I don't know where we went. We drove down the road from Vandervoort and went down maybe a mile or two. I don't know, and we turned around and went back the same way we came from. We turned around and went back for about the same distance, probably the same place, turned around and went back and we left, and the next place that I knowed where we were, that I know for sure where it was other than driving down the road, was at Big Boy's Grocery."

The evidence indicates that the Cureton property was between Vandervoort and Big Boy's Grocery.

Barom Powell testified that he was with the defendant and Gentry in the vicinity of the Cureton property on the day before the fire and that they were drinking; that they drove by the Cureton property three times and then returned to the defendant's home and continued drinking. That the following night he and the defendant, and the defendant's wife, returned to the Cureton property; that he and the defendant got out of the pick-up truck, climbed a fence and walked several yards out into the Cureton property and when in sight of a barn, the appellant announced that he was going to burn the barn and that the witness was going to burn the

other building. The testimony on this point is as follows:

"Q. What car were you in?

A. In my pickup. And we got there Sonny said, 'This will be good enough—'

Q. Got where?

A. To that place.

Q. To what place?

A. This Buck Cureton place.

Q. All right.

A. And me and Sonny got out and got over the fence and got off there a little bit and I said, 'What are we fixing to do?', and he said, 'Well, you're going to burn this place over here, and I'm going to burn this one.' And I said, 'No, I'm not,' and I went back to the pickup.

Q. Was any inducement offered to you to do the work?

A. I believe he said something about twenty-five dollars if I would burn it."

According to this witness he got back into the pickup with the defendant's wife who drove the pickup some distance and turned it around and drove back to near where the defendant had climbed the fence, and that appllant again climbed the fence leaving the Cureton property and got into the pickup.

Then the witness was asked the following question, and gave the following answer:

"Q. When he got into the pickup did you see any fire?

A. I just saw a glow out to the left out there. It was going pretty good."

At page 93 of the transcript, Jerry Hackworth testified as follows:

"Q. Tell us what Paul Burke said.

A. I don't know how it come about, but he said him and his wife and Baram Powell was supposed to have burned the barn, and that him and his wife backed out and he burned it.

Q. Now who backed out, did he say?

A. Baram and Carolyn.

Q. What else did he say?

A. That he burned it his self."

The defendant testified in his own defense and denied being in the vicinity of the Cureton property in the company of Powell and Gentry on the day prior to the fire. He denied being in the vicinity of the Cureton property on the night of the fire as testified by Powell and denied that he made the statements attributed to him by Hackworth.

We now take up the points relied on by appellant in the order presented.

Appellant contends for his first point, that the state failed to establish *corpus delicti* and that the fire was incendiary. He cites the cases of *Hancock* v. *State,* 204 Ark. 174, 161 S. W. 2d 198, and *Johnson* v. *State,* 198 Ark. 871 S. W. 2d 934, as authority on this point.

In the Hancock case only one barn burned and in the Johnson case a trailer loaded with dry cotton burned. In the Johnson case the exhaust from a tractor pulling the

trailer was directed upward through a four foot pipe and the fire started near the top of the load of cotton.

In the case at bar, *two buildings* several hundred yards apart burned simultaneously on a still "drizzly" night. One of the fires was well under way while the other was still small when discovered. In the total absence of any evidence that the fires could have been of other than incendiary origin, the question was properly submitted to the jury and the jury was justified in the conclusion it reached.

For his second point, appellant contends that the witness, Baram Powell, was an admitted accomplice and his testimony has to be corroborated to support a conviction. He cites the Johnson case, supra, and *Froman and Sanders* v. *State*, 232 Ark. 697, 339 S. W. 2d 601, as authority on this point.

No accomplice was involved in the Johnson case, and in Froman v. State, the prosecuting witness waited in a car while a robbery was committed, she inquired as to whether or not the victim had been injured, the money from the robbery was counted out and divided in her apartment, and although she denied receiving any of the money, she *harbored the defendants* in her apartment.

In holding that the witness was an accomplice as a matter of law in the Froman case, this court applied the rule as to whether or not the accomplice could be convicted as a principal or accessory in the same case, and concluded that she could have been, citing *Havens* v. *State,* 217 Ark. 153, 228 S. W. 2d 1003.

In the case of *Simon* v. *State,* 149 Ark. 609, 233 S. W. 917, this court said:

> "The test, generally applied to determine whether or not one is an accomplice, is, could the person so charged be convicted as a principal, or an accessory before the fact, or an aider and abbetter upon the evidence? If a judgment of conviction could be sus-

tained, then the person may be said to be an accomplice; but, unless a judgment of conviction could be had, he is not an accomplice.

* * *

"The term 'accomplice' can not be used in a loose or popular sense so as to embrace one who has guilty knowledge, or is morally delinquent, or who was even an admitted participant in a related, but distinct offense. To constitute one an accomplice, he must take some part, perform some act, or owe some duty to the person in danger that makes it incumbent on him to prevent the commission of the crime. Mere presence, acquiescense or silence, in the absence of a duty to act, is not enough, however, reprehensible it may be, to constitute one an accomplice. The knowledge that a crime is being or is about to be committed can not be said to constitute one an accomplice. Nor can the concealment of knowledge, or the mere failure to inform the officers of the law when one has learned of the commission of a crime."

This court has defined an accomplice as one who could himself be convicted of the crime charged against the defendant, either as principal or accessory. *Henderson* v. *State,* 174 Ark. 835, 297 S. W. 836. This court has also said that a witness is not an accomplice if he cannot be indicted for the offense, either as a principal or accessory. *McClure* v. *State,* 214 Ark. 159, 215 S. W. 2d 534.

The question of whether or not a witness is an accomplice is a question of mixed law and fact in the trial of a criminal case. *Edmonson* v. *State,* 51 Ark. 115, 10 S. W. 21; *Jackson* v. *State,* 193 Ark. 776, 102 S. W. 2d 546. When that question is submitted to a jury, its findings on the subject are final, unless the testimony shows conclusively that the witness was an accomplice. *Redd,* v. *State,* 63 Ark. 457, 40 S. W. 374.

The question was properly submitted to the jury in the case at bar, and the jury found that Baram Powell

was not an accomplice. There is no testimony showing conclusively that Powell was an accomplice, and his testimony did not have to be corroborated in order to sustain a conviction on his testimony.

Having concluded that the witness, Powell, was not an accomplice in the crime of arson in this case, we do not reach the sufficiency of the corroboraitng evidence under the third and fourth points relied on by appellant.

For his fifth point, appellant contends that the comments of the trial judge on Jerry Hackworth's testimony were prejudicial error.

The court and attorneys were having some difficulty getting Jerry Hackworth, one of the state's witnesses, to talk loud enough to be heard by the jury. Appellant's counsel objected to the testimony on direct examination because the witness had not made himself audible, and requested that the witness be disqualified if he could not talk loud enough to be understood. The court overruled the objections and stated:

> "If he can't talk loud enough for the jury to understand him, they won't get his testimony and it won't be anything but in your favor."

Hackworth was a state witness and was on direct examination at the time the objection to his testimony was made and overruled. We find no objection in the record to the comment made by the trial judge.

Appellant contends as his sixth point that the remarks and actions of trial judge and sheriff in the presence of jury, when the jury reported for further instructions, were prejudicial error.

One of the jurors asked the question:

"Why was the case put off this long?" The record then appears as follows:

"THE COURT: That's a question, of course, that I have no idea about, and I am not in a position to answer it, and I have to leave it there . . . Did you mean to inquire of the Court why the case was put off so long in coming to trial after the Information was filed on December 23, 1965?

JUROR: Yes, sir.

THE COURT: The reason for that was that Judge Bobby Steel disqualified himself and asked me to try the case. I am fairly busy myself, and I just didn't get up here any sooner.

JUROR: Thank you.

THE COURT: If it pertained to why it was so long before they filed the case on the 23rd of December, 1965, I don't know anything about that.

SHERIFF HENSLEY: Joe, you tell them.

MR. POE: I want my exceptions saved to the giving of that admonition by the Court.

THE COURT: For the record, Sheriff Hensley said 'Joe can tell you.' The Court heard him and stopped him. Nothing more was said by Mr. Hensley and Mr. Hardegree did not say anything."

It is not clear from the transcript whether the "admonition" complained of by appellant was an admonition to the sheriff, when the court "stopped him," or whether the statement to the juror was being referred to as an "admonition" by appellant's counsel, but in any event we are unable to see how the defendant could have been prejudiced on this point.

For his seventh point, appellant contends that instruction No. 10 was an erroneous declaration of law, and again cites the Froman case, supra.

Instruction No. 10 was an instruction on the sufficiency of corroborating evidence to sustain a conviction on the testimony of an accomplice. In the Froman case, supra, the majority opinion found that the witness *was an accomplice* as a matter of law and that there was no *corroborating evidence.* In the case at bar there was coorroborating evidence which was considered by the jury along with the question of whether witness Powell was an accomplice. We find no prejudicial error in the giving of the instruction.

The judgment of the trial court is affirmed.

Affirmed.

BYRD, J., concurs.

CONLEY BYRD, Justice, concurring. I concur on the basis that there was sufficient testimony to corroborate the testimony of Baram Powell, even if he were an accomplice.

LEE H. BURFORD *v.* STATE

5251 413 S. W. 2d 670

Opinion delivered April 17, 1967

Skillman & Burrow, for appellant.

Joe Purcell, Attorney General; *Don Langston,* Asst. Atty. Gen., for appellee.

J. Fred Jones, Justice. Lee H. Burford was convicted in the Crittendon County Circuit Court and sentenced to three years in the state penitentiary for the crime of sodomy, consisting of an unnatural sex act with one David Arthur Paris.

Burford has appealed to this court and relies on the following three points for reversal:

> "1. The Circuit Court of Crittenden County, Arkansas erred in denying motion of the Appellant for directed verdict, upon conclusion of the State's case in chief and at the close of evidence on behalf of Appellant, as a matter of law, there being no corroboration of the commission of the criminal offense charged.
>
> "2. The court erred in permitting certain testimony of witness David Gunn to be admitted into evidence over objection of Appellant.
>
> "3. The Circuit Judge committed error in permitting the jury to return for instructions of the Court as to whether or not, if the defendant was found guilty, they could permit the court to fix punishment which clearly indicated the jury could not agree on a verdict, and the court should have declared a mistrial."

The record in the case presents the following facts:

About 11:00 p.m. on December 4, 1965, the appellant met Paris in Memphis, Tennessee. They drove

across the river to Arkansas in appellant's station wagon automobile and the vehicle was parked on a little used side road under the Arkansas end of the Mississippi River bridge.

About 11:00 or 12:00 p.m. officers Busby and Gunn of the Arkansas State Police, while patroling the area came upon the defendant's parked automobile. Seeing no one in the parked station wagon, the officers directed the beam of a flashlight into the station wagon and found the defendant and Paris naked from the waist down lying on their sides in the seat of the station wagon with the appellant lying behind and close against Paris. Both men were arrested and charged with sodomy.

Paris entered a plea of guilty and he testified as a state's witness at the trial of appellant. Paris testified in detail as to an act of sodomy committed on him by appellant, including penetration of the body as required by Ark. Stat. Ann. § 41-814 (Repl. 1964).

Appellant's first point is without merit. The crime of sodomy may be proven by circumstantial evidence only. *Hudspeth* v. *State,* 194 Ark. 576, 108 S. W. 2d 1085. Certainly no higher degree of evidence is required in corroborating the testimony of an accomplice than is required for conviction. In the case of *Beasley* v. *State,* 219 Ark. 452, 242, S. W. 2d 961, this court said:

> "The rule in this state is that the corroborating evidence need only tend to connect the defendant with the commission of the offense, and not that such evidence of itself be sufficient, and where there is sufficient evidence tending to connect the defendant with the offense, its sufficiency is a question for the jury, together with that of the accomplice."

Appellant's second point is also without merit.

The accomplice, David Paris, admitted to officer Gunn what had transpired in the appellant's automobile. The appellant stood about seven feet away when the

admission was made and the appellant remained silent. Paris testified to later statements made by appellant in jail which indicated appellant had heard Paris make the first statement. The admission of this evidence was not error.

In the case of *Moore* v. *State,* 151 Ark. 515, 236 S. W. 846, a statement offered in evidence *was not* made in the presence of the defendant and a *denial was made* by the defendant as soon as he heard about the statement, but in that case this court said:

> "Proof of damaging statements against an accused person, made in the presence of the accused, are admitted upon the theory that the jury might find that the silence of the accused, in the face of accusation was a tacit admission. Of course, such testimony might, or might not, have the probative value, the circumstances of the case being such that the jury might find that the accused was not called upon to make denial; but this would be a question for the jury under the circumstances of each particular case. Here, however, Thomas' statement was made not only in appellant's absence, but was denied by appellant as soon as he was advised the statement had been made."

See also *Martin* v. *State,* 177 Ark. 379, 6 S. W. 2d 293; *Polk* v. *State,* 45 Ark. 165; and *Sheptine* v. *State,* 133 Ark. 239, 202 S. W. 225.

As to appellant's third point, Ark. Stat. Ann. § 43-2306 (Repl. 1964), states as follows:

> "Court to fix punishment.—When a jury find a verdict of guilty, and fail to agree on the punishment to be inflicted, or do not declare such punishment in their verdict, or if they assess a punishment not authorized by law, and in all cases of a judgment on confession, the court shall assess and

declare the punishment, and render judgment accordingly."

In case of *Ward* v. *State*, 236 Ark. 878, 370 S. W. 2d 425, the trial court instructed, along with other instructions when the case was submitted to the jury, that if the jury was unable to set a punishment, the court would do so. This court laid down the following rule—holding the above practice to be error.

> "Thus, it appears, we have not previously announced any required rule in this regard to guide the trial courts. So, after careful consideration, we now hold that the jury should not be told *initially* they can let the court impose the punishment but should be told only *after* they report they have reached a verdict of guilty but are unable to agree on the punishment to be imposed." (emphasis supplied).

We are of the opinion that the jury had reached its verdict on the guilt of the appellant when the inquiry complained of by appellant was made by the juror. We find no error in the court's answer to this inquiry.

The judgment of the trial court is affirmed.

Affirmed.

Fogleman, J., disqualified.

T. C. DINGLE, ET AL *v.* CITY OF EUREKA SPRINGS ET AL

5-4190 413 S. W. 2d 641

Opinion delivered April 17, 1967

M. D. Anglin. for appellant.

James E. Coate, for appellee.

CONLEY BYRD, Justice. Appellants, T. C. Dingle, et al., instituted this action in the Chancery Court of Carroll County, Arkansas, to compel the city of Eureka Springs, by and through its duly elected officials, to hold a special election for the purpose of changing its city commission form of government to a mayor and alderman form. Appellants, in filing with the city clerk their petition containing 211 signatures, were proceeding under Act 497 of 1965 (Ark. Stat. Ann. §§ 19-110-111 Supp.. 1965]). The city clerk rejected the petition and this mandamus action followed.

The trial court agreed with the position taken by the city that the petition was an initiative petition under Amendment 7 to the Constitution of the State of Arkansas, and dismissed the action for mandamus upon a demurrer because the petition had not been filed with the city clerk more than 60 days before the November general election.

In *Knowlton* v. *Walton,* 189 Ark. 901, 75 S. W. 2d 811 (1934), we held that such a procedure as petitioners are here following was wholly independent of the Initia-

tive and Referendum Amendment to the Constitution, and that the election called for under the act there involved was not controlled by the election provisions of Amendment 7. Therefore we hold that the chancellor was in error in interpreting Act 497 as being a proceeding under the Initiative and Referendum Amendment. There is nothing in the Initiative and Referendum Amendment limiting the power of the legislature to pass an act authorizing a city to change its form of government at a special election to be called by its mayor on the petition of a certain number of voters therein.

In view of our decision on April 3, 1967, in *Catlett v. Republican Party;* 242 Ark. 283, 413 S. W. 2d 651, it would also appear that the chancery court had no jurisdiction of this cause of action and that, upon remand hereof, same should be transferred to the circuit court. Of course, our holding in the Catlett case does not affect the jurisdiction given to chancery courts under the Initiative and Referendum Amendment having to do with the sufficiency of local petitions filed with the county clerk or city clerk, as the case may be.

For the reasons herein set forth, this cause is reversed and remanded.

JIMMIE MCKINE *v.* STATE

5246 413 S. W. 2d 860

Opinion delivered April 4, 1967

[Rehearing denied May 15, 1967.]

[redacted]

Floyd G. Rogers, for appellant.

Joe Purcell, Attorney General; *Don Langston,* Asst. Atty. Gen., for appellee.

CARLETON HARRIS, Chief Justice. Jimmie McKine, appellant herein, was convicted of the charge of Driving While Intoxicated (second offense) in the Municipal Court of the City of Fort Smith, Arkansas. He appealed to the Circuit Court of Sebastian County (Fort Smith District), and was found guilty by a jury, sentenced to ten days in the County Jail, fined $250.00, and his driver's license suspended for a period of one year. From the judgment so entered, McKine brings this appeal.

We are unable to consider this appeal on its merits, for though the transcript has been thoroughly explored, no order granting the appeal by the Circuit Court is shown. This is a requirement of the law. Ark. Stat. Ann. §§ 43-2708 and 43-2709 (Repl. 1964). See also *McConnell* v. *State,* 227 Ark. 988, 302 S. W. 2d 805.

It might be added, however, that a majority of the court would also affirm the case on the merits.

Appeal dismissed.

SPECIAL SCHOOL DISTRICT OF FORT SMITH AND CHRIS D. CORBIN, SUPT. *v.* MR. RUBY C. LYNCH

5-4158 413 S. W. 2d 880

Opinion delivered April 24, 1967

Daily & Woods, for appellants.

Hardin, Barton, Hardin & Jesson; By: *Robert T. Dawson,* for appellee.

CARLETON HARRIS, Chief Justice. Mrs. Ruby C. Lynch, who had taught in the Fort Smith public school system for twelve years, held a teaching contract with the Fort Smith School Board for the 1964-65 term, the school term commencing September 3, 1964, and continuing for one hundred and eighty-two days. On December 9, 1964, following a series of absences due to illness, Mrs. Lynch, appellee herein, directed a letter to Mr. Chris D. Corbin, Superintendent of Schools, requesting a leave of absence for the balance of the school term; on December 11, Dr. George W. Allen, appellee's physician, directed a letter to the superintendent to the

effect that she was unable to fulfill her contract by reason of illness. On December 31, Mr. Corbin advised by letter, "We will be glad to grant you a leave of absence in terms of the policy listed in our Administrative Policy Handbook." The handbook was a pamphlet published and distributed to the personnel of the school system. The pertinent provisions to this litigation are found in Chapter v, entitled "Absence of Employees." Under Section 1, "Leave of Absence," the following provision is found:

"Granting of a leave by the Board of Directors signifies its intention to re-employ the person upon termination of his leave, with one proviso: there must be a vacancy which, in the judgment of the superintendent of schools, the returing employee is qualified to fill."

Section 6 provides:

"Whether or not the employee wishes to return to the school system he must, thirty days before expiration of his leave, signify to the superintendent of schools, in writing, his intention to return to the employ of the Board of Education or to submit his resignation."

At the same time that Mrs. Lynch requested a leave of absence, she also applied to the Teachers Retirement Board for disability benefits, and was accepted, disability payments commencing the first of the year. Mrs. Lynch received disability checks thereafter, but she only cashed these checks through the month of July, 1965, all checks received subsequent to that date being returned. Sometime in May, appellee orally notified Mr. Corbin that she desired to again teach with the commencement of the fall term.[1]

"Yes, I went to see him in May and told him what my doctor had told me, that if I kept on progressing

[1]It is not definite, from the evidence, whether this was late May or early June.

as well as I was then doing, that I would be able to teach in the fall."

There was no further communication between the parties until August 9, when appellee wrote Corbin and requested that her leave be terminated, and that she be returned to her teaching position.[2] Corbin then called her over the telephone, and apparently read to her the provision under Section 1, cited at the outset of this opinion. Mrs. Lynch remembered that he said something about "it was at his discretion as superintendent." The board did not give Mrs. Lynch a contract, and on August 31, 1965, she instituted suit in the Sebastian Chancery Court, seeking a Writ of Mandamus directing the school board and Corbin, appellants herein, to issue to her a 1965-66 teaching contract, and also asking that they be restrained from entering into any other teaching contracts until her contract had been issued. On trial, appellants contended that appellee did not comply with the necessary requirements for reinstatement as an active teacher, as set forth in the provisions under which she was granted a leave of absence nor did she follow the designated procedure for removing herself from the disability retirement rolls to regain her status as physically qualified to teach.

The court found that appellee was entitled to her contract under the provisions of Ark. Stat. Ann. § 80 1304(b) (Supp. 1965), and held that she was entitled "to recover of and from the defendant compensation at the then prevailing contractual rate for teachers of her experience minus any and all amounts paid to the plaintiff by the State Teachers Retirement Board from Oc-

[2]Mrs. Lynch testified that Corbin told her at the time of her visit in May that she would have to have a doctor's certificate, but that he would have Dr. Bost, a member of the school board, contact her doctor (Dr. Allen) as a matter of determining Allen's views relative to her health. Corbin testified that this was done, but that Bost subsequently indicated that he did not think Mrs. Lynch was ready to go back to teaching.

tober 1, 1965, to September 1, 1966.'"[3] From the decree so entered, appellants bring this appeal.

For reversal, appellant relies upon four points, but these are interrelated, and we do not deem it necessary to discuss each one separately.

Actually, the question is whether, in changing her status from an active teacher to that of an inactive one on leave and drawing disability, did Mrs. Lynch still retain the identical rights of a teacher who completed her contract, or was it first necessary that she follow established procedures to become reinstated to active standing?

Mrs. Lynch testified that she was given leave until the end of the school year (the evidence reflected that the school year ended June 4, 1965). Admittedly, she never gave any written notice to either Mr. Corbin or the school board until August 9 that she would be physically able, and ready, to teach when the fall term commenced.[4] She did orally notify Mr. Corbin some time in May or early June, but, according to her testimony, heretofore quoted, she advised Mr. Corbin that her doctor said, "If I kept on progressing as well as I was then doing, that I would be able to teach in the fall." It is at once obvious that, even though the oral notice had been given thirty days before the end of the term, and even if the oral notice be considered as substantial compliance with the notice provision, such notice would still be defective, for it is indefinite and conditional, dependent entirely on whether her health continued to

[3]We do not discuss the question of the jurisdiction of the Chancery Court to issue Writs of Mandamus, since the Chancellor ignored this prayer in the complaint, and based the relief granted on the theory that appellants had breached the contract with appellee.

[4]Her written notice of August 9 was accompanied by a statement from Dr. Allen. Even then, his statement is not absolute: "It is my professional opinion that she *will be able* [Emphasis supplied] to resume teaching school in the fall semester of 1965."

improve. Accordingly, if Mrs. Lynch was bound by the provisions found in Chapter 5 of the Administrative Policy Handbook, heretofore quoted, she cannot prevail in this litigation, for those provisions were not complied with.

The Chancellor held that the only question was whether the specific language of Ark. Stat. 80-1304 could be amended by the terms of the Teachers Retirement Law, or by the Administrative Policy Handbook, which had been adopted by the local school board, and he held that the section referred to was controlling. The pertinent part of that section is as follows:

"Every contract of employment hereafter made between a teacher and a board of school directors shall be renewed in writing on the same terms and for the same salary, unless increased or decreased by law, for the school year next succeeding the date of termination fixed therein, which renewal may be made by indorsement on the existing contract instrument; unless during the period of such contract or within ten (10) days after the termination of said school term, the teacher shall be notified by the school board in writing delivered in person or mailed to him or her at last and usual known address by registered mail that such contract will not be renewed for such succeeding year, or unless the teacher during the period of the contract or within ten (10) days after close of school shall deliver or mail by registered mail to such board his or her written resignation as such teacher, or unless such contract is superseded by another contract between the parties."

It is admitted that the board did not send Mrs. Lynch a ten-day written notice that her teaching contract would not be renewed. The Chancellor apparently gave no consideration to the last quoted phrase, "*unless such contract is superseded by another contract between the parties* [Emphasis supplied.]" We think the court erred in reaching its determination, and this is true

whether the provisions (listed in the Administrative Policy Handbook) under which Mrs. Lynch was granted leave are held to be a new contract, or whether such provisions are considered a part of appellee's 1964-65 teaching contract, entered into between the board and Mrs. Lynch on May 18, 1964. It may be that the italicized phrase primarily has reference to a new teaching contract (for the ensuing year), but, unquestionably, the parties here did enter into a new agreement, whatever it may be called. The Chancellor adopted the theory, here argued by appellee, that Mrs. Lynch never lost her standing as a regular teacher, but, under any theory, it is evident that her status as a teacher had changed, for she was not teaching at the end of the school year, and regular teachers with contracts do teach until the school year has ended. We think the provisions of the statute, relied on by the Chancellor, can only have reference to those teachers who have fulfilled their contracts, and who are thus eligible to be "carried over" to another school year. Mrs. Lynch, of course, did not comply with her contract, though such non-compliance was through no fault of her own.

However, even if we should consider that the taking of leave was not accomplished under a new contract, it would still appear that she violated the terms of her own teaching contract. This contract, *inter alia,* states:

"* * * that the teacher will conform to all the requirements, rules and regulations that the board has adopted or may hereafter adopt."

The provisions under Chapter 5 at issue in this litigation are included in the official publication of the board of directors of the Special School District of Fort Smith, and were expressly included as a part of appellee's teaching contract. So—Mrs. Lynch did not comply with the requirement of notifying the superintendent of her intention to return to active status, whether that requirement be considered as necessitated under a new

agreement (under which she was granted leave)—or under her teaching contract.

The doctrine of equitable estoppel also precludes Mrs. Lynch from recovery against the school board. In *Williams Manufacturing Company* v. *Strasberg,* 229 Ark. 321, 314 S. W. 2d 500, we said:

"* * * One cannot 'have his cake and eat it too.' He cannot accept benefits under a contract, and at the same time, avoid his obligations under such agreement. Appellee received a substantial benefit from the shipment of fall shoes, and having accepted that benefit, he cannot refuse to compensate the company because of their alleged breach."

Here, Mrs. Lynch received and accepted a valuable benefit from the school board, one incidentally that the board was not statutorily required to give. Having accepted the leave benefits as provided in the Administrative Policy Handbook, she cannot now be heard to say that the requirements for a return to active status are meaningless and without force or validity.

It might also be mentioned that there was no guarantee of reemployment, even if Mrs. Lynch had complied with all prerequisites, for the agreement permitting leave clearly states that reemployment is subject to a vacancy, "which, in the judgment of the Superintendent of Schools, the returning employee is qualified to fill."

Since, admittedly, the written notice signifying her intention to return was not given, and finding no evidence that would operate as a waiver of the requirement of written notice, it actually becomes unnecessary to discuss the question of appellee's failure to comply with the requirements of the Teacher Retirement System for removal from the disability retirement roll. Of course, a school board would not knowingly employ a teacher who might not be physically able to carry out the duties of the position, and the testimony reflects that, commenc-

ing with the 1961-62 school year, Mrs. Lynch had been absent quite a bit.[5] Appellee strongly argues that the requirements of the rule relative to removal from the disability roll were waived by the conduct of the parties, but, as stated, because the failure of appellee to give the notice, heretofore considered, is fatal to her cause of action, further discussion could only be in the nature of *dictum.*

Reversed.

BROWN and FOGLEMAN, JJ., concur.

JOHN A. FOGLEMAN, Justice, concurring. I concur in the result, but I would reverse and dismiss for want of jurisdiction. The chancery court is totally devoid of jurisdiction to issue a writ of mandamus, which appellee admitted was the only remedy sought. I am not unmindful of Ark. Stat. Ann. § 33-101 (Repl. 1962) which is § 1 of Act 54 of 1939, but it is patently unconstitutional. It violates Article 7, §§ 11 and 15. The former provides that the circuit court shall have exclusive jurisdiction of all civil and criminal cases, the exclusive jurisdiction of which may not be vested in some other court provided for by the Constitution. A more apt example of a legislative attempt to extend or enlarge the jurisdiction of courts of equity could not be found.

That the writ of mandamus is a common-law writ and within the jurisdiction of the circuit court only should be without argument, being a remedy at law. 34

[5]According to the evidence, she only taught 39½ days in the 1964-65 school term, was absent 30 days during the 1963-64 school year, 23 days during the 1962-63 school year, and 22 days during the 1961-62 school year.

[6]According to Hoyt R. Pyle, Executive Director of the Teacher Retirement System, a person desiring to be removed from the disability payroll must first request consideration of her case by the retirement system's medical board, and must present a properly executed medical report from her doctor, which states that she has fully recovered, and is physically able to return to teaching. The board would then be in a position to act on the request.

Am. Jur. 810, Mandamus, § 4. It is a common-law writ as distinguished from an equitable one and was unknown to the equity practice. 34 Am. Jur. 812, Mandamus, § 6; 55 C. J. S. 47, Mandamus, § 17b. In sustaining the jurisdiction of a circuit court, this court said that mandamus is essentially a proceeding at law. *Faulkner Lake Drainage Dist.* v. *Williams*, 169 Ark. 592, 276 S. W. 604. It is designed for the enforcement of *legal* rights. *Arkansas State Highway Commission* v. *Otis & Company*, 182 Ark. 242, 31 S. W. 2d 427; *Bingham* v. *McGehee,* 185 Ark. 707, 49 S. W. 2d 358; *Barney* v. *City of Texarkana,* 185 Ark. 1123, 51 S. W. 2d 509.

The legislature is without authority to give the chancery courts any jurisdiction they could not exercise at the time of the adoption of the Constitution of 1874. It can vest chancery courts only with jurisdiction in matters of equity. *German Nat'l Bank* v. *Moore*, 116 Ark. 490, 173 S. W. 401; *Wilson* v. *Lucas*, 185 Ark. 183, 47 S. W. 2d 8; *Patterson* v. *McKay*, 199 Ark. 140, 134 S. W. 2d 543. Their jurisdiction is fixed and permanent, and cannot be enlarged or abridged. Any law passed for the purpose of divesting, enlarging, diminishing, abridging or changing it is unconstitutional. *Hester* v. *Bourland*, 80 Ark. 145, 95 S. W. 992; *Gladish* v. *Lovewell*, 95 Ark. 618, 130 S. W. 579. In *Patterson* v. *McKay, supra,* this court said it did not offer a more extended discussion of this matter for the reason that it thought the principle must be universally recognized.

This court has held other legislative acts unconstitutional for this reason. Among them are:

An act providing for contest of primary elections in the chancery court was held unconstitutional. *Hester* v. *Bourland*, 80 Ark. 145, 95 S. W. 992.

An act purporting to give the chancery court jurisdiction to oust an incumbent officeholder for corruption in office. *Gladish* v. *Lovewell*, 95 Ark. 618, 130 S. W. 579.

In matters of which it has no jurisdiction, the judgments of a chancery court are void. *Raney* v. *Hinkle*, 80 Ark. 617, 95 S. W. 993; *Miller* v. *Tatum*, 170 Ark. 152, 279 S. W. 1002. The disregard of such void judgments would not constitute contempt. *Miller* v. *Tatum, supra.* They would not be res judicata in any future action. *Weathers* v. *City of Springdale*, 239 Ark. 535, 390 S. W. 2d 125. A fundamental want of judicial power cannot be supplied by acquiescence of the parties. *Sheffield* v. *Heslep,* 206 Ark. 605, 177 S. W. 2d 412; *O'Dell* v. *Newton,* 224 Ark. 541, 275 S. W. 2d 453; *Catlett* v. *The Republican Party of Arkansas,* 242 Ark. 283, 413 S. W. 2d 657. The lack of jurisdiction of the subject matter cannot be waived by any act of the parties. *Sugar Grove School Dist. No.* 19 v. *Booneville Special School Dist. No.* 65, 208 Ark. 722, 187 S. W. 2d 339. Consent of the parties cannot possibly confer jurisdiction of the subject matter. *Jernigan* v. *Baker*, 221 Ark. 54, 251 S. W. 2d 999; *Weathers* v. *City of Springdale, supra.*

Whether the question is raised by the parties or not, it is not only the power but the duty of a court to determine whether it has jurisdiction of the subject matter. 20 Am. Jur. 2d 453, Courts, § 92; 21 C. J. S. 175, Courts, § 114.

I would dismiss, rather than remand with directions to transfer to a court of law, because I think appellee has sought to have the court control the discretion of the Superintendent of Schools and the Directors of the School District. The appellee had no right to a leave of absence under her contract, nor do there appear to be any statutory provisions governing the same. Provision for such leaves, then, becomes a discretionary matter with the school board. They exercised this discretion by providing administrative policies in connection therewith. While these regulations provide for re-employment of a teacher granted leave thereunder, after proper notice by the teacher, there is the proviso that there must be *a vacancy which, in the judgment of the superintendent of schools,* the returning employee is *qualified* to fill.

Certainly the physical ability of appellee to perform was an element to be considered by the superintendent and I feel that the evidence is clear that by the time this was established (assuming that it was established) the superintendent did not feel, in his judgment, that appellee was qualified to fill any vacancy then existing.

It is elementary that mandamus will not lie to compel performance of an act that is discretionary. *Smith* v. *Sullivan,* 190 Ark. 859, 81 S. W. 2d 922; *Jackson* v. *Collins,* 193 Ark. 737, 102 S. W. 2d 548; *Hardin* v. *Cassinelli,* 204 Ark. 1016, 166 S. W. 2d 258; *State ex rel Pilkinton* v. *Bush,* 211 Ark. 28, 198 S. W. 2d 1004; *Village Creek Drainage Dist. of Lawrence Co.* v. *Ivie,* 168 Ark. 523, 271 S. W. 4. It will only lie to compel performance of a purely ministerial act or to require, but not control, the exercise of discretion. *Arkansas State Highway Comm.* v. *Mabry,* 229 Ark. 261, 315 S. W. 2d 900; *Dotson* v. *Ritchie,* 211 Ark. 789, 149 S. W. 2d 603; *Satterfield* v. *Fewell,* 202 Ark. 67, 202 S. W. 2d 949. It cannot be used to correct an erroneous decision already made by an officer or tribunal. *Jackson* v. *Collins,* 193 Ark. 737, 102 S. W. 2d 548; *Mance* v. *Mundt,* 199 Ark. 729, 135 S. W. 2d 848; *Mobley* v. *Conway County Court,* 236 Ark. 163, 365 S. W. 2d 122; *Dotson* v. *Ritchie, supra*; *State ex rel Latta* v. *City of Marianna,* 183 Ark. 927, 39 S. W. 2d 301. It will not be granted to review the exercise of discretion by an officer or board. *Better Way Life Ins. Co.* v. *Graves,* 210 Ark. 13, 194 S. W. 2d 10.

I also think that mandamus would not lie because it is essential to the issuance of the writ that the legal right of the petitioner to the performance of the act be clear, undoubted and unequivocal, so as not to admit of any reasonable controversy. *Naylor* v. *Goza,* 232 Ark. 515, 338 S. W. 2d 923. The petitioner failed to make such a showing as to invoke this writ, regardless of whether she was entitled to other relief or not.

I am authorized to state that Brown, J., joins in this concurring opinion.

A. L. SOSEBEE ET AL *v.* RAYMOND T. BOSWELL, TRUSTEE FOR BLAYLOCK INVESTMENT CORPORATION

5-4142 414 S. W. 2d 380

Opinion delivered April 24, 1967
[Rehearing denied May 29, 1967.]

Young & Rosteck; By *O. M. Young* and *Smith, Williams, Friday & Bowen;* By *George Pike Jr.,* for appellant.

Griffin Smith, for appellee.

GEORGE ROSE SMITH, Justice. This is a foreclosure suit brought by the appellee Blaylock Investment Com-

pany to enforce a deed of trust securing a loan made by Blaylock to the three appellants, Dr. and Mrs. Sosebee and Valley View Developers, Inc. The chancellor rejected the borrowers' plea of usury and entered a decree of foreclosure. Inasmuch as we find that the testimony of Blaylock's own witnesses establishes a clear-cut case of usury we need discuss only that issue.

For several years before the loan was made in 1965 the Sosebees, acting through the Valley View corporation, had been attempting to develop a residential addition to North Little Rock. The venture was in serious financial trouble, with materialmen and other creditors pressing their claims. The Sosebees applied to Blaylock Investment Company, a loan broker, for a loan of $118,000, of which $78,700 was to be used to pay creditors and the remaining $39,300 (which was never actually advanced) to develop and sell 51 lots in the subdivision. Blaylock refused to lend any money to Sosebee for construction purposes, because it believed him to be an incompetent builder. It did agree to finance the development and sale of the 51 lots, which it considered to have a value of about $223,000. The parties expected all the lots to be sold during the three-year life of the loan.

William G. Cooksey, Blaylock's Arkansas manager, testified that the company did not think the interest upon a subdivision loan such as this one to be a great enough return for the risk involved. Moreover, Blaylock itself did not make long-term investments in such loans: "All of our loans wind up with institutional investors." Hence, before closing the Sosebee loan, Blaylock sought (a) an institutional investor and (b) an opportunity to make for itself a profit in addition to whatever interest might be involved.

Both objectives were accomplished. Blaylock obtained a firm written commitment from Standard Life & Accident Insurance Company by which Standard agreed to purchase the $118,000 loan. Standard was to

receive a 1% commitment fee from the borrowers, and Blaylock was to receive a 1% service charge from them —both items admittedly being chargeable as interest. The loan, bearing interest at 6% per annum, was payable over a period of three years in three equal principal installments.

Blaylock also procured from the Sosebees a side contract (called an Escrow Agreement) by which Blaylock expected to increase its profit. The pivotal question in the case is whether that additional profit must be treated as interest. If so, the loan was usurious; otherwise not.

The Escrow Agreement was in the form of a letter, addressed to Blaylock, which the Sosebees and Valley View were required to sign. The agreement is so hard to summarize accurately that we quote its essential provisions:

"In consideration of your . . . procuring for the undersigned the sum of $118,000.00 in development financing and your undertaking to provide permanent FHA and/or VA financing for residences to be constructed upon the captioned lots, which undertaking shall include your finding the necessary funds, processing the applications for FHA and/or VA loan, and when approved by The FHA and/or VA and your investors the closing of such mortgage loans, the undersigned [do] hereby agree . . . to place in escrow with you at the time each lot . . . is released from the blanket $118,000.00 mortgage covering such lot, the sum of $150.00 for each such lot. If the builder of a residence upon the respective lot closes his permanent FHA and/or VA financing upon said lot through your company, after approval of the property and borrower by the investor and the FHA and/or VA, the said sum of $150.00 shall be refunded to the undersigned when such respective loan is closed. It is understood and agreed that you shall make such mortgage loan after approval of the borrower and the property

for such loan by the FHA and/or VA and your investor, at your then going discount rate, but not to exceed the discount and other charges then in force and charged by Federal National Mortgage Association in the purchase of such mortgage notes.

"As to the monies escrowed attributable to any lot, if permanent financing relating to such is not closed through your company within three (3) years from date hereof, such monies are to be forfeited to you as liquidated damages, processing fees, and refund of legal charges and expenses incurred and to be incurred by you. This forfeiture to be complete without notice or the necessity of demand by you; upon failure of the events hereinabove set forth to occur within the time limit set forth. The said forfeited liquidated damages to be applied and disbursed by you without accounting to the undersigned in any manner . . . in your uncontrolled discretion, it being agreed, however, that upon the happening of either event the undersigned shall have no further or additional liability arising out of this agreement. The closing of a loan through the facilities of another lender, except for short term construction loans, shall be cause for immediate forfeiture of the fee applicable to a given lot without regard to the time element specified above.

"Should, on any date prior to maturity, the development loan be prepaid in a lump sum payment then the undersigned [do] hereby agree . . . to place in escrow with you at the time the mortgage is retired in full the sum of $150.00 for each individual lot covered by the mortgage on the date of prepayment. The final disposition of these escrowed funds shall be made in exact accord with the provisions applicable to releases covering individual lots."

This Escrow Agreement is to be tested by two well-settled principles: First, any profit exacted by the lender must be treated as interest if it depends upon a con-

tingency not within the control of the debtor. As we said in *Hollan* v. *American Bank of Com. & Tr. Co.*, 159 Ark. 141, 252 S. W. 359 (1923): "When the lender stipulates for the absolute repayment of principal and interest at the highest legal rate, and for a further profit payable upon a contingency not under the control of the borrower, the contract is usurious. Furthermore, even *the chance* [our italics] of the lender's receiving excessive profit under the transaction or arrangement is more than the lender is legally entitled to require. * * * *A fortiori* is the contract usurious when the contingency under which the excessive interest is payable is under the control of the lender."

Secondly, the moneylender cannot impose upon the borrower charges that in fact constitute the lender's overhead expenses or costs of doing business. Such outlays are fundamentally for the lender's benefit and cannot, by whatever device, be shouldered off upon the borrower. On this point our recent decisions are unequivocal. *Strickler* v. *State Auto Finance Co.*, 220 Ark. 565, 249 S. W. 2d 307 (1952); *Winston* v. *Personal Finance Co.*, 220 Ark. 580, 249 S. W. 2d 315 (1952).

The Escrow Agreement manifestly flouts both principles. These borrowers had not even a semblance of control over the contingency that would avoid the forfeiture of each $150 deposit. On this point the appellees make this assertion in their brief. "It should be pointed out here that all Sosebee had to do to avoid forfeiture of the $150 per lot was to send the customers to Blaylock and have Blaylock make them a loan." The short answer to this twofold suggestion is that both possibilities were patently beyond Sosebee's control. Sosebee's responsibility to the moneylenders was that of selling lots. It did not lie within his power to compel the purchaser of a lot to apply to Blaylock for a loan.

Again, even if the purchaser did elect to seek a Blaylock loan Sosebee had no voice in the lender's deci-

sion to approve or disapprove the application. In the first paragraph we have quoted from the Escrow Agreement it is stated no fewer than three times that each loan must be approved by Blaylock's investor. At the oral argument counsel for the appellees insisted that Blaylock was contractually bound to make a loan to any purchaser whose credit rating was acceptable. True, but all that assertion really means is that Blaylock promised to do business as usual, making only such loans as any other similar lending agency would have been equally glad to make. It is significant that Blaylock offered no discount, financial advantage, or other inducement for its supposedly valuable promise to provide long-term financing for those who bought lots in Valley View Subdivision.

The Escrow Agreement likewise runs counter to the rule that the lender's overhead expenses cannot be foisted off on the borrower as something other than interest on the loan. The contract, quoted above, declares that the escrow deposits are to be forfeited as "liquidated damages, processing fees, and refund of legal charges and expenses incurred and to be incurred" by Blaylock. Blaylock's manager, Cooksey, came up with this lame explanation: "The $150.00 is a fee that we have determined from past experience that would cover our expense and justify us committing ourselves for a period of three years. . . We, of course, have to maintain our office and our staff. We have to contact banks for verification of applicants' deposits, many cases the employers." In short, Blaylock had overhead expenses that stemmed not from Sosebee's duty to sell lots but from its own business of lending money.

Especially pertinent to the issue of usury is the third paragraph that we have quoted from the agreement. Here Blaylock guaranteed to itself its profit of $150 a lot even if the loan made by its investor should be prepaid in full before any lots were sold and thus before Blaylock had incurred any risk or any expense.

If the prepayment were accomplished by a refinancing of the debt, the new mortgagee, according to the appellees' reasoning, could have legally exacted from Sosebee precisely the same Escrow Agreement that Blaylock required. In that event Sosebee would have been unconditionally bound to pay $150 a lot to one lender or the other, and often to both, since it would not be possible for both lenders to finance the improvement of a particular lot. Similarly, if all the lots were bought by a single purchaser who paid cash for the property, thus liquidating the Sosebee loan, Blaylock would pocket $150 a lot without having lifted a finger to earn it.

The appellees argue in their brief that the transaction was shielded from usury by the forfeiture's being contingent. They say: "Forfeiture was contingent on non-compliance [on Sosebee's part]. The presence of a contingency eliminates any aspect of usury. *Dunbar* v. *State Building & Loan,* 171 Ark. 232, 284 S. W. 2d [1926]." This statement is much too broad. In the first place, the insertion of the contingency itself may be a cloak for usury, as in *Doyle* v. *American Loan Co.,* 185 Ark. 233, 46 S. W. 2d 803 (1932). Secondly, the *Dunbar* case, relied on by these appellees, involved a loan made by a *bona fide* building and loan association. We distinguished such transactions in *O'Brien* v. *Atlas Finance Co.,* 225 Ark. 176, 264 S. W. 2d 839 (1954), where we bottomed our decision upon an observation that applies equally well to the Escrow Agreement now before us: "If this transaction is not usurious, then any transaction can be dressed up so as not to constitute usury although it would be clear that it was merely a scheme to evade the usury laws."

The decree must be reversed and the cause dismissed.

HARRIS, C. J., and FOGLEMAN, J., dissent.

JOHN A. FOGLEMAN, Justice, dissenting. This appeal comes from a decision of the chancellor that the transaction did not constitute usury. We must, in order to

reverse, say that his findings of fact were clearly against the preponderance of the evidence, or that the evidence viewed in the light most favorable to appellee, shows that the transaction was usurious as a matter of law. I do not agree that either situation prevails.

This court has not abrogated the rule that the burden of proof is upon the party who pleads usury to show clearly that the transaction was usurious. *Wallace* v. *Hamilton*, 238 Ark. 406, 382 S. W. 2d 363; *Smith* v. *Mack*, 105 Ark. 653, 151 S. W. 431; *Jones* v. *Phillipe*, 135 Ark. 578, 206 S. W. 40; *Briant* v. *Carl Lee Bros.*, 158 Ark. 62, 249 S. W. 577. The defense of usury against payment of a prima facie obligation must be established by clear and convincing evidence and not by mere preponderance. *Hollan* v. *American Bank of Commerce & Trust Co.*, 159 Ark. 141, 252 S. W. 359; *Baxter* v. *Jackson*, 193 Ark. 996, 104 S. W. 2d 202; *Commercial Credit Plan* v. *Chandler*, 218 Ark. 966, 239 S. W. 2d 1009.[1] This rule has been modified only in cases where the lender includes some hidden and unitemized charge in the transaction. The burden is upon the lender to satisfactorily explain the hidden item. *Universal CIT Corporation* v. *Lackey*, 228 Ark. 101, 305 S. W. 2d 858. Usury will not be presumed, imputed or inferred when the opposite conclusion can reasonably be reached. *Cammack* v. *Runyan Creamery*, 175 Ark. 601, 299 S. W. 1023; *Hill* v. *Jacobs*, 187 Ark. 1162, 60 S. W. 2d 564; *Brown* v. *Fretz*, 189 Ark. 411, 72 S. W. 2d 765; *Brittain* v. *McKim*, 204 Ark. 647, 164 S. W. 2d 435.

There is no hidden or unitemized charge in this case. All dealings were open and above board. Dr. Sosebee

[1]I am not unmindful of *Dickinson-Reed-Randerson Co.* v. *Stroupe*, 169 Ark. 277, 275 S. W. 520; *Tisdale* v. *Tankersley*, 192 Ark. 70, 90 S. W. 2d 225; and *Tisdale* v. *Maness*, 192 Ark. 465, 92 S. W. 2d 380, wherein it was held that a fair preponderance of the evidence was all that was necessary. Later cases have restated the "clear and convincing rule". All three of these cases affirmed the trial court and in each of the first two, evidence that seems to have shown clearly that there was usury was presented. The third might actually have applied the "mere preponderance" rule but cited no authority.

knew exactly what the transaction was. However reluctant he may have been to make the agreement, he was not overreached in the dealings. A collateral contract required by a lender entered into contemporaneously with a contract for lending and borrowing of money where the collateral agreement is itself lawful and made in good faith, does not invalidate a contract for loan of money as usurious, although the lender might gain some advantage or the effect might be to exact more from borrower than would accrue to lender from a legal rate of interest. *Hogan* v. *Thompson,* 186 Ark. 497, 54 S. W. 2d 303; *Leavitt* v. *Marathon Oil Co.,* 186 Ark. 1077, 57 S. W. 2d 814; *Commercial Credit Plan* v. *Chandler,* 218 Ark. 966, 239 S. W. 2d 1009. The position which a court of equity should take is well stated in the affirmance of a decree finding that a transaction was in good faith and not usurious in *Johnson* v. *Chicot Bank & Trust Co.,* 128 Ark. 640, 194 S. W. 29:

> "* * * Even if it be found that Simms took advantage of the necessities of the Johnsons to drive a hard bargain, and purchased the land at less than its true value, it does not necessarily follow that the transaction was usurious, but on the other hand, if the testimony showed that the conveyance of the land at a grossly inadequate price was merely a scheme to disguise an usurious transaction, then a court of equity should look through the form of the transaction to the substance and declare it to be void."

Unquestionably this court has always scrutinized suspicious transactions that might constitute covers to conceal usurious interest in order to determine the true nature of the transaction. *Hartz* v. *Wilson,* 205 Ark. 965, 171 S. W. 2d 956. This court has been most reluctant in these cases to overturn decisions of chancellors involving determinations whether the lender acted in good faith or the transaction was a cloak for usury as pointed out in *Griffin* v. *Murdock Acceptance Corp.,* 227 Ark. 1018, 303 S. W. 2d 242.

A contract requiring payment for services rendered and not exclusively for money advanced is not usurious. *Ayers & Graves* v. *Ellis,* 185 Ark. 818, 49 S. W. 2d 1956. A contract for payment of a commission of 1½% of the amount of notes and invoices given a bank against which the bank advanced money to a mill company at 10% interest by credit to its account was held to be for compensation for services and trouble in keeping the account in this manner for the mill company and not to render the loan usurious. *Citizens Bank* v. *Murphy,* 83 Ark. 31, 102 S. W. 697.

Notes and mortgage given to cover money and merchandise to be furnished by payee with interest at 10% per annum, was not rendered usurious by agreement that payee would charge a commission of 10% for the first year and 20% for the second year on the price paid by him to jobbers and wholesalers on merchandise furnished the maker by him, if made in good faith for securing a profit on the goods and not to evade the usury laws. *Briggs* v. *Steel,* 91 Ark. 458, 121 S. W. 754.

In *Leavitt* v. *Marathon Oil Company,* 186 Ark. 1077, 57 S. W. 2d 814, the collateral contract required was a lease of a filling station, bulk sales station and equipment worth $7,500.00 by borrower to lender for $1.00 per month. The transaction was held not usurious in the absence of a corrupt agreement between the parties making the lease a device or cloak for usury which the lender intended to exact and the borrower to pay.

An agreement between a cotton factor and cotton planters by which the former was to loan substantial sums of money at 10% per annum to the latter to enable them to make a cotton crop and the latter were to ship at least 200 bales of cotton which factor was to undertake to sell or to pay $1.25 per bale liquidated damages for each bale less than the required number was held not to make the transaction usurious. *Blackburn* v. *Hayes,* 59 Ark. 366, 27 S. W. 240. Such an ar-

rangement was held to be valid even where a contention was made that the cotton was not being sold at the highest market price. *Scott* v. *McCraw, Perkins & Webber Co.*, 119 Ark. 133, 177 S. W. 901. The same result was reached when the agreement required a bank to ship one bale for each $10.00 advanced. *Allen-West Comm. Co.* v. *Peoples Bank*, 74 Ark. 41, 84 S. W. 1041.

An agreement requiring that straitened rice farmer pay his lender a salary for assistance and advice about cultivating and harvesting a rice crop for which money was loaned was held in good faith and valid. *Cain* v. *Stacy*, 146 Ark. 55, 225 S. W. 18.

Appellee is trustee in a deed of trust to secure the payment of an indebtedness of appellants to Blaylock Investment Corporation, a firm of mortgage bankers, approached by Dr. Sosebee on behalf of appellants. As mortgage banker, Blaylock is not really a money lender. Its normal procedure is to approach an institutional investor on a proposed loan for a commitment from the investor to purchase the loan at some future date. Blaylock then loans the money to the borrower on the terms agreed upon for the commitment in order to expedite the deal. In this case a firm commitment was obtained from Standard Life and Accident Insurance Company to purchase the loan on or before May 15, 1966. The purpose of Blaylock in making this type of loan at all was in order to promote its usual business—that of handling loans on individual residences, just as the purpose of the cotton factors in the cases above cited was to promote their usual business of selling cotton. Blaylock would not have made any subdivision loan at any interest rate if they were not going to get at least an opportunity to get the home owner loans. They sought and obtained an advantageous agreement insuring solicitation on their behalf by appellants and guaranteeing themselves an entree to prospective lot purchasers for the placing of individual home loans.[2] In order to in-

[2]Blaylock also placed these loans with institutional investors and received a fee from them for doing the collecting and bookkeeping, amounting to from one-fourth to one-half of one per cent

sure performance, they provided for liquidated damages, just as the cotton factors did. They did not require the payment of this amount until a lot was sold and the liquidated damages were to be returned to appellants if Blaylock actually handled the permanent financing for a residence constructed on the particular lot. Blaylock's undertaking was to provide FHA or VA financing by finding the necessary funds, processing the applications and closing the loans approved by FHA and VA. Such loans were to be at the going discount rate, not to exceed discount rates and charges then charged by Federal National Mortgage Association in the purchase of notes. The only requirement was that the borrower and property meet the requirements for the loan by the FHA or VA and the investor whose funds were obtained by Blaylock. This is a service which requires some care and skill and knowledge of the money market and available investors. It would definitely be an advantage to lot purchasers, most of whom would not have the slightest idea about obtaining this type of financing. It should be a matter of common knowledge that there are times when our economy is such that loans of this type become difficult to obtain. A guaranteed source of this financing would naturally promote the sale of lots,[8] and each purchaser would be informed of Blaylock's undertaking. If only 14 of 51 lot purchasers obtained their loans through Blaylock, the transaction could not possibly, under any construction, result in the payment by appellants under both the loan and the collateral agreement of an amount in excess of 10% per annum on the loan.

I submit that the only fact question for the court below was whether or not the collateral agreement was entered into in good faith. No one contends that it is

of the interest paid on the loan. They would also receive a fee of 1% of the loan at the time it was placed.

[8]For some reason appellee had five houses on other property for sale which he "could not close" and on which he unsuccessfully tried to borrow money from Blaylock. Blaylock's vice president said that the money market as to government insured loans had been in a state of turmoil for about six months.

in and of itself illegal. I do not see how it can be said that the chancellor's finding is clearly against the preponderance of the evidence. I also submit that the agreement cannot be considered usurious because of the fact that it is not obvious or apparent that more than 10% of the amount of the loan would be paid as interest on the note and liquidated damages under the contract. In this I do not agree with the majority's application of some of our earlier decisions.

I contend that the holding in *Dunbar* v. *State Building & Loan Association*, 171 Ark. 232, 284 S. W. 2, is applicable and requires a holding for appellant.

> "The test laid down by this court to determine whether a loan of money by a building and loan association to a stockholder therein is usurious and void is to ascertain whether the contract is an unconditional agreement to pay more than 10 per cent per annum for the use of money, or whether an agreement to pay more is dependent upon a contingency. Before the agreement can be characterized as usurious, a contract to pay more than 10 per cent per annum for the use of money by a stockholder therein must depend upon the happening of a certain event. If dependent upon a contingency, the agreement is not such a usurious contract as is inhibited by our Constitution and law. *If there is an element of uncertainty and hazard in the contract relative to the amount of interest to be paid, this contingency excludes the idea of usury in the agreement.*" [Emphasis mine]

Here is the application there made:

> "In the contract before us it is clearly provided that Annie Spears Dunbar should receive, in the settlement of her loan, her full share of the profits which the association might earn during the period her stock was maturing. Although she was required to pay a small amount as interest in excess of 10 per

cent per annum, the interest payments, had she made them, would have automatically been reduced by earnings of the association upon her monthly payments in case of a full performance of the contract on her part. Just what interest she might have paid under the contract had she matured her stock and liquidated her loan by a surrender thereof cannot be computed, as the time her monthly payments were to continue was dependent upon the maturity of her stock through the payment of dues and the net amount earned on her monthly payments. If loaned out immediately and continuously, the monthly interest payments might have been compounded for her benefit many times. *This element of hazard or contingency in the contract* eliminated any usury from the agreement." [Emphasis mine]

The contingency there was certainly not under the control of the borrower. This rule is not altered in the slightest by the holding in *Doyle* v. *American Loan Co.*, 185 Ark. 233, 46 S. W. 2d 803. To the contrary, it is recited as a well settled rule. It was said to be equally well settled that a merely *colorable* contingency or hazard would not prevent excessive interest charges from being usurious. There the loan was for six months and the maximum 10% was withheld. The contingency was that borrower would not have to pay if he died or suffered permanent and total disability, loss of eyesight, loss of a hand or foot, or damage of more than 50% to his household furniture. The court held this to be a cloak or device for usury *because the lender was not an insurance company.* A more obvious device could not be found. Had the lender been an authorized insurer, the transaction would not have been usurious. Blaylock is engaged only in the business of rendering the services called for by the escrow agreement in this case.

I cannot agree that the decision in *O'Brien* v. *Atlas Finance Company,* 223 Ark. 176, 264 S. W. 2d 839, limited legal, bona fide collateral agreements to building and loan associations. Such a limitation would be unconscionably, and probably unconstitutionally, discriminatory.

There the borrower was actually paying his loan in monthly installments by paying on an investment certificate issued by lender at 2% interest. No such transaction is involved here. This transaction is much more comparable to the building and loan association practice than to the investment certificate of certain finance companies.

Neither can I agree with the application of *Hollan* v *American Bank of Comm. & Trust Co.,* 159 Ark. 141, 252 S. W. 359, by the majority. The language quoted therefrom in its opinion is an excerpt from a textbook and all except the last sentence is dictum. The last sentence was correctly applied, but the earlier part is contrary not only to earlier cases, but to *Dunbar* v. *State Building & Loan Association,* 171 Ark. 232, 284 S. W. 2, a case decided three years later. I submit that the actual *holding* in the *Hollan* case is consistent with that of the *Dunbar* case. Hollan was an automobile dealer. The bank contended that a note bearing 8% interest payable thirty days after date was not rendered usurious because of a 1% brokerage charged, since it was contemplated that the maturity would be extended if the borrower had not sold enough cars to pay the note. The court held that the clear preponderance of the evidence was against the bank's contention. The court said that the payment of *the* 1% *brokerage was not based upon a contingency,* having been taken out when the loan was made. It added that the *time* for payment was not within the option or control of the borrower but that extensions and renewals were wholly optional with the lender and a matter of its grace and favor. The language of a textwriter should not supersede the decisions of our own court. Dr. Sosebee and Valley View certainly could not force any purchaser to go to Blaylock but there certainly would have been an excellent opportunity for solicitation by them. On the other hand, Blaylock could not turn down any borrower who could meet reasonable credit and security requirements. The contingency, then, was not subject to control by the lender, and it seems to me that appellants did have some control over it.

The vice president of Blaylock explained how the

amount of $150.00 per lot was selected. It is an amount determined from past experience which would cover their expense in committing themselves to obtain or maintain institutional investors who would accept the permanent residential loans, even in tight money markets, over a period of three years and to process loan applications by unsuccessful applicants for which Blaylock would not otherwise be compensated. This is something different from a service charge for overhead expense on a loan actually made as was the situation in *Strickler* v. *State Auto Finance Co.*, 220 Ark. 565, 249 S. W. 2d 307 and *Winston* v. *Personal Finance Co.*, 220 Ark. 580, 249 S. W. 2d 315. Blaylock did not include any of its overhead expense connected with this loan in arriving at the $150 figure, nor does it seek to require appellant to bear that burden.

How can we say that there is a clear or even fair preponderance of evidence that the conclusion reached by the chancellor is one that could not reasonably be reached?

Possible usury based upon a collateral contract not consummated and upon which suit was not brought is not a defense to an action for the amount of money loaned and for foreclosure of the mortgage securing it. *Mitchell* v. *Day,* 193 Ark. 942, 104 S. W. 2d 198. This is another reason why the chancellor should be affirmed, as this case is strikingly similar. In the *Mitchell* case, the lender agreed to loan $2,000.00 at 8% upon the security of a mortgage on certain land, if borrower would deed him another tract of land. Lender advanced $983.63, but refused to make further advances because of defects in borrower's title to the mortgaged property and returned the deed to the other property. Thereafter, upon borrower's ultimate refusal to perform, lender brought suit on the note and to foreclose the mortgage. Here, appellee seeks only to have judgment for the amounts actually advanced and no recovery is sought on the collateral agreement. The contract here was never consummated in the sense of the above holding. Appellant wholly failed

to furnish the required payment and performance bond for the work of certain contractors worded to protect the lender's priority and to insure that necessary development of the lots be accomplished. All parties knew that this development was necessary in order for appellants to be able to retire the loan. Only three lots were sold before acceleration of the debt, so only three deposits against liquidated damages were made. Thus the contract was not consummated. While I find no definition of the word "consummate" in the Arkansas cases, the facts in the *Mitchell* case clearly indicate that court had in mind the definition given in Black's Law Dictionary and supported by most of the authorities listed under the definition in Words and Phrases. It is:

> "To finish by completing what was intended; bring or carry to utmost point or degree; carry or bring to completion; finish; perfect; fulfill; achieve."

To consummate a contract is to carry it to its ultimate completion. *Schulman* v. *City of New York*, 178 Misc. 593, 35 NYS 2d 100.

Since the majority do not reach the question of propriety of acceleration of the debt, I will not discuss it at length. It is sufficient to say that both the failure to furnish payment and performance bond protecting the lender's priority and insuring the development of the property constituting the security as required by the security instrument and the failure to pay interest when due have adequate evidentiary support.

I would affirm the decree of the trial court.

I am authorized to state that Harris, C. J., joins in this dissent.

MARY ALICE MOORE, ADMINISTRATRIX, ET AL *v.* MICHAEL ROBERTSON ET AL

5-4156 413 S. W. 2d 872

Opinion delivered April 24, 1967

Bernard Whetstone, for appellant.

John M. Graves and *Louis Tarlowski*, for appellee.

GEORGE ROSE SMITH, Justice. This action arises out of a head-on collision in Calhoun county between a car owned and being driven by Ezell Walters and a pick-up truck that its driver, Michael Robertson, had borrowed temporarily from its owner, Jim Ritchie, a filling station operator who used the truck in his business. There were two passengers in the Walters automobile: Clayton Moore, who was killed, and Wallace Montgomery, who was injured. Moore's widow and Montgomery, now the appellants, brought the suit, originally naming only

Robertson and Ritchie as defendants. The principal question on appeal is whether the trial court abused its discretion in setting aside a default judgment against Robertson, the driver of the truck owned by Ritchie.

The complaint was filed on November 23, 1964. Ritchie was served with summons on November 27 and duly filed his answer on December 16. Robertson was served with summons on December 2, but he failed to file an answer within the time allowed by law. On January 11, 1965, on motion of the plaintiffs, the court entered a default judgment against Robertson on the issue of liability, with the question of damages to be heard at a later date. Also on January 11 the plaintiffs amended their complaint to bring in a third defendant, J. O. Ashcraft, asserting at the time of the collision Robertson was employed by Ashcraft and was acting in the scope of his employment. (The original complaint had asserted that Robertson was employed by Ritchie.)

On February 12 Ritchie filled a motion to set aside the default judgment against Robertson. Ritchie asserted that his liability insurance company had undertaken his defense, as required by the policy. The motion then went on to allege:

> That under the terms of the policy there is and will be a question of coverage with regards to defendant, Michael Robertson. In view of this, insurer through its agents and servants, contacted defendant, Michael Robertson, with regards to the summons served on him . . . and were advised in writing on December 1, 1964, that Mitchell Robertson would take appropriate action in order to answer the summons to avoid any default judgment being rendered. Relying on the written statement of defendant Michael Robertson, defendant Jim Ritchie's insurer did not deem it necessary or proper to undertake the defense of Michael Robertson at that time. That had Michael Robertson not indicated that he intend-

ed to retain an attorney to answer the complaint filed against him, that even though there was and is a question of coverage under the terms of the policy issued to defendant Jim Ritchie, he would have undertaken the defense of Michael Robertson.

On February 23 Robertson filed his own motion to vacate the judgment against him, asserting the same facts as those set out in Ritchie's motion. The court heard and decided the matter before the expiration of the term at which the default had been taken. No testimony was introduced, but the plaintiffs admitted the assertions of fact in the motions. The court vacated the judgment, without stating its reasons. Later on the case was tried on its merits and resulted in a judgment in favor of all three defendants.

Whether a default judgment should be vacated during the same term is an issue lying within the discreton of the trial court. *Johnson* v. *Jett,* 203 Ark. 861, 159 S. W. 2d 78 (1942). Hence the question now before us is whether there was an abuse of discretion in this instance. We have concluded that there was, that the judgment should not have been vacated.

At one time our statutes were markedly liberal in permitting trial courts to grant extensions of time for the filing of defensive pleadings and to set aside default judgments within the term. That liberality was greatly curtailed by the enactment of Acts 49 and 351 of 1955. Those acts were construed in *Walden* v. *Metzler,* 227 Ark. 782, 301 S. W. 2d 439 (1957), and *Pyle* v. *Amsler*, 227 Ark. 785, 301 S. W. 2d 441 (1957). We held that the 1955 statutes were mandatory in requiring a defendant to plead within the time fixed by law and in allowing a trial court to set aside an ensuing default judgment only upon a showing of unavoidable casualty.

Some two months before the *Walden* and *Pyle* cases were decided the legislature adopted Act 53 of 1957, which relaxed the strictness of the 1955 acts to the ex-

tent of declaring that "nothing in this Act shall impair the discretion of the Court to set aside any default judgment upon showing of excusable neglect, unavoidable casualty or other just cause." Ark. Stat. Ann. § 29-401 (Repl. 1962). In the case at hand there is no issue of unavoidable casualty. The question is whether the trial court abused its discretion in finding either excusable neglect or other just cause for vacating the judgment.

As far as Robertson himself is concerned, no excuse whatever is offered for his failure to file an answer. He had been served with a summons. He knew that an answer was required. He assured Ritchie's insurance carrier that he would take appropriate action in time to avoid a default. Yet he did nothing and offers no explanation for his delinquency.

Ritchie and his insurer are in no better position than Robertson. Ordinarily they would have no standing to question a judgment entered against a codefendant. Here, however, the insurer seeks to step into Robertson's shoes by raising the possibility that his liability to the plaintiffs may be within the coverage of Ritchie's policy. Yet how can the insurer be permitted to enjoy the benefits of Robertson's position without also submitting to its burdens? The company relied upon Robertson to act in its behalf, to protect it from the consequences of a default judgment. In the circumstances Robertson's inexcusable neglect must be imputed to the insurance company. We have often held that a party is bound by the negligence of his attorney in failing to file an answer. *Dengler* v. *Dengler*, 196 Ark. 913, 120 S. W. 2d 340 (1938), citing earlier cases. If one cannot rely upon his attorney in such a situation there is even less basis for reliance upon one having no knowledge of the law.

During our discussion of the case there was a suggestion that the trial court was justified in setting aside the default judgment, on the ground that the plaintiffs joined Ashcraft as a defendant on the same day that the judgment was obtained. We perceive no inconsistency

in the plaintiffs' course of action. They were entitled, under the law, to a default judgment against Robertson. There were entitled, under the law, to pursue whatever remedy they might have against Ashcraft. Absent any incompatibility between the plaintiffs' two claims for relief—and there was none—we perceive no reason for requiring them to give up one right as a condition to asserting the other.

At the trial on the merits the court found that the sole cause of the collision was Ezell Walters' drunken driving and that Robertson was not acting in the course of his employment by Ashcraft, his workday having ended before the collision occurred. The appellants question the sufficiency of the proof to sustain those findings, but we think it enough to say that there is an abundance of competent evidence to sustain the trial court's decision.

With respect to Robertson the judgment is reversed and the cause remanded for reinstatement of the default judgment; with respect to Ritchie and Ashcraft the trial court's judgment on the merits is affirmed.

BYRD, J. dissents.

CONLEY BYRD, Justice, dissenting. Where, as here, a default judgment can serve no purpose or be sustained on any theory except as a penalty for failure to plead within the twenty days required by Ark. Stat. Ann. § 27-1135 (Repl. 1962), it is my position that the trial court may set aside the default under the "other just cause" provision in Ark. Stat. Ann. § 29-401 (Repl. 1962).

Obviously, Robertson has not brought himself within the "excusable neglect" or "unavoidable casualty" provisions of the statute (although it is an oddity that he, a truck driver, did not wish Ritchie's insurer to represent him in the matter). Nor does Ritchie have any standing to question a judgment against Robertson. But with the trial court it is a different proposition, for the plaintiffs were still pursuing their lawsuit against Ritchie and Ashcraft.

The alleged liability of Ritchie and Ashcraft to plaintiffs was based upon the premise that Robertson was negligent in the operation of Ritchie's truck. Consequently in pursuing their cause of action against Ritchie and Ashcraft, plaintiffs would force the trial court to try the issue of liability (or negligence) of Robertson. Ritchie and Ashcraft had denied that Robertson was negligent.

No delay was occasioned to plaintiffs in the presentation of their case because they did not make Ashcraft a party until the day the default was entered against Robertson. Nor were the pleadings completely joined at the time the default was set aside.

The default entered went only to the liability of Robertson. The damage issue remained to be presented. Any trial court, conscious of its work load, would certainly want to try the damage issue against Robertson at the same time the damage issue was presented against Ritchie and Ashcraft.

Thus, a default against Robertson did not relieve the trial court of the burden of trying the issue of negligence on the part of Robertson; it would not expedite plaintiff's rights against Robertson; and by permitting the default on liability to stand, the trial court ran the risk of having to enter inconsistent verdicts. See *Porter-Dewitt Constr. Co.* v. *Danley,* 221 Ark. 813, 256 S. W. 2d 540 (1953).

What purpose then does a default serve? Under the proceedings of this case, it did not relieve the trial court of the responsibility of determining the negligence or liability of Robertson, nor would it expedite the handling of plaintiff's claims in the ordinary course of events. Does a default under these circumstances amount to anything more or less than a penalty? I think not.

Courts abhor penalties and will not enforce them, even when a person has contracted to pay them. *Canadian*

Mining Co. v. *Creekmore,* 226 Ark. 980, 295 S. W. 2d 357 (1956); *McIlvenny* v. *Horton,* 227 Ark. 826, 302 S. W. 2d 70 (1957).

Furthermore, trial judges are not struck with blindness. Only a little inquiry of counsel on the facts would show that the practical issue here was whether Robertson was negligent in failing to successfully avoid a collision with a drunk driver on the wrong side of the road. While cases may be found in which a person in Robertson's position has been found to be negligent, such is contrary to the norm of human conduct, and the trial court was certainly entitled to take this into consideration in setting aside the default—particularly so since it would have to hear the testimony on that issue anyway.

For the reason set forth above, I would affirm the judgment of the trial court.

ERNEST W. ROWLEY v. ARKANSAS STATE HIGHWAY COMMISSION

5-4201 413 S. W. 2d 876

Opinion Delivered April 24, 1967

Gordon and *Gordon*, for appellant.

John R. Thompson and *Joe T. Gunter*, for appellee.

PAUL WARD, Justice. This is an action where the Arkansas Highway Commission (appellee) sued to condemn, for highway construction purposes, land belonging to Ernest W. Rowley (appellant). The decisive issue on appeal requires an interpretation of Ark. Stat. Ann. § 76-536 (Repl. 1957) which is § 3 of Act 115 of the Acts of 1953. Since the facts out of which the issue arises are not in dispute they will be briefly stated.

Appellee's complaint, filed November 1, 1963, sought to take the fee in .04 acres of land; at the same time appellee deposited in court $2,000 as the estimated value, and; filed a declaration of taking as provided in Ark. Stat. Ann. § 76-534 (Repl. 1957). Also on the same day the court entered an Order of Possession giving appellee "the right of immediate entry onto the possession of the property ..." On December 4, 1963 appellant answered, stating the $2,000 was grossly inadequate and asking for just compensation. Later, at appellant's request he was given permission by the court to withdraw the $2,000 deposit.

On July 14, 1965 appellee filed an Amendment to its Complaint and also an Amendment to its Declaration of Taking, asking the trial court to allow it to take only a part of the land originally sought. Then appellant filed a Motion to strike the amended complaint. A response was filed by appellee, and, on February 7, 1966, the trial court overruled the Motion to Strike, stating appellant would have the right to prove any damage done to the land not taken.

On March 15, 1966 a jury was impaneled to determine the value of the land (as reduced by the amended complaint. The jury fixed the amount at $1,000. In entering the judgment for said amount in favor of appellant the trial court also entered judgment for $1,000 against appellant and in favor of appellee.

Appellant now prosecutes this appeal from the last portion of the above judgment, relying only on the following point:

> "The trial court erred in permitting the appellee to abandon a portion of the lands originally taken."

It is our conclusion that appellant is correct and that the trial court erred in allowing appellee to amend its original complaint and declaration of taking.

The statute first referred to above, § 76-536, reads as follows, in all parts pertinent here:

> "Immediately upon the making of the deposit provided for in Section 5 [§ 76-538] *title* to said lands in fee simple ...*shall* vest in the persons entitled thereto ..." (*Emphasis ours.*)

Appellee makes no contention that § 76-538 mentioned above was not complied with.

Appellee attempts to evade the plain wording of the statute by citing numerous decisions from this and other jurisdictions which concededly hold that the condemnor can amend its complaint to take less property than first asked for. However, they have no persuasive value here because they were decided before the enactment of the statute here relied on by appellant. Ark. Stat. Ann. § 76-536 (Repl. 1957) is § 3 of Act No. 115 of 1953. Prior to 1953 this state had no statute similar to the one just mentioned, nor does it appear that the cited decision from other jurisdictions were confronted with any such statute.

It is argued, also, by appellee that it would be against public policy to require the State to purchase more property than it needs or can use. This argument, however, is answered by Ark. Stat. Ann. § 76-548 (Repl. 1957) which gives the Highway Commission the right to sell any real property "which is no longer necessary or desirable for State Highway purposes ..."

The cause is therefore reversed and remanded for further actions consistent with this opinion.

B-W ACCEPTANCE CORP. *v.* NORMAN POLK, D/B/A NORM'S FURNITURE CITY

5-4166 414 S. W. 2d 849

Opinion delivered April 24, 1967
[Rehearing denied May 29, 1967.]

Barber, Henry Thurman, McCaskill & Amsler, By *Guy Amsler Jr.* for appellant.

Clint Huey, for appellee.

LYLE BROWN, Justice. B-W Acceptance Corporation originated this suit in replevin against appellee Norman Polk, d/b/a Norm's Furniture City. Jury trial resulted in a verdict in favor of Norm's.

Norman Polk was a retail furniture and appliance dealer in Warren. The merchandise involved was purchased from two wholesale distributing companies, Douglass Distributing Company and Magnavox Company. Norm's had arranged with B-WAC to carry financing paper on items purchased from these companies. The distributors would transfer the title to Norm's purchases to B-WAC. In turn, Norm's would cause to be executed in its behalf a B-WAC WHOLESALE FLOOR PLAN. Each of the instruments was designated as "Trust Receipt" and one would be executed for each order. The original due date on each trust receipt was ninety days. Each month Norm's floor-planned merchandise would be checked by B-WAC's field representative. The representative would calculate the amount due B-WAC for items sold out of the trust, and Norm's would give him a check. If out of a particular trust list some items of listed merchandise still remained on the floor, then that particular trust receipt could be renewed for another ninety days. For the renewal a service charge was required. The renewal fee could be paid either by Norm's or by the distributor who indorsed that particular trust receipt.

The trust receipts are identical except for the listed appliances. They may be described generally as a type of title retaining instruments. Title is, of course, retained by B-WAC, and possession is given Norm's for the purpose of sale in the regular course of business. The provisions of the trust receipts pertinent to a decision in the case are as follows:

> "I (we) may sell the merchandise at retail in the regular course of business, for not less than the respective release price listed below, however, upon any such sale I (we) shall forthwith account for and deliver the proceeds thereof to B-WAC (Entruster) or its assigns for application upon the debt with respect to merchandise so sold, and until such accounting and delivery, I (we) shall hold the entire proceeds in form as received in trust for B-WAC (Entruster), or its assigns, separate and apart from

our own funds. I (we) further agree to permit B-WAC (Entruster) or its duly accredited representatives to physically inspect and to see the model and serial number on such merchandise on the floor at all reasonable times during business hours."

A default in either of these or other obligations authorized B-WAC to collect the amount due or take possession of the merchandise.

B-WAC's claim in replevin was two-pronged. A violation of its right of inspection was claimed, along with alleged default in three trust receipts.

Appellant's Point 1 (a): *BWAC was denied its right to inspect the merchandise on the floor at all rensonable times during business hours.* Since we do not here try issues of fact, it would serve no useful purpose to summarize all the evidence. We simply examine the record to determine if there is substantial evidence to support the jury verdict.

Norman Polk had been in the furniture and appliance business in Warren since 1958. B-WAC and Norm's started their finance dealings in 1963. Arrangements were made for floor plan financing and for the financing of retail sales. Ordinarily, B-WAC's field representative stationed at El Dorado checked Norm's floor plan merchandise during the first half of each month. Then during the latter part of the month the representative would return to Warren and work any delinquent retail accounts. Friction arose between the parties in December 1964, and culminated in circumstances forming the basis of this Point 1 (a). The field representative on his December inspection calculated the amount due B-WAC. Norm's gave him a check in the proper amount and asked that it be held. The check was forthwith cashed. On the January inspection the same experience occurred. When the second check was cashed Norman Polk called the Little Rock office of B-WAC and complained. On the basis of that conversation and his evaluation, the branch

manager of B-WAC decided that Norm's floor plan should be checked and collection made twice monthly. This new arrangement, in the manager's opinion, would avoid requests for holding checks.

On January 25th the field representative returned to Norm's under instructions from the branch manager. The first discussion between the representative and Norman Polk was about some delinquent retail accounts. Norman Polk was under the impression that they could be charged against his retail reserve held by B-WAC. The two called the Little Rock office of B-WAC about the matter. The branch manager refused Norman Polk's request and then asked to talk with the field representative. After the latter conversation the field representative walked over to Norman Polk and said he was repossessing "all my floor plan."

All of Norm's trust receipts were that day mailed from Little Rock to the field representative, and he returned to the store with them the following day. (In the meantime, Magnovox's credit manager called long distance about its account.) B-WAC's representative requested a complete check of all the floor-plan merchandise. Anticipating a repossession, Norman Polk said he would first want to talk to his lawyer. He gave the representative his lawyer's name. That ended the conversation.

B-WAC's manager called Norm's attorney, who testified at the trial. The attorney had not studied the contract. It was his recollection that Norman Polk told him of an agreement on the part of B-WAC or its representative to check his inventory once each month. Assuming such agreement existed, Attorney Roberts advised B-WAC's manager that B-WAC should inspect upon the regular agreed dates. No further contact was made by B-WAC with Norman Polk, and suit was shortly filed.

The substance of the testimony we have recited was offered by appellee, Norman Polk. From this testimony,

buttressed by other circumstances in the record, the jury concluded that B-WAC had not been denied its right "to inspect at all reasonable times." This is a relative term. Does it mean daily, weekly, monthly, or any time which satisfies the desires of the inspector? The answer depends upon the peculiar circumstances of a particular *status quo*. The jury must have been impressed, as are we, that there was no impending threat of insolvency, fraud, unsecured indebtedness, or serious delinquency. The customary monthly inspection was made on January 6th and Norm's remitted for the billing.

Suffice it to say that the jury found B-WAC had not been denied the right to inspect at all reasonable times. Considering the burden of proof, the evidence, and the valued right of jurors to take into consideration their own observations and experiences, we cannot say as a matter of law that the jury erred.

Appellant's Point 1 (b): *Trust Receipts* 7, 12, *and* 13 *had matured at the time this action was filed.* Trust Receipt, (Ex.) 7. It was executed February 6, 1964, due in ninety days. During that year two of the five listed items were sold and reittanmces were made to B-WAC's field representative. Each ninety days there was a renewal of the trust in the customary manner. The last renewal in 1964 advanced the due date to February 1, 1965. This lawsuit was filed February 2, 1965. (Subsequent "curtailment" or "service" charges have been made each three months, presumably by Douglas Distributing Company.) B-WAC accepted the renewal from Douglass, which distributor had a power of attorney from Norm's with respect to these trust receipts.

Trust Receipt, (Ex.) 12. The original maturity date was January 22, 1965, some nine days before the filing of this suit. A three-months renewal is indorsed on the receipt, showing "renewed to 4-22-65."

Trust Receipt, (Ex.) 13. The original maturity date was January 28, 1965, some five days before the filing of

this suit. Again, a three months renewal is indorsed on the trust receipt, showing "renewed to 4-28-65."

When B-WAC elected to indorse a renewal on a trust receipt in lieu of request to the distributor for payment of the note and charged the "renewal service charge" to the debtor, the jury could conclude there had been no default.

Appellant's Point 2: *The trial court erred in permitting the introduction of testimony relative to Norm's outstanding retail installment sales contracts financed by B-WAC.* We agree with appellant that if the only purpose of this testimony was to establish a motive for the filing of this suit, the evidence would be inadmissible. *Boynton Land & Lumber Company* v. *Dye,* 126 Ark. 513, 191 S. W. 13 (1910). However, it was admissible for other purposes. It could possibly shed some light on the important question of whether the last visit by B-WAC's representative to Norm's was in the course of a reasonable inspection of the floor-planned merchandise. This line of questioning was initiated by appellee's counsel on cross-examination and could well shed some light on the witnesses' credibility.

Appellant's Point 3. *It was error for the court to submit to the jury, as an element of damage to Norm's, the expenditure of an attorney's fee.* We have examined the previous holdings of our court in which the allowance of an attorney's fee has been upheld in the absence of statutory authority. This case does not fall within the framework of those cases. In fact, this court has held that an attorney's fee is not recoverable in a replevin case. *Jacobson* v. *Poindexter,* 42 Ark. 97 (1883).

Affirmed except as to the allowance of an attorney's fee.

GEORGIA PACIFIC CORP. *v.* B. BRYAN LAREY, COMMISSIONER OF REVENUES

5-4188 413 S. W. 2d 868

Opinion delivered April 24, 1967

Griffin Smith, for appellant.

Lyle Williams and *Tom Tanner*, for appellee.

LYLE BROWN, Justice. The Arkansas Commissioner of Revenues assessed a sales tax against Georgia Pacific Corporation on materials manufactured in Arkansas by Georgia Pacific. The materials were sold; they were withdrawn from stock and utilized in Georgia Pacific's facility at Crossett, Arkansas. Secondly, the commissioner assessed an Arkansas Compensating (Use) Tax against Georgia Pacific on products which Georgia Pacific manufactured without the State and which were shipped to Crossett and likewise utilized in the Crossett facility. The trial court upheld both assessments.

[1]On motion of B. Bryan Larey, presently Commissioner of Revenues, he is substituted as appellee in lieu of his predecessor, Doris McCastlain.

Sales Tax. The Arkansas Gross Receipts Act of 1941 (Sales Tax) is basically a tax on gross proceeds, or gross receipts, derived from the sale of tangible personal property and certain specified services. However, the Legislature enlarged the term "gross proceeds" or "gross receipts" to include stock withdrawals for personal use. Section 2 (d) of Act 386 reads as follows:

> "(d) [Standard definition of 'gross proceeds' or 'gross receipts.' The term 'gross proceeds' or 'gross receipts' shall include the value of any goods, wares, merchandise, or property withdrawn or used from the established business or from the stock in trade of the established reserves for consumption or use in such businesses or by any other person." Ark. Stat. Ann. §§ 84-1902 (Repl. 1960).

With respect to the second paragraph of Section 2 (d), it was interpreted by this court in *Cook, Com. of Rev.* v. *Southwest Hotels, Inc.*, 213 Ark. 140, 209 S. W. 2d 469 (1949):

> "It cannot be doubted that under § 2 (d) of Act 386 one who withdraws merchandise or commodities from his commercial establishment or stockpile, or who reserves it for personal use, is chargeable with the two per cent tax."

It is our holding that Georgia Pacific is liable for the sales tas.

Use Tax. The Arkansas Compensating Tax Act of 1941 has no provision even remotely resembling the "withdrawal for use" provision contained in the sales tax act. Ark. Stat. Ann. § 84-3105 imposes a tax on articles purchased for use, storage, or consumption within this State. Throughout the Act, the words, "sales," "sales price," and "purchase," are used to predicate the taxing of the use of the articles purchased for use, storage, or consumption.

Since there are no express words in the Use Tax Act which would justify the imposition of the tax on "withdrawals for use," it is our duty to resolve the question in favor of the taxpayer. See *U-Drive-Em Service Co., Inc.* v. *Hardin, Commissioner of Revenues,* 205 Ark. 501, 169 S. W. 2d 584 (1943).

This case is distinguishable from *Republic Steel* v. *McCastlain,* 240 Ark. 979, 403 S. W. 2d 90 (1966). In that case, Republic shipped reinforcing steel bars from its manufacturing plant in Chicago to Arkansas. Here, Republic processed the bars into a finished product and used them in building certain improvements for the United States Government under a construction contract held by Republic Steel. The opinion emphasizes the fact that Republic was acting in two separate and distinct capacities—as a manufacturer, it made the steel bars; as a contractor, it used them to perform its contract. As a manufacturer, Republic transferred its title in the steel bars to itself or its agent in the capacity of a contractor.

In this case, there was no dual capacity transaction. This was strictly a situation in which Georgia Pacific, for example, desired to remodel some offices in Crossett. In Oregon it owns a plant where panelling is manufactured. Georgia Pacific sent for a quantity of panelling and installed it in its offices. There the transaction ended. In this situation we hold Georgia Pacific is not liable for the use tax.

Affirmed in part and reversed in part.

FOGLEMAN and BYRD, JJ., would reverse as to both sales tax and use tax.

JOHN A. FOGLEMAN, Justice, dissenting. I respectfully dissent from that part of the majority opinion affirming the lower court on the assessment of sales or gross receipts tax. It seems obvious to me that there must be a transfer of title or possession before there is a tax.

In sustaining this tax, the majority rely upon a statement from *Cook* v. *Southwest Hotels, Inc.*, 213 Ark. 140, 209 S. W. 2d 469, admitted by appellee in its brief to be dictum. It is interesting to note that in this case holding that hotels were not liable for the tax on food consumed by employees, the court said that tax liabilities do not spring from inexact language, nor do they attach by construction,—rules that the majority is overlooking.

On the contrary, a reading of the statutes indicates that no tax was imposed upon a transaction such as this. Ark. Stat. Ann § 84-1903 (Repl. 1960), provides: "There is hereby levied an excise tax of three per centum (3%) upon the gross proceeds or gross receipts derived from all sales to any person * * *". Obviously the tax is clearly upon gross proceeds from sales. But these words are defined in the statute (quoted only insofar as applicable here):

> "84-1902. Definitions.—The following words and phrases shall, except where the context clearly indicates a different meaning, have, when used in this act [§§ 84-1901—84-1904, 84-1906—84-1919], the following meanings:
>
> (a) Person: The term 'person' includes any individual, company, partnership, joint venture, and joint agreement, association (mutual or otherwise), corporation, estate, trust, business trust, receiver, or trustee appointed by any State or Federal Court or otherwise, syndicate, this State, any county, city, municipality, school district, or any other political subdivision of the State or group or combination acting as a unit, in the plural or singular number.
>
> * * *
>
> (c) Sale: The term 'sale' is hereby declared to mean the transfer of either the title or possession, except in the case of leases or rentals, for a valuable consideration of tangible personal property, regardless of the manner, method, instrumentality, or de-

vice by which such transfer is accomplished. The term 'sale' is also declared to include the exchange, barter, lease, or rental of tangible personal property. [Supp. 1965.]

(d) Gross Receipts—Gross Proceeds: The term 'gross receipts' or 'gross proceeds' means the total amount of consideration for the sale of tangible personal property and such services as are herein specifically provided for, whether the consideration is in money or otherwise, without any deduction therefrom on account of the cost of the property sold, labor service performed, interest paid, losses or any expenses whatsoever.

The term 'gross proceeds' or 'gross receipts' shall include the value of any good, wares, merchandise, or property withdrawn or used from the established business or from the stock in trade of the established reserves for consumption or use in such business or by any other person."

This clearly indicates that the tax is levied only upon the gross proceeds *from sales to persons*. When the definition of gross proceeds or gross receipts is read into the section levying the tax, one cannot read out the words following—"derived from all sales to any person"—nor can one department of the same corporation as the seller qualify as a "person". Consequently, there can be no tax where there is no transfer of either the title or possession of the property involved. If the legislature had intended the effect given by the majority, then they would have changed the definition of the word "sale" to cover this transaction.

While it might be argued that the literal application of the terms of the act make it ambiguous, this favors the taxpayer, not the taxing authority.

This tax, like the former inheritance tax, is an excise tax or privilege tax. *Hardin* v. *Vestal*, 204 Ark. 492,

162 S.W. 2d 923. As such it is a special tax. *McDaniel* v. *Byrkett*, 120 Ark. 295, 179 S.W. 491. The laws imposing such a tax are to be construed strictly against the government and in favor of the taxpayer. *McDaniel* v. *Byrkett, supra; McCain* v. *Crossett Lbr. Co.,* 206 Ark. 51, 174 S. W. 2d 114; *Scurlock* v. *City of Springdale,* 224 Ark. 408, 273 S. W. 2d 551. Tax acts are to be construed most strongly against the sovereign and most liberally in the taxpayer's favor. *Thompson* v. *Chadwick,* 221 Ark. 720, 255 S. W. 2d 687.

A tax cannot be imposed except by express words indicating the purpose to do so. *Wiseman* v. *Arkansas Utilities Co.,* 191 Ark. 854, 88 S. W. 2d 81; *Cook* v. *Ark. Missouri Power Corp.,* 209 Ark. 750, 192 S.W. 2d 210; *Cook* v. *Ayers,* 214 Ark. 308, 215 S. W. 2d 705; *Commissioner of Revenues* v. *Arkansas State Highway Comm.,* 232 Ark. 255, 337 S.W. 2d 665; *Cheney* v. *Tolliver,* 234 Ark. 973, 356 S.W. 2d 636. The express purpose to tax must be so clear that no reasonable mind should conclude the intent was otherwise. *Cook* v. *Southwest Hotels,* 213 Ark. 140, 209 S.W. 2d 469.

Where there is *any* ambiguity or *doubt* it *must* be resolved in favor of the taxpayer and against the taxing power. *Wiseman* v. *Arkansas Utilities Co.,* 191 Ark. 854, 88 S. W. 2d 81; *McCain* v. *Crossett Lumber Co.,* 206 Ark. 51, 174 S. W. 2d 114; *Cook* v. *Wofford,* 209 Ark. 824, 192 S.W. 2d 550; *Cook* v. *Ayers,* 214 Ark. 308, 215 S.W. 2d 705; *Commissioner of Revenues* v. *Arkansas State Highway Commission,* 232 Ark. 255, 337 S. W. 2d 665. *All* ambiguities or doubts respecting liability for the tax *must* be resolved for the taxpayer. *City of Little Rock* v. *Ark. Corporation Commission,* 209 Ark. 18, 19 S.W. 2d 382; *Moses* v. *McLeod,* 207 Ark. 252, 180 S. W. 2d 110.

Even if the general assembly intended to do what the majority says they did, we cannot say so unless we can say that their language necessarily leads to that conclusion. *Hardin* v. *Ft. Smith, Couch & Bedding Co.,* 202 Ark. 814, 152 S. W. 2d 1015. The courts are not at liberty to imply a meaning to a tax act which is not clearly

stated. *Scurlock* v. *City of Springdale,* 224 Ark. 408, 273 S.W. 2d 551. As was said by this court in *McLeod* v. *Commercial National Bank of Little Rock,* 206 Ark. 1086, 178 S.W. 2d 496:

> "If it be thought that, at most, the legislative purpose as expressed by the words employed is ambiguous, still the holding must be adverse to appellant because doubt in such cases is invariably resolved in favor of the taxpayer."

These rules were applied in holding that the rental of automobiles was not subject to this tax, the transfer of possession not being exclusive but only temporary. *U-Drive-Em Service Co.* v. *State,* 205 Ark. 501, 169 S.W. 2d 584.

While a law should be construed to give some meaning to all its parts, if possible, the construction *must not be inconsistent* with the language used therein. *Cook* v. *Arkansas State Rice Milling Co.,* 213 Ark. 396, 210 S. W. 2d 511.

It should be noted that the legislature must have defined "gross proceeds or gross receipts from sales" as they defined "gross receipts" in order to reach the result attained by the majority, a construction inconsistent with the language of the act.

This court has expressly held that in view of the rules that tax acts are to be construed in favor of the taxpayer, we cannot read into it matters adverse to the taxpayer. *Morley* v. *Pitts,* 217 Ark. 755, 233 S. W. 2d 539. To reach the conclusion in the majority opinion it is necessary in these circumstances to either read out of § 84-1903 the words "derived from all sales to any person or read the same words into the definition of "gross proceeds" or "gross receipts". Certainly we should apply the same rule as was applied on the attempt to read something into the statute.

I submit that in affirming the court as to the sales tax, the majority is giving the act a liberal construction in favor of the taxing power, is resolving ambiguities against the taxpayer, is reaching a conclusion to which the language of the legislature does not necessarily lead, and reading words out of the literal terms of the act. I would reverse the decree of the trial court on both taxes.

I am authorized to state that Byrd, J., joins in this dissent.

RUTH SPARKS *v.* THE FIRST NATIONAL BANK IN LITTLE ROCK

5-4189 413 S. W. 2d 865

Opinion delivered April 24, 1967

Griffin Smith, for appellant.

John H. Haley, for appellee.

JOHN A. FOGLEMAN, Justice. Appellant questions the propriety of an order of the Probate Court appointing a guardian for her without notice and without any medical testimony. Appointment of a guardian was sought by her daughters who alleged her to be incompetent by reason of mental incapacity, "including habitual drunkenness and excessive use of drugs". Subsequently, these daughters petitioned for immediate appointment of appellee as temporary guardian for ninety days, alleging that appellant had fled the state to evade service of process on the original petition. The trial court heard the testimony of one Odie Criglow Green, a sister of appellant, and one of the daughters. Finding that the welfare of appellant required the appointment, the court appointed appellee as temporary guardian of appellant's estate and a daughter as temporary guardian of her person, both for ninety days[1]. No contention is made that any medical testimony was heard by the court.

The court proceeded under Ark. Stat. Ann. § 57-620 (Supp. 1965) [§ 207 of Act 140 of 1949, as amended] which provides:

> "Temporary guardian.—If the court finds that the welfare of an incompetent requires the immediate appointment of a guardian of his person or of his estate, or of both, it may, *with or without notice*, appoint a temporary guardian for the incompetent for a specified period, which period including all extensions thereof, shall not exceed ninety 90 days, and remove or discharge him or terminate his guardianship. If made without notice, the temporary

[1]Letters of guardianship, however, failed to note the limitation on the appointments, as required by statute.

guardian shall forthwith give to the incompetent person notice of the appointment. The appointment may be to perform duties respecting specific property or to perform particular acts, as stated in the order of appointment. The temporary guardian shall make such reports as the court shall direct, and shall account to the court upon termination of his authority. *In other respects the provisions of this Code concerning guardians shall apply to temporary guardians,* and an appeal may be taken from the order of appointment of a temporary guardian. The letters issued to a temporary guardian shall state the date of expiration of the authority of the temporary guardian. [Acts 1949, No. 140, § 207, p. 304; 1951, No. 255, § 12, p. 591.]" [Emphasis ours]

Another section of the Probate Code, (§ 188 of Act 140 of 1949) appearing as § 57-601 c. Ark. Stat. Ann. (Supp. 1965), defines the word "incompetent" as used in the Code. Insofar as this case is concerned, an incompetent is a person who is "incapable, by reason of insanity, mental illness, * * *habital drunkenness, excessive use of drugs or other mental incapacity, either of managing his property or caring for himself."

Sec. 57-614 Ark. Stat. Ann. (Supp. 1965) [§ 201 of 140 of 1949] requires that, before appointing a guardian for a person, the court must be satisfied that he is either a minor or otherwise incompetent.

Ark. Stat. Ann. § 57-615 (Supp. 1965) [§ 202 of Act 140 of 1949] provides for a hearing for determination of incompetency and, in pertinent part, reads:

"a. Minors. The fact of minority shall be established by satisfactory evidence.

b. Other Incompetents. In determining the incompetence of a person for whom a guardian is sought to be appointed for cause other than minority the court *shall require that the evidence of incompetence*

include the oral testimony or sworn written statement of one or more qualified medical witnesses, whose qualifications shall be set forth in their testimony or written statements. If the alleged incompetent is confined or undergoing treatment in an institution for the treatment of mental or nervous diseases, or a hospital or penal institution, one of the medical witnesses shall be a member of the medical staff of such hospital or institution." [Emphasis ours]

It is clear from a mere reading of the statute that the framers of the Probate Code intended that no guardian be appointed without the court having the benefit of a medical opinion. Appointment of a person or corporation to take charge of one's property, even for a limited time, is a drastic step and it is appropriate for the legislative branch to determine appropriate safeguards. The use of the word "shall" requires a construction making the testimony or statement of at least one qualified medical witness mandatory in determination of incompetency. If this clause were to be construed as permissive, then it is a useless appendage, for the court could require medical testimony if it desired without this clause. The construction of the word "shall" as being mandatory is supported by the following sentence providing that one of the medical witnesses, if the alleged incompetent is confined or undergoing treatment in an institution or hospital, "shall be a member of the medical staff of such hospital or institution."

The section on temporary guardians provides for procedures, in certain instances, different from those prescribed for other guardians. The specific statement with reference to the application of other provisions of the Code to temporary guardians clearly indicates an intent that those procedures governing the appointment of guardians are also applicable to the appointment of temporary guardians. If the contention of appellant is

correct, the section would not only have provided for hearing "with or without notice" but also with or without the testimony or statement of a medical witness or witnesses.

While this court has recognized that the provision with reference to temporary guardianships was designed to take care of emergencies or instances where delay could cause irreparable damage to the estate of an incompetent [See *Becker* v. *Rogers*, 235 Ark. 603, 361 S. W. 2d 262], also recognize that damage might well be done to one not incompetent by the improper appointment of a guardian for his person or estate or property. If the safeguards are too exacting, the matter is for legislative, not judicial, attention.

We do not pass upon the question of the necessity of any examination of the incompetent by the medical witness, as that question is not before us; however, we find nothing in the Probate Code to require that medical witnesses must have examined the alleged incompetent.

The order of appointment of the temporary guardian is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

JONES, J., not participating.

BYRD, J., disqualified.

TRI-STATE MILL SUPPLY COMPANY v. PROCESS ENGINEERING, INC. AND PEOPLES LOAN & INVESTMENT COMPANY

5-4095 414 S. W. 2d 94

Opinion delivered April 24, 1967
[Rehearing denied May 15, 1967.]

Wright, Lindsey & Jennings, for appellant.

Edgar A. Woolsey Jr. and *Jeta Taylor* and *Harper, Harper, Young & Durden,* for appellee.

J. FRED JONES, Justice. Tri-State Mill and Supply Company sued Process Engineering, Inc., J. D. Sanders, Ozark Sales & Service Company and Peoples Loan & Investment Company in the Circuit Court of Franklin County. The case was transferred to Chancery.

Tri-State sought a money judgment against Process in the amount of $41,217.63 for materials sold on open account. It sought a materialman's lien paramount to

a mortgage held by Peoples Loan on the property involved. Peoples cross claimed for foreclosure of its mortgage, and Tri-State answered with the affirmative defense of usury.

The trial court dismissed the complaint of Tri-State as to Process; entered a decree in favor of Peoples Loan for $11,524.29 and ordered foreclosure of the mortgage security. Tri-State has appealed.

In this case either Tri-State or Process must suffer a loss because Sanders, a Tri-State salesman, succeeded in obtaining from Tri-State materials that were charged to Process but used by Sanders in ventures undertaken by him for his own benefit. Fundamentally the issue is whether, on the one hand, Sanders had such apparent authority to act for Tri-State that Process was justified in not questioning the purchases charged to Process' account with Tri-State, or, on the other hand, Sanders' course of dealing was so indicative of bad faith that Process should have attempted to ascertain the extent of his actual authority. The controlling principles of law are not in issue. See *Hill* v. *Delta Loan & Finance Co.*, 224 Ark. 785, 277 S. W. 2d 63 (1955), and *McCarroll Agency* v. *Protectory for Boys, etc.*, 197 Ark. 534, 124 S. W. 2d 816 (1939).

Tri-State Mill Supply Company is a corporation engaged in the business of manufacturing and selling mill supplies of all kinds including steel buildings and steel chicken houses made to order. Tri-State has its principal place of business in Arkansas, and makes its sales to customers through individual commission salesmen operating out from its branch offices in Arkansas. Tri-State obtains from "vendors" such items its customers demand, which are not manufactured by Tri-State or held in stock by it in warehouses.

Process Engineering, Inc. is a corporation with its principal place of business in Oklahoma. Process is engaged in the business of prefabricating and erecting steel buildings, including feed mills and chicken houses.

The designing and preparation of plans and specifications and the erection of buildings and installation of equipment and machinery according to plans and specifications, seem to be the principal business of Process. A Mr. Stone is the president and general manager of Tri-State, and Mr. Ellis is president and general manager of Process.

About 1961, one James D. Sanders had gone broke in the contracting business in another state, and upon his return to Arkansas he was employed as a salesman for Tri-State by Mr. Stone. Mr. Stone and Sanders had been boyhood friends, and it appears that the usual investigation as to background and integrity was waived in Mr. Sanders' case when he was employed by Tri-State and Mr. Sanders was assigned to Northwest Arkansas working out of the Conway branch office of Tri-State.

Tri-State and Process had done considerable business with each other on a rather loose but mutually satisfactory basis until Sanders went to work for Tri-State in 1961. Soon after Sanders went to work for Tri-State, Mr. Ellis was invited to a sales meeting held by Tri-State in Pine Bluff, at which time he was introduced to the Tri-State salesmen and his business was solicited by Tri-State and he was assured that Tri-State salesmen were of the highest integrity and that their words could be relied upon.

It appears that the business conducted by Tri-State, as related to the business of Process, and the benefits one expected to derive from the services of the other, were brought about and carried on in this manner: The salesmen for Tri-State would sell a completed building (turn key job) to be erected where the purchaser wanted it. Tri-State would make its profit on the sale of a completed building, the salesman would receive his commission from Tri-State, and to avoid the appearance of being in competition with other contractors who purchased their materials from Tri-State, Process would actually prepare the plans and specifications for buildings sold

by Tri-State, and insofar as other contractors were concerned, Process was an independent contractor who was just another customer of Tri-State. Insofar as the purchaser was concerned, Process was a subcontractor or a part of Tri-State, and insofar as Tri-State and Process were concerned, their actual relationship is not clear from the record. In any event, the materials for the jobs contracted by Tri-State were billed out to Process. When Process needed materials for its own separate jobs, it purchased these materials from Tri-State. When a job was completed, or at convenient intervals, Tri-State and Process would balance their accounts and settle any difference.

After Sanders went to work for Tri-State, he sold a grain elevator to Arkansas Valley Industries to be erected in Mississippi. He arranged with Mr. Ellis for Process to design and actually erect the building, and all materials were billed out to Process as if Process was an independent contract customer and had procured the contract itself and was merely purchasing the materials from Tri-State. Mr. Ellis settled up with Tri-State upon completion of this job and no controversy arose. The materials for this job were billed out to Process, although the construction was procured by Sanders representing Tri-State.

The record in this case contains considerable testimony to the effect that after Sanders was employed by Tri-State, Tri-State further extended its interest into the actual construction and installation of the buildings and machinery it sold to owner customers, and in order to keep it from appearing that Tri-State was competing with its contractor customers in the erection of buildings and installation of machinery, Tri-State would bill the materials out to Process, making it appear that Process was the actual customer, when in fact the final purchaser of the building or machinery was the customer of Tri-State, the inference being that through billing the materials out to Process, Tri-State would reap the benefits of the profits on the *erection* of the building and in-

stallation of the machinery, as well as the mark-up profits on the materials sold, thus putting Tri-State actually in competition with other contractors who sold "turn key" building jobs to individuals and purchased the materials from Tri-State.

As a matter of fact it would appear from the record that this procedure may well have been Sanders' idea and primarily initiated by him. The record would also indicate that if Tri-State did not encourage the procedure, it did nothing to discourage it when it knew, or should have known, that this procedure was being carried out by Sanders especially through Process.

In regard to the job in Mississippi, Mr. Stone testified as follows:

"Q. Can you briefly describe the transaction between Tri-State and AVI?

A. It was a sales agreement. Now the reason I recall it so vividly, the reason is we had our legal counsel draw up the sales agreement. We were studiously not entering into a contract. It was a sales agreement whereby we would furnish this grain elevator for a specified price. Now, we were going to buy this thing and erect it by Process for a specified price.

Q. You say you had your legal counsel examine this document.
Why?

A. We don't go into contracting. We don't do contracting work as contractor.

* * *

Q. What did your contract with AVI provide then?

A. We agreed to sell AVI this equipment installed

by Process at their plant in Greenville per specification for a given price.

* * *

Q. Did you ever see a written agreement between Sanders purportedly on behalf of Tri-State and Process? Or was all of this oral as far as you were concerned?

A. I don't recall seeing such an agreement. I cannot at the same time say there isn't any.

Q. So far as your were concerned, is it your understanding that Process was purchasing certain material from you on that particular job?

A. Well, the understanding is, or it was my interpretation of the understanding that we were actually selling the job to AVI. We were in turn buying it from Process. But because we were able to sell this particular job, Process was going to buy whatever materials they needed that we handled to do the job with from us.

* * *

THE COURT: This is cross examination.

Q. Why were you studiously avoiding the contract?

A. We are not in the contracting business, and we don't have a contractor's license.

Q. You would be competing with your customers, would you not?

A. That is true.

Q. And wouldn't want to do that directly?

A. No, sir.

Q. But you did make this contract through Jim Sanders yourself and allow Process Engineering to perform it as if they were purchasing the material from you. Is that not a fair statement of that situation? Isn't that why you avoided the contract directly?

A. Well, we avoided the contract directly for the reasons I just gave you. This was a sales agreement between Tri-State and AVI duly drawn up by legal counsel. Now, we did buy the job from Process Engineering through our contract.

Q. Did they agree to install your material?

A. They agreed to do the job. At the same time they agreed to buy from us whatever materials they might need in the job that we had to sell.

Q. Hadn't Jim Sanders already arranged for the job, as a matter of fact, before this contract?

A. Well, he had been in contact with the customer and had gotten it up to a point of sale.

Q. Had he not signed an agreement in Tri-State's name, and didn't you later back up that agreement?

A. No, sir.

Q. He had signed no agreement? Is that your testimony?

A. I am not saying that. I am trying to recall exactly. He may have signed a document which we voided and so notified the customer.

Q. But it was performed, was it not?

A. We voided it.

Q. You tore up the document but you performed the contract, didn't you?

A. We replaced it with a sales agreement.

Q. That you signed yourself?

A. That is right.

Q. But you went ahead on the same practice and pattern he had in actual fact outlined for your company, didn't you? You backed his agreement in practice and in fact?

A. We backed up his sales, we sure did.

Q. All the way?

A. Yes, sir."

We do not say that this procedure was legally, morally or even ethically wrong, but it is obvious from the record that this procedure placed Sanders in a position to perpetrate the fraud he obviously perpetrated according to the record in this case.

While acting as a salesman for Tri-State in Northwest Arkansas, Sanders simply started selling chicken houses to farmers, ordering the materials from Tri-State, charged or billed out to Process, and delivered to the farm of the purchaser where they were erected under the supervision of Sanders, and in some instances with the assistance of Process from whom he also purchased some items of material. Sanders collected from the farmers, paid enough on his personal account for materials and labor to Process to keep his credit good with Process, and finally sold a $9,500.00 chicken house to a farmer near Ozark, ordered the chicken house from Tri-State on Process' account, took a deed to 76.25 acres of land in payment for the chicken house and built three more chicken houses for himself on the land so purchased. He purchased the materials for his own three chicken houses from Tri-State, had the materials charg-

ed to Process, and then borrowed $16,211.49 from Peoples Loan & Investment Company, mortgaging the land with the new chicken houses thereon to Peoples as security for the loan should he live, and taking out a life insurance policy through Peoples as additional security for the loan should he die.

Sanders ordered most of the materials he purchased from Tri-State through the Tri-State Conway office. He not only ordered and obtained delivery of the materials on Process' account without question from Tri-State or Process, he dictated the mark-up to be charged, or profits to be derived by Tri-State, on the items purchased. On several occasions Sanders sold materials for Tri-State and then exceeded his authority by purchasing the materials direct from "vendors" on Tri-State's account, and Tri-State "backed him up."

Mr. Jerry Wayman, manager of the Tri-State Conway branch, testified as follows:

"Q. Who prepared the total figure in the bill on the invoice? Where did that total come from?

A. The total bill for Process?

Q. Yes.

A. I would have totaled the invoices from vendors, the delivery tickets from stock, and *Mr. Sanders would tell me how much to add on what he had sold the job for.*

Q. What do you mean, how much to add?

A. *What percentage of profit to make.* In other words, he would tell me how much he had sold that job for.

Q. Now, just looking at the delivery tickets and the purchase orders of vendors, what figures are shown there?

A. Cost figures only.

Q. Those are strictly cost figures?

A. That is correct.

Q. Then the add on for profit?

A. Yes, sir.

Q. *Is there a standard add on every job, such as five per cent or ten per cent for mark-up.*

A. *No, sir.*

Q. *What did you rely upon Mr. Sanders for then —to give you the percentage mark-up?*

A. *That is correct.*

Q. *Was the customer aware of the percentage mark-up to be charged on a job?*

A. *I don't know, sir. My information came from Sanders.*

Q. *Sanders.*

* * *

A. ...that is a ticket that we use to ship something from our warehouse to a customer.

Q. In other words, you make this up yourself?

A. Yes, sir. It is a printed form and we fill in this part.

Q. Who does it show this material was sold to?

A. That is a memo shipping ticket that says that it was shipped to Tri-State at Conway.

Q. That says it was sold to you?

A. Yes, sir.

Q. Sold to Tri-State at Conway?

A. Yes, sir.

Q. Who does it say it is shipped to?

A. Jim Sanders." (emphasis supplied)

Mr. Ellis of Process testified that when he received the billings from Tri-State on the materials purchased by Sanders for the chicken houses:

> "I discussed the matter with the people involved and was assured that this was being carried on in the same manner in which we had worked with Tri-State before. As for lack of a better name, as a third party in their negotiation. We had been requested by Mr. Stone and by the people at Tri-State to operate in this manner, and in turn bought certain materials and services from us. We had operated in that manner prior to this time. All negotiations had been open and above-board. Our relations had been excellent with this group of people."

Sanders formed a corporation, Ozark Sales & Service Company which was made party defendant in this case, but Sanders' luck ran out before his corporation got underway, and Sanders wound up in bankruptcy owing Process $25,400.70 for materials and service purchased *from* Process, and owing Tri-State $41,217.63 for materials he purchased *for* Process, and owing Peoples Building and Loan $11,524.29 for borrowed money secured by a mortgage and a life insurance policy with the premiums prepaid.

Sanders exchanged a $9,500.00 chicken house for the 76.25 acres of land, he built three other chicken houses on this land and then transferred it to Tri-State by warranty deed impressed with a mortgage to Peoples in the balance amount of $14,995.68.

The appellant contends that the loan from Peoples Loan and Investment Company to Sanders was usurious and the mortgage lien void. This contention is based upon the allegation that Sanders was required to take out term life insurance as a prerequisite to obtaining the loan. The record shows the life insurance was obtained upon a separate application. Without the inclusion of the premiums paid, the loan would not be usurious. Since this issue turns upon whether or not Sanders was forced to carry the life insurance as a prerequisite to obtaining the loan, the chancellor's finding to the effect that Sanders was not forced to carry the life insurance is not contrary to a preponderance of the evidence.

We have diligently searched the briefs and the entire record and have found nothing which we feel was overlooked by the chancellor in this case. The chancellor was confronted with a fact question presented on conflicting testimony, and we are unable to say that the findings of the chancellor were clearly against the preponderance of the evidence.

The decree of the chancellor will be affirmed.

Affirmed.

CITY OF LITTLE ROCK *v.* LEAWOOD PROPERTY OWNERS ASSOCIATION

5-4254 413 S. W. 2d 877

Opinion delivered April 24, 1967

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

Patten & Brown and *Louis W. Rosteck,* for appellee.

CONLEY BYRD, Justice. The city of Little Rock, Arkansas, appeals from the action of the circuit court in granting a zoning variance to appellee, Leawood Property Owners' Association, for the purpose of constructing a swimming pool and related recreational facilities. At issue is the scope of review permitted by the circuit court on appeals from actions of the city's Board of Adjustment, and the sufficiency of the evidence to sustain the circuit court's judgment in favor of the Leawood Property Owners.

The Leawood Property Owners' Association is a nonprofit corporation formed for the purpose of constucting, maintaining and operating a swimming pool and recreational area in the Leawood section of Little Rock. Leawood is a composite of several contiguous subdivisions of the city of Little Rock, consisting of several hundred nice residences of recent construction.

The Leawood Property Owners initiated this action by requesting permission of the Little Rock Planning Commission to amend the bill of assurance and restrictive covenant applying to one of the parcels on which the Association proposed to construct its facilities. The Planning Commission permitted the amendment and then suggested to the Association that, since the Little Rock zoning ordinances did not make a specific zoning provision for swimming pools and related community facilities, the Leawood Property Owners would have to go before the Board of Adjustment. The Board of Adjustment denied the application for a variance without any assignment of reasons therefor.

The city's authority with respect to zoning, the jur-

isdiction of the Planning Commission, and the duties of the Board of Adjustment are contained in Act 186 of 1957. This is a comprehensive act providing for the creation of the City Planning Commission, zoning, subdivision control, etc. With respect to the Board of Adjustment it provides as follows (Ark. Stat. Ann. § 19-2829 [Supp. 1965]):

> "The zoning ordinance shall provide for a board of zoning adjustment, which may either be composed of at least three (3) members or the planning commission as a whole may sit as the board of zoning adjustment. The board of zoning adjustment shall have the following functions:
>
> * * *
>
> "(2) Hear requests for variances from the literal provisions of the zoning ordinance in instances where strict enforcement of the zoning ordinance would cause undue hardship due to circumstances unique to the individual property under consideration, and grant such variances only when it is demonstrated that such action will be in keeping with the spirit and intent of the provisions of the zoning ordinance. The board of zoning adjustment shall not permit, as a variance, any use in a zone that is not permitted under the ordinance. The board of zoning adjustment may impose conditions in the granting of a variance to insure compliance and to protect adjacent property.
>
> "Decisions of the board of zoning adjustment in respect to the above shall be subject to appeal only to a court of record having jurisdiction."

Act 186 of 1957 was amended by Act 134 of 1965 (Ark. Stat. Ann. § 19-2830.1 [Supp. 1965]), as follows:

> "In addition to any remedy now provided by law, appeals from final action taken by the administrative, quasi judicial, and legislative agencies concerned

> in the administration of this act may be taken to the Circuit Court of the appropriate county, wherein the same shall be tried de novo according to the same procedure which applies to appeals in civil actions from decisions of inferior courts, including the right of trial by jury."

At trial in circuit court, appellees took the position that under Act 134 of 1965 they were entitled to present their petition for a zoning variance anew in the same manner as appeals from municipal courts and justice of the peace courts. Appellants contended that the only issue before the circuit court was whether the Board of Adjustment, in making its decision, was arbitrary. In making its argument, appellant relies upon *Missouri Pac. R. R. Co., Thompson, Trustee,* v. *Williams,* 201 Ark. 895, 148 S.W. 2d 644 (1941), but due to the difference in the language between the reviewing statutes in that case and Act 134 here, that case does not sustain appellant's position. We therefore hold that under Act 134, above, appellee was correct in its position that appeals from the Board of Adjustment to the circuit court are to be tried de novo on the same issue that was pending before the Board of Adjustment.

Having decided that the circuit court may try anew the issue presented to the Board of Adjustment in the first instance, the next question is whether there was substantial evidence to support the judgment of the circuit court. In this connection Robert Beal, a real estate salesman with the firm of Rector-Phillips-Morse, testified that he had sold lots in subdivisions where swimming pools and related community facilities were planned as part of the development, and that a swimming pool assisted in the sale and development of the lots—particularly those close to the pool and park area. It was Mr. Beal's opinion that the construction of the pool and related recreational area would enhance the property in the Leawood area. Mr. James Larrison, called on behalf of the Leawood Property Owners, testified that he could

not conceive of a situation where a swimming pool would lessen the value of surrounding property where the pool was operated within the regulations of the city, with proper setback, screening, and off-street parking.

In addition to the testimony, Act 186 (Ark. Stat. Ann. § 19-2829 [c] [Supp. 1965]) provides that the city in its control of the development of subdivision land, may request the reservation, for future public acquisition, of land for community or public facilities; and that when a proposed subdivision does not provide an area or areas for community or public facilities, the city regulations may provide for a reasonable dedication of land for such facilities or for a reasonable equivalent contribution in lieu of dedicated land, the contribution to be used for acquisition of facilities to serve the subdivision.

In view of the lack of any zoning classification for swimming pools by the city zoning ordinances, the testimony before the court, and the statutes recognizing the desirability of community facilities such as are here involved, we must hold that there was substantial testimony to sustain the court's finding that the variance here granted would be in keeping with the spirit and intent of the provisions of the zoning ordinance. There was certainly substantial evidence from which the trial court could find that the proposed variance would not alter the character of the neighborhood.

Affirmed.

ROBERT THORN *v.* STATE

5213 414 S. W. 2d 85

Opinion delivered May 1, 1967

(No brief for appellant).

Joe Purcell, Attorney General; *Don Langston,* Asst. Atty. General, for appellee.

CARLETON HARRIS, Chief Justice. Robert Thorn, appellant herein, was accused of the crime of possessing stolen goods of the value of more than $35.00, the item being a 1955 Ford Fairlane automobile. On trial, he was convicted, and the jury fixed his punishment at one year in the penitentiary. From the judgment so entered, appellant brings this appeal.[1]

[1]The attorney who tried this case obtained the order for an appeal to this court, but he has not filed a brief. The Attorney General has briefed the case in accordance with our Rule 11(f) & (g), basing his brief on alleged errors which were asserted in the motion for trial.

For reversal, it is first argued that, "The trial court erred in permitting witnesses to testify on behalf of the state who were not made known to appellant prior to the trial." This point is based upon the contention that counsel for appellant only learned of three or four of the witnesses on the day of trial. We find no merit in this argument. In the first place, though not at all clear, it appears that the additional names were added to the list shown on the Information on the 19th of January, 1966, and appellant was not tried until January 25, 1966. Whether notified or not by the sheriff or prosecuting attorney, it does appear that the list was available, and the record does not reflect that counsel for appellant made any effort to contact officials for the purpose of ascertaining the names of additional witnesses. At any rate, the statutory requirement is merely directory. *Baker* v. *State,* 215 Ark. 851, 223 S. W. 2d 809. In *Norton* v. *State,* 237 Ark. 783, 376 S. W. 2d 267, the prosecuting attorney had furnished the names of all state witnesses, except Katy Thompson, the prosecutor telling the defense counsel that he could not recall her name, and would furnish it later. This was not done, and, on appeal, this failure was cited as error.

We said:

"In fact, however, the prosecuting attorney overlooked the matter of communicating the requested information to the defense attorney before the trial. Even so there was no error in permitting Katy Thompson to testify, for the defense could have learned her identity simply by making a telephone call to the prosecuting attorney or to Keith. In the circumstances it cannot be said that the State unfairly produced a surprise witness."

It might also be stated that there was sufficient evidence to convict Thorn without using the witnesses complained of, their testimony being largely cumulative.

Appellant contends that the court erred in overruling his motion for a directed verdict of not guilty, *i. e.,* he contends that the evidence was insufficient to sustain the verdict. We do not agree.

Jimmy Rogers testified that his car was stolen, and that the car returned to him by the sheriff belonged to him. The value of the car was considerably more than $35.00.

Earl Orr, state trooper, heard a radio report that a red and white Ford Fairlane had been stolen, and, while passing through Arkadelphia, he observed an automobile, answering this description, parked near a restaurant. Two men were in the vehicle, one in the front, and one in the back. The officer drove one block, made a call to check the number of the license tag on the stolen car, received the information, and started back to the automobile, but it had been driven away, though Orr could see it some distance ahead. He started in pursuit, but lost sight of the vehicle while making a curve. Resurfacing of the highway was in progress, and one lane of traffic was blocked with barricades. The occupants of the Ford were forced to stop, and Orr observed three men running from the car. They ran across a field and into some woods. Other officers were notified, and a search was made in the area, the officers later obtaining bloodhounds from the State Prison. Shortly after midnight, two of the men, including Thorn, were located about twenty yards off a gravel road, lying in a sage grass field. This was about five or six miles from where the automobile had been abandoned. Orr identified Thorn as one of the men he had observed in the car.

Ike Dawson, an employee of Reynolds Metals Company, testified that as he was on his way to town he observed a red and white Ford on the highway; that this automobile stopped quickly and three men jumped

out and ran over into the woods; that within seconds a state police car drove up and stopped behind the Ford.

Richard McElhannon testified that he was working on a fence in front of his home, and observed three men come out of the woods:

"* * *So I stood still and watched them, and they climbed over the fence and sat down, and a couple of them pulled off their shoes and dumped something out; and then my little dog was out in the road barking at them. One of them finally got up; I guess it must have been three or four or five minutes, maybe, and came down toward where my truck was parked, which evidently they hadn't seen before, and takes a look around and out down the road; doesn't see anything; slips on a pair of cotton gloves and heads for my truck. Well, that's when I stepped out from where I was, and asked him what he was doing. He asked me the way back to Arkadelphia, and I told him the way back to Arkadelphia, but not with my truck. So he went on back out in the woods and all three climbed back over the fence and left."

Rick Emory, who had charge of the bloodhounds, was present when the two men were located in the sage, and he identified Thorn as one of them.

Sheriff Witt Stevenson, Sheriff of Clark County, also engaged in the search for the men, and was present when they were apprehended. He identified Thorn as one of the two, stated that the men were tired, hungry and thirsty, and that their clothes were torn.

Lt. Herrell Porterfield of the state police likewise was present when Thorn was apprehended.

Thus, appellant was identified as being one of the persons in possession of the automobile, was identified in the vicinity of the abandoned car by a farmer, identi-

fied as one of the persons running away from the vehicle, and was placed under arrest after being trailed by the bloodhounds to his hiding place.

Orr testified during the trial that when Thorn was arrested and searched, he had several hundred dollars in bills on his person. There was no objection to this testimony by appellant, and in his closing argument, the prosecuting attorney said:

"*** We had better stop these men running around the countryside filling their pockets with money, and I say unlawfully."

This statement was objected to, and appellant moved for a mistrial. The motion was denied, but the trial court told the jury that Thorn was not being tried for larceny of money, and the possession of the money could not be considered unless it shed light on the theft of the automobile. No prejudice could have resulted to appellant, and, for that matter, no objection having been made when the testimony was given, the prosecuting attorney was actually commenting on the evidence.

Finding no reversible error, the judgment is affirmed.

BROWN, J., disqualified and not participating.

CHARLES PERRYMAN *v.* STATE

5234 414 S. W. 2d 91

Opinion delivered May 1, 1967

No brief for appellant.

Joe Purcell, Attorney General; *Don Langston,* Asst. Atty. General, for appellee.

GEORGE ROSE SMITH, Justice. The appellant was convicted of having indecently exposed himself to a girl under the age of sixteen. Ark. Stat. Ann. §§ 41-1127 and -1129 (Repl. 1964). The jury fixed his punishment at imprisonment for six months. The testimony of the prosecuting witness and of another high school student who was present when the incident occurred was amply sufficient to support the verdict.

The court did not err in allowing the fifteen-year-old prosecutrix to testify. In criminal cases the trial judge is given wide discretion in determining the competency of a minor as a witness. *Harris* v. *State,* 238 Ark. 780, 384 S. W. 2d 477 (1964). There was no abuse of discretion here. Quite the opposite, the record suggests no basis for

questioning the competency of this witness. Nor did the court err in refusing to permit defense counsel to delay his opening statement to the jury until the State had rested its case. That exact point was decided in *McDaniels* v. *State*, 187 Ark. 1163 (mem.), 63 S. W. 2d 335 (1933).

Affirmed.

ARKANSAS STATE HIGHWAY COMMISSION *v.* ROY CROMER ET UX

5-4180 414 S. W. 2d 90

Opinion delivered May 1, 1967

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

Ralph W. Robinson, for appellee.

GEORGE ROSE SMITH, Justice. This condemnation suit involves a tract of land near the tract that was taken in what now appears to have been essentially a companion case: *Arkansas State Highway Commn.* v. *Griffin,* 241 Ark. 1033, 411 S. W. 2d 495 (1967). There we

held that the trial court erred in permitting the landowners to prove an enhancement in value that was the result of the proposed improvement, the construction of Interstate Highway 40. That same proof was made in the case at bar; so this judgment must also be reversed.

Counsel seek to distinguish the *Griffin* case on the ground that there the landowners' testimony in chief included the prohibited element of valuation, while here the condemnor's attorney brought the matter out in cross-examining the landowners' expert witnesses. When those witnesses admitted that they had taken such inflated selling prices into consideration in arriving at their estimates of the value of the property being taken, the highway department's attorney made an unsuccessful effort to have those estimates of value excluded from the record.

The asserted distinction between that case and this one is not well taken. An expert witness may state his opinion without first giving the facts upon which it is based. *Arkansas State Highway Commn.* v. *Johns,* 236 Ark. 585, 367 S. W. 2d 436 (1963). Hence the appellant's attorney was compelled to elicit the facts by cross-examination. In this respect the case at hand is to be distingished from *Arkansas State Highway Commn.* v. *Russell,* 240 Ark. 21, 398 S. W. 2d 201 (1966). There we held that a landowner's testimony should not be stricken simply because he admits on cross-examination that he has taken an inadmissible fact (such as an offer to purchase) into account in reaching his conclusion about the value of his land. Here, by contrast, the experts' reliance upon inflated selling prices led them to an ultimate opinion that was actually erroneous for the purposes of condemnation, because it included an element of value not properly a part of just compensation. Hence the opinion should not have reached the jury's ears, not because it was technically inadmissible but because it was wrong and consequently misleading to the jury.

Reversed.

Opinion delivered May 1, 1967
[Rehearing denied May 29, 1967.]

William W. Green, for appellant.

Joe Purcell, Attorney General, *Don Langston,* Asst. Atty. General, for appellee.

PAUL WARD, Justice. This appeal comes to us under Criminal Procedure Rule No. 1. The background facts are summarized below.

On November 16, 1965 John T. Cromeans (appellant) was arrested in Arkadelphia on information that, while drunk and driving a stolen automobile, he had a collision with another car and killed a woman. Appellant was

placed in jail and later taken before a magistrate. Upon pleading guilty and waiving a hearing, he was bound over to the grand jury on a charge of first degree murder. About a week later an information was filed charging appellant with murder in second degree. Upon arraignment he pleaded guilty as charged and was sentenced to seven years in the penitentiary, the last two years being suspended on good behavior.

On April 4, 1966 appellant filed a habeas corpus proceeding in the Garland County Circuit Court, claiming his constitutional rights had been violated, and asking for a new trial. This petition was later withdrawn and on October 11, 1966 another petition was filed. In this petition appellant alleged:

1. He had a preliminary hearing without benefit of counsel.

2. He was threatened with twenty-one years in the penitentiary if he did not plead guilty.

3. He was sentenced to seven years (two years suspended) without counsel.

A somewhat lengthy hearing was held before the Circuit Judge on appellant's petition. In denying the petition the court made a written finding of facts and law.

We have carefully read the record of the proceedings on appellant's petition and also the findings of the court and have concluded, for reasons hereafter set out, that appellant's constitutional rights have not been violated.

One. We find that when appellant was arrested he was allowed to communicate freely with an attorney of his own choosing. The same is true at the time of his arraignment, when he entered a plea of guilty. It is true that his attorney was not present when the plea was made, and

this is assigned as error under the holdings in *Hamilton* v. *Alabama,* 368 U. S. and *Smith* v. *State,* 401 S. W. 2d 749. These cases are not in point here because they deal with a jury trial. When appellant here pleaded guilty and waived a hearing he acted on advice of counsel. This is not denied. There is no contention here that appellant made any incriminating statement at the preliminary hearing.

Two. It is argued by appellant (although not raised in the petition) that the offense which he committed did not constitute second degree murder. The trial court held otherwise and we cannot say it was error.

Rule No. 1 does not contemplate a trial *de novo,* and none was had in this instance. Therefore we have no way of knowing what criminal acts appellant may have committed. When he pleaded guilty he chose not to raise that issue. The only question before us is whether appellant's constitutional rights were violated when he so pleaded after consulting with his attorney.

Three. We find no merit in appellant's contention that he did not "knowingly and understandingly" waive counsel when he pleaded guilty. Appellant was approximately fifty years old, he had finished the ninth grade in school, and he had previously been in court on criminal charges. There is nothing in the record to show he possessed any mental deficiencies.

Fourth. At the hearing below (on appellant's petition) a letter written by appellant was allowed to be introduced in evidence, and this is assigned as reversible error. We cannot agree. It appears that the letter was relevant to test the credibility of appellant. In any event, we find nothing in the letter which was prejudicial to appellant, and no such prejudice is pointed out by appellant.

Failing to find that any of appellant's constitutional

rights—the right to counsel and the right not to be mistreated or coerced—have been violated, the judgment of the trial court must be, and it is hereby, affirmed.

BYRD, J., dissents.

C. E. TOLLIVER *v.* JOHNNY RILEY ET AL

5-4167 414 S. W. 2d 92

Opinion delivered May 1, 1967

R. W. Laster, for appellant.

W. B. Howard, Jack Segars and *Lohnes T. Tiner*, for appellee.

LYLE BROWN, Justice. Plaintiff-appellant Tolliver instituted this proceeding to cancel two conveyances he made to appellee, Johnny Riley. By bill of sale and warranty deed Tolliver conveyed to Riley the Cotton Boll Liquor Store on the outskirts of Trumann, Arkansas. The chancellor refused to cancel these instruments. The principal issue for reversal is whether there was a valid delivery of the deed and the bill of sale.

Johnny Riley was in the retail liquor business at Harrisburg and C. E. Tolliver was similarly engaged

at Trumann. Early in 1965 the two men began discussing the sale by Tolliver and the purchase by Riley of the Cotton Boll Liquor Store. By February 4th they had agreed on a sale for $32,500.00. An inventory would be taken, and Riley would pay extra for any merchandise beyond an inventory of $6,000.00. On that date they met at the office of Tolliver's attorney, Clyde Smith. An agreement was there executed styled "Sale and Purchase Option Agreement." The full purchase price was not recited.

In the days that followed, Attorney Smith had the abstract brought down to date and prepared a warranty deed and bill of sale. On February 26th the parties again met in Smith's office. On this occasion Riley brought along his attorney, Lohnes Tiner of Harrisburg. Riley brought with him two time deposit certificates in the sum of $5,000.00 each and $25,000.00 in one-hundred-dollar bills. The evidence preponderantly shows that Tolliver wanted mostly cash, but did not want bills in these denominations. He thought the bank kept serial numbers of such denominations, and for tax reasons he did not want them traced to him. Also, he apparently did not want to take the money in front of witnesses. Tolliver suggested that the final payment be postponed until Monday (following this Friday meeting). It was agreed that the seller and purchaser would meet in Trumann on Monday, at which time a mortgage debt would be paid the bank by Tolliver, the balance of the purchase price would be paid, and inventory would be taken. Tolliver told the attorneys that he and Riley could take care of these matters without the attorneys' services. These arrangements seemed to be agreeable to all parties. Riley assigned over and delivered his certificates of deposits. Tolliver executed the warranty deed and the bill of sale, which were handed to Riley's attorney. Riley and his attorney, Tiner, returned to Harrisburg. Tiner delivered the conveyances to his client and instructed him to have them recorded. This was done the following morning.

The facts just recited are substantially undisputed. The same thing cannot be said with respect to the events which followed. The voluminous transcript contains an abundance of controverted testimony. Among the numerous witnesses who testified were four of the five attorneys who participated in the trial of the case. (In this respect we invite the attorneys' attention to Canon 19 of the Canons of Professional Ethics, 237 Ark. 984.) The remaining factual point in issue which is pertinent to a decision on appeal concerns the final payment of the consideration. Tolliver asserts that he never received the balance of the purchase price, which was to be paid in cash. Riley asserts that the events leading up to, and including, final payment are as follows:

When Riley left the recorder's office on Saturday morning he was told by Attorney Tiner that Tolliver was at the Bank of Trumann and wanted him to come over and conclude the matter. Riley went to his home, obtained the cash, and headed for Trumann. Riley's journey on the way was delayed when he stopped to aid a woman motorist who was out of gas. While Riley was so engaged on the highway between Harrisburg and Trumann, Tolliver drove up. At this point, so Riley testified, he got his money out of his pick-up and got in Tolliver's car, where they counted out 218 one-hundred-dollar bills. Riley asked for a receipt, but Tolliver assured him the bill of sale and warranty deed would suffice. Riley wanted to proceed then to take inventory but was told Tolliver had to go to Little Rock. The two agreed they would meet at the liquor store the next morning (Sunday) and take inventory.

The next morning Riley went to Trumann in company with Bob Smith, who was going to operate the store under a lease from Riley. They found a Mr. and Mrs. Bell in the store. Apparently they were not open for business, but Bell worked in the store. Tolliver did not show up for the inventory. He was finally located

but advised Riley they could not take the inventory on Sunday. Tolliver said he had called Little Rock and received that information. Tolliver drove away. Riley called his lawyer and the sheriff. The locks were changed, and the inventory was completed by Riley and Smith around midnight. The next day Smith began operating the store. Tolliver came to see Riley in Harrisburg, but Riley referred him to attorney Tiner. The next occasion for any meeting between Riley and Tolliver was in court on March 8th, at which time a receiver was appointed to take charge of the store pending the outcome of litigation.

No third person testified who purported to have witnessed the final payment to which Riley testified. However, there was strong corroboration of events leading up to, and following, the exchange of cash on the highway. The chancellor found that the final payment had been made, and there is an abundance of testimony and circumstances in proof to justify his conclusion.

The essence of appellant's argument for reversal is that Tolliver did not intend to pass title on February 26th, and did not pass title because the full purchase price was not then paid. It is not necessary to labor this point, because the chancellor found that the balance of the purchase price was in fact paid the following day.

Affirmed.

HERMAN B. YOUNG *v.* ARKANSAS STATE HIGHWAY COMMISSION

5-4219 414 S. W. 2d 87

Opinion delivered May 1, 1967

Harold Sharp and *Spitzberg, Bonner, Mitchell & Hays;* By: *John P. Gill,* for appellant.

John R. Thompson; By: *Robert H. Hall,* for appellee.

LYLE BROWN, Justice. This is an eminent domain case. Arkansas State Highway Commission sued to take 0.33 acres from appellant Young's tract of 14.7 acres. The jury awarded the property owner $2,500.00, which he considered inadequate. Appellant relies on two points for reversal, namely, inadequacy of the verdict, and the trial court's refusal to give a separate instruction explaining the right of the property owner to testify as to fair

market value. These points will be listed and discussed in that order.

1. *The verdict is inadequate and is not supported by substantial evidence.* An expert witness and the landowner testified as to values. The highway department offered no testimony. The expert witness fixed just compensation at $8,140.00. The landowner estimated his damage to be between ten and twenty thousand dollars. These being the only "before and after" figures introduced, it is the landowner's contention that an award should have been made within the bounds of the proffered figures. This contention must be rejected upon the basis of our holding in *Ark. State Highway Comm.* v. *Schanbeck,* 240 Ark. 277, 398 S. W. 2d 897 (1966). There the trial court instructed the jury to return a verdict within the limits of the value witnesses. This instruction was held to be in error in view of the right of the jury "to exercise its own independent thinking and judgment in translating the testimony into a finding of fact."

We are asked to declare the verdict inadequate. In *Hales & Hunter Co.* v. *Wyatt,* 239 Ark. 19, 386 S. W. 2d 704 (1965), this court said:

> "Neither can it be said that the jury verdict of $2,500.00 instead of the $7,598.14 sought is so inconsistent with the pleadings and proof that the verdict is subject to appellant's motion for judgment *non obstante verdicto.* We have held that where the jury renders a verdict based upon substantial evidence for more than a nominal amount, although inconsistent with either theory of the case, then the trial court does not have authority to award a larger sum than that determined by the jury. *Fulbright* v. *Phipps,* 176 Ark. 356, 3 S. W. 2d 49."

The verdict is based on substantial evidence. Young bought the 14.7 acres on February 20, 1963, for $1,200.00 an acre. Within a few days he learned that the highway

department was slicing off practically all the frontage on State Highway No. 1. This was necessary to make a proper approach to the new interstate highway, which crossed Highway No. 1. When this information reached Young, he immediately sold the 14.7 acres (less the taking) to Transportation Industries, Inc. for $1,200.00 an acre. (In turn, Transportation obtained an easement for an access road to its property.) The 0.33 acres taken was valued at $660.00. The jury might well have determined Young's only damage to have been $660.00 since he sold his remainder at the same acreage rate for which he purchased it. Young testified that before the taking he had in mind erecting a motel. Yet there was no testimony which showed the property to be considered feasible for such a business.

At the time Young bought this acreage it was generally known that Interstate 40 would overpass State Highway No. 1 at this juncture. There an elaborate interchange was planned. Therefore, as of the date of Young's deed, land values in the area had been substantially affected and land uses had changed. This court looks with disfavor on using land values suddenly changed in anticipation of a proposed highway improvement. *Arkansas State Highway Commission* v. *Griffin,* 241 Ark. 1033, 411 S. W. 2d 495 (1967). Likewise, the jury may well have frowned on damages near the full amount claimed in the belief that this would be unjust enrichment.

Appellant argues that the 14.7 acres was landlocked as a result of the taking. However, the jury may have found this assertion not to be entirely correct. The expert witness testified that there would still be access across a ditch which would require a large culvert.

2. *The trial court erred in refusing to instruct that the owner may testify as to the fair market value of his property.* Appellant offered an instruction dealing only with the right of the owner to testify as to the market value of his property. It was proper to refuse the instruc-

tion. *Steptoe* v. *St. L., I. M. & S. Ry. Co.*, 119 Ark. 75, 177 S. W. 417 (1915):

> "The giving of the following instruction, at the de fendant's request, is also assigned as error: '13. The jury are instructed that while they are the judges of the weight of the evidence, and the credibility of the witnesses, yet, they must not disregard the testimony of any witness arbitrarily, nor are they to discard or depreciate the testimony of a witness merely because he is in the employ of the railway company.' The instruction, as will be seen, singles out a certain class of witnesses, and it was improper to do that in a instruction. We have often held that it was not good practice to single out facts or witnesses, individually or in classes, and to refer to them in instructions—that this court will not reverse a case for refusal to give such an instruction; but, on the other hand, we have held that the giving of such an instruction, though bad practice, does not constitute reversible error."

The court properly instructed the jury on the credibility of all witnesses. He gave an additional instruction on "opinion evidence." The first paragraph of this last instruction was applicable to the landowner's opinion as well as the expert's opinion. Under these circumstances the giving of the refused instruction could well have been duplicitous and prejudicial.

We do not hold that in every situation the giving of a properly phrased credibility instruction as to a witness or class of witnesses is inadvisable. We do hold that when the jury is adequately instructed generally on the credibility of all witnesses, it is not error to refuse to single out a witness or class of witnesses in an additional intruction.

Affirmed.

5-4187 414 S. W. 2d 106

Opinion delivered May 1, 1967

Lofton, Herrod & Cole; By: *E. H. Herrod,* for appellant.

Wright, Lindsey & Jennings; By: *Isaac A. Scott Jr.,* for appellee.

JOHN A. FOGLEMAN, Justice. This appeal presents the question of the priority of the lien of a construction money mortgage to a mechanic's and materialman's lien.

Appellant, a heating and air conditioning contractor, contends that its lien for labor and materials furnished for the heating and air conditioning system of a dwelling house has priority over the lien of a recorded construction money mortgage containing the language requisite to its purpose under which appellee advanced money to a developer, Pouncey Construction Company, for the construction of the house. Appellant claims priority under Ark. Stat. Ann. §§ 51-601, 51-604, 51-605, and 51-607 (1947), all being sections of Act 146 of 1895. The mortgage was recorded on February 5, 1965. The only work done on the premises by appellant prior to this date was an inspection of the premises on January 24th by Mark Partin, its President and General Manager, and the preparation of the plans for heating and air conditioning and a "Manual J worksheet"[1] delivered to the owner on January 25th. Appellant testified that his "on-site" inspection on January 24th consisted of the determination of the direction the house would face by a compass reading and the location of the center of the house on the lot. This latter was in order to determine the proper location of the unit by use of a tape measure and a wooden peg. The peg was driven into the ground to aid in the use of the tape. The whole inspection and measurement took about thirty minutes. Partin admitted that he probably could have determined the direction the house would face from a set of plans given him by Pouncey. He made mental notes of his inspection and later prepared the documents for delivery to Pouncey with an estimate of cost. He says that he and Pouncey entered into a verbal contract at the time of the delivery of these documents.[2] He claims that there was an agreement that appellant would be paid for what Partin had done if FHA approval was not obtained. Partin testified that

[1]Apparently this worksheet was for submission to the FHA as a necessary requisite for a commitment to insure a permanent loan on the house.

[2]There is testimony that would tend to show that there was no contract until FHA approval had been given somewhat later, but, in view of our holding, the difference in dates is of no significance.

appellant did not order the equipment to be used but started making the necessary fittings. The time work was started on these fittings is not definitely stated. There is no evidence that anything else was done by appellant or the builder before the date the mortgage was recorded, which, of course, was after FHA approval.

An employee of appellee made a physical examination of the lot on the date the mortgage was recorded. He found no visible construction materials, no stakes or string along the ground on the lot, nor any other evidence of anything done to prepare the lot for construction. He did not walk to the back side of the lot. He took a photograph to record the appearance of the lot as to improvement or preparation therefor. He admitted that there could have been a one-inch stake in the ground in the grass on the lot which he would not have seen. We find that the trial court correctly held that the construction money mortgage had priority.

The statutory lien relates only to work done or materials or machinery furnished under or by virtue of any contract with the owner. (Ark. Stat. Ann. § 51-601) Even under appellant's contention there was no contract with Pouncey until after the estimate of cost, plans and worksheet were submitted one day after the lot measurement and inspection on which he relies. Even though a lien perfected in the statutory way might relate back to the time the lienholder began to furnish his services or materials, the services and materials must have been furnished under the contract. The lien is effective only when the contract is made with the owner. *Hawkins* v. *Faubel,* 182 Ark. 304, 31 S. W. 2d 401. Since all work done after the contract was entered into with Pouncey was subsequent to the recording of the construction money mortgage, the lien would not be effective until after the recording. Thus, the construction money mortgage would be a prior incumbrance and entitled to priority under the plain language of Ark. Stat. Ann. § 51-605. Cases cited by appellant in support of

its contention that its lien antedates that of appellee are based on actual furnishing of supplies under contract with the owner or the doing of substantial visible construction work on the premises to be improved before the mortgage in question was recorded. See, e.g., *Cook* v. *Moore,* 152 Ark. 590, 239 S. W. 750; *Georgia State Savings Asso.* v. *Marrs,* 178 Ark. 18, 9 S. W. 2d 785; *Ferguson Lbr. Co.* v. *Scriber,* 162 Ark. 349, 258 S. W. 353.

But appellant contends that it has priority under § 51-607. According to the construction given that section by this court, appellant's lien would relate back to the commencement of the building so that it would be prior to a construction money mortgage recorded after *any* work had been done or materials furnished on the lot to be improved under contract with the owner by *anyone* entitled to such a lien. *Planters Lumber Company* v. *Jack Collier East Co.,* 234 Ark. 1091, 356 S. W. 2d 631. But this does not improve the position of appellant for we are unable to find any evidence of such a commencement of the building prior to the recording of appellee's mortgage.

Appellant earnestly contends that "commencement of the building" can be at some time earlier than the placing of materials on the land to be improved and that this preliminary work by appellant was such a commencement. We hold that the work done by appellant was not the type of work which would qualify as "commencement of the building." We find no decision of our court on this point, nor has appellant cited any, but in all of the Arkansas decisions that we have found under which the materialman or mechanic was found to have priority, some material had been placed on or near the property or some work had been done thereon which would be readily visible so as to make it obvious that improvements on the property were being commenced or were underway. The preliminary inspection and planning of appellant could not constitute work upon the

building or material furnished therefor. The fabrication of fittings could not have constituted commencement of the building, as we construe § 51-607, and were not "furnished" at that time. The very purpose of that section is to fix priorities in cases such as this. Consequently, there must be some means for a prospective lender to determine whether there are prior liens. Since there is no requirement that mechanic's and materialman's liens be recorded, the only possible way to make this determination is by visual inspection of the premises. The "commencement of such buildings and improvements" as used in the section in question, then, means some visible or manifest action on the premises to be improved, making it apparent that the building is going up or other improvement is to be made. 36 Am. Jur. 112, Mechanic's Liens, § 167; 57 C. J. S. 732, Mechanic's Liens, § 179. This must be done with the intention and purpose then formed to continue the building to completion. Almost without exception the courts of other states have adopted this meaning of these words in similar statutes. See *Rupp* v. *Earl H. Cline & Sons,* 230 Md. 573, 188 A. 2d 146, 1 ALR 3d 815, reviewing decisions of the Maryland court and referring to cases in accord from other jurisdictions. See, also, annotation following on page 822 at pages 825 to 828.

The decree of the lower court is affirmed.

JAMES BATTLE OLDHAM *v.* STATE

5263 414 S. W. 2d 610

Opinion delivered May 1, 1967

[Rehearing denied June 5, 1967.]

James R. Van Dover and *F. N. Burke Jr.*, for appellant.

Joe Purcell, Attorney General; *Don Langston*, Asst. Atty. General, for appellee.

J. FRED JONES, Justice. On October 22, 1965, appellant entered pleas of guilty to two counts of grand larceny and two counts of burglary in the Lee County Circuit Court and was sentenced to five years in the penitentiary on each count of burglary and four years on each count of grand larceny. One of the larceny counts and one of the burglary counts grew out of the theft of a saddle, and the other two counts grew out of the theft of a pistol. Each of these items was taken from a different place in Lee County. The sentences were cumulative and concurrent and actually amounted to one sentence of nine years on all counts.

Appellant was committed to the penitentiary and on April 4, 1966, he filed a petition in the Lee County Circuit Court for a writ of habeas corpus alleging that his constitutional rights had been violated by failure of the trial court to provide him with counsel. Hearing was had by the trial court on appellant's petition and the writ was denied. Appellant has appealed to this court and relies on the following point for reversal:

> "Point 1. The Court erred in failing to grant the appellant a new trial for the reason there is no proof in the record that appellant was advised of his constitutional right to counsel and that he knowingly waived his right."

Appellant was first arrested in Memphis, Tennessee, and charged with drunkenness when he was found asleep in his automobile. The arresting officers found a saddle and a pistol in the trunk of appellant's automobile, and apparently the saddle and pistol were identified as objects taken from burglarized buildings in Lee County, Arkansas, and the appellant was charged with

burglary and grand larceny as above set out. Appellant waived extradition from Tennessee to Arkansas, entered pleas of guilty on arraignment in Municipal Court, as well as in Circuit Court where his sentences to the penitentiary were imposed. He now contends in support of his petition for habeas corpus, that the saddle and pistol were found in his possession through an unlawful search and seizure conducted by the police officers in Memphis. Having entered pleas of guilty, the record remains silent as to the evidence upon which the state based its information and upon which the state would have relied at the trial of the cases. Appellant testified at the hearing on his petition as follows:

* * *

"Q. That is the gun and saddle you were charged with stealing in Lee County?

A. Yes, sir.

Q. Do you know where you were accused of stealing them from?

A. Yes sir, from R. K. Monroe and Freeland Nash.

Q. Were they stolen from the same place?

A. No, sir.

Q. One charge referred to the taking of the gun and the other the taking of the saddle?

A. Yes, sir."

Appellant argues, however, that his constitutional rights were violated in that there is no proof in the record that he was advised of his constitutional right to counsel and that he knowingly waived that right.

There is considerable conflict in the testimony as to whether the appellant was advised that he had a right

to the assistance of counsel in his defense. Appellant testified that he knew the nature of the charges against him and the penalty involved. He testified that he did not request the assistance of counsel and that to the best of his knowledge, he was not offered counsel or asked by the court if he desired counsel at the time he entered his plea of guilty.

The trial judge examined the appellant at some length on this point, and then the trial judge stated, in response to an inquiry by appellant's counsel, as follows:

* * *

> "I don't remember every word this court said to him, but I do know that for the past year or eighteen months we ask every defendant if he has an attorney or if he wants an attorney and if he is going to plead guilty we appoint somebody to confer with him before he enters his plea."

The trial court is to be commended for adopting this procedure and if a *record* could be made of such proceedings, it would be of considerable value to the trial court in properly disposing of petitions of this nature and would be of considerable value to this court on appeal. Such record would avoid the necessity of a trial judge matching his memory with that of a defendant as to events that transpired in a trial over which he presided.

Whether the appellant in this case was or was not advised that he was entitled to the assistance of counsel, we conclude from a study of the entire record before us, that the appellant had full knowledge of his right to counsel and that he intelligently waived it.

Appellant testified at the hearings on his petition that he prepared the petition and had no assistance in the preparation of his petition and the other pleadings filed by him in this case. From a very cursory examination of the pleadings prepared by the appellant in this case,

including the citations of authority in support of his petition for the writ of habeas corpus, we are convinced that appellant certainly must have known that he was entitled to the assistance of counsel whether he was so advised by the trial court at his arraignment or not.

The record reveals that after counsel was appointed by the trial court to assist appellant in this case, the appellant on November 20, 1966, wrote to the attorney as follows:

* * *

> "If possible I would like for you to visit me here as there [are] some points to this case which I feel should be gone over with you. I do request a copy of all legal papers to be filed in this appeal. I would like a copy of the transcript, Bill of informations, Warrants, and Commitments on this case. I also want a copy of the appeal brief, before it is filed with the Supreme Court. I do not want any unnecessary delays in this appeal. I would like very much for you to work with me on this matter, which I'm sure you are capable of doing. So that this appeal may be filed with the Supreme Court just as soon as possible. Thanking in advance for any consideration you may give me on this."

And on December 3, 1966, he wrote to his attorney as follows:

> "I am writing you in regards to a letter I wrote you on the 19th day of November, as you have not seen fit to answer this letter which was asking you to let me know what action you had taken on my appeal. As you have not taken time to answer this letter. I know you must feel this case to be a burden upon you. As I feel sure that you know and I know you did not want this case when you were appointed for the writ of habeas corpus hearing on May 31, 1966. As you made known at that time. I have no

choice but to ask you to ask the Court to release you from this case. For I do not feel that you can or will properly represent me in this appeal. If you do not see fit to do this. Then I will ask the court to do so myself."

In the case of *Swagger* v. *State*, 227 Ark. 45, 296 S. W. 2d 204, where a nineteen year old uneducated boy who had never appeared in court before was involved, this court said:

"The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."

At the hearing before the trial court on the petition, appellant testified in answer to questions, as follows:

* * *

"Q. Will you tell the Court why you entered a plea of guilty?

A. Well, it all breaks down to one thing, or things, which I won't bring out now.

Q. I want you to bring out everything. You are accusing this Court of mistreating you and I want you to bring out everything.

A. I think I done what anybody would do under the circumstances. It was more or less my understanding that if I would plead guilty I would receive my sentence and could serve it and be on my way, as to where if I did not enter a plea of guilty I could receive a longer sentence. Another thing I was in a strange

State without help, therefore I did enter a plea of guilty.

Q. Do you mean you were willing to enter a plea of guilty and go down there and serve a sentence when you were not guilty?

A. Under the circumstances.

Q. Under what circumstances?

A. That I do not want to bring in."

The appellant in the case at bar is 41 years of age. He admitted he had served at least three prior sentences on pleas of guilty. Appellant's record with the United States Department of Justice, appearing as a part of the record on this appeal reveals considerable experience as a defendant in criminal law cases. This record reveals that appellant was sentenced in Indiana on a fraud count; that he was sentenced in Kentucky, as well as Indiana, for violation of the Dyer Act; that he was sentenced in Indiana and in Georgia for transporting a stolen automobile; that he was sentenced in Mississippi under the Dyer Act; that he was sentenced in Indiana for transporting a stolen automobile; that he was sentenced on a similar charge in Georgia; that he was also sentenced in Georgia for theft; that he was sentenced in Tennessee on felonious use of an automobile; that he was sentenced to five years in Florida for armed robbery, and on August 17, 1965, he was fined $26.00 in Memphis, Tennessee for being drunk in an automobile.

From our examination of the entire record in this case, we are convinced that appellant knew of his constitutional rights to have the assistance of counsel, and that he intelligently waived his right to counsel when he entered his pleas of guilty in this case. We are of the opinion that appellant's constitutional rights were not

violated by the failure of the trial court to appoint counsel for the appellant when no request for counsel was made by appellant, and that the trial court was correct in denying the petition for a writ of habeas corpus.

The judgment of the trial court is affirmed.

Affirmed.

RUTHIE MAE BROOKS *v.* ROBERT E. WAGE ET AL

5-4179 414 S. W. 2d 100

Opinion delivered May 1, 1967

Howell, Price, & Worsham, for appellant.

McMillen, Teague, Bramhall & Davis; By: *Thomas M. Bramhall,* for appellee.

J. Fred Jones, Justice. This is a workmen's compensation case involving the question of whether or not the injury and resulting death of an employee grew out of and occurred within the scope of his employment. The Workmen's Compensation Commission held that it did. The Circuit Court on appeal reversed the Commission and we agree with the Circuit Court.

The claim was filed by Ruthie Mae Brooks, the widow of a deceased employee, Fred W. Brooks. The Commission rendered a thorough and comprehensive opinion in this case, but we do not agree with the legal conclusion reached by the Commission on the facts of this case. We conclude that there was no substantial competent evidence to support the findings and award of the Commission.

At the time of his injury and death, Fred W. Brooks had been employed for a number of years by Robert E. Wage in the general contracting business. He had worked on jobs all over Little Rock, including two or three jobs in the Broadmoor Addition. The decedent drove to and from work in his own pickup truck. He worked by the hour and his regular work day started at 8:00 a.m. and stopped at 4:30 p.m. The decedent lived in the Tie Plant area on the east side of North Little Rock, and for two days prior to February 15, 1965, he worked on his job in the Brookwood Addition to Little Rock, located off the new Benton Highway near the city limits in the extreme southwest section of Little Rock.

Early on Monday morning, February 15, the respondent employer called decedent at home by telephone

and requested him to stop by Long-Bell Lumber Company, 4501 Asher Avenue, and pick up some reinforcing rods and bring them on out to the job. On this point the employer testified as follows:

"Q. What were your instructions to him at that time?

A. I told him to come by Long-Bell Lumber Company and pick up some reinforcing rods and to go to No. 8 Rosewood, which is in the Brookwood Addition out behind Meadowcliff."

and at page ten of the transcript. Mr. Wage testified as follows:

"Q. Mr. Wage, what hours did Mr. Brooks normally work?

A. From eight to four-thirty.

Q Now, would you have had any reason to expect him to reach Long-Bell Lumber Company prior to eight o'clock?

A. No.

Q. Would you have wanted him to be on the job out there in—was it Brookfield?

A. Um-hum (nods affirmatively). No. Brookwood.

Q. By eight o'clock, or would it have been satisfactory to you if he had reached Long-Bell by eight o'clock?

A. No, his work time started at eight o'clock and I had no call on him before eight o'clock or after four-thirty.

Q. I see.

A. Unless we agreed to it."

On the morning of February 15, the decedent left home about 7:00 a.m.; picked up two of his neighbor women who worked in Little Rock, drove south across the bridge from North Little Rock to Little Rock, then drove west out No. 10 Highway through the extreme north and northwest side of Little Rock, turned south onto Monroe Street from Highway 10 and delivered the neighbor women to the place of their employment at 1701 North Monroe Street. He then drove north on Monroe Street toward No. 10 Highway.

Decedent was killed in a collision at the intersection of Broadmoor and Berkshire Drives in the Broadmoor Addition lying west of University Avenue in the extreme west or southwest section of Little Rock, and several blocks northwest of Long-Bell Lumber Company, and several more blocks north of No. 8 Rosewood in the Brookwood Addition. The collision occurred about 7:30 or 7:35 a.m. while the deceased was driving in a northwesterly direction on Broadmoor Drive. He was traveling in a course that would have led him into Boyle Park or the intersection with west 12th Street. He had already crossed 12th Street in coming from North Monroe and was traveling in the opposite direction from Long-Bell Lumber Company, where he was not expected to be for another twenty-five or thirty minutes, when the collision occurred

There seems to be no question but that an employee is not within the course of his employment under the Arkansas Workmen's Compensation Act while traveling to or from his job before or after regular work hours unless he falls within one of several generally recognized exceptions to the "going and coming" rule.

This court has recognized various exceptions to the going and coming rule, such as where an employee has reached a place so close to the employer's premises as to be considered on a part of the employer's premises.

Bales v. *Service Club,* 208 Ark. 692, 187 S. W. 2d 321; where the employer furnishes transportation to and from the place of employment. *Hunter* v. *Summerville,* 205 Ark. 463, 169 S. W. 2d 579, in the case of traveling salesmen, where traveling is an integral part of the employment. *Frank Lyon Co.* v. *Oates,* 225 Ark. 682, 284 S. W. 2d 637, also where the employer agrees to furnish transportation, *Hunter* v. *Summerville,* 205 Ark. 463, 169 S. W. 2d 579.

Another exception, and the one argued in this case, is where the employee is on a special mission for the employer before or after regular working hours. Arkansas, as well as most states, recognizes this exception, but the gray area in this exception is broadened when the employee deviates from his route in performing the special service for his employer in order to perform special service for himself or for a third party.

To cite and attempt to distinguish the cases in this area of exception to the "going and coming" rule, would enlarge this opinion to text book chapter proportions, and there are already text book chapters on the subject; 8 Schneider, Workmen's Compensation, chapter 33, § 1733, and volume 7, § 1680; 1 Larson's Law on Workmen's Compensation, § 19.50.

The New York case of *Mack's Dependent* v. *Gray,* 167 N. E. 181 (N. Y. 1929) cited by appellant contains facts somewhat different from the facts in the case at bar. It primarily involved the "dual purpose doctrine," but the opinion in that case by Chief Justice Cardozo presents sound reasoning on the "going and coming" rule and its exceptions, as well as the "dual purpose" doctrine, and has been followed by this court.

The deceased employee, Marks, made his home and place of business in Clifton Springs, New York. On the day in question, his wife was visiting in Shortsville, where Marks was to pick his wife up at the end of the

day. The employer, learning of the planned trip, asked Marks to take his tools and fix some faucets in a house in Shortsville. The job was of a small nature. There would have been no need for a special trip as no profit could have been derived. Marks did not use company transportation, but used his own automobile. He would be paid the normal wage, however.

Marks was killed enroute to Shortsville. The journey was not made at the request of his employer or for employer's work. The trip was made to fulfill his promise to pick up his wife.

In the Mark's case, Chief Justice Cardozo states the issue as follows:

> "Whether the injury was one 'arising out of and in the course of the employment' is the question to be answered."

In arriving at the decision in that case, Chief Judge Cardozo speaking for the New York Court of Appeals, says:

> "Unquestionably injury through collision is a risk of travel on a highway. What concerns us here is whether the risks of travel are also risks of the employment. In that view, the decisive test must be whether it is the employment or something else that has sent the traveler forth upon the journey or brought exposure to its perils.
>
> * * *
>
> "In such circumstances we think the perils of the highway were unrelated to the service. We do not say that service to the employer must be the sole cause of the journey, but at least it must be the concurrent cause. To establish liability, the inference must be permissible that the trip would have been

made though the private errand had been cancelled. We cannot draw that inference from the record now before us. No, on the contrary, the evidence is that a special trip would have been refused since the pay would have been inadequate. The test in brief is this: If the work of the employee creates the necessity for travel, he is in the course of his employment, though he is serving at the same time some purpose of his own. If, however, the work has had no part in creating the necessity for travel, if the journey would have gone forward though the business errand had been dropped and would have been cancelled upon failure of the private purpose, though the business errand was undone, the travel is then personal, and personal the risk."

Perhaps our own case of *Martin* v. *Lavender Radio & Supply, Inc.*, 228 Ark. 85, 305 S. W. 2d 845 (1957), also cited by appellant, is more in point with the case now before us.

In that case, Martin, the employee, was employed as a purchasing agent, and one of his duties consisted of obtaining the mail from the post office, by either stopping himself while on his way to work, or sending another employee, at Martin's discretion. In going to work Martin drove on a certain street, he turned left from this street when going directly to work, but traveled further on and turned right when going by the post office. Unless he was tardy, Martin would usually collect the mail himself before going to work. On the morning in question, Martin had traveled some three-fifths of the distance to work when he was injured in an automobile collision. If going to work Martin would have turned left, if going to the post office he would have continued some distance further before turning right. The collision occurred before he reached the first turning point.

The Commission awarded compensation, the Circuit

Court affirmed the award of the Commission. In reversing the Circuit Court judgment, this court recognized the exception to the "going and coming" rule, when the employee has a duty to perform for the employer while enroute home after regular working hours, and then this court said:

> "There is no reason, of course, why the converse would not be true, namely, if the employee has a duty to perform for the employer while enroute to the place of employment . . . this court apparently has not previously had the opportunity of applying this concept of laws to facts arising within our state."

This court then cites with approval from Mark's Dependents v. Gray, supra, and says:

> "Let it be made clear that we are not saying that an employee, on his way to work, must deviate from the normal route to perform some errand before he would be acting in the course of his employment. For instance, suppose that the post office had been located at a point that appellant would reach before arriving at 7th and Ash—on the same street that Martin traveled each day in going to the office. *In such case, Martin would be acting within the scope of his employment when he drove up and stopped at the post office—and not before. Stopping would be a deviation from the normal procedure of simply traveling to work.*
>
> "The reasoning set forth by Justice Cardozo seems to us to be entirely logical and persuasive, and worthy of adoption. This, then, is the rule that governs this case. 'The decisive test must be whether it is the employment or something else that has sent the traveler forth upon the journey or brought exposure to its perils. *** We do not say that service to the

> employer must be the sole cause of the journey, but at least it must be a concurrent cause. *** and sufficient within itself to occasion the journey." (emphasis supplied).

Workmen's compensation insurance is not *life* insurance. The burden rests on the claimant to prove that the accident grew out of and occurred within the course of employment, and while the Commission is obligated to resolve any doubt in favor of the injured employee, and the Circuit Court and this court are obligated to affirm the Commission on appeal if there is any substantial evidence to sustain the finding of the Commission, *Auto Salvage Co.* v. *Rogers,* 232 Ark. 1013, 342 S. W. 2d 85; the doubt resolved by the Commission must be a reasonable doubt and substantial evidence must be competent evidence and it must be of a substantial nature and not based on surmise and conjecture.

In Martin v. Lavender, the employee had not reached a point where his additional duties would have taken him out of the usual "going and coming" rule and placed him within the exception and within the course of his employment.

In the case at bar, even if we assumed that the decedent was placed within the course of his employment upon the receipt of the phone call to go by Long-Bell, there could be little doubt that he was outside the scope of his employment while traveling on an entirely different route and mission, and in a different direction from his home in North Little Rock through the north side of Little Rock to discharge his passengers on North Monroe Street. There would have been no doubt at all that he would not have been within the scope of his employment had the employer not asked him to go by Long-Bell and he had been on the way from his home to his regular job site off the new Benton Highway when the accident occurred, or if his employer had simply told him "I want you to work at the Long-

Bell Lumber Company today." Neither would there have been much question but that Brooks would have been within the course of his employment under the facts of this case had he gone directly from his home to Long-Bell, and the accident had occurred after he turned off his regular course to work in order to go to Long-Bell, even though he was not expected to go to Long-Bell until the store opened at 8:00 a.m., *Martin* v. *Lavender, supra.*

So, the main question here is whether or not the employee was within the "going and coming" rule, or was within the exception at the time of his injury. If he was within the rule, that is, if he was simply going to work, when did the exception apply, if it did? If he was at any time within the exception to the general rule and departed from it, when did he re-enter the exception and what was his status at the time of his injury?

The deceased's employer did not know he was taking women to work on North Monroe Street, however, that was none of the employer's concern because the employer had "no call on him" before 8:00 a.m. From the record before us no one knows why the deceased was in the Broadmoor Addition on the west side of Little Rock, but that is where he was when the accident occurred and he was not traveling toward Long-Bell at 4501 Asher Avenue, nor was he traveling toward his regular work place off the new Benton Highway. He was traveling in the opposite direction from both places. Perhaps he had lost his way to Long-Bell, as well as to his regular job site. But perhaps he had thought of another errand he wished to perform. Perhaps he had forgotten to tell or ask his passengers something and was returning to North Monroe Street. Perhaps he had even decided not to work that day, all of these "perhapses" are pure conjecture, but one of them is as logical as any other and neither constitutes evidence of any degree whatsoever.

A mere request or order from an employer that a service be performed by the employee while going to the regular place of employment before the work day begins, does not automatically and *per se,* place the employee within the course of his employment. The employee must at least engage in the course of carrying out the assignment, or returning from having done so, before he can be said to be within the course of his employment. To hold otherwise would make it too easy to carry compensation coverage to the scene of an accident, and would convert the "going and coming" rule into the exception and unduly shift the burden of proof in compensation cases.

In the case of *Johnson* v. *Clark,* 230 Ark. 275, 322 S. W. 2d 72, at page 279 of the state report, this court said:

> "The coming and going rule is an affirmative one in the sense that the employee has the burden of showing that it does not apply, for otherwise any injury occurring between his departure from his home and his return would presumptively arise out of and in the course of his employment."

Had the deceased been injured on his way to North Monroe Street, in the case at bar, the evidence would not be substantial that he was on his way to Long-Bell, and to have assumed he was lost would not have supplied substantial evidence. There is no question but that the deceased was on a mission of his own in going to North Monroe Street rather than to Long-Bell on Asher Avenue, and it is just as logical to assume that he was not lost and was still on a mission of his own, as it would be to assume that he was lost and trying to go to Long-Bell when he was injured while traveling northwest in Broadmoor.

A more specific question here, is whether or not the duties of the decedent's employment exposed him to the

hazards he encountered at the place where he was injured, and we conclude that there is no substantial evidence that it did. We have not overlooked the "dual purpose" doctrine in arriving at our conclusion in this case. We conclude that if the deceased had a dual purpose in traveling northwest in Broadmoor at the time of the accident, going by Long-Bell Lumber Company was not one of them. The only evidence in the record that the decedent was on his way to Long-Bell when the accident occurred, was the evidence that his employer told him to go there and his own statement that he was going to do so.

The judgment of the trial court is affirmed.

Affirmed.

GEORGE ROSE SMITH, J., dissents.

MARVIN CLARK, GUARDIAN OF THE ESTATE OF THOMAS HARVEY CAGE, A MINOR *v.* ARKANSAS DEMOCRAT COMPANY

5-1440 413 S. W. 2d 629

[Rehearing denied May 1, 1967.]

[Original opinion delivered March 13, 1967; page 133.]

Ben D. Lindsey and *Spencer & Spencer;* By: *Don Gillaspie,* for appellant.

Robert C. Compton and Austin McCaskill, for appellee.

LYLE BROWN, Justice. The original opinion contains this language: "Under the holding in *Terry Dairy*, and reiterated in *Cox*, this case should be reversed, with directions to the trial court to ascertain the damages." This phraseology could well be interpreted to mean that on retrial the *only* question to be submitted to the jury is damages. This interpretation does not comport with our case law. We have a long line of cases which hold that on remand for trial of a law case it is tried *de novo*.

In the early case of *Harrison* v. *Trader and wife* 29 Ark. 85 (1874), this court said, quoting with approval from an Alabama case:

> "When a judgment is reversed, the rights of the parties are immediately restored to the same condition in which they were before its rendition; and the judgment is said to be mere waste paper."

This holding was approved in *Holt* v. *Gregory, et al,* 222 Ark. 610, 260 S. W. 2d 459 (1953). Also, see *Manzo* v. *Boulet,* 220 Ark. 106, 246 S. W. 2d 126 (1952); *Martin* v. *Street Improvement District No.* 349, 180 Ark. 298, 21 S. W. 2d 430 (1929); and *Westinghouse Credit Corp.* v. *First National Bank of Green Forest, et al,* 241 Ark. 287, 407 S. W. 2d 388 (1966).

Rehearing denied.

WILMA WELLS MORGAN *v.* HAROLD M. WELLS, OGLEE MCDOLE, LENORA MCDOLE & NATIONAL OLD LINE INSURANCE COMPANY

4151 415 S. W. 2d 323

Opinion delivered May 8, 1967

Douglas Bradley and *Penix & Penix,* for appellant.

W. B. Howard and *Jack Segars,* for appellees.

CARLETON HARRIS, Chief Justice. Appellant, Wilma Wells Morgan, was granted a divorce from appellee, Harold M. Wells, on October 12, 1962.[1] During the marriage, these parties acquired approximately 2½ acres of land in Craighead County, a half interest in a 120-acre farm in Greene County, and equity in a residence

[1]Appellant, after her divorce, married Clayton Howard Morgan, but for convenience, she will be referred to in this opinion as Mrs. Wells, since most of the testimony deals with matters that occurred during her marriage to appellee Wells.

in Jonesboro, all of these properties being held as estates by the entirety. However, only the Greene County farm is involved in this appeal. The other half interest in the farm is owned by appellees, Oglee McDole and Lenora McDole, his wife, Lenora being a sister of appellee Wells. In March, 1962, appellee retained an attorney for the purpose of commencing a divorce action against appellant, and such a suit was filed. Mrs. Wells, in the office of her husband's attorney, executed an entry of appearance and the parties entered into a written separation agreement. However, Wells dismissed his suit, and they resumed the marital relationship. Thereafter, they purchased and made a down payment on the Jonesboro property,[2] mentioned above, and resided thereon until a subsequent separation in September, 1962, when Mrs. Wells instituted suit for divorce. This suit was filed by Mr. John States, Mrs. Wells' attorney. As her attorney, Mr. States prepared a Waiver and Entry of Appearance, for Mr. Wells' signature. As to property, the waiver provides:

"For and in consideration of this waiver it is agreed that the defendant Harold Wells is to pay to the plaintiff Wilma Wells child support in the sum of $80.00 each month and this is in lieu of any other property rights.

"It is agreed that the defendant is to set aside the home located at 1407 Cole Street in the City of Jonesboro as the sole property of the plaintiff herein and that she has agreed to meet monthly payments falling due hereafter. Plaintiff makes no claims against any other real estate other than the home and personal property necessary to maintain the home consisting of household goods located therein as the property of the plaintiff herein."

Wells then took the waiver to his own attorney, Mr. Joe Boone. Boone called States, and inquired particularly as to which party would get the Greene County

[2]Prior to the purchase of this property, Mr. and Mrs. Wells had lived on the Greene County farm.

farm, and States advised that his client, Mrs. Wells, was not interested in the farm, and did not want any part of it.[3] Wells then executed the waiver, and thereafter, on October 12, Mrs. Wells was granted a divorce. The decree recites that the divorce was rendered upon the complaint, the Waiver and Entry of Appearance executed by appellee, the oral testimony of appellant, and one Jean Harrison, a witness on her behalf. As to property, the decree recites as follows

"The court further finds that the parties have agreed on their property *** that the dwelling located at 1407 Cole Street in the City of Jonesboro, Arkansas be awarded to the plaintiff and that she assume monthly payments due on said property. With the final payment of the debt due on same the property is to become her property absolutely. Plaintiff is to receive as her own property the household goods located at the dwelling aforesaid."

The decree contained no recitation as to the Greene County property. No quitclaim deed was given to appellee by appellant. The McDoles, who had already commenced farming the property, continued to occupy same, and paid rent to Mr. Wells, based on his interest.

In October, 1963, Wells and the McDoles applied to the National Old Line Insurance Company, the final appellee in this litigation, for a loan. National Old Line applied to the Kansas City Title Insurance Company for title insurance, and this organization was represented by Mr. States. Since a part of the record title was still in Mrs. Wells, there was a requirement that she either convey her interest, or that she join in the note and mortgage. Appellant refused to execute a deed sent to her by States, but did subsequently sign the note and

[3]Boone testified that he specifically asked States if a quitclaim deed to this property would be executed by appellant in favor of appellee, and was informed that would be done. States agreed that he had advised that his client wanted no part of the farm, but said that he did not remember the particular statement about executing the deed.

mortgage, and this, according to her testimony, was done at the request of the McDoles and her ex-husband. The instruments were signed in St. Louis, Missouri.[4] The loan, in the amount of $12,500.00, was closed. A portion of this money was used to pay an outstanding lien to Connecticut General Life Insurance Company, costs of the loan, and the balance, of approximately $4,800.00, was disbursed to appellees. Of this amount, approximately $1,500.00 was used to dig a well on the farm.

Admittedly, Mrs. Wells did not receive any part of the money. The record does not show whether the first annual payment due (December, 1964) to National Old Line was paid, but it does reflect that taxes were paid on the property by appellees Wells and McDole. In other words, it does not appear that appellant has spent any money on the property since the divorce.

In January, 1965, Mrs. Wells instituted suit against all appellees, alleging that she had an interest in the property as a tenant by the entirety; that the parties could not agree upon an equitable division of the lands, and that said lands (the Greene County farm) be partitioned and divided among them, if susceptible of division, and, if not susceptible of division, the property be sold, and the proceeds divided according to the several interests of the parties. National Old Line Insurance Company answered, asserting that, if the property were ordered sold, it should be sold subject to the mortgage lien of the insurance company; the McDoles and Wells filed separate answers and counter-claims which in effect denied that appellant held any interest in the property. After the filing of several amendments to the pleadings by the parties, the cause proceeded to trial. At the conclusion of the evidence, the court entered its decree, finding, as to the realty here involved:

"That the complaint of the plaintiff for the partition of the real property hereinafter described should

[4]After her marriage to Morgan, appellant resided with her new husband in Wichita Falls, Texas. However, they separated, and she went to St. Louis, Missouri.

be denied and dismissed for want of equity; *** that the plaintiff is estopped to assert any interest in the real property hereinafter described; that the plaintiff is entitled to no relief as against the defendants McDole; that the plaintiff is entitled to no relief as against the defendant, National Old Line Insurance Company; *** and that plaintiff is not entitled to an accounting for any matter asserted in her pleadings against the defendants, Harold M. Wells, Oglee McDole and Lenora McDole."

From the decree, appellant brings this appeal.

Only one point is relied upon for reversal, *viz.*, "It was error for the court to divest appellant of the record title in her lands and to fail to grant her petition and an accounting." However, several different grounds are advanced in support of this point.

Appellant argues that fraud was committed upon her, and that she was overreached in executing the written separation agreement in March, 1962; also, that she signed because of fear of her husband. We do not agree that the testimony establishes these facts; to the contrary, we are of the opinion that the evidence preponderates to the effect that Mrs. Wells read the instrument before signing, and fully understood its meaning and effect; further, that she executed same entirely voluntarily and free from any coercion by her husband. However, there is no necessity to discuss the evidence on this point since appellee concedes that the written separation agreement was abrogated by the reconciliation of the parties which occurred subsequent to the execution of the instrument.

Appellant, likewise, advances the argument that the divorce decree of October 12 was *res judicata* as to property rights; that the phrase, "court further finds that the parties have agreed on their property," is compatible only with the conclusion that the parties were leaving all record titles as they then existed. We do not

agree with this argument. In *Smith* v. *Smith,* 190 Ark. 418, 79 S. W. 2d 265, the same contention was urged. Though the facts were somewhat different, the point here raised by appellant was mentioned. We said:

"Appellant also contends that the decree of foreclosure should be reversed, because the property settlement was not incorporated in the decree for absolute divorce, or because it was not adopted in rendering the final divorce decree, and that their property rights now must be treated in this case as adjudged in the divorce suit. It was not necessary for the property rights of the parties to be adjudged in the divorce proceeding, as they had been settled by contract. The parties had a right to settle their property rights out of court by contract, and their contract relative thereto might be thereafter enforced in a court of competent jurisdiction."

Likewise, in *Fisher* v. *Fisher,* 237 Ark. 321, 372 S. W. 2d 612, a property settlement was effected between the parties preceding their divorce. This court stated the facts, as follows:

"The principal issue presented in this case is whether the appellee should have a reformation of the deed she received from the appellant. This deed was part of a property settlement between them preceding their divorce. Following the divorce appellant instituted this suit alleging that he and the appellee owned twenty-six acres as tenants by the entirety. He asked for partition thereof and for his proper share of the rents collected by the appellee. In her answer appellee denied his assertions. By cross-complaint she contends that she is the sole owner of the disputed property by the terms of their property agreement and that this tract of land was omitted through mutual mistake or fraud from appellant's deed to her, therefore, the deed should be reformed to include this land. The appellant denied the allegations in the cross-complaint and then pleaded as a de-

fense the statute of frauds and *res judicata.* Upon a trial of the issues the Chancellor decreed reformation of the deed so as to convey to appellee the disputed lands. From that decree appellant brings this appeal."

Mrs. Fisher testified that she did not know the twenty-six acres had been omitted from the deed, but Mr. Fisher testified that he observed that the twenty-six acres were not included, and, if this acreage had been included, he would not have signed the instrument. After disposing of other arguments, this court, as to *res judicata,* said:

"In the case at bar the divorce decree specifically recites: 'There are no property rights to be determined herein.' The appellant and the appellee are in agreement that there was a property settlement between them before the divorce. They disagree only as to the inclusion of the twenty-six acres. The daughter and son-in-law corroborated the appellee's version of this agreement which was perfected before the granting of the divorce as is indicated by the very terms of the decree. It cannot be said that upon the face of the record or by extrinsic evidence the property rights between appellant and appellee were raised and determined in the divorce action."

In the instant case, the wording of the divorce decree is somewhat stronger, since it specifically finds that "the parties have agreed on their property." Likewise, they are in agreement that there was a property settlement between them—but, as in *Fisher,* they simply disagree as to the provisions of the settlement. Here, too, appellees' version is corroborated by other witnesses, while appellant furnished no corroboration for her version of the settlement. Mr. States, who *represented appellant,* testified that the parties entered into their oral agreement in his office, and in his presence. From his testimony:

"Well, the first thing discussed between the two of them in my presence was support money for the chil-

dren. That was the first thing I directed their attention to because I was interested in seeing how the children were going to be cared for under the decree and then a discussion was had in regard to two automobiles. She kept the automobile she was driving and he kept the automobile he was driving. Then she wanted the household goods in the house there on Cole Street and he agreed to that. Then she wanted the dwelling on Cole Street to be hers and said that she would make the monthly payments and then, as I recall, Harold mentioned something about a farm in Greene County and Mrs. Wells said, 'I'm not interested in the farm. I don't want any part of it.' When they got to that point then, I thought that was all the property they had. Nothing else had been discussed. I turned then to Mrs. Wells and I said, 'Now, I'm going to draw up an Entry of Appearance and I want to be sure that you understand. You get the property on Cole Street and you make the monthly payments,' and she said, 'That's right,' and, 'You're not interested in the farm property?' and she said, 'That's right.' Then I left them and went in to my typewriter in the small room and drafted the Entry of Appearance."

Appellant strenuously objected to this testimony, contending that it was a privileged communication between attorney and client, and that States could only testify to the aforementioned facts, after first obtaining the consent of appellant. The trial court overruled the objection—and, we hold, properly so. The reason is stated in the case of *Vittitow* v. *Burnett,* 112 Ark. 277, 165 S. W. 625:

"The object of the rule is to secure freedom in communication between attorney and client in order that the former may act with full understanding of the matters in which he is employed; but, as the rule tends to prevent a full disclosure of the truth, it should be strictly construed and limited to cases falling within the principle on which it is based. 40 Cyc. 2361, 2362. There is no privilege as to statements by a client to

his attorney for communication to a third person. 40 Cyc. 2375. Vittitow employed Carpenter to assist him in purchasing the land from Burnett, and directed him to write to Burnett, making him an offer for the land. It was intended that the matters embraced in the letter written by Carpenter to Burnett should be communicated to the latter, and it was necessary that it should be communicated to Burnett in order to be acted upon. Therefore, the letter falls within the rule that communications made to an attorney by a client and intended by the latter to be imparted to a third party for the benefit of the client do not come within the rule laid down in the statute."

Here, according to two witnesses (States and appellee), the discussion as to settlement was not simply between States and Mrs. Wells, but also included Mr. Wells. Of course, since no settlement could be entered into without each party knowing what the other party required in settlement, it was absolutely necessary, even though they had not been in the same room together, that the views of each be communicated to the other. No privilege attached in this case.

We think the wording of the Waiver and Entry of Appearance establishes that a property settlement was entered into, and we likewise are of the opinion that the great weight of the evidence shows that the provisions of that settlement were in accord with the testimony of appellee Wells and his witnesses. While the written settlement, prepared by attorney Joe Boone of Jonesboro, and entered into in contemplation of the first divorce action, was abrogated, and of no legal effect in this controversy, it is interesting to note that the disposition of the Greene County property was exactly the same as in the alleged oral agreement, *i. e.*, Mr. Wells was to have the Greene County Farm. Appellant argues that the meaning of the clause in the waiver providing that Mrs. Wells "makes no claims against any other real estate other than the home and personal property," is simply that she makes no claim to any

property *belonging to her husband,* and that the quoted language has no reference to property which the two of them own together as an estate by the entirety.

This brings us to the question of estoppel which we consider to be applicable and controlling in this litigation. Mrs. Wells certainly did not apply the above reasoning to the property held as an estate by the entirety which she was to receive, for she did take exclusive possession of the home on Cole Street in Jonesboro. The fact that she later lost this property because of failure to meet payments is not material herein. Having acted upon the provisions of the agreement which were to her advantage, she cannot subsequently be heard to reject those portions of the same agreement which were not to her advantage. Appellant asserts that appellee is also estopped to question her title to the farm property because of the fact that she executed the note and mortgage to National Old Line Insurance Company, and this act inured to the benefit of appellee in that the company would not have loaned the money, except for the fact that she likewise became liable on the note. We do not agree with this argument. It is true that Mrs. Wells executed these instruments; it also appears from her testimony that she was requested to sign same by the McDoles and her ex-husband. Let it first be remembered that this request would never have been made if she had conveyed her interest in the farm, as we find she had agreed to do. In the next place, irrespective of how many times she might have been asked to execute the instruments, it is very clear from the testimony that she was not caused to execute same by virtue of any representations made by appellee Wells. Of course, unless she relied upon his statements, there can be no valid claim of estoppel. *Storey* v. *Brewer,* 232 Ark. 552, 339 S. W. 2d 112. That she placed no reliance whatsoever on anything her ex-husband might have said is abundantly clear. From her testimony, during cross-examination:

"Q. You have told us that you had a very close relationship with the McDoles, is that right?

A. Yes, sir.

Q. Well, just how would you characterize your relationship with Harold Wells at the time this conversation took place?

A. Just mutual.

Q. Just what?

A. Just mutual I guess you'd call it.

Q. Mutual, just what do you mean by that?

A. I don't know how to express it.

Q. Just tell us, what was your relationship with Harold. Was it pleasant or unpleasant?

A. It was unpleasant most of the time.

Q. Unpleasant most of the time, so you sure wouldn't believe anything Harold told you about it, would you?

A. No, sir.

Q. You didn't have any reason to trust Harold, did you?

A. No, sir.

Q. You knew he would skin you out of your eyeteeth if he got a chance, didn't you?

A. Yes, sir."

If Mrs. Wells signed these instruments because of the urging of any of the parties, it would appear such action was influenced by her relationship with the McDoles, rather than because of any representations on

the part of her ex-husband. She testified that she had a very close relationship with this couple, had visited them on several occasions, and that she and her present husband had even spent the night with them. The record also reflects correspondence with the McDoles.

The testimony in this case was very much in conflict, but we agree that the weight of the evidence supports the findings of the court. It follows that the principles of law here enunciated are controlling.

Affirmed.

FREDDIE HAYES MOORE *v.* GEORGIA TUCKER, ADM'X

5-4206 414 S. W. 2d 374

Opinion delivered May 8, 1967

James R. Howard, for appellant.

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

CARLETON HARRIS, Chief Justice. These proceedings relate to the efforts of Freddie Hayes Moore to establish herself as the legitimate daughter of Herbert Hayes, deceased. Appellant was born on May 24, 1923, and her mother is Thelma Rivers Hayes Foston; she alleges that her father was Herbert Hayes, who died testate in Pulaski County on May 17, 1965. A holographic will, pur-

portedly, executed by Hayes, was admitted to probate, the estate being devised to Elsie Montague, a former wife, and Saxonia Shields a daughter. Mrs. Moore filed a petition in the Probate Court attacking the validity of the will, and seeking to have herself determined as the only heir of Herbert Hayes; in the alternative, she prayed that, if the will be held valid, she be declared a pretermitted child. On trial, appellant abandoned the contention that the will was invalid, and proceeded solely on the theory that she was a pretermitted child. At the conclusion of the hearing, the court denied the petition, and from the order so entered, appellant brings this appeal. For reversal, it is simply alleged that the court erred in holding that Mrs. Moore failed to prove she was the child of Herbert Hayes.

As is usual in this type of case, testimony was considerably in conflict. Thelma Rivers Hayes Foston, mother of appellant, and a resident of New York, testified that, in 1922, as a 16-year-old girl, and while a resident of Little Rock, she became acquainted with Herbert Hayes; that he was 35 years of age at the time. The witness said that she had sexual relations with Hayes, became pregnant, and her child, appellant herein, was subsequently born. She stated that Hayes, not knowing she was pregnant, left Little Rock in 1922 and went to New Orleans, and that he wanted her to go with him, but she did not want to leave her mother. Mrs. Foston testified that he then went to Canada,[1] where he operated concession stands at fairs and rodeos. There are two birth certificates for appellant. According to Mrs. Foston, her mother gave the information on the first birth certificate, which showed the name of the child as Mardilla Jones, the mother as Thelma Rivers, and the father as Paul Jones. The age of the father is given as 20 years. This birth certificate was filed on June 9, 1923. During the trial, evidence was offered that Herbert Hayes, during the time that he lived in Little Rock, was also known as Herbert Jones, his father

[1]The record reflects that he had previously lived in Canada for some period of time.

having assumed that name because of a homicide committed in Kentucky. Mrs. Foston testified that her father was very angry over the pregnancy, and insisted that she marry one of his friends, Fred Morris, Hayes having left the city. However, Morris went to Chicago, and never returned. This last occurrence took place after the birth of the child, but since Morris had indicated that he would return and marry her, the witness testified that she had the certificate changed, and a second birth certificate was issued on August 2, 1923, showing Fred Morris as the father of the child. Thelma Foston, about ten months later, went to Massachusetts, and married Herbert on September 30, 1924.[2] The next year, the two went to Philadelphia, and sent for the baby (appellant herein), which was being kept by Hayes' father and mother. Mrs. Foston said that the three lived together; that Hayes recognized the baby as his child, and represented her as his daughter to friends. A separation occurred in 1929, and the parties were divorced in March, 1932, in Little Rock. The witness lived in this city for about seven months, and then went to New York. Upon receiving information that Hayes had been injured and was in the hospital, she returned to Little Rock, and, with her daughter, visited him on several occasions before he died.

Appellant, a resident of Little Rock since about 1945, testified that she remembered her father from early days in Boston and New York, and that he always recognized her as his daughter. She lived with her mother in New York until March, 1944, at which time she married Edward Moore. After about a year the Moores moved to Little Rock, and have lived here since that time. Hayes had also returned to Little Rock to live, and appellant testified that he frequently visited in her home, and referred to her children as his grandchildren. She stated that he helped her financially a number of times, would visit her about once a month, and always gave the children Christmas and birthday presents.

[2]The marriage certificate was offered in evidence.

Appellant's husband testified that he had known his wife during childhood as a "Hayes;" that, after their marriage and return to Little Rock, Herbert Hayes visited in the home, and the children called him "Grandpa" and "Grandaddy." The marriage certificate of appellant and her husband (1944) reflects her name as Freddie Hayes, and the birth certificates of her children, born in 1948 and 1952, reflect the mother's name as Freddie Hayes.

Hazel B. Bright, 72 years of age, testified that she had known Herbert Hayes all of his life, and that he was also known as Herbert Jones; that she lived close to him, and had frequently heard him talk about his beautiful daughter, Freddie; that he had stated that appellant was his daughter, and that he loved her.

Saxonia Shields, one of the beneficiaries under the will, and daughter of Hayes,[3] testified that she met Thelma Rivers Hayes Foston and Freddie Moore at a nursing home (to which Hayes was taken after leaving the hospital), and Mrs. Foston told her that Mrs. Moore was her daughter, but not Herbert Hayes' daughter.

Lydia Talbert, a registered nurse at the University Medical Center, testified that a few days after Hayes was admitted to the emergency room, a lady appeared who gave her name as Thelma, claiming to be the ex-wife of Mr. Hayes. Mrs. Talbert asked about the relatives, and was informed, "She [Thelma Foston] was all he had and as soon as she found out about his illness she came to take care of him. *** We asked if he had any children and she said, no, said she was all he had."

Nathaniel Wilson, who was employed by Routen's nursing home as manager during the time that Herbert

[3]While appellant and her mother do not admit that this witness was a child of Herbert Hayes, the record contains the birth certificate of Saxonia, dated December 14, 1920, and reflecting that she was born in Toronto, Canada, her father being listed as Herbert Hayes, and her mother as Elsie Shadd Hayes (now Montague). According to the testimony, Elsie Shadd and Herbert Hayes were married in February, 1920, in Toronto.

was an occupant of the home, testified that he inquired from Mrs. Foston as to the relationship of Mrs. Moore: "Her response to that was that the daughter was her daughter, although Mr. Hayes did raise her."

Further:

"I asked her what was the daughter's relation, because the daughter wasn't talking during the interview, she wasn't very conversant. She only identified herself as Mrs. Moore. She was a Mrs. Moore to me. So I asked her what was the relationship of the daughter to Mr. Hayes. This is when she stated this was her daughter although Mr. Hayes did raise her as a daughter.

Q. Did she say whether or not Hayes was her father, is what we are trying to get at.

A. No, she did not at any time say he was the father.

Q. Did she say he was not the father?

A. She did not say he wasn't the father. She said he raised her."

Georgia Tucker, employed by Hubble Funeral Home, testified that she was well acquainted with Herbert Hayes, and that he had discussed his family with her. According to this witness, he had stated that he had been married to Thelma Rivers Hayes Foston, but had no children by this wife. Mrs. Tucker said she went to see him at the University Hospital soon after learning of his accident, and that Mrs. Foston had told her that she was the ex-wife of Hayes, that she had a daughter, but the daughter was not Herbert's daughter.

This summarizes the pertinent testimony before the court.

Appellant's evidence to the effect that Hayes was her father (outside of her own evidence) thus consisted of the testimony of her mother, Thelma Foston, and that of Hazel B. Bright, who stated that Hayes had said that appellant was his daughter. Of course, the mother can hardly be classed as a disinterested wit-

ness. On the other hand, two witnesses, who apparently have no interest in the result of the litigation, emphatically stated that Mrs. Foston told them that Mrs. Moore was not the child of Hayes, and a third witness, Nathaniel Wilson, testified that Mrs. Foston said that appellant was her daughter, "though Mr. Hayes did raise her as a daughter."

In our view, the strongest evidence offered by appellant was her own marriage certificate, which showed her maiden name as Hayes, and the birth certificates of her children, which likewise reflected that maiden name. Though the information appearing on these certificates was evidently given by appellant herself, the strength of the evidence lies in the fact that it was given long before the estate became involved in litigation. However, having lived with Hayes for several years, and never having known any other father, it is not especially unusual that she used this name. Be that as it may, we think the birth certificates of appellant are the most persuasive items of evidence in the record, and these completely belie appellant's assertion that she is a daughter, although it is argued that the original birth certificate bolsters her case.

Appellant points out that there is evidence that Herbert Hayes was also known as Herbert Jones during his early years in Little Rock, and that this "ties in" with the birth certificate, which gives the name of the father as Jones. Of course, Jones is not an unusual name, and the information appearing on the birth certificate falls far short in identifying the father as Herbert Hayes or "Jones." In the first place, the name appearing on the certificate is "*Paul* Jones"; in the next place, though Thelma Foston testified that Herbert Hayes was about 35 years of age at the time she was going with him and became pregnant, the certificate reflects that "Paul Jones" was 20 years of age.

Summarizing, it was shown that Thelma Foston was married to Herbert Hayes, and there is testimony, though mainly from interested witnesses, that Hayes

recognized appellant as his daughter. However, like the Chancellor, we think appellant failed to establish her contention that Hayes was her father; certainly, we are not able to say that his findings were against the preponderance of the evidence.

The decree is affirmed.

DEVAZIER GRAVEL, INC., *v.* JAMES LEE BUSBY

5-4183 414 S. W. 2d 853

Opinion delivered May 8, 1967

[Rehearing denied June 5, 1967.]

Phil Hicky and *E. J. Butler*, for appellant.

James Robertson, for appellee.

GEORGE ROSE SMITH, Justice. The appellee owns a 236-acre farm in St. Francis county. The appellant mines and washes gravel upon a nearby 80-acre leasehold in the foothills of Crowley's Ridge. Busby brought this suit to enjoin the gravel company from casting its waste products upon his farm and to recover damages for pecuniary injuries already suffered. After hearing the evidence the chancellor awarded Busby a judgment for $12,000 and permanently enjoined the defendant from permitting water from its gravel-washing operations to reach Busby's land. For reversal the appellant contends that the decree is against the weight of the testimony.

In our opinion the overwhelming preponderance of the evidence supports the chancellor's findings. Before Devazier began its operations in April, 1962, Busby's farm was effectively drained by a man-made ditch system more than a mile in length, some of the ditches being as much as ten feet wide and nine feet deep. Within a month after Devazier began to wash gravel Busby protested the damage that was being done to his land by the waste water flowing from Devazier's plant. What the chancellor described as "tremendous" quantities of sand and clay were deposited in the plaintiff's ditches, causing them to overflow in wet weather. On two occasions during the three years preceding the trial in 1965, Devazier sent in heavy equipment to clean out Busby's drainage system. Those measures were ineffective, because the resulting spoil bank, composed of clay and sand, could not be spread over the fields without permanent damage to their fertility.

That Busby was seriously injured is not open to question. The overflow of water and silt from the clogged ditches damaged both the land and the growing crops. More than 12,000 cubic yards of clay and sand were deposited upon his farm. The only complete remedy would be the removal of those substances at a cost estimated at eighty cents a yard. A real estate dealer testified that the market value of the farm had been reduced by $23,600. Upon the proof as a whole the chancellor's award of $12,000 is by no means excessive.

Nor can it be said that the plaintiff was not entitled to injunctive relief for the future. The testimony adduced by the defendant offered hardly a semblance of justification for its course of action, other than self-interest. Clarence Devazier valued his contracts for the sale of gravel at $90,000. It is a fair conclusion from the evidence that the gravel plant was such a profitable venture that Devazier was determined to continue it even at the cost of having to pay Busby for the damage inflicted upon his property. At the trial, after Busby has suffered losses for three years, Clarence Devazier

merely stated that within the next ten days or two weeks he planned to excavate additional settling ponds to relieve the situation. In the circumstances only a permanent injunction can afford Busby the protection that he is entitled to by law.

Affirmed.

DELORES WASSON, ADMINISTRATRIX *v.* FRANCES PYRON

5-4196 414 S. W. 2d 391

Opinion delivered May 8, 1967

[Rehearing denied June 5, 1967.]

Spencer & Spencer and *Don Gillaspie,* for appellant.

Shackleford & Shackleford, for appellee.

GEORGE ROSE SMITH, Justice. Doris E. Beene died intestate on April 3, 1964. Mrs. Beene's niece, the appellee Frances Pyron, was at first the administratrix of the estate. Several of Mrs. Beene's heirs asserted, in a petition filed in the probate court, that Mrs. Pyron had kept for herself a diamond ring and $18,503.93 of in-

surance money that should have been inventoried as assets of the estate. The probate judge, without passing on the merits of the petition, brought the matter to an issue by discharging Mrs. Pyron as administratrix, appointing the appellant as her successor, and suggesting that the appellant bring suit in equity for the recovery of the ring and insurance money.

In the chancery case the court held that the ring was an asset of the estate but that Mrs. Pyron was entitled to the insurance money. An appeal and cross-appeal bring both issues to us for review. (There is also a precautionary appeal from the probate court order, but it is unimportant.)

We turn at once to the controversy over the insurance proceeds, which presents a far-reaching question of the first magnitude—a question which, if resolved in favor of the appellant, might prove to be little short of calamitous for hundreds upon hundreds of our citizens. That question is whether the insurance company's agreement to pay the insurance money to Mrs. Pyron as a contingent beneficiary was void for want of compliance with the Statute of Wills.

The facts are simple. Mrs. Beene was the sole beneficiary of a $19,000 group insurance certificate issued by the Metropolitan Life Insurance Company upon the life of her husband, who died on July 17, 1963. Instead of taking the insurance money in cash Mrs. Beene entered into a contract with the Metropolitan by which it agreed to pay her $108.98 a month for twenty years. If Mrs. Beene died without having received the full amount the funds still held by the company, commuted to present value, would be paid to Frances Pyron, the appellee. In the contract Mrs. Beene reserved the power to change the contingent beneficiary at any time and to withdraw the funds herself if she chose to do so. Mrs. Pyron was still the contingent beneficiary when her aunt died a few months later. The appellant now contends that the contract was a testamentary disposition that should fail for

non-compliance with the Statute of Wills. The argument is that even though Beene himself might have named a contingent beneficiary of the policy, his widow could not do so *by contract* when the money became payable to her alone.

We are aware, as a matter of common knowledge, that agreements like this one are widely used in the life insurance business. There is certainly no public policy against such contracts, upon which countless persons are dependent. In the few cases in which the validity of similar contracts has been considered, the weight of authority sustains the arrangement, either on the basis of a statute or on the theory of a third-party-beneficiary contract. Appleman, Insurance Law & Practice, § 889 (1966 and Supp. 1967); *Mutual Ben. Life Ins. Co.* v. *Ellis,* 125 F. 2d 127, 138 A. L. R. 1478 (2d Cir. 1942), *cert. den.* 316 U. S. 665 (1942); *Hall* v. *Mutual Life Ins. Co. of N. Y.,* 122 N. Y. S. 2d 239, 282 App. Div. 203 (1953), *aff'd* 306 N. Y. 909, 119 N. E. 2d 598 (1954); *Toulouse* v. *N. Y. Life Ins. Co.,* 40 Wash. 2d 538, 245 P. 2d 205 (1952).

In Arkansas we need not rely upon common-law authorities, for the point is explicitly covered by our Insurance Code. Section 334 of the Code reads in part: "Any life insurer shall have the power to hold under agreement the proceeds of any policy issued by it, upon such terms and restrictions as to revocation by the policyholder and control by beneficiaries, and with such exemptions from the claims of creditors of beneficiaries other than the policyholder as set forth in the policy or as agreed to in writing by the insurer and the policyholder. Upon maturity of a policy by death in the event the policyholder has made no such agreement, the insurer shall have the power to hold the proceeds of the policy under an agreement with the beneficiaries." Ark. Stat. Ann. § 66-3325 (Repl. 1966).

It will be noted that the Code is liberal in allowing the insurer, by agreement with the policyholder him-

self, to hold the proceeds "upon such terms and restrictions as to revocation by the policyholder and control by beneficiaries" as may be agreed upon. There is no reason to suppose that the draftsmen of the Code—a comprehensive statute evidencing the greatest care in its preparation—meant to be less liberal with respect to subsequent agreements made between the insurer and the beneficiary. Quite the contrary, unless the second quoted sentence is so construed it is practically meaningless and practically useless, for surely statutory authority was not deemed to be necessary to enable an insurer and a beneficiary to make a simple agreement by which the company would retain the proceeds of a policy as an investment by the beneficiary. Thus it is an inescapable conclusion—and an altogether desirable one—that the legislature intended to validate just such agreements as the one now before us. Otherwise the statutory language is pointless.

With respect to the diamond ring Mrs. Pyron, laboring under the handicap of the Dead Man's Statute, was unable to adduce much proof that it had been delivered to her as a gift during her aunt's lifetime. On this branch of the case it cannot be said that the trial court's decision is against the weight of the evidence.

Affirmed on direct and cross appeal.

FOGLEMAN, J., dissents.

JOHN A. FOGLEMAN, Justice, dissenting. I would reverse the lower court on that phase of the case having to do with the insurance proceeds.

The conclusion that this is an attempted testamentary disposition of the proceeds of life insurance on the life of an insured by his beneficiary seems inescapable to me. Doris E. Beene was entitled to this money at the time of her husband's death. The fact that there were optional modes of settlement did not change the fact that it was she, not her designee, who was entitled to

the entire proceeds. Even under the contract she entered into with the insurance company, she was entitled to withdraw the balance on hand at any time at her absolute election. Even though she designated appellee to receive whatever balance had not been paid to her under the installment settlement, she reserved the unrestricted right to change that designation at any time.

Clearly we would have to find that this was a gift in order to sustain the position of appellee, except for Ark. Stat. Ann. § 66-3325 (Repl. 1966) [which I will subsequently discuss]. This cannot be done because there must be both a delivery and the surrender of possession, dominion and control to validate any gift, either inter vivos or causa mortis. *Marshall Bank* v. *Turney,* 105 Ark. 116, 150 S. W. 693; *Fancher* v. *Kenner,* 110 Ark. 117, 161 S. W. 166; *Umberger* v. *Westmoreland,* 218 Ark. 632, 238 S. W. 2d 495; *Smith* v. *Clark,* 219 Ark. 751, 244 S. W. 2d 776. Obviously the agreement is not in compliance with our statute of wills, not being in the handwriting of the testator as required by Ark. Stat. Ann. § 60-404 (Supp. 1965) or executed in the presence of witnesses as required by Ark. Stat. Ann. § 60-403. It goes without saying that it was contrary to the statute on descent and distribution.

There is *no* evidence that Carter R. Beene designated any contingent beneficiary or authorized his beneficiary to do so.

It seems to me that not only a donee or legatee but any third-party-donee beneficiary would be eliminated by the holding in *Ragan* v. *Hill* 72 Ark. 307, 80 S. W. 150, from which I quote:

> "*** W. M. Rees was an old man, being 78 years of age; was feeble; afflicted with some disease; did not expect to live long; had $1,000; offered to and did loan it to John C. Hill & Son; and they executed to him therefor the following instrument of writing:

'Clarksville, Ark., July 14th, 1899. Received from W. M. Rees one thousand dollars with interest at 4 per cent. It is agreed that in case of the death of W. M. Rees that B. C. Rees is to take charge of this money [Signed] John C. Hill & Son.' At the time he loaned the money he stated that it was 'to go to B. C. Rees at his death.' He was a good friend of B. C. Rees. He died on the 18th of August, 1899. John C. Hill & Son advanced $191.85 to pay his funeral expenses. Was the $1,000 a gift to B. C. Rees?

* * *

In every case a delivery is necessary to constitute A gift. In this case W. M. Rees loaned the money to John C. Hill & Son. He never parted with dominion over it in his lifetime. It was not delivered to B. C. Rees, or to any one for him. In the language of witness John C. Hill, 'it was to go' to B. C. Rees at the death of W. M. Rees. The directions of the latter (W. M. Rees) in this respect were testamentary in character, and were not effective, because not made and proved as a will."

This decision should certainly be controlling in Arkansas over any authorities from other states, in the absence of any statutory law to control. The majority claim to find this in Ark. Stat. Ann. § 66-3325 (Repl. 1966), a part of the Insurance Code. The section, except for the last sentence, is quoted in the majority opinion. The first sentence cannot have any application because there is no evidence of any agreement of the insured with the insurer which could be applicable here. The necessary statutory law, then, to permit avoidance of our rules governing gifts and wills must be found in the second sentence, which the majority purports to do, by reasoning I am unable to follow, and which seems illusionary to me. That section simply says that the insurer shall have the power to *hold* the proceeds of the policy under an agreement with the beneficiaries. I have

been unable to find any definition of the word *hold* that would even remotely indicate such a construction as given by the majority. In its context in the statute *hold* means: "To retain in one's keeping, to maintain possession of, or authority over; not to give up or relinquish." Webster's New International Dictionary, Second Edition. "To keep; to retain; to maintain possession of or authority over." Black's Law Dictionary.

The statute doubtless would permit the beneficiary to make an agreement by which all or a part of the proceeds would belong to or be contemporaneously paid to a third party or parties, perhaps in succession—a completed gift. It does contain language which in literal terms, might permit an insurance company to pay the balance to someone else as do our statutes pertaining to bank accounts (Ark. Stat. Ann. § 67-552) and savings and loan accounts (§ 67-1838). Even if this sentence did permit an insurance company to pay on death to another with impunity, still the statute does not purport to vest title in the payee on death, as does § 67-1838 (5) (a) in the case of savings and loan association accounts. Construction of the statute, as is suggested above, to permit such payments by the insurance company would make the second sentence of the section in question very meaningful. It is to be noted that no one has sought recovery from the insurance company here.

But, says the majority, there is no reason to suppose that the draftsmen of the Code meant to be less liberal with respect to subsequent agreements between the insurer and beneficiary than they were with agreements between insurer and insured. If they did not, why didn't they say so? They say that the insurer may hold the proceeds "under *on* agreement with the beneficiary" not "under *such an* agreement with the beneficiary." [Emphasis mine] If they had meant to use the latter language, even that would not have accomplished the result reached by the majority because there could be no terms and restrictions "as to revocation by the policy-holder and control by beneficiaries, and with such

exemptions from claims of creditors of beneficiaries other than the policy-holder * * *". I am unable to read into the statute language which does not appear there, as is necessary to reach the result attained in the majority opinion.

The proper rule of statutory construction applicable here was stated very early by this court in *Reynolds* v. *Holland,* 35 Ark. 56, as follows:

> "The rule to be applied in this view, is: First—that the intention is to be sought in the whole of the act taken together, and in other acts in *pari materia.* If the language be plain, unambiguous, and uncontrolled by other parts of the act, or other acts or laws upon the same subject, the courts can not give it a different meaning to subserve a public policy, or to maintain its constitutional validity. The question for the courts is not what would be wise, politic and just, but what did the legislature *really mean to direct.* This narrow circle embraces and circumscribes the whole ambit of the court, although within that it may move freely in catching the intention. It may disregard the literal meaning of words, when it is obvious from the act itself that the use of the word has been a clerical error, or that the legislature intended it in a sense different from its common meaning."

This case was cited with approval and quotation from the opinion in *Snowden* v. *Thompson,* 106 Ark. 517, 153 S. W. 823.

In order to enable the court to insert words in a statute, or read into it different words from those found in it, the intent thus to have it read must be plainly deducible from other parts of the statute. *Graves* v. *Burns,* 194 Ark. 177, 106 S. W. 2d 602.

I have been unable to find anything in the Insurance Code from which it may be deduced that the legislature

intended any such construction as the majority have given it.

I contend that the section of the Act in question is plain and unambiguous and that there are no other sections of the Act which justify the construction given by the majority. I do think it is controlled by other Acts in pari materia—the laws of descent and distribution and the statute of wills. I agree that there is nothing so sacrosanct about these statutes as to exempt them from repeal or amendment, even by implication, but in order to bring this result the conflict must be irreconcilable—which is not the case.

In construing an Act, all statutes on the subject will be construed together. *Doles* v. *Hilton,* 48 Ark. 305, 3 S. W. 193; *Graves* v. *Burns,* 194 Ark. 177, 106 S. W. 2d 602. This court said in *Boone County Board of Education* v. *Taylor*, 185 Ark. 869, 50 S. W. 2d 241:

> "* * * a statute is not to be construed as though it stood alone on any particular subject. It is well settled that repeals by implication are not favored; and, in construing any statute, the court should place it beside other statutes relevant to the subject and give it a meaning and effect derived from the combined whole."

A statute should be construed with relation to other statutes so that all will stand. *Davidson* v. *Rhea,* 221 Ark. 885, 256 S. W. 2d 744. As this court, speaking through the late Justice Minor Millwee, said in *Faver* v. *Cleveland Circuit Court,* 216 Ark. 792, 227 S. W. 2d 453:

> "* * * It is also well settled that repeals by implication are not favored and that two statutes should be construed so as to give effect to both, if possible."

The statute in question here can be construed, as I have suggested, so that it does not conflict with either the statutes of descent and distribution or the statute of

wills, and all should remain in full force and effect. The majority opinion does not rely upon but cites a textbook and authorities from other states as the weight of authority sustaining such contracts. A brief examination of them is in order, as I suggest that they contribute little, if any, weight in such a case as we have before us.

Statements from textbooks, of course, are no better than their supporting authorities. Appleman, Insurance Law and Practice, § 889, contains the following statements:

> "* * * A settlement agreement may, therefore, name a contingent beneficiary without violating the statute of wills."

> "Thus a contract between the insurer and beneficiary under which the insurer is to retain the proceeds, pay the interest to the beneficiary during her life and the principal to others on her death is valid." [Supp. 1967]

Hall v. *Mutual Life Ins. Co. of New York,* 122 N. Y. S. 2d 239, 282 App. Div. 203, affirmed 119 N. E. 2d 598, 306 N. Y. 909, is cited as authority for the first statement. *Mutual Ben. Life Ins. Co.* v. *Ellis,* C. C. A. N. Y. 1942, 125 F. 2d 127, 138 A. L. R. 1478, cert. denied, 62 S. Ct. 945, 316 U. S. 665, 86 L. Ed. 1741 and *Vant* v. *Mutual Ben. Life Ins. Co.,* 262 F. 2d 803, cert. denied, 79 S. Ct., 1139, 359 U. S. 1002, 3 L. Ed. 2d 1030, rehearing denied, 79 S. Ct. 1432, 360 U. S. 923, 3 L. Ed. 2d 1538 are cited for the second.

The *Hall* case is not good authority for there the payee on death was named *irrevocably*. The court stated:

> "* * * There was no reservation of the right to change the supplementary beneficiary."

While the beneficiary of the policy had the right thereunder to withdraw the principal, she never did, receiving only the interest. The court there stated very frankly

that it was making a policy decision. In doing so, however, it referred to certain statutes. One of these was an earlier statute of 1906 [L. 1906, Ch. 326. § 101] providing for optional modes of settlement in life insurance policies and specifying that a policy beneficiary might stipulate for gift over on his death. A statute in effect at the time the case arose provided that when the proceeds of a life insurance policy are left with the company under a trust or other agreement, the benefits thereafter accruing should not be transferrable, nor subject *to commutation* or incumbrance. So, in that case there was neither right to commutation or revocation, as was the case here. The court then stated that the Legislature, after a contrary decision in the lower court, had made clear that the supplementary contract, with gift over in the event of death, required no protection from statutes regulating execution of testamentary dispositions. This was done upon the recommendation of the Law Revision Commission. A section of the Act and the note of the Commission, said the court, made it clear that, in so doing, there was no purpose to change the law.

In the *Ellis* case the United States Court of Appeals for the Second Circuit disagreed with a previous New York decision, virtually identical with *Ragan* v. *Hill,* 72 Ark. 307, 80 S. W. 150, and decided the case on what it took to be Coloradi law. It emphasized that the rights of the payees-on-death there could not be terminated by the policy beneficiary without three months notice in writing to the company, in which requirement they found adequate consideration for a contract. The court then answered the argument that the agreement violated the statute of wills by saying that this consideration made the rights of these payees a contractual obligation and not an interest in the property of the decedent. In applying Colorado law, the court relied on certain cases rendered of doubtful value because of later Colorado decisions. It is noteworthy that Appleman did not cite this case as authority for the first proposition quoted above.

The *Vant* case is proper authority for the second statement but relates purely and simply to an agreement between insured and insurer for payment of policy proceeds to his widow and son, who were trying to obtain immediate, rather than deferred payment.

The only other case cited by the majority as contributing to the weight of authority is *Toulouse* v. *New York Life Ins. Co.*, 40 Wash. 2d 538, 245 P. 2d 205. Its value is considerably diluted by reason of the fact that one judge wrote the majority opinion, two judges concurred, two others concurred specially and four dissented. In that case, Sherlock, the insured, not the beneficiary, exercised an optional mode of settlement on an endowment policy. The payees-on-death were the beneficiaries of the policy. The majority opinion states that it proceeds on the assumption that, in making a supplementary contract, the insured proceeded under a right given him by the policy. The majority opinion contains the following statements clearly distinguishing that case from this:

> "* * * In the present case, the rights of the four nieces and the nephew in the supplementary insurance contract are derived from the original insurance policy through the exercise of Option 1.
>
> * * *
>
> Mr. Sherlock might have defeated their rights by withdrawing all the money, but he had no right under the agreement to substitute someone else in their stead as the third-party donee-beneficiary;".

The majority quoted a section of the Washington Insurance Code identical with Ark. Stat. Ann. § 66-3325, except that the second sentence does not include the words "by death" following the words "upon maturity of a policy." I submit that the logic of the dissenting opinion is much sounder than that of the majority.

Actually the opinion of the majority here is based upon a policy determination. I do not profess to know, as they do, that a contrary holding would be calamitous to hundreds upon hundreds of our citizens. I would rather doubt that there are nearly so many of these contracts in existence and the absolute power of revocation could be utilized to correct any that do exist. I suggest that appropriate trust agreements might well accomplish all the purposes one might seek to accomplish by this form of agreement. We may rest assured that insurance companies will be duly alert to any decision we render here. But even if the assumption of the majority were so, it is not for us but for the General Assembly to make such policy determinations. We should not sacrifice our own rules of statutory construction and our statutes of descent and distribution and statutes of wills on the altar of expediency.

While the record here does not disclose whether there are creditors of this estate, I can well imagine that the device here furnished will be utilized to avoid application of assets such as these to payment of a decedent's just debts in some instances.

I would reverse the lower court on this part of the decree and judgment.

AMERICAN STATE BANK *v.* CARL CREEKMORE, JUDGE

5-4211 414 S. W. 2d 389

Opinion delivered May 8, 1967

Dale L. Bumpers, for appellant.

Lonnie Bachelor and *Bachelor & Bachelor*, for appellee.

PAUL WARD, Justice. This Petition for a Writ of Prohibition stems from a suit in replevin, and raises questions of jurisdiction of the trial court. The factual background, about which there is no controversy, is summarized below.

On May 17, 1966 Jim Brewer filed a complaint in the Crawford County Circuit Court to recover a rock crusher in possession of Bill Beam, d/b/a/ Beam Brothers Contractors. Brewer also asked judgment for $1,500 against Beam for expenses in locating the machine and a like amount for detention of same. Beam answered with a general denial, and a cross-complaint against the American State Bank located in Franklin County—hereafter referred to as "Petitioner". It was there alleged that Petitioner had previously sold the rock crusher to him—Beam—for $550; that Petitioner knew the machine needed extensive repairs, and did not mention any dispute over the title. Beam prayed the court for relief as follows: (a) Dismiss Brewer's complaint; (b) otherwise, judgment against Petitioner for breach of title, and; judgment against Petitioner for any amount that Brewer might recover against him—Beam. Service on Petitioner was had in Franklin County.

Petitioner filed a Motion to Quash service and Dismiss the cross-complaint on the ground that it was an Arkansas corporation situated in Franklin County, and

that, therefore, Beam's cross-complaint could not be tried in Crawford County. The Motion was denied by the trial court, and this "Petition for Writ of Prohibition" comes to us as case No. 4211.

On November 23, 1966 Brewer filed an "Amended Complaint for Replevin" against Beam and the Petitioner (the bank) alleging, among other things; plaintiff is owner and entitled to possession of the rock crusher; on December 20, 1965 Petitioner took the machine and converted it to its own use, and then conveyed possession and title to Beam; he inquired of Beam and Petitioner about the location of the rock crusher, but they denied any knowledge thereof "*when in truth and in fact defendant knew the location thereof, and with Beam Brothers Contractors concealed same from plaintiff . . . until he had expended large sums of money in locating same*". (Emphasis ours.) Plaintiff prayed for judgment in the amount of $1,500 "against all of said defendants for expenses for locating" the equipment.

Petitioner again filed a motion to quash and dismiss—as in case No. 4211. The motion was denied, and again Petitioner seeks relief in this Court as in case No. 4211. This case comes to us as No. 4212. At the request of Petitioner the two cases were consolidated for presentation here.

We first consider case No. 4212 where the trial court refused to quash the service on Petitioner. The court was correct, and the petition for a Writ of Prohibition must be denied.

The amended complaint, as previously abstracted, shows a cause of *joint liability* against Petitioner and Beam. That being the situation, and Beam being a resident of and having been served in Crawford County, service on Petitioner in Franklin County was good. In the case of *Terry* v. *Plunkett-Jarrell Company*, 220 Ark. 3, 246 S. W. 2d 415, we find this language

> "Thus, before a cause may be prosecuted against a defendant outside the county of his residence,

> there must be a resident defendant or a defendant summoned in the county in which the suit is brought, against whom there is a *bona fide* claim of joint liability".

See also *Barr* v. *Cockrill, Judge,* 224 Ark. 570, 275 S. W. 2d 6.

In case No. 4211 we hold that the trial court erred in refusing to grant Petitioner's Motion to quash service on Beam's cross-complaint. The reason for so holding is that the cross-complaint did not state a cause of joint liability against Petitioner and Brewer. However this error is of no material significance at this time in view of our holding in case No. 4212. In the case of *Rudolph* v. *Mundy,* 226 Ark. 95, 288 S. W. 2d 602 we held that where a plaintiff sues all of the joint-tort-feasors, the joint-tort-feasors must prosecute their claims for contribution against each other in that action or lose the right to do so. Therefore Beam may now prosecute any cause of action, pertinent to this case, he has against Petitioner, by now filing appropriate pleadings and obtaining service thereon.

It follows that the petition for a Writ of Prohibition must be, and it is hereby, denied.

ROBERT LYNN DUNLAP, ETC. *v.* MARYLAND CASUALTY CO.

5-4215 414 S. W. 2d 397

Opinion delivered May 8, 1967

[Rehearing denied June 5, 1967.]

Byron R. Bogard and *Patten & Brown;* By *Gerland P. Patten,* for appellant.

S. Hubert Mayes Jr., for appellee.

LYLE BROWN, Justice. This is a suit on behalf of Robert Lynn Dunlap to establish vicarious liability against Maryland Casualty Company. The question is whether a guest's liability policy affords coverage to a host driver with respect to a claim by an injured party with whom the host collides. Maryland denied liability, and its position was sustained by the trial court.

On Sunday, January 29, 1961, Glenn Gouge, Jr. a teen-ager, was permissively driving his father's car. At Sunday School he met some friends of his own age and invited them to ride around with him prior to either going to church or going home for the noon hour. The boy ran a stop sign and collided with a vehicle driven by Mr. Dunlap. In the collision Dunlap's infant child received brain damage.

Suit was filed on behalf of the infant child and against Glenn Gouge, Jr. Judgment was obtained for $19,959.25. Gouge, Sr. carried liability insurance in the sum of $10,000, and his insurer has paid that amount.

The case before us—*Dunlap* v. *Maryland Casualty Company*—arises in this manner: One of the boys riding with Glenn Gouge, Jr., was Dan Smith. His father carried liability insurance with Maryland Casualty. When the case of *Dunlap* v. *Gouge* was filed, Maryland was notified of the filing. Maryland was advised by Dunlap's counsel that in his opinion Maryland's policy issued to the Smith family covered this accident. Maryland declined to participate. The mother of the injured child brings this suit to compel payment by Maryland Casualty.

Counsel for appellant Dunlap advances a unique theory upon which claim for recovery from Maryland is predicated. It is contended that Dan Smith's act of riding in the Gouge automobile constituted a *use* of a non-owned automobile by Dan Smith. Maryland's policy covering the Smith family refers to coverage with respect to the *use* of a non-owned automobile. It is Dunlap's theory that under this "use coverage" Maryland is liable.

Succinctly stated, the Smith policy is a family automobile policy. Maryland Casualty agrees to pay on behalf of the insured (which includes any relative who is a member of the Smith household) certain sums which the insured shall become legally obligated to pay as damages because of bodily injury. This coverage is extended to the use of certain types of non-owned automobiles. Sub-section (c) under "Persons Insured" extends coverage to any other person legally responsible for the use of a non-owned automobile. Appellant Dunlap contends that under this provision Glenn Gouge, Jr. was insured under the Smith family policy. It is asserted that he is a "third person legally responsible for using a non-owned automobile which is also being used at the same time by the Smiths or a relative."

The pivotal question is: Was Dan Smith *using* the Gouge automobile? There is no allegation of joint venture between the teen-agers riding in the Gouge auto-

mobile. There is no proof that Dan Smith participated, directly or indirectly, in the operation of the Gouge car. In the complaint filed in this case, the only reference to Dan Smith's activity is that "Dan Smith was riding in (using) said automobile by permission of the owner thereof." Dan Smith was not made a party to the case of *Dunlap* v. *Gouge*, in which the judgment for personal injuries was rendered.

There are many cases which discuss the subject of "use" as the word is utilized in liability policies. We have not been cited a case—nor do we find one—where the factual situation precisely fits the case at bar. Courts and text writers point up the importance of the factual context of each case. For example, every case cited by appellant has a factual feature which distinguishes it from this case. Cited by appellee is *Potomac Insurance Company* v. *Ohio Casualty Insurance Company et al,* 188 F. Supp. 218 (1960). It contains a state of facts very similar to this case. Under a liability policy issued by Potomac to Marvin Mark, Potomac was obligated to defend Mark against any suit arising out of the "use" by the insured of any non-owned automobile. Mark was a guest in a vehicle owned and driven by Hilda Koerber. The Koerber car was involved in a collision. By declaratory judgment procedure Potomac sought a determination of the demand made against it to defend. The court said:

> "Defendants contend that the word 'use' is ambiguous and may be extended to cover Marvin Mark's situation in the Koerber automobile. It is the opinion of this court that no reasonable person could thusly construe the language of the policy; to do so would, in effect, extend its coverage to any situation wherein the insured is the occupant of an automobile. Clearly this is neither the intended nor apparent meaning of the policy."

The opinion in *Potomac* does not afford us a detailed description of the terms of the policy. The sum-

marization of the provisions, however, describes a striking similarity to the policy in our case.

Affirmed.

CURTIS W. JONES ET AL *v.* G. F. BROWN ET AL, TRUSTEES OF FIRST BAPTIST CHURCH OF BENTON

5-4221 414 S. W. 2d 618

Opinion delivered May 8, 1967

Martin K. Fulk and *Griffin Smith*, for appellant.

Hall & Tucker and *John F. Lovell, Jr.*, for appellee.

LYLE BROWN, Justice. This is a suit between adjoining property owners to resolve the title to a strip of ground nineteen and two-tenths feet in width. Appellants, Curtis W. Jones, et al., appeal from a decree of the trial court holding that appellees, G. F. Brown, et al, trustees of the First Baptist Church of Benton, and their predecessors in title, had been in adverse possession of the property since 1952.

Some thirty-five years ago Dr. Dewell Gann, Sr., obtained record title to Lots Four, Five, and Six in Block Fifteen, all of which were deeded in 1946 to Dr. Dewell Gann, Jr. A portion of this property was deeded in that year to Dr. C. W. Jones Sr., and another portion was deeded in 1949 to Dr. Jones and his son. The property remaining to Dr. Gann was situated between the Jones land to the south and the First Baptist Church to the north.

In 1952 the Joneses and Dr. Gann joined in a suit to confirm title to their respective interests in the three lots. Included in the suit were fifteen feet of Smith Street to the south and four feet of Market Street to the east, both strips bordering on the Jones property. Those portions of the streets had been abandoned by the city. The confirmation decree purported to set aside Lot Four to Dr. Gann and the balance to the Joneses, all by metes and bounds descriptions.

The present lawsuit had its genesis when the church trustees, appellees herein, decided to purchase the Gann property for the purpose of expansion. It was then discovered that the south boundary line of Lot Four splits a duplex building owned by Dr. Gann and his successors in title. Nineteen and two tenths feet south of this line is an old fence running east and west. Part of this fence was originally erected by one of the Joneses in 1952, and it was extended in 1957 by a tenant of Dr. Gann. If the fence were extended to the east a short distance it would apparently tie into the southwest corner of the duplex.

Dr. Gann died in 1957, and his widow died in 1965. In the latter year the church obtained from the executor of the Gann estate a deed to Lot Four and the easterly 162.6 feet of the north nineteen and two-tenths feet of Lot Five, described by metes and bounds. The latter strip, the subject of the present controversy, is claimed by the church by reason of adverse possession thereof by its predecessors in title, the Ganns. The Joneses, appellants herein, dispute this claim. The chancellor found the disputed strip to have been adversely possessed for more than seven years by the Ganns, and it is this finding which we are asked to reverse. We decline to do so.

The record title of the Joneses is weakened by two significant factors. First, the original plat of Block Fifteen, upon which the various legal descriptions are based, was severed from the original city plat and lost. That was several years prior to this lawsuit. So it is not at all clear exactly where the "true" boundaries are located. Secondly, the surveyor's plat prepared for this lawsuit shows that the church building protrudes into Lot Four, the Gann duplex protrudes into Lot Five, the Jones Clinic straddles the line between Lots Five and Six, and the south wall of another building extends into the closed portion of Smith Street. There was no showing at the trial that anyone, even the Joneses, ever considered the boundaries to split each of these buildings. In fact, Dr. Jones, Jr., recognized the fence as the south line of the Gann property.

The Gann duplex building was some fifty years old and from 1952 to 1965 was occupied by a tenant who paid his rent to the Ganns, with no objection from the Joneses. The balance of the disputed area is effectively enclosed by the fence erected by the Joneses and extended by the tenant. Actual possession of the strip would appear, therefore, to have been established by the church's predecessors in title. See *McNeely* v. *Ballard*, 220 Ark. 736, 249 S. W. 2d 567 (1952); *Miller* v. *Fitzgerald*, 169 Ark. 376, 275 S. W. 698 (1925).

As to the adverse nature of the possession, this case is similar in many respects to *Rossner* v. *Jeffrey,* 234 Ark. 723, 354 S. W. 2d 705 (1962), where the disputed strip was likewise enclosed within a fence for many years. The contention was there made that the lack of testimony as to the *intent* of the possession, caused by the death of the claimant's predecessor in title, precluded a finding of adverse possession. In response to this argument we said:

> " 'The "adverseness" of the possession . . . does not consist alone of mental intentions, but it must also be based on the existence of physical facts which openly evince a purpose to hold dominion over the land in hostility to the title of the real owner, and which will give notice of this hostile intent. A possession, it appears, is adverse to the true owner when it is unaccompanied by any recognition, express or inferable from the circumstances, of the right in the latter.' Tiffany, Real Property (3d Ed.), § 1142. 'When the evidence tends to show that the possession has all the qualities of an adverse holding, the law presumes that such possession is adverse, absent evidence to the contrary.' Thompson, Real Property, § 2544. There is nothing to indicate that Ketscher's open and notorious possession was permissive or subordinate to the Rossners' title. The chancellor was therefore justified in concluding that the necessary hostility of intent existed. If this were not so it would often be impossible to prove adverse possession after the death of the person who had acquired title in that way."

Such a result in this case is strengthened by the fact that the Joneses, although present at the trial, offered no testimony. This failure to present their version of the facts is significant. In *Saliba* v. *Saliba,* 178 Ark. 250, 11 S. W. 2d 774 (1928), the lower court instructed the jury that failure to produce evidence under a party's control creates a presumption that it would be unfavorable to him. That instruction was approved by this court.

This uncontested possession by the Ganns for a substantial period of time after the execution by them of the deeds to the Joneses also serves to rebut the presumption that continued possession by a grantor of land deeded to a grantee is subordinate to the title of the grantee. See *Anderson* v. *Burford*, 209 Ark. 452, 190 S. W. 2d 961 (1945), and the many Arkansas cases there cited.

The recognized starting point for metes and bounds descriptions in the involved area is an iron pin at the southwest corner of the courthouse square. That starting point is the basis for the metes and bounds description by which the chancellor made the award to the church. That description places the south boundary line of the disputed property at the fence and nineteen and two-tenths feet into Lot Five as shown on the unofficial plat of Block Fifteen.

Affirmed.

DOROTHY BEEVERS, ADM'X *v.* WILBURN W. MILLER

5-4204 414 S. W. 2d 603

Opinion delivered May 8, 1967

[Rehearing denied June 5, 1967.]

Chambers & Chambers and *McKay, Anderson & Crumpler*, for appellant.

Shaver, Tackett & Jones; By: *Boyd Tackett,* for appellee.

JOHN A. FOGLEMAN, Justice. Appellant contends that the trial court erred in failing to give AMI 502, its requested Instruction No. 6. Appellee contends that this was not reversible error because the content of the proffered instruction was covered by the court's instructions numbered 6 (AMI 501) and 7 (AMI 203).

Appellant brought suit against appellee alone for wrongful death of her decedent while a passenger in a truck being driven by one Herschel Goodwin. She alleged that appellee, driving a truck negligently, forced Goodwin to swerve his vehicle off the road, on which both were traveling, to avoid a collision, causing the latter vehicle to overturn and the death of her decedent. Appellee defended on allegations that he did not meet the vehicle driven by Goodwin, and, in the alternative, that the sole proximate cause of the death was the negligence of the owner and operator of the vehicle driven by Goodwin. There was testimony that Goodwin was a young man, inexperienced in driving the truck, a top-

heavy oil rig, and was just learning to drive it. Appellee testified that he gave such a rig plenty of space on the day of the occurrence and that there was no crowding when he met it.

Appellee makes certain contentions about the record on appeal which are not well founded because of the provisions of Act 555 of 1953, the purpose of which was to simplify appellate procedure.

The first contention is that the bill of exceptions is not approved by the trial court. This is no longer necessary unless a difference arises as to the correctness of the record. See Ark. Stat. Ann. (Repl. 1962) §§ 27-2127.3, 27-2127.4, 27-2127.8 and 27-2129.1.

He next contends that the transcript of testimony and record designated by appellant is insufficient for the court to know whether the instruction in question should have been given and that the court will presume that the parts of the record omitted will support the action of the trial court. The objection is tardily made. Appellee had ten days after the filing of appellant's designation of the record within which to serve and file a designation of additional portions of the record. Ark. Stat. Ann. § 27-2127.2 (Repl. 1962). It was only necessary to have enough of the record to show that part pertaining to the one point contained in appellant's statement of points to be relied upon and we find nothing to show the inadequacy of the record in this respect. If appellant had designated more, she would have run the risk of an assessment of costs against her even upon reversal of the case. *Spikes* v. *Hibbard*, 226 Ark. 93, 288 S. W. 2d 38. As was there said, it is the clear intention of the act and particularly § 27-2127.6 to reduce the expense of litigation by requiring the omission of all matters not essential to the decision of the question presented by the appeal. It is there clearly stated that when the record has been abbreviated without objection from opposing parties, no presumption shall be indulged that the findings of the trial court are supported by any

matter omitted from the record. This court has so applied this statute uniformly, where appellant filed his designation of points to be relied upon, as was done here. *Griffin* v. *Young*, 225 Ark. 813, 286 S. W. 2d 486; *Manila School District No.* 15 v. *Sanders*, 226 Ark. 270, 289 S. W. 2d 529; *Bell* v. *Kroger Company*, 230 Ark. 384, 323 S. W. 2d 424. It is the duty of the appellee to designate for inclusion in the record any explanatory matter that might be needed to support the court's action. *Reed* v. *Reed*, 238 Ark. 840, 385 S. W. 2d 35. It was the duty of appellant to include in the record any additional record designated by appellee. *Arkansas Farmers Association, Inc.* v. *Towns*, 232 Ark. 997, 342 S. W. 2d 83. An appellee who fails to object to the record as abbreviated by appellant acts at his peril. *Southern Farmers Association, Inc.* v. *Wyatt*, 234 Ark. 649, 353 S. W. 2d 531.

Appellee also asserts that the abstract of the record by appellant is so deficient that the court cannot know whether the failure to give the instruction was prejudicial error. Although it is impossible for the seven judges of this court to explore a transcript to determine whether there was reversible error, this is not a case where sufficiency of the evidence to support a verdict is questioned and the relatively brief abstract of the abbreviated record was sufficient to be the "condensation without comment or emphasis, of only such material parts of 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" required by Rule 9 (d). If appellee considered the abstract insufficient he had the option to submit a supplemental abstract. Rule 9 (e). Appellee has not pointed out any deficiency in the abstract.

Appellee also contends that appellant's objection to the court's failure to give the questioned instruction came after the jury was instructed and actually after the argument of the case. Nothing in the transcript reflects that this was the case. Appellee relies on language

in the objection which indicates that appellee's counsel had argued the case to the jury at the time the objection was made. This objection was not contained in the original transcript but supplied in a supplement to the original transcript, certified by the official court reporter. Neither the original nor the supplement shows when the objection was made. Appellee joined in the motion under which the supplement was filed and waived any objection thereto. This was an appropriate time to bring this matter into the record. It is suggested that the court was aware of the objection but requested that appellant wait until the jury was deliberating to put the specific language of the objection into the reporter's record. It is well known among the bench and bar that this is a common practice designed to expedite the trial by diminishing the time jurors must wait for instructions to be settled, prepared in written form and given. In the absence of a specific objection by counsel, which does not appear here, we find no waiver on the part of appellant's counsel under such circumstances.

The court's Instruction No. 6 (AMI 501) requested by appellee, defined proximate cause and then told the jury:

> "This does not mean that the law recognizes only one proximate cause of damage. To the contrary, if two or more causes work together to produce damage, then you may find that each of them was a proximate cause."

By its Instruction No. 7 (AMI 203) the court told the jury that its verdict should be for appellant if they found she had met the burden of proving that she had sustained damage, that appellee was negligent and that such negligence was a proximate cause of her damages; otherwise, its verdict should be for appellee. Appellee then requested AMI 502 which would have first told the jury that when two or more persons are guilty of negligence working together as proximate causes of damage,

each may be found to be liable, regardless of the relative degree of fault. It would have added that if they found that negligence of appellee proximately caused damage to appellant, it was not a defense that some third person may also have been to blame. No contention is made that the instruction is an incorrect statement of law or that it is abstract.

The avowed purpose of AMI was to improve communication between judge and jury by the giving of understandable instructions on the applicable law. See AMI Introduction. The note on use of AMI 502 states that it should not be given when the case is submitted on interrogatories. It further states that the last sentence *should be used only* when some person who may also have been at fault *is not a party to the action.* In the draft, the word "defendant" is given in both the singular and the plural, indicating that it is a proper instruction where there is a *single defendant* and *a defense that the negligence of one not a party to the action caused the damage.* It would eliminate any idea that the negligence of another only contributing to the damage could be a defense or reduce the amount of appellant's recovery, however great that contribution might be. The jury was not told this anywhere and this instruction was necessary for them to have a clear understanding of this. Consequently, the instruction should have been given and the failure to give it constituted reversible error as this matter was not otherwise adequately covered. If we adopted any other position, it would be difficult to understand why AMI 502 was drawn or when it should be used since the combination given by the court would have been sufficient to cover all situations.

As earlier pointed out, the pleadings show clearly that appellee's defense was largely based on a contention that appellant's damage was caused solely by the negligence of Goodwin. He did not plead negligence by her decedent, nor did he assert that negligence of Goodwin should be imputed to him. Consequently, the jury

should understand clearly that appellant was entitled to a verdict if it found appellee guilty of negligence which contributed as a cause, however slightly, to appellant's damage, even though they might have thought that the negligence of Goodwin was a far greater contributing cause. With the issues so presented, Goodwin not having been made a third party defendant, it was imperative that the jury be told that Goodwin's negligence constituted no defense unless they found it to be the sole proximate cause. We do not think that the instructions given by the court made this clear. It was essential to do so in order to give the jury a clear understanding of the governing legal principles, particularly in a case submitted for a general verdict. Speculation as to the failure to make Goodwin a party would have been eliminated as a possible factor in the verdict.

Even if the court's general instructions could be said technically to have covered the matter in a general way, it is error to refuse to give a specific instruction correctly and clearly applying the law to the facts of the case, even though the law in a general way is covered by the charge given, unless it appears that prejudice has not resulted. *St. Louis & S F R Co.* v. *Crabtree,* 69 Ark. 134, 62 S. W. 64; *Western Coal & Mining Co.* v. *Buchanan,* 82 Ark. 499, 102 S. W. 694; *Western Coal & Mining Co.* v. *Burns,* 84 Ark. 74, 104 S. W. 535; *Nebraska Underwriters' Ins. Co.* v. *Fouke* 90 Ark. 247, 119 S. W. 261; *American Fire Ins. Co.* v. *Haynie,* 91 Ark. 43, 120 S. W. 825; *Western Coal & Mining Co.* v. *Moore,* 96 Ark. 206, 131 S. W. 960.

In *St. Louis & S. F. R. Co.* v. *Crabtree, supra,* where this court reversed the trial court for failure to give an instruction that it was the duty of one approaching a railroad track to look both up and down the track as long as he approached, notwithstanding the giving of a general charge that one approaching a crossing should look and listen for approaching trains, this language very appropriate to this case was used:

"* * * A lawyer would, of course, understand that the charge of the judge was intended to convey the idea that the traveler about to cross a railroad track must look for trains from both directions, and must continue on his guard until the danger is passed. But jurors are not usually learned in the law. They may have concluded in this case that plaintiff discharged the duty to look and listen by looking only in the direction from which he was expecting a train to come, or by looking and listening at only one time. We do not say that they did take this view of the law, but they might have done it, under instructions which did not explicitly tell them that it was his duty to look in both directions, and to continue on his guard until the track was passed. When the circuit judge was asked to make the law clear to the jury on this point, by telling them that one approaching a railroad track should 'look up and down the track as long as he approaches,' we think he should have done so. But counsel for plaintiff say that we should presume that the attorney for the company in presenting the case to the jury argued that the instruction that one about to cross a railway track 'should look and listen for approaching trains' meant that he should look north as well as south. We are willing to indulge in this presumption, for we have no doubt that this argument as to the meaning of the instruction was made by the attorney for the defendant company. In other words, the trial judge having refused to explicitly instruct the jury on this point, the only resource left to the company was to rely upon a statement of the law made to the jury by its attorney. But jurors are not required to take the law from counsel, and it was putting an undue burden upon the defendant company to compel it to rely upon convincing the jury as to the proper view of the law by an argument of its attorney. If the sympathies of the jury happened to be with the other side, that might be difficult to do, and might be too heavy a task even for the most gifted attorney. It is a burden that the

law does not impose, for it is the duty of the judge to instruct; and each party has the right to have the jury instructed upon the law of the case clearly and pointedly, so as to leave no ground for misapprehension or mistake."

The argument advanced here is somewhat analagous to that advanced by appellee in *Prescott & N. W. Ry. Co.* v. *Weldy* 80 Ark. 454, 97 S. W. 452. In treating the contention this court said:

"While it is true that all of the instructions given by the court predicated the plaintiff's right to recover solely on the defect in the track or roadbed, as set forth in the complaint, still the defendants were entitled to a specific instruction, telling the jury that if the injury occurred from some cause other than that alleged in the complaint, or that if the deceased was guilty of negligence in the particular mentioned which contributed to the injury, there could be no recovery."

The minds of the jurors should have been directed to this particular point. *Bailey* v. *State*, 92 Ark. 216, 122 S. W. 497.

A reversal must follow the refusal of a proper instruction, unless it affirmatively appears that no injury resulted. *St. Louis & S. F. R. Co.* v. *Crabtree*, 69 Ark. 134, 62 S. W. 64; *Hamilton-Brown Shoe Co.* v. *Choctaw Mercantile Co.*, 80 Ark. 438, 97 S. W. 284; *Prescott & N. W. Ry. Co.* v. *Weldy*, 80 Ark. 454, 97 S. W. 452; *Western Coal & Mining Co.* v. *Buchanan*, 82 Ark. 499, 102 S. W. 694; *Ohio Handle & Mfg. Co.* v. *Jones*, 98 Ark. 17, 135 S. W. 455.

Although the court is not required to give every correct instruction offered when the instructions given explicitly, clearly, fully and fairly cover the matter requested, we cannot say that prejudice to appellant did not result in this situation.

Reversed and remanded for new trial.

HARRIS C. J., and BROWN, J., dissent

LYLE BROWN Justice, dissenting. The majority opinion holds that the trial court erred in refusing to give plaintiff's requested instruction AMI 502. From this holding I must dissent. This is a two-party lawsuit in which plaintiff alleges the defendant driver was negligent. The defendant denies negligence and asserts the deceased met death as a result of the negligence of the driver operating the truck in which deceased was a passenger. The court gave AMI 501, followed by AMI 203. Bearing in mind that Goodwin (in whose truck deceased was a passenger) was not a party to the suit, I think the two instructions, given in the order copied, were sufficient.

"AMI 501. The law frequently uses the expression 'proximate cause,' with which you may not be familiar. When I use the expression 'proximate cause,' I mean a cause which, in a natural and continuous sequence, produces damage and without which the damage would not have occurred.

"This does not mean that the law recognizes only one proximate cause of damage. To the contrary, if two or more causes work together to produce damage, then you may find that each of them was a proximate cause."

"AMI 203. Dorothy Beevers as Administratrix claims damages from Wilburn W. Miller and has the burden of proving each of three essential propositions:

First, that she has sustained damages;

Second, that Wilburn W. Miller was negligent;

And third, that such negligence was a proximate cause of plaintiff's damage.

"If the you find from the evidence in this case that each of these three propositions has been proved then your verdict should be for Dorothy Beevers, Admx.; but, if, on the other hand, you find from the evidence that any one of these propositions has not been proved, then your verdict should be for Wilburn W. Miller."

Considering these two instructions together, the court told the jury that if Miller was negligent, and Miller's negligence was *a proximate cause,* Beevers' administratrix was entitled to recover any damages sustained. Then with reference to defendant Miller's assertion that Beevers' driver (Goodwin) was negligent, the jury was in effect told, in the second paragraph of AMI 501, that Goodwin's negligence would not bar recovery against Miller.

In addition to the copied instructions, plaintiff requested AMI 502:

"When the negligent acts or omissions of two or more persons work together as proximate causes of damage to another, each of those persons may be found to be liable. This is true regardless of the relative degrees of fault between them.

"If you find that negligence of the defendant proximately caused damage to the plaintiff, it is not a defense that some third person may also have been to blame."

First, I would call attention to this statement: "When the negligent acts or omissions of two or more persons work together as proximate causes of damage to another, each of those persons may be found to be liable." This jury could not find liability against Goodwin because he was not a party to the suit. To that extent the instruction could confuse the jury because in this case there is only one person charged with liability.

The second paragraph of AMI 502 does not speak of *liability*. It speaks of *blame*. Concededly, the second paragraph appropriately explains that any blame on the part of Goodwin would not free Miller if the latter's negligence was *a proximate cause*. In fact, it is there spelled out more explicitly than in the last paragraph of AMI 501. On the other hand, the exact argument can be made to the jury irrespective of which "last paragraph" is given. Of course lawyers naturally like to hear the trial judge instruct the jury in phrases that they can "hammer home" by quotation in their closing arguments. This is one reason for the traditional argumentative instructions, giving one for the plaintiff in his chosen words, then another to counteract it in the chosen words of the defendant. The majority opinion cites a number of old cases. Many of the cases cited are good examples of the pitfalls of lengthy instructions dealing in "specifics" advanced by plaintiff and defendant. The trend in composition of instructions is based on the requirements that they be conversational, understandable, and unslanted. It is refreshing to know that we are moving away from the old form of "instructions for the plaintiff" and "instructions for the defendant."

Secondly, the refused instruction is not a "must" instruction—one to be given in every tort case. When the case is submitted on interrogatories, the note on use to AMI 502 recommends that the bracketed portion of AMI 501 be given, if appropriate.

Finally, it is my view that if the giving of AMI 502 be conceded appropriate, yet the refusal to give it was not prejudicial error. This conclusion is based on the theory that the subject matter was covered by AMI 501.

I would affirm. HARRIS, C. J. joins in this dissent.

FRANK SHOWEN *v.* MORRIS H. MOORE

5-4222 414 S. W. 2d 613

Opinion delivered May 8, 1967

[Rehearing denied June 5, 1967.]

Holt, Park & Holt, for appellant.

House, Holmes & Jewell, for appellee.

J. FRED JONES, Justice. This is an appeal from the Pulaski County Circuit Court and the question presented is whether or not the trial court erred in entering a summary judgment on the record before it in this case.

Morris H. Moore as plaintiff in the trial court, filed suit in unlawful detainer against Frank Showen to recover the possession of a dwelling house occupied by Showen. Showen retained possession under cross bond.

Moore alleged ownership of the property involved; that Showen had paid no rent since October 1964, but has wrongfully and without right held over and refused to quit possession notwithstanding demands therefor.

Showen answered by general denial and with the allegation "that the relationship of landlord and tenant does not now exist and has never existed between the plaintiff and the defendant or anyone under, by or through whom plaintiff claims the right to possession of

the property." * * * "that the plaintiff, Morris H. Moore, has no right to the possession of said property or any part thereof."

With the issues thus joined, Moore filed a motion for summary judgment and upon the pleadings, exhibits, interrogatories, and the deposition of Showen; the motion for summary judgment was granted and judgment for possession was entered in favor of Moore. Showen has appealed to this court, relying on the following point for reversal:

> "There are genuine issues as to material facts that require the introduction of evidence in this case which has been denied to appellant by the granting of the summary judgment."

The record reveals the following facts:

Appellant is a disabled veteran, fifty-four years of age. Appellant was born in the house he now occupies and has lived there all his life. The property at one time belonged to appellant's grandfather and appellant lived in the house with his mother until her death in 1964, and has continued to occupy the house since his mother's death. Appellant's mother, Mrs. Showen, and appellee's mother, Mrs. Moore, were very close lifelong friends until Mrs. Moore's death about 1937. After the death of Mrs. Showen in 1964, appellant learned, for the first time, that the legal title to the property was in Mrs. Moore. He knew that Mrs. Moore had "helped" his mother "when they auctioned the place off at the court house," and after Mrs. Moore died in 1937, appellant knew that his mother continued to occupy the house under some kind of agreement between his mother and appellee, but did not actually see the written agreement until after his mother's death. Appellant's deposition on this point is as follows:

* * *

"A. I knew that Mrs. Moore when they auctioned the place off at the Court House, I knew that she helped mother.

Q. At that time?

A. In the auction. I knew that.

Q. From the legal title viewpoint, the first time you were aware of the fact that the actual legal title was in Mrs. Moore's name was after your mother's death, was it not?

A. That's right.

Q. And the first time you knew that your mother had entered into an agreement with—

A. Morris Moore.

Q. Morris Moore was after your mother's death?

A. It wasn't the first time I knew that there was some kind of an agreement. I never did see the actual agreement until after her death.

Q. You knew that your mother was there under some agreement with Mr. Morris Moore?

A. That's right.

* * *

Q. Your mother let you live in the premises all of the time until her death?

A. Yes, sir.

Q. And you did not claim any interest in the property in contradiction of her claim to ownership I take it?

A. Not to her ownership. I have never claimed ownership, I mean before her death.

Q. Actually you were just born in the house?

A. That's right.

Q. And by reason of being a child of—

A. Mamie Showen.

Q. Mamie Showen, Mamie McCoppin Showen you just grew up there and there wasn't—

A. It was my lifelong home and so there is no question."

In answer to interrogatories propounded by appellee, the appellant stated that he claims an undivided one-half interest in the property as one of the two surviving heirs of his mother, who acquired title to the property through her father, Joseph McCoppin, and by gift Inter Vivos from Mrs. Moore, and that he has further acquired title to the property by adverse possession since the appellee made claim to the property as his own after the death of his mother, Mrs. Moore. In answer to interrogatories, appellant contended that he and his deceased mother paid the general taxes on the property for the years 1951 through 1962, and that he and his deceased mother had actual, continuous and uninterrupted possession of the property for approximately 70 years; that the property belonged to his grandfather, Joseph McCoppin; that he was born in the home on said property where he is now living, and his possession has been adverse since 1947. Appellant admits that he has never expended any sums for rent and does not have insurance in force on the property.

William Joseph McCoppin was a brother to Mrs. Showen and he also lived with Mrs. Showen and appellant in the property until his death in 1955.

On December 30, 1937, after the death of Mrs. Moore, the appellee entered into a lease agreement with Mrs. Showen and her brother. The lease agreement was filed for record in the Pulaski County recorder's office on October 25, 1939, and this lease is not questioned by appellant. Since this lease is so important to the decision we reach, it is copied in full as follows:

LEASE CONTRACT

286

To

32687 Morris Moore Mamie McCoppin Showen et al

LEASE CONTRACT

THE STATE OF ARKANSAS, County of Pulaski: KNOW ALL MEN BY THESE PRESENTS:

That whereas, Mrs. Maude Addis Moore, prior to her death, owned the property in the City of Little Rock, Pulaski County, Arkansas, known as lots 15 and 16, in block No. 1 of Clark's Addition to the City of Little Rock, Arkansas, which is the property now in possession of and occupied by the undersigned; and

WHEREAS, the said Mrs. Maude Addis Moore during her lifetime permitted the undersigned to use and occupy said premises, in consideration that the undersigned would keep the improvements on said premises in a reasonable state of repair and pay for such repairs and keep the said property insured in some solvent insurance company and pay the premiums thereon, insuring the same in the name and for the benefit of Maude Addis Moore, and would pay all State, County, City and District taxes and assessments of every kind and character on said property, and the undersigned has used and occupied said property for a number of years under

such agreement with the said Mrs. Maude Addis Moore; and

WHEREAS, since the death of Mrs. Maude Addis Moore, said property is now owned by Morris Moore, her son, to whom the same was bequeathed by the will of said Maude Addis Moore:

NOW, THEREFORE, the undersigned (whether one or more) expressly acknowledges the ownership of said property by the said Morris Moore, and in consideration of the said Morris Moore permitting the undersigned to live upon, use and occupy said property, the undersigned has this day and does hereby agree with the said Morris Moore that the undersigned will keep said property in a fair and reasonable state of repair and pay all costs and expenses of such repairs, and pay all other items of expense that are proper and necessary in order to keep said property in a good, usable, and habitable condition and will pay all taxes, State, County, City and District due and to become due against said property and all assessments heretofore or hereafter made against the same, and will insure said property in some solvent insurance company and pay all the premiums thereon, having said policy or policies made to the said Morris Moore.

And the undersigned further agrees that possession, use and occupancy of said premises by the undersigned or anyone claiming by, through or under the undersigned, shall not and will not constitute or be construed to be adverse to the said Morris Moore, and it is further understood that during the existence of this contract the undersigned shall not be required to pay any rent upon or for said premises.

It is further understood that this contract can be terminated by either party at any time by either party giving to the other party thirty days advance notice of the date upon which termination shall be effective, which notice shall be given in writing by ordinary United

States mail, addressed to the undersigned at Little Rock, Arkansas, or to Morris Moore at Marshall, Texas, and upon cancellation or termination hereof, the undersigned will deliver possession of the above premises to the said Morris Moore or his agent upon the date of termination hereof as fixed by the notice aforesaid.

IN TESTIMONY OF WHICH, This instrument is executed this 30th, day of December, A. D. 1937.

Mamie McCoppin Showen

William Joseph McCoppin

This lease instrument was duly attested, notarized and filed for record on October 26, 1939, and no question is raised as to its authenticity or purpose.

Appellee filed his complaint under Ark. Stat. Ann. § 34-1503 (Repl. 1962) where "unlawful detainer" is defined as follows:

> "Every person who shall willfully and without right hold over any lands, tenements or possession after the determination of the time for which they were demised, or let to him, or the person under whom he claims, or who shall peaceably and lawfully obtain possession of any such and shall hold the same willfully and unlawfully after demand made in writing for the delivery or surrender of possession thereof by the person having the right to such posessions, his agent or attorney, or who shall fail or refuse to pay the rent therefor when due, and after three 3 days' notice to quit and demand made in writing for the possession thereof by the person entitled thereto, his agent or attorney, shall refuse to quit such possession, shall be deemed guilty of an unlawful detainer."

Appellee filed his motion for summary judgment under Ark. Stat. Ann. § 29-211 (Repl. 1962). Subsection (c) of this statute provides:

* * *

"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. A summary judgment interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

The case of *Webb* v. *Herpin,* 217 Ark. 826, 233 S. W. 2d 385, involved an action in unlawful detainer, and in that case this court said:

"This form of action is meant to provide the landlord with a summary means of ousting a tenant who refuses to pay his rent. By making the lease the tenant recognizes his landlord's title, and the latter ought not be required to jeopardize his ownership whenever he seeks to repossess the land. If the alleged tenant really has a valid claim of ownership he may either defend the possessory action by proving his title, as we have seen, or he may bring a concurrent action to put the title in issue."

In the case of *Griffin* v. *Monsanto Co.*, 240 Ark., 420, 400 S. W. 2d 492, this court said:

"The defendant's pleading is in substance a motion for a summary judgment. We so treat it. Such a motion cannot be used to submit a disputed question of fact to the trial judge. Testimony submitted with the motion 'must be viewed in the light most favorable to the party resisting the motion, with all doubts and inferences being resolved against the moving party.' Judgment should be entered summarily only if the evidence, when so considered, shows that there is no genuine issue as to any material fact in the case."

Appellant did not *allege title* in defense of appellee's claim to the right of possession, but in answer to interrogatories propounded by appellee, he based his claim on inheritance from his mother who acquired title through her father and by gift Inter Vivos from appellee's mother, Mrs. Moore, and also by adverse possession since the property was claimed by appellee.

It is clear from the lease agreement that after the death of Mrs. Moore, appellant's mother as well as her brother who lived with her, recognized appellee's ownership in the property. It is also clear from the lease and appellant's own testimony, that Mrs. Showen and her brother as well as the appellant himself, continued to occupy the property after Mrs. Moore's death, under the lease from the appellee. Mrs. Showen and her brother continued in possession under the lease signed by them until their deaths, and appellant obviously continues in possession under the same lease.

Appellant admits that he only knew that his mother was in possession of the property *under some kind of an agreement with appellee*. Yet appellant claims title through inheritance from his mother who admitted by her duly executed lease that she had no title. Appellant admits that he claimed no title or interest in the property adverse to his mother during her lifetime, and appellant does not question the authenticity of the recorded lease. The lease not only recognizes appellee's ownership in the property insofar as appellant's mother and her brother were concerned, it recognizes appellee as a landlord for appellant's mother *or anyone holding under her*. Appellant admits that he came into possession of the property through the permission of his mother and he admits that he has never paid rent and is in arrears on insurance and taxes.

We conclude that the lease agreement accomplishes the purpose for which it apparently was primarily intended; to give appellant's mother and her brother a home in exchange for the upkeep and payment of taxes,

and to prevent the loss of title by adverse possession to anyone holding under them.

We hold that there was no justiciable controversy presented on the pleadings and exhibits in this case, and that the trial court's decision on that point was based on substantial evidence and should be affirmed. By so holding in this unlawful detainer action, however, we do not foreclose appellant's right to try title to the property involved in an appropriate action.

Affirmed.

AARON K. WYATT v. CLYDE GRIFFIN AND MABEL GRIFFIN

5-4199 414 S. W. 2d 377

Opinion delivered May 8, 1967

Chapman & Wiley, for appellant.

Murphy & Arnold, for appellees.

CONLEY BYRD, Justice. Appellant, Aaron K. Wyatt, appeals from an order of the trial court dismissing upon demurrer his action in ejectment against appellees Clyde Griffin and Mabel Griffin. The amended complaint alleges that appellant is the owner of the E 1/2, SW Frl 1/4, Sec. 23, T-12-N, R-5-W. Attached to the original complaint was a series of conveyances within the Wyatt family dating back to 1941. Paragraphs VI and VII of the complaint alleged as follows:

> "That the lands in question were the subject of litigation between plaintiff's predecessors in interest and the defendants' grantors. The boundary line was fixed by the Supreme Court of Arkansas in the case of *Wyatt* v. *Wycough*, 232 Ark. 760, 341 S. W. 2d 18, establishing the defendants' grantors interest in property in the area as the land in Section 26, Township 12 North, Range 5 West, all lying in Independence County, Arkansas.
>
> "That notwithstanding the plaintiff's ownership and possession of the lands as aforesaid the defendants have, since the boundary line was fixed, without the consent or knowledge of the plaintiff, built and are maintaining a fence from a point 293 feet north of the said Section line for a distance of approximately 810 feet across plaintiff's property."

The prior boundary judgment, affirmed by this court in *Wyatt* v. *Wycough*, 232 Ark. 760, 341 S. W. 2d 18, (1960) found that appellees were the owners and entitled to immediate possession of the NE Frl of the NW Frl, Sec. 26, T-12-N, R-5-W; that the north line of appellees' property was the line surveyed by Hon. Clyde Griffin, County Surveyor, along which a fence was erected; and that appellees were entitled to possession of the lands immediately to the south, bounded on the east by the East line of the NW 1/4 of Sec. 26 and on the

west and south by the old river bed.

Appellees contend that to state a cause of action in ejectment or to avoid a plea of res judicata it was necessary for appellant to allege in his complaint "that appellees were possessing land north of the line surveyed by Hon. Clyde Griffin, County Surveyor, along which a fence was erected." On this point, we hold that the complaint was sufficient to state a cause of action in ejectment. The complaint obviously alleges that appellees have built a fence north of the boundary line established by the judgment in *Wyatt* v. *Wycough*.

Appellees also take the position that the complaint is insufficient, in that appellant's documents of title give him title only to that portion of the SW 1/4 of Sec. 23 which was originally in "Crow" Island; and that since the complaint does not deraign title to the 9.09-acre swamp land tract in the SE part of the SW Frl 1/4 of Sec. 23 east of the river which would have adjoined appellees' lands on the north, the complaint does not comply with Ark. Stat. Ann. § 34-1408 (Repl. 1962).

To adequately understand appellees' contention one needs to know that when the land was first surveyed in 1826, the portion of the NW 1/4 lying east of the river constituted a parcel of only 8.8 acres or less; and that immediately north of the parcel now claimed by appellees, the 1826 government survey showed a 9.09-acre tract in the SE part of the SW Frl 1/4 of Sec. 23 east of the river. According to the 1826 survey, the descriptions set forth in appellant's muniments of title would have been in an island located somewhat in the center of Sec. 23. Since that time, the river has migrated eastward until all of the lands in question are west of the river and connected to the lands originally in the island, which is referred to in the briefs as "Crow" Island.

Appellees' last position, with respect to the SE part of the SW Frl quarter east of the river, would be well

taken except for the fact that the government survey shows that appellees' land at the time of the government survey was also east of the river, while the judgment in *Wyatt* v. *Wycough*, upon which they now rely as being res judicata, shows their lands in Sec. 26 to now be west of the river. In this situation we have held that when land along a navigable stream is washed away by the gradual action of the river, the land call is forever washed away, and a conveyance by such description thereafter is ineffective. *Adkisson* v. *Starr*, 222 Ark. 331, 260 S. W. 2d 956 (1953). Furthermore, if the land adjoining appellees' on the north were added to "Crow" Island by accretion, it would then be conveyed and properly described by the description under which appellant received his title. *Towell* v. *Etter*, 69 Ark. 34, 63 S. W. 53 (1900).

It has been suggested that appellant's complaint was defective because it did not deraign title back to the United States government or plead adverse possession for the necessary period. We believe that, construing the complaint liberally as we should upon the demurrer, it can be understood as pleading prior peaceable possession in appellant. We have held that a plaintiff in ejectment can recover as against a mere trespasser invading the actual possession of the plaintiff. Since the record is here on demurrer and there is nothing to show any title to the disputed tract in appellees, we hold that the complaint is sufficient to force appellees to plead. *Vanndale Special School Dist. No. 6* v. *Feltner*, 210 Ark. 743, 197 S. W. 2d 731 (1946).

Reversed and remanded.

WARD, J., not participating.

VANCE CUPP, JR., ADMINISTRATOR *v.* POCAHONTAS FEDERAL SAVINGS & LOAN ASSOCIATION ET AL

5-4235 414 S. W. 2d 596

Opinion delivered May 8, 1967

[Rehearing denied June 5, 1967.]

Kirsch, Cathey & Brown, for appellant.

Vernon J. King, for appellees.

CONLEY BYRD, Justice. Appellant, administrator of the estate of J. D. Nolen, brings this appeal primarily for the benefit of Mr. Nolen's children by his first wife, in order to determine the right of ownership of two sav-

ings accounts carried by Mr. Nolen at the time of his death. Appellees are the Pocahontas Federal Savings & Loan Association, Mary E. Mondy and Maggie Burkeen, and Mary E. Mondy, administratrix of the estate of Thucie Nolen, deceased.

The record shows that some time in 1935 J. D. Nolen divorced Mary Nolen, mother of his five children, and shortly thereafter married Thucie Nolen, with whom he lived until his death on April 15, 1965. On January 20, 1961, he established, among others, account No. 4706 in the joint names of himself and Thucie Nolen "as joint tenants with right of survivorship and not as tenants in common." On January 6, 1964, he established account No. 6035 in the name of "J. D. Nolen, payable in case of death to Thucie Nolen." Account No. 4706 has $10,000 therein and account No. 6035 has a balance of $9,903.90.

With respect to account No. 4706, appellant contends that the disposition of the account is not controlled by section 38 of Act 227 of 1963, but by section 1 of Act 343 of 1939; and that the record clearly shows that J. D. Nolen did not intend to create a joint and survivorship account in favor of Thucie Nolen.

Appellees contend that, although the account was created before the effective date of Act 227 of 1963 (Ark. Stat. Ann. § 67-1838 [Repl. 1966]), the act is curative in nature and the account is controlled by the later act. In the alternative, appellees contend that even if Act 343 of 1939 is the controlling statute, there is ample proof to sustain the chancellor's finding that Mr. Nolen intended to create a joint and survivorship account.

We agree with appellant that accounts such as No. 4706 established under Act 343 of 1939 and prior to the effective date of Act 227 of 1963 would be controlled by the interpretation given to Act 343, unless the person owning the account made some change therein after the effective date of the 1963 act, as was the case in *Harris*

v. *Searcy Fed. Savings & Loan Ass'n*, 241 Ark. 520, 408 S. W. 2d 602 (1966). Under the interpretation given to Act 343 of 1939 and the similar banking act, Acts 1937 No. 260 § 1 (Ark. Stat. Ann. § 67-521 [Repl. 1966]), the determination of ownership by the survivor of such account depends upon the intent of the depositor. *Park* v. *McClemens, Ex'r*, 231 Ark. 983, 334 S. W. 2d 709 (1960).

The record shows that prior to January 20, 1961, J. D. Nolen had had other savings accounts, some of which were carried in his and Thucie's names as joint tenants with right of survivorship. On January 20, 1961, he closed out accounts Nos. 3801, 4108, 4109, 4110, 4111, 4112 and 4113, and opened the following accounts:

> "No. 4701 J. D. Nolen and/or Robert Nolen as joint tenants with the right of survivorship and not as tenants in common. $5,000.00
>
> No. 4702 J. D. Nolen and/or Ethel Davis as joint tenants with right of survivorship and not as tenants in common. $5,000.00
>
> No. 4703 J. D. Nolen and/or Martha Davis as joint tenants with right of survivorship and not as tenants in common. $5,000.00
>
> No. 4704 J. D. Nolen and/or Gladys Watson as joint tenants with right of survivorship and not as tenants in common. $5,000.00
>
> No. 4705 J. D. Nolen and/or Fred Nolen as joint tenants with right of survivorship and not as tenants in common. $1,500.00
>
> No. 4706 J. D. Nolen and/or Thucie Nolen as joint tenants with the right of survivorship and not as tenants in common. $9,679.10"

On each of the accounts in the name of J. D. Nolen and his children, he had the following notation typed by the teller: "Make all withdrawals to *J. D. Nolen only* until his death." No such notation was made on account No.

4706 in the name of J. D. Nolen and Thucie Nolen.

In July and August of 1963, J. D. Nolen withdrew $4,000 each from account Nos. 4701, 4702, 4703 and 4704, and gave the money to his children. To Fred Nolen, in lieu of the $4,000, he gave some land which he valued at $4,000, and obtained a receipt therefor. On January 4, 1964, Mr. Nolen closed out accounts Nos. 4701 through 4705 and on the same day established account No. 6035, above mentioned, which was opened in the name of "J. D. Nolen, payable in case of death to Thucie Nolen." At that time he also withdrew $4,666.43 from account No. 4706 (leaving a balance therein of $10,000) and deposited same in account No. 6035.

Opposed to this evidence, appellant shows that when J. D. Nolen and Thucie were married in 1935, an antenuptial agreement was entered into; that deceased had consistently stated that he did not intend for any woman to keep his children from getting his property and that after Thucie died the property would belong to his children.

We think the testimony on Mr. Nolen's intent to create a survivorship account with his wife, Thucie, in account No. 4706 is ample to sustain the chancellor's finding.

With respect to account No. 6035, appellant makes a number of contentions, all based on Ark. Stat. Ann. § 67-1838(5) (Repl. 1966), which reads as follows:

> "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 . . . 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;" (Emphasis supplied.)

Appellant's first contention is that the statute was passed to afford protection to savings and loan associations and should not be construed as affecting substantive rights of contesting claimants to the deposit. This contention is based somewhat on the proposition that the legislature does not possess the constitutional power to declare what shall be conclusive evidence of a fact, as such a declaration would invade the power of the judiciary. Coupled with this contention is the contention that if the statute be construed as creating property rights, it is clearly in conflict with the Statute of Wills.

We disagree with appellant. Obviously, the legislature was aware of the interpretations which this court had given to Act 343 of 1939 and the comparable banking act, Ark. Stat. Ann. § 67-521 (Repl. 1966). In subsection 5(a) of section 38 of the act, it unequivocally states that a person so designated who survives the depositor shall be the owner of the account. Nor do we find any merit in the contention that to so interpret the act would make it unconstitutional. While we have recognized that the legislature can not declare one fact conclusive evidence of another material fact in controversy, such is not the situation involved here. It is perfectly permissible for the legislature to declare the legal effect of doing certain acts. The legislature declared only what the legal effect of executing and filing with the association such a designation would be—namely, to make Thucie Nolen the owner of the account as between heirs and devisees of the holder thereof. We have many similar statutes, such as a statute giving a materialman a lien upon the filing of notice within a certain number of days after he has performed work.

While the effect of Ark. Stat. Ann. § 67-1838(5) is to take such savings and loan accounts out of the operation of the Statute of Wills, we know no reason why the legislature is prohibited from doing so. Both statutes are creatures of the legislature. In this situation the intention of the legislature is clearly stated. While some argument has been made with reference to the repealing section and the emergency section that the legislature was here dealing only with savings and loan associations and not intending to affect property rights, such arguments fall by the wayside when we consider that the legislature has also passed Act 78 of 1965, making the identical provisions applicable to banks in general, and clearly repealing all laws and parts of laws in conflict therewith. We are not here concerned with the rights of creditors nor with what procedure should be followed on such accounts in the event of an insolvent estate.

Lastly, appellant argues that J. D. Nolen did not comply with the terms of subsection 5 of section 38 of the act in executing and filing a designation with the savings and loan association. This contention is made on the basis that the signature card contained only the name of J. D. Nolen and the signature of J. D. Nolen. There was also testimony by numerous interested parties that the account book carried only the name of J. D. Nolen. However, the account was carried by the association on its ledger as "J. D. Nolen, payable in case of death to Thucie Nolen," and the proxy card signed by J. D. Nolen carried the same notation as the ledger sheet. While perhaps it would have been better for the association to have used a card designed solely for the purpose of complying with the statute, we can not say that the proxy card does not comply with the requirements of the statute. All the statute actually requires is that the person holding the account "shall EXECUTE and FILE with the association A DESIGNATION. . . ." To hold that the proxy card did not comply with the statute would be adding a formality to the establishment of such an account that is not contained in the statute.

For the reasons stated, we affirm the judgment of the trial court.

HARRIS, C. J., and BROWN and FOGLEMAN, JJ., dissent.

JOHN A. FOGLEMAN, Justice, dissenting. I dissent from the holding of the majority affirming the award of the proceeds of Account No. 6035 to the estate of Thucie Nolen.

In the first place, I cannot find any compliance with Ark. Stat. Ann. § 67-1838 (5) (Repl. 1966) on which to base the holding. I cannot find an execution and filing of a designation in the proxy card. It is to be noted that the chancellor did not find that there was a designation executed and filed by Nolen on this account, but based his finding on evidence of Nolen's intention. Intention of the account holder is not sufficient unless the expression thereof is executed and filed. While the statute does not prescribe a form of designation, surely there must be some expression of intention therein on the part of the party opening it to create such an account. The proxy card does not purport to do this. It only purports to be a continuing revocable proxy vesting J. D. Nolen's voting power as a *member of the association* in the President of the association. Only two instruments were executed by Nolen, the proxy card and a signature card. The latter constitutes an application for membership and a savings share account. Nowhere is there any mention of Thucie Nolen's name or any indication that Nolen intended the account for which he then applied, to be payable on death to anyone.

If there was any one of the documents prepared at the time this account was opened about which a lesser degree of care would be exercised, it would be the proxy card. The employee of the association who attended to the opening of this account said that Mr. Nolen never had any trouble reading papers involved in the transaction of his business. She opined that he was familiar

with a proxy and its function so that she felt it unnecessary to explain it to him. He certainly had many experiences in the opening and closing of accounts. It only stands to reason that he knew that the signature card was the basis of the opening of the account and that the proxy was for the benefit of management instead of his own. Consequently, he or any other prudent person would be very attentive about the correctness of the signature card but prone to be careless about the proxy card. This seems particularly true when the documents were executed virtually simultaneously.

I would reverse the lower court on the part of the decree relating to Account No. 6035.

I am authorized to state that HARRIS, C. J., and BROWN, J., join in this dissent.

BLACK & WHITE, INCORPORATED v. RESERVE INSURANCE COMPANY

5-4165 414 S. W. 2d 369

Opinion delivered May 8, 1967

Butler, Greene & Byrd and *Rose, Meek, House, Barron, Nash & Williamson,* for appellant.

Wright, Lindsey & Jennings, for appellee.

COURTNEY C. CROUCH, Special Justice. This is an action by the appellant to recover $6,000.00 under an excess liability policy issued by the appellee, Reserve Insurance Company. The trial court, hearing the case without a jury, entered judgment for the defendant.

Appellee's defense was predicated on the appellant's failure to comply with the terms, provisions and conditions of the policy. The appellant contends, for reversal, that the lower court erred in finding that the appellant's conduct was a material breach of a provision of the excess policy.

For a better understanding of the issues raised by this appeal and our conclusions, we briefly summarize the facts. Appellant, Black & White, Inc., carried primary liability insurance coverage with a maximum limit of $10,000.00 for each person in another company. On September 10, 1964, a vehicle operated by one of appellant's employees was involved in an accident which resulted in a suit being filed against it on January 14, 1965, by Owen W. Ashley for personal injuries. A judgment was rendered against the appellant in favor of Ashley on July 8, 1965, in the amount of $16,000.00. The primary carrier paid its maximum coverage on said judgment, leaving a balance of $6,000.00

Appellant first notified the appellee of the accident

and pending litigation by letter dated January 31, 1965, in which it stated that the primary carrier had referred the matter to its counsel for defense. The letter further stated:

> "Since the physical damage was minor and there were no injuries complained of at the time of the accident, we believe the case can be settled without trial. We will keep you informed of future developments as the [sic] occur."

Then on April 22, 1965, appellant, Black & White, notified the appellee by letter that the case was set for trial July 8, 1965, but that a settlement had been tentatively agreed upon and needed only Mr. Ashley's approval. Reserve was further advised that it would be notified immediately should developments occur that would change the present course and delay the settlement.

Byrd Pollard, superintendent of claims for the appellee, testified that on May 25, 1965, he telephoned Bob James, assistant manager of Black & White. James was author of the letters referred to above. At that time, James advised him that the case had been settled within the primary policy and that he had made such a notation on the file. Nothing further was heard or reported to appellee until it was advised that judgment had been entered against the appellant on July 8, 1965. James denied that he had advised Pollard that the case had been settled.

Appellant made demand upon appellee to pay the $6,000.00 excess judgment, which it refused to do, so appellant paid said sum and brought this action for reimbursement, attorneys fees and penalties.

The excess policy provides as follows:

A.

"This policy covers excess limits as shown in Sec-

tion I after and only after the limits, as shown in Section II, of another insurance company, referred to as the primary insurer, are fully used and exhausted."

The conditions of the policy provide as follows:

"1. It is agreed that this policy, except as herein stated, is subject to all conditions, agreements and limitations of and shall follow the primary insurance in all respects, including changes by endorsement ..."

"2. Notice of any accident, which appears likely to involve this policy, shall be given to the company, which at its own option, may, but is not required to participate in the investigation, settlement or defense of any claim or suit. In the event expense and/or costs in connection with any claim or suit is incurred jointly by mutual consent of the company and of the insured or primary insurer, the company, in addition to the limit of liability, as expressed in Item 5, Section 1, of the Declarations shall be liable for no greater proportion of such expense and/or costs than the amount payable by the company under this policy bears to the total loss payment."

The primary policy provides in Section 18 as follows:

"18. Assistance and Cooperation of the Insured. The insured shall cooperate with the company and, upon the company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. The insured shall not, except at its own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of the accident."

In its brief, appellant contends there is an ambiguity

in the excess policy as to whether the primary policy's cooperation conditions are applicable as between the excess insurer and the insured. However, we find no ambiguity as it is quite clear that the excess policy clearly incorporated by reference all the conditions, agreements and limitations of the primary policy, which in our opinion makes the above quoted Paragraph 18 of the primary policy a part of the excess policy.

It is well settled that fact findings by the trial court in a case such as this are treated with the same finality as are jury verdicts on appeal and will be affirmed if supported by substantial evidence. *Norvell* v. *James,* 217 Ark. 932, 234 S. W. 2d 378 (1950).

The trial court made no specific findings of fact or conclusions of law but as a preface to announcing its decision stated:

> "May 28, 1965, you notified it had been settled within primary limits. Judgment will be for the defendant."

We also note that at one point in the proceedings the court said:

> "They have pleaded you did not cooperate and you have not cooperated if you told them that a claim had been filed and then wrote back and said it had been settled and later let it go to judgment. You have not cooperated. You have lulled them."

We think the court's findings that the appellant had advised the appellee that the claim had been settled within the limits of the primary coverage is supported by substantial evidence. We further reach the conclusion that the trial court found that Black & White failed to cooperate.

We, therefore, examine as a matter of law whether these facts would prevent appellant from recovering un-

der the excess insurance policy in question.

Appellant contends that lack of cooperation must be proved by the insurer to have been willful and premeditated and in this connection cites *U. S. F. & G.* v. *Brandon,* 186 Ark. 311, 53 S. W. 2d 422 (1932). However, after a careful review we reach an entirely different interpretation of this decision. In that case, the insured failed to attend the trial and the insurer contended that this constituted a failure to cooperate in violation of the express provisions of the policy requiring him to cooperate. This court in passing on the matter said:

> "It is the duty of the insured to cooperate with the defendant by lending aid and such information as he possessed in preparing the case for trial and to attend the trial and testify as to the true facts and circumstances concerning the accident. Without his presence and aid, the insurance company was seriously handicapped. But there is nothing in this record to show the reason for his absence from the trial. For all we know, he may have been seriously ill or dead. We are, therefore, of the opinion that it was the duty of the insurance company in this action to go further than showing his mere absence from the trial in order to show lack of cooperation and to show the reason for such absence. We cannot, therefore, say as a matter of law that his failure to attend the trial in the absence of any proof or explanation as to why he so failed established a breach of the contract in this regard. On the contrary, we think that it was a question for the jury and that it was the duty of the appellant in the trial to show that the insured had no good reason to absent himself from the trial."

We do not interpret the term "no good reason" as used by the court in the Brandon case to encompass willful, deliberate or premeditated failure to cooperate. For example, the insured might have testified that

he knew that the case was set for trial on a given date but simply forgot it, and certainly this would not be willful, premeditated or deliberate as the terms are normally used, but it would be "no good reason" for being absent from the trial.

The policy reads, "The insured shall cooperate with the company, and etc." In the Brandon case this court said the word "cooperate" is a simple word and anyone with sufficient intelligence to qualify as a juror in a civil action would know that it simply means to operate with or work together. Appellant and appellee had been working together up to a point, but when appellant advised that the case was settled and then took no steps to retract the information or notify appellee the case was to be tried, it certainly was not working with the appellee. We think that rather than assisting the insurer that it was operating in the opposite direction! Such action would certainly operate as a breach of the cooperation clause in the policy of insurance.

The appellant in the Brandon case cited authorities from other jurisdictions to justify its position but in each of the cases cited, as pointed out by this court, the insured had willfully and deliberately failed to attend the trials. However, at no place did this court say in Brandon it was incumbent on an insurance company to prove willful or deliberate failure to cooperate before invoking the non-cooperation clause. Neither did the court point out what reasons might constitute failure to cooperate. We are, therefore, of the opinion that the Brandon decision is not applicable in this case. In fact, we are unable to find any case law in any jurisdiction applicable to the facts in this case.

Appellant further contends it is incumbent upon the insurer to prove it has been prejudiced before it can invoke the non-cooperation clause. There is a wide divergence of opinion in other jurisdictions as to whether prejudice is necessary in order to enable an insurance company to avoid liability where there has been a breach

of the cooperation clause. This point has never been decided by this court and we do not deem it necessary to pass on this matter at this time, as we think both prejudice and a material violation of the cooperation clause have been shown in this case.

When appellant notified the appellee that the case had been settled and failed to retract this misstatement of fact, appellee was precluded from doing anything to protect its obligations under its excess policy.

Appellee argues that appellant had done nothing but watch and wait and it would probably have not done anything even if it had been notified of the trial. However, from the very beginning appellant led appellee to believe that the case involved minor damages and subsequently advised that it had been tentatively settled and finally stated that it had been settled. Therefore, there was never any reason for appellee to do anything other than to make inquiry from time to time as to the status of the litigation and certainly there was no reason for it to make any further inquiry after being notified on May 28, 1965, that the case had been settled.

Byrd Pollard testified without objection as follows:

> "Upon receipt of that information on May 28, 1965, the file was placed in a basket for the purpose of closing it out. If I had received information it was not closed and was to proceed to trial, the file would have been referred to Mr. Goheen, the Vice President in Charge of Claims of Reserve, for the purpose of pretrial review. I would also have made inquiry as to demands, injuries, out of pocket expenses of this situation and all information pertaining to the trial itself, evidence to be presented in a settlement. This would have been followed all the way through. I was not advised at all about the trial. The next information coming to me was a letter in July advising that the case had been tried and had resulted in a verdict."

The actions of appellant prevented appellee from demonstrating how far it would have gone to protect itself in the way of settlement negotiations, pre-trial preparation, and trial preparation had it known the case was going to trial, but from the company policies outlined by Pollard and by logical reasoning we can assume that it would not have let the matter in effect go by default on its part.

Appellant argues that appellee should have been in contact with the attorney for the primary carrier for information and settlement possibilities. However, we point out that this attorney was retained by the primary carrier and not by appellee and never once was any information given to appellee that the case could not be settled within the primary limits, so there was no reason for it to contact anyone except its insured to keep informed of the developments. We further point out that the cooperation clause under consideration provides that the insured shall cooperate, not the primary carrier.

Bob James testified that he handled claims for the appellant and that they had in the neighborhood of 100 accidents a year, so he was no novice in handling claims of this nature and dealing with the insurance companies. Despite his assurance and promise to keep appellee advised, there is nothing in the record to disclose why he misled appellee to its prejudice.

Affirmed.

BYRD, J., disqualified.

JONES, J., dissents.

J. FRED JONES, Justice, dissenting. I do not agree with the majority view in this case. It is my view that when the Reserve Insurance Company was advised that suit had been filed for an amount, far in excess of the primary coverage, it elected to depend entirely on the primary insurance carrier to bear the expense of defending the suit in protection of its own $10,000.00 limits,

and thereby took the calculated risk of paying the excess of any judgment over $10,000.00 This is exactly what appellee had contracted to do; it could be required to do no more and had no right, under its contract with appellant, to do anything less.

Appellee had written notice from the appellant that suit for $25,000.00 had been filed, and that the primary carrier was defending the lawsuit. Appellee had subsequent written notice that the case was set for trial on July 8, 1965. Appellee did nothing, and was required to do nothing under its contract, until it was notified that judgment for $16,000.00 had been rendered on July 8, 1965, at which time it was called upon to pay the excess amount of $6,000.00. Appellee then contended that it had been advised in a telephone conversation with appellant's assistant manager prior to July 8, 1965, that the case had been settled within the policy limits of a primary liability insurance contract between the appellant and another company, and appellee refused payment on the grounds that appellant had failed to render the cooperation required under the provisions of the primary policy which provisions were adopted by reference, in the policy issued by appellee.

Appellant denied that it had advised appellee that settlement had been made, but appellee was permitted to fortify the testimony of its claims superintendent on this point with a notation the superintendent says he made in the lower right hand corner of an entry sheet at the time he says he obtained the information by phone.

Appellant was not required, under its policy contract with appellee, or with the prime insurance carrier, to keep appellee advised of the progress of the negotiations toward settlement; it is usually the other way around. As a general rule and practical matter, when an insurance carrier is notified of a claim made or lawusit filed against its insured, it takes over from there, and keeps the *insured* advised of the progress made toward settlement.

It is my view that the appellee's evidence in this case loses its substantial qualities when measured by the logic, or lack of it, in the proposition that an assured would pay premiums on an insurance policy for protection against the hazards of a lawsuit, and then advise its insurance carrier that a lawsuit had been settled when in fact it had not.

I fail to see wherein the appellee was prejudiced in any event. Appellee's superintendent testified to the effect that upon receipt of advice that the case had been settled, the file was placed in a basket for the purpose of being closed out, and that had he not been so advised, the file would have been referred to the vice-president in charge of claims for the purpose of pre-trial review. It is my opinion that this is not the kind of service appellant had paid for under its policy. Appellee could have referred the file to its vice-president on April 22, 1965, when it was notified by *letter* that the trial was set for July 8, if it considered this procedure of any importance under the policy. No liability accrued to appellee until judgment was entered in this case, and as I view it, the policy was written for the protection of the appellant and not for the protection of the appellee.

I would reverse the decision of the trial court and direct judgment against the appellee for $6,000.00.

Opinion delivered May 15, 1967

[redacted]

Jack L. Lessemberry, for appellant.

Joe Purcell, Attorney General; *Don Langston,* Asst. Atty. General, for appellee.

CARLETON HARRIS, Chief Justice. Appellant, Aaron Clark, was charged by Information in Crittenden County on September 17, 1963, with the crime of murder in the first degree. Counsel for Clark was appointed by the court, and the case was continued until February 20, 1964. On that date, appellant appeared before the court with his attorney, and after the prosecuting attorney moved to reduce the charge, Clark entered a plea of guilty to murder in the second degree. Thereupon, the court sentenced him to a term of twelve years in the Arkansas State Penitentiary. In November, 1965, appellant filed a petition[1] under our Criminal Procedure Rule

[1]There are no filing marks on the petition, but the petitioner shows it as being filed on November 12, 1965.

No. 1, asserting the violation of certain of his constitutional rights before entering his plea and asking for a hearing on his allegations. The petition listed the names and addresses of purported witnesses that he desired to have subpoenaed on his behalf. The court appointed an attorney to represent Clark on the petition, and on February 25, 1966, a judgment was entered entitled, "Findings and Order." The order recites that the cause came on to be heard, the petitioner appearing by his court-appointed attorney, and the matter was submitted upon the petition filed by appellant. After finding that such petition was not verified, as required by Section (A) of Criminal Procedure Rule No. 1, the court made further findings based on docket sheets, and the original file, to the effect that an attorney had been appointed for Clark on September 20, 1963, and that appellant had waived formal arraignment, and entered a plea of not guilty. The order further recites that, following a continuance until the next term of court (Clark being permitted to make bond), the charge against appellant was, on February 20, 1964, reduced to second degree murder. The order then sets out that, on the said date, appellant was accompanied into open court by his attorney, and was asked if he understood the charge, and whether he desired to plead guilty. When appellant replied in the affirmative, the court sentenced him to the term of twelve years in the State Penitentiary. After reciting these findings, the judgment sets forth that the petition is without merit, and is denied. Subsequently, another attorney was appointed to appeal the judgment to this court.

Section (A) of Criminal Procedure Rule No. 1 provides that the petition (motion), praying that a sentence be vacated or corrected, shall be verified. There was a valid reason for including this provision. It is not the purpose of Criminal Procedure Rule No. 1 to permit the holding of a second hearing simply as a matter of giving a defendant two trials; rather, the purpose of the

rule is to provide a method for determining, after the filing of an appropriate petition, whether any constitutional requirements or statutory enactments, either federal or state, relative to the rights of an accused, have been violated, or whether the sentence is otherwise subject to a collateral attack. Of course, conducting a hearing on these petitions adds to the work load of the trial courts, many of which already contain over-crowded dockets, and these courts should not be asked to conduct hearings on motions that are actually frivolous in nature, and which cannot be supported by legal evidence. The requirement of a verification subjects one to possible penalties for perjury, and thus discourages the filing of this type of petition. The particular petition involved here is preceded by a motion to proceed in *forma pauperis,* which apparently was attached as the front sheet of the actual petition for relief, and this motion to proceed as a pauper is verified. It may be that petitioner considered this as a verification of the entire motion. Without detailing the allegations set out in the principal motion, let it suffice to say that we think they were sufficient to require the court to have Clark brought before it, and to give appellant an opportunity to present evidence to sustain his contentions. It might also be mentioned that any records relied on by the Circuit Court, in whole or in part, in reaching its conclusions (such as docket sheets, transcript of interrogation or statements made at the time of the plea, etc.) should be included as a part of the record sent to this court. This has not been done in the present instance, the transcript consisting only of the "Findings and Order" of the Circuit Judge, and the petition filed by appellant.

It is therefore the order of this court that this cause be remanded with directions to first give the petitioner a reasonable opportunity to verify his petition; if the petition is not verified, it shall be dismissed. If Clark, within the time allotted, verifies said petition, then, and in that event, the court shall enter its order directing

that appellant be brought before it, and thereupon conduct a hearing in accordance with the provisions of Criminal Procedure Rule No. 1.

It is so ordered.

FOGLEMAN, J., disqualified.

ROBERT STEPPS *v.* STATE

5252 414 S. W. 2d 620

Opinion delivered May 15, 1967

[Rehearing denied June 5, 1967.]

Brockman & Brockman, for appellant.

Joe Purcell, Attorney General; *Don Langston,* Asst.

Atty. Gen., for appellee.

GEORGE ROSE SMITH, Justice. On the night of January 15, 1966, the appellant shot and killed Artis Frazer at Hosea Miller's Place, a drive-in roadhouse near Tucker, Arkansas. The prosecuting attorney at first charged Stepps with first-degree murder, but on the day of trial he reduced the charge to the second degree. The jury found the accused guilty of voluntary manslaughter and fixed his punishment at three years imprisonment. The five points urged for reversal have, for the most part, very little to do with the merits of the case.

It is first argued that the information should have been quashed for the reason that Stepps was not served with a copy, as the statute requires in capital cases. Ark. Stat. Ann. § 43-1204 (Repl. 1964). Officer Smithey testified that he read the information to Stepps at the county jail and explained that he was leaving a copy with Stepps' personal effects so that it would be available either to him or to his lawyer. Not only was this a substantial compliance with the statute, but there was also no possibility of prejudice, there being no contention that Stepps was unaware of the charge against him. An allied pre-trial point, that the accused was not taken before a magistrate after his arrest, is without merit; for that statutory requirement is directory, not mandatory. Ark. Stat. Ann. § 43-601; *Moore* v. *State*, 229 Ark. 335, 315 S. W. 2d 907 (1958).

The witness Thompson, who was sitting in a car outside Miller's Place when the shooting occurred, testified that after Stepps and another man entered the house he heard someone say, "Let me kick him before you . . ." Upon objection the court instructed the jury not to consider the statement. The testimony was actually meaningless, for there was no other proof about any threat or act of kicking. The court's admonition to the jury was clearly sufficient to correct the matter. See

Washington v. *State*, 227 Ark. 255, 297 S. W. 2d 930 (1957).

After the shooting Hosea Miller at once took the injured man to the hospital at England, where Dr. Cooper was called. The defense counsel objected to Dr. Cooper's testimony that he examined a man (dead upon arrival at the hospital) "who I later found out was Artis Frazer." The court's action in overruling counsel's objection to the doctor's statement was not reversible error. In a sense, whenever a witness refers to someone by name it could be argued that the reference is based upon hearsay, however long and well the witness may have known the person referred to. But when, as here, there is not the slightest question about the person's identity there can be so sound basis for insisting that the witness not be permitted to refer to him by name. Here the evidence is undisputed that Stepps shot Frazer in the face, that Frazer was taken to the hospital at England, that Dr. Cooper was called, and that Dr. Cooper examined the body of a man whose death had been caused by a bullet wound in the face. To require a new trial merely because Dr. Cooper was allowed to say that he later found out that the body was that of Artis Frazer would be an absurdity.

Finally, it is argued that the State's suppression of certain evidence amounted to a denial of due process of law. There was a sharp dispute about whether Frazer had a knife in his hand when he was killed. Hosea Miller testified that he did not see a knife immediately after the shooting, but when he got back from the hospital he found a knife on the floor and called it to the attention of Officer Perkins. Perkins testified that he picked up the knife, took it to the county jail, and placed it in a locker that he shared with Officer Bradley. Both officers testified that in some way or other the knife was lost or mislaid before the trial.

This case is unlike those in which the State has

deliberately suppressed or inadvertently destroyed evidence essential to the defendant's proof of his innocence. *State* v. *Fowler*, 422 P. 2d 125 (Ariz., 1967); *Trimble* v. *State*, 75 N. M. 183, 402 P. 2d 162 (1965). Here Officer Perkins admitted that he had picked up the knife and that (doubtless to his chagrin) it had been lost. There is no reason to suppose either that the jury disbelieved the officer's uncontradicted statements or that the accused's position would have been strengthened by the actual production of the knife.

Affirmed.

JERRY SPEARS *v.* EL DORADO FOUNDRY, MACHINE & SUPPLY COMPANY

5-4231 414 S. W. 2d 622

Opinion delivered May 15, 1967

[Rehearing denied June 5, 1967.]

Shackleford & Shackleford, for appellant.

M. P. Matheney, for appellee.

George Rose Smith, Justice. This is a suit brought by the appellee upon a written contract by which the appellant and two other men guaranteed the payment of an open account owed to the plaintiff by Southern States Mechanical Contractors, Inc. The appellant insists that his liability as a guarantor was discharged by the appellee's action in extending the time for payment and in taking Southern States's promissory note in place of the open account. The chancellor rejected this defense, but we are of the opinion that it should have been sustained.

R. L. Clinton, J. R. Gardner, and the appellant were officers of Southern States. On October 27, 1961, they signed the following letter, addressed to the appellee: "This is to advise you that, because of our special interest in the above named Corporation, we, the undersigned do jointly guarantee the account of Southern States Mechanical Contractors, Inc. up to a limit of $6,000.00."

Six months later Spears, with the knowledge of the appellee company, sold his stock in Southern States (for $292.69), withdrew from that concern, and went in business for himself. Later on Spears obtained a discharge in bankruptcy, but he failed to schedule his obligation to the appellee and so was not released from it.

At the time the guaranty agreement was executed Southern States owed the appellee $5,074.48. On June 11, 1962, the appellee for the first time took a promissory note from Southern States for the amount due, the note bearing interest at six per cent and being payable in ninety days. The appellee discounted the note at a bank and continued to sell merchandise to Southern States on credit. When the note reached maturity Southern States paid the interest, made a payment on the account, and executed a renewal note for the balance still due. Similar renewal notes were executed and discount-

ed over a period of nearly two years, the final note being dated March 17, 1964. Clinton and Gardner, the other guarantors, signed the notes, but Spears knew nothing about them.

Southern States finally became insolvent and went into receivership, paying two cents on the dollar. The appellee was unable to collect anything from Clinton or Gardner. At last, more than three years after Spears had left Southern States, the appellee demanded that he pay the amount still due—$3,276.93. Spears's refusal to pay led to this suit, in which the appellee sought and recovered not only the face amount of the claim but also the interest and attorney's fees provided for in the last promissory note.

The guaranty, with its stated limitation of $6,000, was a continuing one which would remain in force until it was revoked as to future transactions. *First Nat. Bk.* v. *Waddell,* 74 Ark. 241, 85 S. W. 417, 4 Ann. Cas. 818 (1905). (In citing the *Waddell* case we should explain that the word "not" which appears in the next to the last line on page 246 of the Arkansas Report was inserted by a typographical error and was not part of the original text that was being quoted.)

The appellee's substitution of interest-bearing notes, payable in ninety days, for the open account, payable on demand, discharged Spears's liability as a guarantor. We considered a similar situation in *Morrilton* v. *Moose,* 185 Ark. 1051, 49 S. W. 2d 1044 (1932), where the appellees guaranteed the payment of a bank account owned by the city of Morrilton. The city accepted interested-bearing certificates of deposit, due in one, two, and three years, in lieu of the account. In holding that the sureties were discharged we said: "In the instant case negotiable instruments which might have been sold or transferred to a third party were taken in the stead of a checking account and created a new contract

not only in form, but in substance, which precluded the city of Morrilton from withdrawing its money from the bank either in whole or in part and placed the sureties in a position where they could not protect themselves." That reasoning is equally applicable to the case at bar.

Reversed and dismissed.

JIMMY C. GOSSETT ET AL *v.* STATE

5255 414 S. W. 2d 631

Opinion delivered May 15, 1967

Brown, Compton & Prewett, for appellant.

Joe Purcell, Attorney General; *Don Langston,* Asst. Atty. Gen., for appellee.

PAUL WARD, Justice. Edward Easley and Jimmy C. Gossett and his wife were charged with the "crime of possessing burglary tools". Upon trial they were convicted as charged and sentenced to two years in the penitentiary.

Appellants were charged and tried under the provisions of Ark. Stat. Ann. § 41-1006 (Repl. 1964) which, in all material parts here, reads:

"Any person who . . . has in his custody . . . any

tools, false key, lockpick, bit, nippers, fuse, force screw, punch drill, jimmy, bit, or any material, implement or other mechanical device whatsoever, adapted, designed or commonly used for breaking into any vault, safe, railroad car, boat, vessel, warehouse, store, shop, office, dwelling house, or door, shutter, or window of a building of any kind, shall be guilty of a felony, and upon conviction thereof, shall be punished by imprisonment in the penitentiary for not less than [2] years, nor more than ten [10] years."

The facts are not in dispute. Early one morning a cream colored Buick car was seen parked at Charlie's Drive-In which is located in the City of Magnolia. The occupants of the car appeared to be tampering with a cigarette machine placed outside of the Drive-In building. A policeman, who had been promptly notified, apprehended appellants in a Buick car similar to the one above mentioned. There was found in the car a tire tool, two screw-drivers, a lug wrench, and a bar used to remove tires from car wheels. Appellants were arrested, and were charged and convicted as above mentioned.

At the close of the State's testimony appellants moved the court to direct a verdict in their favor. The motion was denied, hence this appeal.

It is our conclusion that the court erred in refusing to grant appellants' motion.

It appears from the record that all the tools found in appellants' possession are in common, daily use in connection with the operation of automobiles—except, perhaps, the screw-drivers which are commonly used in homes and shops. The sheriff, who was a witness for the State, testified, in substance: I know what these tools are; they are two screw-drivers, a lug wrench, and a bar that is commonly used to take tires off cars wheels—I carry one in the back end of my car; most cars are equipped with a lug wrench—I have one in my car; the

bar is used to mount tires or take tires off of a wheel—that is the purpose of it; the screw-drivers are in common use in households and are carried in automobiles.

It is true, as shown by the testimony, that any one of the above mentioned tools could be used to pry open a door or break into a house, but so could a pocket knife. Such a showing is not sufficient for a felony conviction under the statute previously quoted. The burden was on the State to prove beyond a reasonable doubt that at least one of these "tools" was designed or commonly used in committing burglary. It is our firm conviction that the State failed to meet this burden.

The case of *Satterfield* v. *State,* 174 Ark. 733, 296 S. W. 63, reversed a conviction obtained under the same statute here involved where the evidence was less favorable to the accused than here. In the cited case the accused had in his car two bolt cutters, four files, one hammer, two Stillson wrenches, a flashlight, and a pistol. In that case the Court said:

> "We cannot attribute to the Legislature the intention to prohibit the making, mending, designing, setting up or having in possession of the common, ordinary everyday work tools of a mechanic, plumber, carpenter, farmer or other person who may require such tools in business, trade or profession. If so, the act would be unconstitutional and void."

The State relies on the case of *Prather* v. *State,* 191 Ark. 903, 88 S. W. 2d 851. That case, however, is not controlling or even persuasive in this case because the accused had in his possession nitroglycerin.

Reversed.

BROWN, J., disqualified.

INTERSTATE LIFE & ACCIDENT INSURANCE CO.,
v. ALINE ELLINBERG

5-4233 414 S. W. 2d 857

Opinion delivered May 15, 1967

Macom & Moorhead, for appellant.

George E. Pike, for appellee.

PAUL WARD, Justice. This is an action to collect on an insurance policy issued by the Interstate Life & Accident Ins. Co. (appellant) to the husband (now deceased) of appellee—Aline Ellinberg. Suit was filed, under the policy, by appellee and, upon trial, the jury returned a verdict in her favor.

On appeal, appellant relies on one point:

"The Court erred in not granting appellant's request for a directed verdict in its favor upon the conclusion of the evidence, because there was no substantial evidence on which a verdict could be based."

Set out below is a summary of the essential, and undisputed, background facts.

The policy was issued on March 22, 1965; it pur-

ported to pay $1,000 to the beneficiary (appellee) upon the death of Mr. Ellinberg who died December 17, 1965; an application for the policy, signed by the deceased and appellant's agent, furnished certain information given by the deceased; the application (as filled out and signed) and the policy are made a part of the record, and; the decisive issue is whether the policy was invalidated because of false information contained in the application. The material questions and answers contained in the application are set out below:

15. "Q. Are you now in good health and free from physical impairment or deformity?

A. Yes.

16. Q. Have you ever had an operation?

A. Yes, appendectomy 1942.

17. Q. Have you ever been advised to have an operation?

A. Same as No. 16.

19. Q. Have you ever had any ailment listed (twenty diseases are listed, one of which is 'high or low blood pressure')?

A. None."

23. "Give below all causes for which you have conconsulted a doctor in the last five years.

A. None."

The material parts of the policy are set out below.

"If this policy was originally issued on the weekly payment basis, and if, within two years before the date of issue of this policy you received institutional, hospital, medical or surgical treatment or attention, this policy will be void, unless (1) the claim-

ant shows that the treatment was not material to the risk, or (2) reference to the treatment is contained in the application for this policy, or (3) the policy has become incontestable. If the policy is void, the premiums will be refunded."

The policy was issued on a weekly payment basis.

Testimony. Set out hereafter is a brief summary of the testimony introduced in evidence.

Dr. Hester, for appellant: I treated the deceased between March 22, 1963 and March 22, 1965; treated him for asthmatic bronchitis, for asthma seven or eight times; his blood pressure was elevated; deceased knew he had high blood pressure; I had deceased in the hospital several times.

Mrs. Gilbert, a witness for appellant, testified: I am employed at the DeWitt City Hospital, in charge of keeping records; the deceased was admitted to the hospital once in September and twice in November, 1964.

Appellee, in her brief, states the decisive issue in this case as follows: "The question, therefore, in this case is whether or not there is any testimony in this record to show that the ailment was more than a mere temporary, trifling or unimportant affliction."

Put on that basis, we think the case must be reversed, because we think there is such testimony—as pointed out previously. Appellee testified that her husband "died from a heart attack". Dr. Hester not only testified the deceased had high blood pressure and that he knew about it but he further testified that asthma could induce coronary thrombosis. He stated: "The problems which you see with asthma as far as your cardial is concerned is a right-sided heart failure which comes on over a period of time due to the thickening of

the right side of the heart due to the fibrosis of the lungs . . . ." As previously pointed out the policy would be void if deceased failed to reveal the facts that he had received hospital or medical treatment within two years before issuance of the policy. The record is conclusive that he did receive such treatment and within the stated time. Also we think the treatments were for ailments more than "mere temporary, trifling or unimportant". It is pointed out that a doctor's testimony in matters of this nature are entitled to more weight and consideration than that of lay witnesses. This was pointed out in the case of *Woodmen of the World* v. *Brown* 194 Ark. 219 (p. 223) 106 S. W. 2d 591.

The case must therefore be and it is hereby reversed.

Reversed.

ELTON GORDON ET AL *v.* STREET IMPROVEMENT DISTRICT No. 1 OF GILLETT ET AL

5-4181 414 S. W. 2d 628

Opinion delivered May 15, 1967

John W. Moncrief, for appellants.

Macom & Moorhead and *Townsend & Townsend,* for appellee.

LYLE BROWN, Justice. Two complaints were filed by a total of six property owners (appellants here) challenging the formation of, and validity of assessments levied by, Street Improvement District No. 1 of Gillett. The trial court held the District to have been legally formed and the challenged assessments valid.

The District was formed in 1964 and covered the entire city, or town, of Gillett. At that time a part of only two streets in Gillett were hard-surfaced. The new program called for the hard-surfacing of a great majority of all business and residential streets. These suits were filed in July and August 1965, shortly after the ordinance was passed assessing the benefits to the property owners.

Appellants list nine points to be relied upon for re-

versal. The points are not listed in the argument, but from a careful examination of matters argued, we discern three contentions. We have many times held that points not argued in the brief are waived. This case points up one good reason for the rule. Absent argument of points, we would have to explore a record consisting of 689 pages, an abstract consisting of 147 pages, and numerous detailed exhibits. We proceed to consider the three points which are argued.

1. *The assessors and commissioners of the district arbitrarily and illegally accepted the assessments made by the county assessor of the value of the improvements.* The argument does not cite us to any testimony to support this contention, nor do we find any in the abstract. Two of the district's assessors testified at length. They established a well-recognized formula for assessing benefits—such elements as property value, superficial area, frontage, location, improvements, and relation to business and other establishments. The board held some thirty meetings and all decisions on assessment factors were made when at least two of the assessors were present. The services of a registered professional engineer were utilized. All three assessors signed the original assessment. The assessment on a small number of tracts was revised and that certificate was signed by two of the assessors. If any of the tracts in the revised assessment were owned by appellants it is not pointed out in the abstract or the brief. The trial court approved these records and in the absence of citation to the contrary we must assume he was correct.

2. The second contention of appellants is: "The evidence shows the partiality and discrimination as between Sullivan, Gordon, Fred Morgan, Vizzier, Lehman, M. M. Morgan and Pratt appellants, on the one hand, and certain town officials and some of the appellees on the other." From an examination of the abstract, we find the conclusion of the trial court on this point to be fully justified by the evidence. His finding was stated

in these words:

> "Even though an effort was made to show that the assessors gave favored treatment to the mayor, members of the council and others, the record does not reflect that the assessors deviated in the slightest from the established method and formula used in assessing the benefits. On the contrary, the record reflects that they consistently used the same criteria and formulae for each and every parcel and tract of real property located within the confines of the street improvement district."

Two of the assessors testified for a substantial part of the three-day trial. They were closely examined and cross-examined with respect to the assessments on tracts of alleged "favored" citizens. The testimony of the landowner-appellants in this regard consisted mostly of personal opinions to the effect that they had been mistreated. Their testimony was not based on benefits measured by the well-developed guidelines used by the assessors. A summarization of the testimony would serve no useful purpose and unnecessarily extend the opinion.

3. Finally, appellant F. Lehman asserts a wrongful and excessive assessment of his farm land. Preliminarily, Lehman contends that he was fraudulently induced to sign a petition for the creation of the district. Part of Lehman's farm extends into the city limits and is improved inside the city. He was assured, so he says, that his farm would not be affected by any tax. *Boles* v. *Kelley,* 90 Ark. 29, 117 S. W. 1073 (1909), holds a similar contention to be unavailing when it is not shown that signatures procured by fraud were sufficient to reduce the number of remaining signers to less than a majority. There was no such allegation in the case at bar.

Finally as to the allegation of excessive assessment: The north portion of Mr. Lehman's farm is inside the city limits. That portion is platted in lots and

blocks, but functionally it has remained in acreage. There appears to be roughly forty acres. His property line abuts several of the streets which will be paved. The present improvement on this property is a modern home at the south end of Second Street. That street will be paved. Mr. Lehman also has an elevator in the northeast corner of the property and within a few hundred feet of streets to be paved. He does custom drying of rice, oats, and soybeans. That portion of Lehman's farmland inside the city will abut fourteen blocks of improved streets. The annual taxes are $219.80. Lehman figured it "acreage-wise" and it amounts to $4.86 per acre. The chancellor found Lehman's assessments to be neither arbitrary, discriminatory, capricious, nor excessive.

Most of the protesting landowners testified. Essentially, they gave their opinion that their assessments were excessive, particularly because of the absence of direct and immediate benefits to be received from the improvement. They also made comparisons with assessments levied on their neighbors' properties. They showed no knowledge of the many criteria used by the assessors. Under a basic rule of law enunciated by this court on at least four occasions, it is most difficult to establish excessive assessment by the landowners' type of testimony. In *Improvement Dist. No. 1 of Clarendon* v. *St. Louis Southwestern Ry.*, 99 Ark. 508, 139 S. W. 308 (1911), this court said:

> "When the assessment of the benefits arising from, and the proportionate cost of, a local improvement has been made upon the property specifically benefited thereby, by the proper officials in the manner prescribed by law, it devolves upon the party attacking same to show that the amount of these assessments is excessive or unequal. It has been held that the amount of the benefits which such officers have found and determined to accrue to each lot and parcel of real property in a district by reason of the improvement will be presumed to be correct and just,

and the courts will not disturb same until the contrary has been shown by the evidence. Such evidence must consist, not merely of opinions that the assessments are excessive, but of facts which 'will overturn the *prima facie* fairness and equality of the assessment established by the returns of the assessors.' "

The findings of the chancellor are in all respects affirmed.

BOYCE E. GROSS & DELORIS GROSS *v.* W. S. YOUNG

5-4233 414 S. W. 2d 624

Opinion delivered May 15, 1967

[Rehearing denied June 5, 1967.]

Mobley & Bullock, for appellants.

Richard M. Priddy and *John G. Rye,* for appellee.

JOHN A. FOGLEMAN, Justice. Appellants, husband and wife, seek to reverse a decree of the chancery court cancelling a deed by which appellee, grandfather of one of appellants, conveyed certain lands to them reserving a life estate.

The deed was executed by appellee on June 14, 1963. Suit for cancellation was filed March 23, 1966. Appellee alleged in his unverified complaint that he went to the home of his grandson, Boyce Gross, to live about May 9, 1963, and that he made arrangements with Gross whereby he would convey the property to the latter if Gross would furnish a home to him as long as the former lived. He further alleged that he executed and delivered the deed in order to carry out this agreement and that the consideration was the agreement on the part of the grandson and his wife to furnish him a home. Although appellee stated that he was 92 years of age at the time of filing the complaint, there are no allegations of mental incapacity or undue influence. The only basis alleged for cancellation was that on September 19, 1964 Gross told appellee, with an oath, to take his trunk and leave. Appellee claimed that this conduct amounted to fraud and failure of consideration. Appellants, in their answer, admitted the execution and delivery of the deed but denied all other allegations of the complaint. After hearing all the evidence, the chancellor announced his holding that, considering the advanced age of appellee at the

time of the transaction, the relationship of the parties, and testimony to prior deeds, the deed would have to be cancelled without regard to whether the agreement was made or not. Decree, from which this appeal is taken, was accordingly entered. In this finding and action we find reversible error.

While the chancellor did not find there was any agreement between the parties, appellee's testimony completely negated the allegations of the complaint.

Appellee had five children, two boys and three girls, only three of whom were living at the time he testified. The mother of Boyce Gross was one of these children. She died when Boyce was two or three weeks old and appellee and his wife brought him to their home and raised him. None of the other four children were ever married. The three living children all resided at appellee's old home place. Although appellee claimed to be a resident of Pope County, he had worked in southeast Arkansas after 1937, coming back in 1955 and staying six years. Thereafter, he went back to southeast Arkansas but returned to Pope County in 1963. He visited frequently in his grandson's home during all these years, staying as long as a week. He testified that he was fond of his only grandchild, loved him and had confidence in his integrity. He went to the home of this grandson to live on May 9, 1963. He said that Boyce was just about like his own child. Appellee rode with Gross to the latter's work one day and, on the way, told Gross that he was not going back anymore but would get a place in Pope County. Gross then said that appellee could live with him as long as he wanted to. On a later date appellee walked alone to the office of a lawyer for the purpose of talking about making a will. Later he went back and the lawyer, now deceased, prepared a deed to appellants. He said that Gross had been with him on this trip but had gone back to his work before the deed was written. Appellee took the deed home and gave it to Gross. Thereafter, Gross thought

there was something wrong with this deed in that it did not describe a four-acre tract properly. Boyce Gross had Mr. Charles Gardner, a Russellville attorney, look it over and appellee went to this lawyer's office a few days later and signed new deeds, one to appellants and one to his son, John Young. Both deeds recited that the consideration was $1.00 and other good and valuable considerations paid. Appellee said that he just gave his son part of his land and appellants part of it.

Appellee did not say anything to Gross about giving him any land and did not talk to either of appellants about giving them land until the first deed had been made. On cross-examination appellee gave this explanation for deeding the land to his grandson:

"Q. Now you never did—let me rephrase that question. Mr. Young, you never did have a discussion with Mr. Boyce Gross and Deloris Gross that they agreed to take care of you if you agreed to convey this property did they? They never did make such an agreement as that did they?

A. No, sir.

Q. You just thought you'd give it to them?

A. Boyce said I could stay with him as long as I wanted to and I was giving him the property to satisfy him. That was paying him for keeping me.

Q. All right, sir, and you also might have given it to him as a gift because you liked him, is that right?

A. No, I'd done give him all I could stand to give him. I give him the property to make it safe so he could get his pay for keeping me.

Q. Well sir, he never did ask you to give him anything for payment for keeping you did he?

A. No, sir."

Appellee testified that he had made other substantial gifts to appellants[1], both before and after the making of the deed.

On behalf of appellants Mr. Gardner testified that Mr. Young told him that he had the original deeds prepared because he was personally fond of Gross and that his sons had been living on his property for many years and taking the income but that Gross had not participated. Appellee expressed a desire to Gardner to take care of Gross and John Young, whom he considered to be a favorite son. While the testimony is not clear as to the content of the original deeds which were probably destroyed, Gardner said there was an error in one or both of them[2]. He also said that he recommended to appellee that a life estate be reserved in these deeds. He further said that he told appellee he would not have him execute the deeds on the first day he came to the office nor would he permit him to sign them if either Boyce Gross or John Young were present, but if appellee wanted him to prepare the deeds, he could come back sometime by himself. He testified that appellee appeared the next day, apparently by himself, and executed the deeds.

Appellee does not agree with Gardner's version of the preparation of these deeds. He testified that he gave Gross the original deeds[3] and never saw them again.

[1]Appellee testified that these gifts of a value of over $2,000.00 were "not much".

[2]The error pertained to the description of a four-acre tract.

[3]While the originals were not available and no one testified as to their content, the inference is strong that Mr. Young had deeds to both Boyce Gross and John Young prepared by the first lawyer he saw.

He said Gross had Gardner prepare the new deeds and then took him down to sign them. He denied having any conversation with Gardner about the deeds and said that Gardner just showed him where to sign. He did not read them, thinking they would be copies of the original deeds.

It is true that where a deed is executed in consideration of an agreement by a grantee to support the grantor and this agreement is made by the grantee for the fraudulent purpose of securing the deed and without the intention to carry it out, the deed will be set aside in equity for fraud. *Hendrix* v. *Thomas*, 235 Ark. 791, 362 S. W. 2d 22. It is also true that this court is committed to the doctrine that a grantor may, in equity, have a deed rescinded and the title reinvested in him whenever he has conveyed land to a grantee in consideration of an agreement by the grantee to support, maintain and care for the grantor during the remainder of his natural life and the grantee neglects or refuses to comply with the contract. *Hendrix* v. *Thomas, supra.* In this case, however, there is no evidence to show there was any such agreement. The testimony of the grantor positively negates this. His acts were motivated by the love and affection he had for that grandson whom he had raised as if he were his own child, and gratitude for the offer of a home for his declining years. Natural love and affection has always been held to be sufficient consideration for a deed where the relationship of the parties is such as to justify the presumption that love and affection exist. *Faulkner* v. *Byland*, 201 Ark. 1185, 147 S. W. 2d 37. No matter how much the grandfather's confidence may have been misplaced, no matter how reprehensible we may think the subsequent conduct of the grandson to be, the making and delivery of the deed by appellee was a purely voluntary act on his part and the vesting of title was complete upon delivery of the deed. *Ferguson*

v. *Haynes,* 224 Ark. 342, 273 S. W. 2d 23.

It is not clear to us on just what grounds the chancellor cancelled this deed. His reference to the age of the grantor, the relationship of the parties and their dealings might lead to the conclusion that he felt that the deed was procured through undue influence of Boyce Gross over his grandfather. He may have meant to indicate some degree of mental incompetency. Not only was there no allegation of mental incompetency in the pleadings, but there is a total failure of proof in that regard. What this court said in *Richard* v. *Smith,* 235 Ark. 752, 361 S. W. 2d 741, is appropriate here:

> "There was recently before us the case of *Donaldson* v. *Johnson,* 235 Ark. 348, 359 S. W. 2d 810, which involved a woman of advanced age who suffered from diabetes and other disorders and would have intervals in which she was mentally unstable but at other times was perfectly competent. She deeded her home to her granddaughter and in that case we said:
>
> 'The test of mental competency to execute a deed is found in *Petree* v. *Petree,* 211 Ark. 654, 201 S. W. 2d 1009, where we quoted *Pledger* v. *Birkhead,* 156 Ark. 443, 246 S. W. 510, as the applicable rule in cases of this kind.
>
> "If the maker of a deed, will, or other instrument has sufficient mental capacity to retain in his memory without prompting the extent and condition of his property and to comprehend how he is disposing of it and to whom and upon what consideration, then he possesses sufficient mental capacity to execute such instrument. Sufficient mental ability to exercise a reasonable judgment concerning these matters in protecting *his own interest in dealing with another* is all the law requires. If a person has such mental capacity, then, in the absence of fraud, du-

ress, or undue influence, mental weakness, whether produced by old age or through physical infirmities, will not invalidate an instrument executed by him. *McCulloch* v. *Campbell,* 49 Ark. 367, 5 S. W. 590; *Seawel* v. *Dirst,* 70 Ark. 166, 66 S. W. 1058; *Taylor* v. *McClintock,* 87 Ark. 243, 112 S. W. 405; *McEvoy* v. *Tucker,* 115 Ark. 430, 171 S. W. 888." [Emphasis added]' "

It is crystal clear that appellee met this test. The trial judge, in stating that he would permit some leading by counsel in examing appellee because of his advanced age, commented that his memory was very good as to these events. Appellee's testimony clearly demonstrates his mental capacity.

There is also a total failure of allegation or proof of undue influence. Notwithstanding the confidence of appellee in Boyce Gross, the former's own testimony shows that there was no effort on the part of Gross to influence the old gentleman in any respect. Mr. Young acted as a free agent in disposing of his property. Obviously, his greatest affection was directed toward his only grandson and one of his sons, to both of whom he deeded property. He also seemed to have felt that there had been some discrimination against his grandson, in that the latter had not shared in the income from the home place as had Mr. Young's children.

In *Boggianna* v. *Anderson,* 78 Ark. 420, 94 S. W. 51, this court said:

"*** It is not sufficient that the grantor or testator was influenced by the beneficiary in the ordinary affairs of life, or that he was in close touch and upon confidential terms with him; but there must be a malign influence resulting from fear, coercion, or any other cause which deprives the grantor or testator of his free agency in disposing of his property.

McCulloch v. *Campbell,* 49 Ark. 367, 5 S. W. 590."

We find no evidence to meet this test.

Reversed and dismissed.

PULASKI FEDERAL SAVINGS & LOAN ASSOCIATION, A CORPORATION *v.* DONALD S. WOOLSEY

5-4213 414 S. W. 2d 633

Opinion delivered May 15, 1967

Wright, Lindsey & Jennings, Edward L. Wright, Jr., for appellant.

Reed & Blackburn, C. E. Blackburn, for appellees.

J. FRED JONES, Justice. This is an appeal from a decree of the Pulaski County Chancery Court wherein mortgaged property was sold under a decree of foreclosure but a money judgment against the mortgagor was denied.

The record reveals that on March 11, 1964, Donald S. Woolsey and wife, for value received, gave Pulaski Federal Savings & Loan Association their promissory note for $22,000.00 payable in monthly installments of $141.76 and secured by a mortgage on property owned by Mr. and Mrs. Woolsey. The note contained a thirty day acceleration clause.

On November 12, 1964, the Woolseys conveyed the property to William and Mary Prim, and Mr. and Mrs. Prim assumed payments of the note to Pulaski Federal under an agreement between the Prims and Pulaski Federal, wherein the Woolseys were not released, but were specifically retained as primary obligors on the note. No payment was made on the note from June 1965, until November 12, 1965, when the rights under the acceleration clause were exercised by Pulaski Federal and suit was filed praying a joint and several personal judgment against the Woolseys and the Prims for the balance of the unpaid indebtedness on the note in the amount of $21,571.16, together with interest, attorney's fee and cost for a foreclosure of the mortgage lien on the property.

The case was tried on August 11, 1966, and on August 30, 1966, th chancellor decreed a personal judg-

ment against the Prims for $21,648.36, together with interest at the rate of ten per centum per annum from March 10, 1966, and ordered sale of the property under foreclosure and the proceeds applied to the judgment. The decree included $500.00 attorney's fee but personal judgment against the Woolseys was denied.

On September 2, 1966, notice was given by the Commissioner in Chancery that the property would be sold on September 29, 1966, under the foreclosure decree. On September 28, 1966, the Woolseys filed a motion in part as follows:

* * *

> "As matters now stand, these defendants, Donald S. Woolsey and Betty J. Woolsey, have no monetary interest in the outcome of a forced sale of said property, however, should the plaintiff be successful on appeal in securing the right to a personal judgment, defendants would then have a monetary interest in the outcome of the Commissioner's Sale.
>
> "WHEREFORE, defendants pray that an order be issued from the Court suspending the Commissioner's Sale and appointing a receiver to procure a tenant, collect rents and hold the proceeds of such rents subject to the orders of this Court until a final determination of this matter is determined by the Supreme Court or the time for appeal expires without the perfecting of such appeal."

Also on September 28, 1966, Pulaski Federal filed notice of appeal to this court from that portion of the final decree which denied personal judgment against the Woolseys.

The motion to suspend the Commissioner's sale was denied on September 29, 1966, and on September 29, 1966, the property was sold under the foreclosure decree and Pulaski Federal purchased it for the highest and only bid of $18,000.00.

Pulaski Federal has perfected its appeal to this court relying on the single point for reversal as follows:

> "The Court erred as a matter of law in denying personal judgment on the note against the Woolseys."

We agree with the appellant. There is no question but that property may be sold under a mortgage foreclosure and a judgment rendered for the recovery of the debt against the defendant personally. Ark. Stat. Ann. § 51-1106 (1947).

The general rule as announced in 59 C. J. S. § 774 is as follows:

> "Effect of Foreclosure
>
> ...the personal liability of a mortgagor is released and extinquished by a foreclosure of the mortgage only to the extent of the value of the premises, in the case of a strict foreclosure, or, in the case of a foreclosure and sale, to the extent of the proceeds applicable to the mortgage debt. In other words, if the mortgagor was originally liable for the mortgage debt, he remains liable for any unsatisfied balance, including unpaid costs and expenses. The rule is not affected by the fact that the mortgagee bid in the premises at the foreclosure sale, for much less than their value, if no fraud or inequitable conduct is shown; and the fact the land increased in value after the foreclosure sale, enabling the mortgagee to make a profit, does not affect the liability of the mortgagor. Where a foreclosure sale is not completed, the mortgagor's personal liability for a deficiency is not extinguished."

Between the time the foreclosure suit was filed in this case on November 12, 1965, and the decree was entered on August 30, 1966, a period of nine months, considerable effort was made by appellees to bring the

account current, and considerable indulgence was exercised by appellant in permitting them to do so. Appellees were never able to pay all the delinquent payments and finally appellant refused a partial payment of $188.00 and proceeded with the foreclosure.

Appellees were parties defendant in the foreclosure suit. They filed an answer admitting all the material allegations in the complaint except default in payment which they denied. Appellees filed no counter claim or cross complaint and upon final decree filed no appeal or cross appeal to this court.

Appellees now seem to argue that if appellant had accepted the payment of $188.00 tendered by appellees, and had accepted other payments in similar amounts which appellees could and would have made; and if appellant had credited all the payments so made to the principal and interest on the note rather than principal, interest, insurance and taxes which were included in the agreed monthly payments; then the payments of principal and interest would have been within $199.00 of current, and for that reason it was inequitable for appellant to accelerate the payment of the remaining installments on the note. We find this argument without merit.

All the payments made by appellees were properly credited to the indebtedness and were properly deducted in the chancellor's decree.

The case of *Crone* v. *Johnson,* 240 Ark. 1029, 403 S. W. 2d 738 (1966) cited by appellees, is not in point with the case here. In the Crone case, the purchase mortgagor was current with his payments until a windstorm damaged the mortgaged property. He was the beneficiary under an insurance policy with loss payable clause in favor of appellee. The insurance check covering the loss was made payable to both parties and neither would endorse the check so the other could cash

it. The mortgagor repaired the damage to the property and in doing so he missed two mortgage payments. The mortgagee undertook to accelerate the maturity of the other payments and sued for the full amount of the indebtedness and for foreclosure. The chancellor in that case allowed the acceleration and ordered the insurance money applied on the debt. This court found that both parties were at fault and reversed with directions to apply the money on the delinquent payments and then on repairs.

In the case of *Johnson* v. *Guaranty Bank & Trust Co.*, 177 Ark. 770, 9 S. W. 2d 3, this court said:

> "The stipulation for accelerating the time of payment of the whole debt may be waived by the mortgagee, especially when it is made to depend upon his option. A court of equity will also relieve against the effect of such provision, where the default of the debtor is the result of accident or mistake, or when it is procured by the fraud or other inequitable conduct of the creditor himself.
>
> "Under our decisions, the stipulation in a mortgage for the whole debt to mature upon default of a part of the debt is not treated as a forfeiture clause, *but rather as a stipulation for a period of credit on condition.* A breach of the clause can only be relieved against when some one of the equitable grounds above stated are established. It was not shown that the failure of the mortgagors to make the payments as stipulated in the mortgage was attributable to the plaintiff or its officers. No excuse was offered for the nonpayment of the levee taxes except that the defendants were short of money, and this [is] not sufficient. It is claimed that the failure to pay the purchase money note and the accrued interest on January 1, 1927, was due to the fault of the mortgagee, and an effort was made to place the blame upon its officers who represented it in the transaction, but in this the chancery court

was justified in finding that the defendants have failed.

* * *

"It was the duty of the defendants to pay the installments as they fell due, and they could not rely on any confusion that resulted from a misunderstanding on their part, which was not the result of any inequitable conduct of the plaintiff or its officers, and which was not caused by any misrepresentations made by them. The chancery court made an express finding that plaintiff did no act amounting to a waiver by it of its rights under the acceleration clause, and, under our familiar rules of practice, the finding of facts by a chancellor must be upheld upon appeal, unless clearly against the preponderance of the evidence. Such is not the case here." (emphasis supplied).

The chancellor, in the case before us, obviously found that appellant did no act amounting to a waiver by it of its rights under the acceleration clause in this case. Had the chancellor found otherwise, no decree would have been entered against the Prims for money judgment and for foreclosure. Certainly the chancellor's finding in this regard is not against the preponderance of the evidence, and the correctness of the decree was not challenged.

The chancellor's finding that the payments were in default is also sustained by the evidence and the decree was not challenged on this point. The judgment against the Prims and the foreclosure of the mortgage decreed by the chancellor was inconsistent with the denial of personal judgment against appellees.

Appellees stated in their motion, supra, that they had "no monetary interest in the outcome of a forced sale of said property," unless appellant should be successful on appeal. That proposition, as well as most of

the other contentions of appellees, was settled in the case of *McCown* v. *Nicks,* 171 Ark. 260, 284 S. W. 739, where this court dealt with a very similar situation as the one we have here, except the mortgage debtors are reversed.

In the McCown case, a trustee sold a tract of land to one Willis for $11,400.00 evidenced by promissory notes secured by vendor's lien retained in the deed. Nicks purchased the land from Willis and assumed the payment of the purchase money notes. Nicks failed to pay one of the notes and on January 12, 1921, reconveyed the land to Willis, who reassumed the payment of the unpaid purchase money notes executed by him for the purchase of the land.

On June 2, 1922, action was commenced against Nicks and Willis for judgment on the notes and to foreclose the lien. Nicks denied personal liability on the notes and ordered the property sold under the lien but the trial court decreed the balance due on the note and ordered the property sold under the lien but dismissed the complaint against Nicks for want of equity. The property was sold at foreclosure where it was purchased by appellant for much less than the balance due on the notes, and the appeal was from that portion of the decree dismissing the complaint as to Nicks.

In reversing the trial court, this court said:

"So long as Nicks' personal liability was thus undetermined, it is not correct to say that he had no interest in the property pledged to secure the purchase money notes, and that it was wholly immaterial to him whether the land under decree was sold for enough to satisfy the judgment. So long as the issue was unsettled as to his personal liability, Nicks was bound to know that it was to his interest to have the property at the foreclosure sale sell for enough, if possible, to liquidate the amount of the decree.

* * *

"There is no inconsistency whatever in appellant's

accepting the proceeds of the sale of the property under the decree as a payment on such judgment, and then seeking by their appeal to have appellee held personally liable for the balance due on such decree. To be sure the appellants would only be entitled to one satisfaction of their judgment, but, since the proceeds of the foreclosure sale did not pay the amount of the judgment, if the appellee be personally liable therefor, the appellants had the right to appeal from the judgment of the trial court holding to the contrary.

* * *

"A plaintiff in a foreclosure suit does not, by causing a sale under the decree of foreclosure before taking an appeal, thereby waive his right to appeal from that part of the decree fixing personal liability for a deficiency of proceeds of such sale."

We are of the opinion that the chancellor erred in dismissing the complaint as to the Woolseys. The decree of the chancellor will be reversed as to Woolseys and this cause remanded with directions to render a decree against them also.

Reversed and remanded.

PACIFIC INSURANCE COMPANY OF NEW YORK
v. ANNA BELLE MARTIN

5-4234 414 S. W. 2d 594

Opinion delivered May 15, 1967
[Rehearing denied June 5, 1967.]

House, Holmes & Jewell; By: *Don F. Hamilton,* for appellant.

White & Young, James K. Young, for appellee.

CONLEY BYRD, Justice. Appellant, Pacific Insurance Company of New York, was the corporate surety bondsman, pursuant to Ark. Stat. Ann. § 67-1238 (Repl. 1966), for M & M Securities Company, Inc., a bonded and licensed securities broker under Act 254 of 1959 (Ark. Stat. Ann. §§ 67-1235—67-1262 (Repl. 1966). Pacific appeals from a judgment in favor of Anna Belle Martin for $1,838, together with 6 per cent interest and $500 attorney's fee taxed under Ark. Stat. Ann. § 67-1256 (Repl. 1966). The basis of appellee's judgment was that an agent of M & M Securities Company, Inc., misrepresented the value of 2,000 shares of stock in Allied Companies, Incorporated, which he exchanged with appellee for 1,838 shares of First Security Life Insurance Com-

pany common stock. Judgment by default was entered against M & M.

For reversal, appellant alleges that the court erred in admitting appellee's testimony as to the value of the First Security stock; that on the record the trial court should have granted a judgment notwithstanding the verdict for $385.98, the value placed upon the First Security stock by appellant's expert witness; and that the trial court erred in awarding an attorney's fee because no tender of the stock was made to the dealer, M & M Securities Company, Inc., prior to entry of the judgment. The first two interrelated issues will be discussed together.

The testimony shows that appellee, a lady 53 years of age with a tenth-grade education and a farmer by experience, had had no practical experience with securities such as stocks; and that on January 14, 1964, she owned 1,838 shares of First Security common stock which she traded to M & M for 2,000 shares of Allied. When asked what she paid for the stock, she stated $1,-838, but this answer was struck from the record by the trial court. Thereafter the only testimony about the value of the First Security stock was her testimony that the agent for M & M represented to her that it was worth $1 per share, whereas the Allied stock was worth $1.15 per share—i. e., that her First Security stock was worth $1,838 but that the Allied stock which she was receiving was worth over $2,000. Appellee also testified that the Allied stock was then of absolutely no value. There was no cross-examination of appellee.

Dayton Covington, a stock broker with Trulock & Company, Inc., of Little Rock, was called as an expert witness by appellant. He testified, based upon two over-the-counter transactions of First Security stock, that the stock sold for 20 cents and 21 cents per share. His opinion was that on January 14, 1964, a share of First Security common stock was not worth more than 21 cents.

While we have held that an owner's testimony on value of personal property is competent evidence, *Pettit* v. *Kilby*, 232 Ark. 993, 342 S. W. 2d 93 (1961), it is seen that in this case appellee did not pretend to know the value of her First Security stock. Therefore, we must agree with appellant that there was no competent testimony here to show that the value of the 1,838 shares of First Security stock was in excess of that testified to by Mr. Dayton Covington. Upon this state of the record, we hold that the trial court should have granted appellant judgment notwithstanding the verdict for $385.98.

Appellant contends that the trial court erred in awarding an attorney's fee under Ark. Stat. Ann. § 67-1256, *supra,* because no tender of the Allied stock was made to M & M, the stock dealer, prior to the entry of the judgment. In making this contention, appellant relies on *People ex rel. Harley* v. *Hendrie,* 263 Mich. 613, 249 N. W. 12 (1933). The Michigan court decision is based upon 2 Comp. Laws of Mich. 1929, Ch. 188, § 9788, which provides that in case of sale contrary to law the sale shall be voidable and the person making such sale ". . . shall be jointly and severally liable to such purchaser, *upon tender to the seller or in court of the securities sold. . .,* for the full amount paid by such purchaser." (Emphasis supplied.)

Our statute with respect to the allowance of attorney's fee and a tender, Ark. Stat. Ann. § 67-1256, *supra,* provides as follows:

"(a) Any person who

* * *

"(2) offers or sells a security by means of any untrue statement. . . is liable to the person buying the security from him, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at six per cent [6%] per year from the date of payment, costs,

and *reasonable attorneys' fees,* less the amount of any income received on the security, *upon the tender of the security and any income received on it,* or for damages if he no longer owns the security. "(c) Any tender specified in this section may be made at any time before entry of judgment." (Emphasis supplied.)

* * *

With reference to the tender, the record shows that appellee's counsel mailed the Allied stock to appellant's counsel on October 26, 1966, and it was returned to appellee's counsel on October 27, 1966; that on October 28, 1966, counsel for appellee attempted to file the stock with the clerk of the court in which the action was pending; and that on November 1, 1966, the clerk returned the stock certificate to counsel for appellee. While the record shows that the judgment was dated October 27, 1966, it was entered nunc pro tunc on November 7, 1966. In view of the fact that M & M, the securities dealer, wholly defaulted and made no appearance in the litigation, we hold that under the circumstances here the foregoing was a sufficient tender to permit the allowance of attorney's fee under Ark. Stat. Ann. § 67-1256, *supra.*

Therefore, we hold that the trial court should have entered a judgment notwithstanding the verdict for the amount of $385.98, together with interest and attorney's fee. If appellee, before the issuance of the mandate herein by the clerk, enters a remittitur for the difference between the principal sum of $385.98 plus interest and the sum of $1,838 plus interest allowed by the trial court, the judgment will be affirmed. Otherwise the matter will be reversed and remanded for a new trial.

HARRIS, C. J., not participating.

JAMES PITCHER *v.* HENRY A. BALTZ, DBA LAWRENCE COUNTY IMPLEMENT COMPANY

5-4239 414 S. W. 2d 859

Opinion delivered May 22, 1967

Rhine & *Rhine*, for appellant.

Kirsch, Cathey & *Brown*, (*Ray A. Goodwin*), for appellee.

CARLETON HARRIS, Chief Justice. A Greene County jury returned a verdict for Henry A. Baltz D/B/A Lawrence County Implement Company, appellee herein, against James Pitcher, appellant herein, on October 12, 1966, in the total amount of $3,244.47, bearing interest at the rate of 10% per annum until paid. Subsequently, the court awarded an attorney's fee in the amount of $324.45, representing 10% of the principal and interest found to be due, together with costs. From the judgment so entered, appellant brings this appeal.

The testimony of the parties is in irreconcilable conflict. Baltz tesitfied that a salesman of his company, Ray Cox, sold Pitcher a second hand 141 International com-

bine in September, 1962. Evidence on behalf of appellee reflects that appellant traded in a John Deere combine, leaving a balance due in the amount of $3,000.00. Under the terms of this transaction, $1,000.00 was due in November of the same year, and $1,000.00 in each of the next two years. Appellant gave to appellee's salesman a note in the said amount, with the last two installments bearing interest from date. Thereafter, according to Baltz, Pitcher and his father came to the implement company office on December 13, 1962, advising that he was not able to meet the $1,000.00 payment that was a few weeks past due. After a discussion, including an agreement to cancel certain repair bills which appellant had sustained in repair of the combine, and which had been occasioned by its use during the fall of 1962, Pitcher paid the sum of $600.00, and executed a new note for $2,400.00, interest being computed on the installments that would be due in November, 1963, 1964, and 1965, respectively.

It might be mentioned that, according to appellee, at the time of the September transaction, appellant had also executed appellee's customary retail order form for used equipment, which reflected the transaction in its entirety. Baltz stated that, at the time of the December agreement, Pitcher not only executed a new note, as heretofore stated, but also executed a new copy of the retail order. This retail order reflects a total purchase price of $4,250.00, an allowance of $1,250.00 for the combine traded in by appellant, the cash payment of $600.00 made by Pitcher, the unpaid cash balance of $2,400.00, time price differential of $439.98, and the schedule of payment installments which would be due in 1963, 1964 and 1965. Appellee testified that he then returned the September note, and September order to Pitcher, since the new contract had been entered into.

The only matter in which the litigants agree is that $600.00 was paid on December 13; however, Pitcher says this amount was paid as a matter of relieving him from his September contract of purchase, and that he told

Baltz to pick up the combine.

Thereafter, appellee negotiated the installment note to International Credit, with recourse upon appellee provided appellant failed to make his payments. None of the installments were ever paid by Pitcher, appellee making all payments to avoid default under the note. Following the last payment, International reassigned the note to Baltz, who repossessed the combine, sold same, and sued Pitcher for the deficiency, together with attorneys' fee as provided in the note.

Appellant denied executing the December note, and stated that he had signed the note and order sued on in September in blank; he contended that these blanks had been subsequently filled in by appellee and constituted the alleged December note. Pitcher testified that he kept asking for the note that had been executed (in September), but Baltz never would return it to him. He also contended that, under the September agreement, the balance due was $2,400.00, rather than $3,000.00.

Actually, the only question presented was whether Pitcher executed a note, and order, in December, 1962. For reversal, appellant first asserts that the court erred in admitting, over his objection, certain evidence offered by appellee, and in restricting and limiting certain evidence offered by appellant. The second assertion for reversal is that the court erred in granting, on appellee's motion, after the jury had been dismissed, judgment for the attorneys' fee, over the written objection of appellant.

Appellant constantly objected to the court's action in permitting Mr. Baltz to testify concerning the terms of the September note, stating, "We object. The note is the best evidence, and we ask that the note be introduced." Of course, under appellee's theory, the note could not be introduced, for Baltz stated it had been given to Pitcher in December when the new note and order were executed. Obviously, the note could not be introduced by the appellee if it had been turned over to the appellant.

Appellant also asserts that, though permitting counsel for appellee to question his witness relative to the September transaction, the court refused to permit the appellant to testify relative to some phases of the September transaction. The argument is without merit for two reasons. In the first place, it appears that all of the facts desired to be placed in evidence concerning the September transaction were, before the trial was over, testified about, and in the next place, when the court ruled adversely to appellant on a particular question (concerning the September transaction) no offer of proof was made, and we are without knowledge as to what the answer might have been.[1] Appellant's father testified in complete detail as to appellant's version of the transaction which purportedly occurred at the time of the signing of the September note. The court also, originally, refused to permit Pitcher to testify that appellant signed the note in blank. However, this testimony was later admitted, and, in fact, an instruction was given embodying appellant's theory. Defendant's (appellant's) Requested Instruction No. 1, as amended, was given to the jury, as follows:

"If you find that the note introduced in this suit, upon which the plaintiff bases his right to obtain judgment against this defendant was not filled out, showing the principal and the time and amount of payments and due dates according to their agreement, and without defendant's knowledge and consent, you are instructed to find for the defendant."

Appellant also complains that his testimony about the transaction in September was limited, the court instructing the jury to the effect that any testimony about the September transaction was permitted only for the purpose of determining the accuracy of the testimony

[1]The same situation existed when appellant asked a question of Mr. Baltz on cross-examination relative to the sale price of the combine (in September). The court sustained an objection to the question, but appellant did not offer to show what the answer would have been.

of the parties with regard to what happened in December, 1962, and for no other purpose. This ruling was correct. Let it be borne in mind that the note sued on was, according to appellee, executed in December. The answer to this litigation, after all is said and done, depends entirely upon the December transaction, *i.e.,* did Pitcher pay the $600.00 on the $1,000.00 payment due in order to renegotiate a new loan—or did Pitcher pay the $600.00 as a matter of terminating the contract. The testimony relating to what happened in September when the original purchase was made is only pertinent and important insofar as it sheds light on what agreement was entered into in December—or perhaps more simply stated, the September transaction was only pertinent to the extent that it evidenced which man was telling the truth about the December transaction.

Each side offered additional witnesses concerning the original agreement in September, and appellant offered the testimony of his father and wife, who, according to his statement, were present at the time of the December transaction. These were fact questions, and accordingly, to be determined solely by the jury. The jury found for appellee, and this finding set at rest all fact questions involved in the litigation.

Appellant next complains that two days after the jury rendered its verdict, appellee's attorney, by oral motion, requested the court to allow judgment for a reasonable attorney's fee in the amount of $324.45. Appellant objected, and asked for leave to reduce his exceptions to writing, the request being granted. The arguments in support of appellant's objection are that the matter of an attorney's fee should have been presented to the jury and no evidence was presented either to the jury or to the court relative to the proper amount that would constitute a reasonable attorney's fee. The arguments are without merit. There was no reason for the question of attorney's fee to be presented to the jury, for appellee's counsel was not entitled to a fee until *after* the jury had rendered a verdict in his client's be-

half. Appellant complains that no evidence was offered to the court, but this argument is without merit for two reasons. For one, though counsel for appellee requested the judge to withhold the entry of the judgment for at least one week, in order that appellant might have an opportunity to offer testimony with respect to the reasonableness of the fee allowed, and although the judgment was not actually entered for several weeks, apparently no effort was made by appellant to present any evidence. In awarding an attorney's fee, it is not necessary that testimony be offered as to the reasonableness of the fee where the court has an opportunity to become familiar with the case and the nature of the services rendered. In *Tech-Neeks, Inc.* v. *Francis, et al,* 241 Ark. 390, 407 S. W. 2d 938, we said:

"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 attorneys 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.' "

The note sued upon provides for the payment of reasonable attorney's fees incurred in collecting same, and we are of the opinion that the 10% fee allowed by the Greene Circuit Court was entirely reasonable.

Finding no reversible error, the judgment is affirmed.

FOGLEMAN, J., not participating.

R. G. JOHNSON AND C. R. RICHARDSON *v.*
DAVID GATES, ET AL

5-4240 415 S. W. 2d 329

Opinion delivered May 22, 1967

Eugene Coffelt, for appellants.

Hardy Croxton and *Eli Leflar,* for appellees.

CARLETON HARRIS, Chief Justice. This litigation arises as a result of a school election in Rogers School District No. 30 of Benton County, held on September 27, 1966, at which time the electorate approved a 55 mill school tax. Appellants are taxpayers and qualified electors in the district, and they instituted suit as a representative action, maintaining that the tax was illegally passed. Appellees demurred, and after a hearing, appellants refusing to plead further, the court dismissed the complaint. From the judgment so entered comes this appeal.

Numerous allegations, as to irregularities of the election, were made in the complaint, but only one is argued on appeal, *viz.*, that the ballot is an illegal and void ballot. The first section of the ballot provided for the election of a member of the board of school directors; the second section provided for the election of a member to the county board of education; the third section provided for the election of a member at large of the county board of education, and the fourth section, at issue in this litigation, reads as follows:

"Vote on measure by placing an "X" in the square above the measure either for or against:

For tax ☐

Against tax ☐

"The 55 mills tax includes (a) 17 mills for the maintenance and operation of schools; (b) 29 mills for the retirement of existing bonded indebtedness which has been previously voted and is a continuing annual building fund tax until the bonds are paid; and (c) 9 mills of this tax is to be collected annually and will constitute a continuing annual building fund tax until the payment in full of the principal and interest of a proposed bond issue of $1,000,000, which will run 20 years and will be issued for the purpose of erecting and equipping new school buildings, and making improvements and additions to present school facilities.

"The surplus each year arising from the building fund taxes, after providing for principal and interest maturing that year and the next six months' interest on all the outstanding bonds, may be used by the District for calling bonds for payment prior to maturity or for other school purposes."

Appellants' contention is set forth in the following statement in their brief:

"Every citizen and voter expects to levy a school tax for the operation of the schools of Arkansas in the several school districts. This he was not permitted to do in the case at bar. The voter was not permitted to vote for the school millage without voting for the building fund of 9 mills and on the other hand was not permitted to vote for the 9 mill building fund without voting for the school millage and still on the other hand was not permitted to vote for the school millage and against the building fund and still on the other hand was not permitted to vote for the building fund and vote against the school millage."

Further

"There will be much said by the appellees in regard to Amendment No. 40 of the constitution of Arkansas, but let it be said that Amendment No. 40 to our constitution specifically provides that the election shall be held under the supervision of the School Board to provide for the levy of Tax mills for the maintenance of school, the erection and equipment of school buildings and the retirement of EXISTING indebtedness."

It is true that this litigation is controlled by Amend- No. 40. That amendment provides as follows:

"The General Assembly shall provide for the support of common schools by general law, including an annual per capita tax of one dollar, to be assessed on every male inhabitant of this State over the age of twenty-one years; and school districts are hereby authorized to levy by a vote of the qualified electors respectively thereof an annual tax for the maintenance of schools, the erection and equipment of school buildings and the retirement of existing indebtedness, the amount of such tax to be determined in the following manner:

"The Board of Directors of each school district shall prepare, approve and make public not less than sixty (60) days in advance of the annual school election

a proposed budget of expenditures deemed necessary to provide for the foregoing purposes, together with a rate of tax levy sufficient to provide the funds therefor, including the rate of tax levy sufficient to provide the funds therefor, including the rate under any continuing levy for the retirement of indebtedness. If a majority of the qualified voters in said school district voting in the annual school election shall approve the rate of tax so proposed by the Board of Directors, then the tax at the rate so approved shall be collected as provided by law. In the event a majority of said qualified electors voting in said annual school election shall disapprove the proposed rate of tax, then the tax shall be collected at the rate approved in the last preceding annual school election.

"Provided, that no such tax shall be appropriated for any other purpose nor to any other district than that for which it is levied."

We do not agree with appellants' contentions, which relate to the first paragraph of the amendment. It will be noted that that paragraph authorizes school districts to levy an annual tax for the maintenance of schools, and compliance with this provision is not questioned in this litigation; there is also an authorization of a tax for existing indebtedness, and the tax is further authorized for "the erection and equipment of school buildings. * * *" It is observed that the ballot in question provides for all three of these matters, and the purpose of the 9 mill tax is the "erecting and equipping new school buildings." This is clearly in accord with the provisions of Amendment No. 40. Appellants' assertion is predicated on an erroneous interpretation that the indebtedness created by the erection and equipment of school buildings must *already be in existence* before a tax can be properly voted for its retirement; under their view, a tax for a *proposed* indebtedness for erection and equipment of school buildings cannot be approved. However, the amendment provides for "the erection and equipment of school buildings *and* retirement of existing

indebtedness." *Both* are included.

Appellants admit that the only new tax which appears on this ballot is the 9 mills which is to be collected annually in payment of the principal and interest for the proposed building program. Accordingly, if the voters did not desire to approve the 9 mills, they could have simply voted against the entire tax levy of 55 mills, and the rate would have remained at 46 mills, adequately providing for maintenance and operation, and already existing bonded indebtedness. Thus, we do not have before us a situation where there are two, or more, questions presented to the voter, *i. e.*, the board is not seeking, in addition to the 9 mills, an increase in the tax rate for maintenance and operation of schools, or an increase in the millage for retirement of existing indebtedness. Of course, if such were the case, the persuasiveness of appellants' argument would be strengthened, and more in point, but such circumstances do not exist.

Judgment affirmed.

DONZELL COOK, ADM'X. *v.* J. D. PITRE

5-4205 414 S. W. 2d 854

Opinion delivered May 22, 1967

Bernard Whetstone, for appellant.

Brown, Compton & Prewett, for appellee.

PAUL WARD, Justice. This is an action to recover damages for the alleged unlawful killing of Luther Cook, on February 25, 1965, by J. D. Pitre (appellee).

Suit was filed by Donzell Cook (widow of deceased) as administratrix of the Estate (appellant), alleging, in material parts, that; appellee wrongfully, wantonly, and maliciously shot the deceased in the back at a distance of seventy five yards, and that deceased had an earning capacity of approximately $2,000 a year. The prayer was for damages for the Estate, the widow and children.

For answer, appellee admits the killing but alleges he shot deceased following his attempt to escape after having been arrested for burglary. He further alleged that the shooting was justified under the law in that he acted as a "reasonable and prudent person in the exercise of his duty as a citizen to arrest and prevent the escape of a felon".

Upon trial the jury found in favor of appellee, and appellant seeks a reversal on two points of alleged error. One, "as a matter of law, the appellee was not justified in killing her husband and that a verdict should have been directed in her favor". Two, relates to the admissibility of certain testimony.

One. We do not agree with appellant's contention on this point.

It is first pointed out that appellant finds no fault with any instruction given to the jury, and none is found or discussed in her brief. It must therefore be assumed that the trial court correctly instructed the jury as to the law as it applies to this case.

Ark. Stat. Ann. § 41-2238 (Repl. 1964) reads, in material parts:

> "If any officer or private person attempt to take a person charged with . . . burglary, robbery . . . or any other crime made a felony by the statute laws of this State, and he be resisted in the endeavor to take the person accused, and by reason of such resistance the person so resisting be killed, the officer or private person so killing shall be justified."

The next section (41-2239) reads:

> "An officer or private person, to be justified in killing a person accused of any felony as herein provided, shall have used all reasonable efforts to take the accused without success, and there must have been, in all probability, no prospect of preventing injury from such resistance, or the escape of the person accused."

Following the above section is § 41-2240, which reads:

> "Justifiable homicide may consist in unavoidable necessity without any will or design, and without any inadvertence or negligence in the party killing."

Burglary is defined by Ark. Stat. Ann. § 41-1001 (Repl. 1964) as follows:

> "Burglary is the unlawful breaking or entering a house, tenement, railroad car, automobile, airplane, or any other building, although not specially named herein . . . by day or night, with the intent to commit any felony or larceny."

Ark. Stat. Ann. § 43-404 (Repl. 1964) reads:

> "A private person may make an arrest, where he has reasonable grounds for believing that the person arrested has committed a felony."

Testimony. Set out below, in some detail, are the pertinent facts as disclosed by the record.

On February 25, 1964, the appellee was a conductor on the Chicago Rock Island and Pacific Railroad. Prior to this time, various railroad cars owned by the Rock Island had been broken into and various articles taken. A discussion between employees of the railroad was had and appellee decided he would make a stakeout of one of the cabooses on February 25, 1964. The appellee entered the caboose, locked it from the inside, and went into a washroom and began his wait. At the time, the appellee was armed with a .45 pistol which belonged to a fellow employee, but the pistol did not have a shell in the chamber. Some 10 to 15 minutes later, the appellee heard someone on the platform of the caboose, and heard noises which indicated to him that a glass pane was being taken out of the door, and the door being unlocked. The appellee waited a few seconds and then stepped from the washroom and confronted Luther Cook who had entered the caboose. Appellee then told Cook "lets go". The appellee then instructed Cook to go out the door and they proceeded towards the roundhouse. On the way to the roundhouse appellee told Cook he was taking him to jail. When the two men reached the roundhouse Cook broke and ran. The appellee shouted to Cook to stop and when he did not respond, he fired a warning shot near his feet. Appellee again shouted to Cook and when he did not stop appellee fired a second warning shot, but Cook continued to run. The appellee pursued Cook, and the pursuit led from the railroad yard and out into the residential section near the yard. During the time which appellee was pursuing Cook, the appellee passed various persons and asked these persons to call the po-

lice. It was beginning to get dark, and the appellee, after pursuing Cook for some 40 minutes, again shouted to Cook to stop, and when Cook continued to run, the appellee fired a third shot, trying to hit Cook in the leg or close enough to his feet to cause him to stop. This third shot hit Cook in the lower portion of his back.

Applying the above factual situation to the sections of the statutes copied previously, we find that the jury, under unchallenged instructions, was justified in finding the killing was justified, and therefore find the trial court did not err in refusing to direct a verdict for appellant.

In the early case of *Carr* v. *State,* 43 Ark. 99 (p. 105) this Court said:

> " 'A private person may make an arrest where he has reasonable grounds for believing that a person arrested has committed a felony.' "

The Court also approved the following statement:

> " 'If a person, having actually committed a felony, will not suffer himself to be arrested, but stand on his own defense, or fly, so that he can not possibly be apprehended alive by those who pursue him whether private persons, or public officers, with or without a warrant, from a magistrate, he may be lawfully slain by them.' "

In *Rayburn* v. *State,* 200 Ark. 914 (p. 919), 141 S. W. 2d 532, we said:

> "A private citizen, who is not an officer, may arrest, without a warrant, one who has committed a felony."

Two. (a) Appellant argues the trial court erred in refusing to allow testimony purporting to show three other persons were allowed to plead guity to a misde-

meanor for stealing items from the railroad cars on prior occasions. Also it is argued that it was error to allow appellee to show the deceased was drawing Social Security benefits. We find no reversibe error in either instance. What offenses others may have committed in the past could have no bearing on the offense with which the deceased was charged here. The nature of each offense obviously depends on the facts of that particular case. Nor do we understand how appellant was prejudiced by showing a source and the amount of deceased's income. Appellant, in her complaint, alleged he had an annual income of $2,000. Also, none of this testimony had any bearing on the question of appellee's justification for shooting the deceased.

Affirmed.

JOHN ED GRAYER *v.* STATE

5265 414 S. W. 2d 870

Opinion delivered May 22, 1967

C. David Furrow, for appellant.

Joe Purcell, Attorney General; *Don Langston*, Asst. Atty. General, for appellee.

LYLE BROWN, Justice. This Rule 1 appeal comes from a judgment of the Crittenden Circuit Court. Petitioner, John Ed Grayer, appellant here, sought discharge from the penitentiary under a petition for writ of habeas corpus, and relief was denied.

A jury convicted appellant in 1958 of burglary and grand larceny. That conviction was reviewed by this court in *Grayer* v. *State*, 234 Ark. 548, 353 S. W. 2d 148 (1962). That review was under certiorari and it was held that the circuit court "had jurisdiction to try and convict him in 1958 for crimes committed in 1952 upon an information filed in 1957 as shown in the record." The holding there was without prejudice to appellant's later filing a petition for a writ of habeas corpus.

In 1962, appellant filed a petition in the Crittenden Circuit Court. A full-scale hearing was conducted, appellant appearing in person and by court-appointed counsel. Grayer's testimony, along with that of his witnesses, was received in evidence. His prayer for discharge was refused. There was no appeal from that decision. Instead, he filed two more petitions for writs of

habeas corpus in 1962 and 1963. Again, there were no appeals from adverse decisions.

Then in 1965, Grayer revived his efforts to gain freedom, proceeding under another petition for a writ of habeas corpus. Again his release was denied and that decision is the basis for this appeal. (Here it should be noted that the two-year interval between the filing of the petition and the submission of this appeal was not due to unreasonable delay on the part of the trial court.)

First, the trial court held that Grayer's petition was not verified. This would have been a proper ground for dismissal after giving petitioner a reasonable opportunity to make verification. The trial court, under the circumstances before it, waived this defect, and its extensive findings reflect that relief was not denied for failure to verify.

Appellant contends he was denied a speedy trial in 1958. He pleads double jeopardy. He claims unlawful detention and illegal search. Finally, he states that a confession and his past criminal record were used against him unlawfully. We reject these contentions for two reasons.

In the first place, it will be remembered that the conviction of 1958 was the result of a jury trial. He was represented by counsel in that trial, and he does not here assert that trial counsel showed non-diligence in any respect. Every allegation here made was open to him at the time of that trial. In fact, the trial court, in examining the petition and amended petition now before us found "that the points upon which the said petitioner relies in his various petitions for writs of habeas corpus filed herein are substantially identical and are, in substance, the same contentions made by the said defendant (petitioner) *in his original trial...*" [Italics supplied.] In making these findings the trial court had before it the record of the case in which appellant was convicted. If those conclusions of the trial court were

incorrect, we have no doubt but that the pertinent parts of the trial record would have been incorporated in the transcript now before us.

Secondly, appellant is in error in asserting that "he should have also been given the opportunity to be present at the hearing held upon his petition in this cause." In conformity with Rule 1, paragraph (C), the trial court examined the motion alongside the records in the case. On that basis written findings were made that the prisoner was not entitled to relief. When the petition can be processed under paragraph (C) the presence of the prisoner is not necessary.

Paragraph (H) of Rule 1 provides that all grounds for relief available must be raised in the original petition for a writ of habeas corpus. Any grounds not there raised cannot be used as a basis for a subsequent petition. The trial court found that the points now raised are substantially identical to those in previous petitions.

In *Evans* v. *State*, 242 Ark. 92, 411 S. W. 2d 860 (1967), we said: "It was not the purpose of Criminal Procedure Rule No. 1 to give a person convicted of a crime a holiday from the penitentiary for the purpose of a hearing, but to conscientiously protect his constitutional rights." Appellant Grayer was given a jury trial, a review by this court of the jurisdiction of the trial court, and a full-scale hearing in 1962 on his initial petition for a writ of habeas corpus. On that occasion he had his holiday from the penitentiary. He never appealed from the trial court's ruling. He has subsequently filed six petitions of various types in the Crittenden Circuit Court. According to the record before us, every one of those petitions had been given consideration by the trial court. So it is apparent to us that appellant has had *both* his holiday from the penitentiary and conscientious protection of his constitutional rights.

Affirmed.

FOGLEMAN, J., disqualified and not participating.

M. L. WALT ET AL *v.* WILLIAM J. BEVIS ET AL

5-4226 414 S. W. 2d 863

Opinion delivered May 22, 1967

Wright, Lindsey & Jennings, for appellants.

Joe P. Melton and *Chas. A. Walls Jr.* and *Stanley R. Price* and *Walter R. Brown,* for appellees.

JOHN A. FOGLEMAN, Justice. This case turns upon the construction of the will of Samuel B. Kirk of Lonoke County who died January 27, 1890. Appellants contend that title to certain lands in Township One North, Range Nine West in Lonoke County, of which the testator died seized and possessed, vested in them as his nearest of kin upon the death of the last of Kirk's children without issue. They assert this claim under Item VIII of the

will, contending that the will shows the intention of the testator to leave his children a defeasible estate in fee simple. In seeking to establish their title appellants find support in several items of the will so we will outline those items which are pertinent or to which specific reference is made by appellants.

LAST WILL AND TESTAMENT OF SAMUEL B. KIRK OF LONOKE COUNTY, ARKANSAS

ITEM III gives all personal property and all rents to the widow with full control and powers of disposition without accounting, directing her to maintain, educate and school their children until each shall have arrived at the age of maturity and to rent, lease and improve lands and collect rents from the real estate thereinafter "given to my children until the youngest child shall have arrived at the age of maturity when the lands given the children herein shall be equally divided between them as hereinafter named;—the object of this item being to give my wife absoute control of all personality and rents with the power of disposing of same as fully and completely as if the same originally belonged to her."

ITEM IV provides that at the death of his widow, the eldest son, Samuel H. Kirk, regardless of his age at the time, should be vested with the property and powers granted the widow and charged with the responsibilities assigned her, with the personal property to be divided among his children share and share alike when the youngest of his children should become twenty-one years of age.

ITEM V, omitting land descriptions, reads:

"I give and devise to my beloved children Samuel H. Kirk, Robert Kirk, Thomas F. Kirk and to any other children that may be born unto me hereafter, by my beloved wife Katie Kirk in common the following described lands lying and situated in Lonoke County, Ar-

kansas to wit: [lands in Township One North, Range Nine West; lands in Township Two North, Range Nine West] and all other lands which I now as hereafter own which I have not disposed of in this will either to my said children or to my dear wife to whom I give lands named in item Sixth of this will. I also give to my said children Block four (4) (Block 4) in Dismukes Addition of the Town of Lonoke, being in South West of North quarter of Section Nineteen in Township two North Range Eight West."

ITEM VI devises certain lands to the widow and states, after describing them: "which said lands she may sell convey and dispose of as she may see proper, and for any purpose she may see proper; but all of said lands not disposed of at her decease shall be equally divided between my chidren, then living, and their heirs share and share alike—that is to say to each of my children, then living one share, but if any of my children shall not be living, but shall have left children then the children of that one to take the share of the parent, but the division must not take place until the youngest of my children shall have arrived at the age of maturity."

ITEM VII: "It is my will and my desire that the lands which I have given to my children shall not be divided between them until the youngest shall have attained his or her majority."

ITEM VIII: "It is my desire, and I will that if any of my children shall die before attaining his or her majority and without any children surviving them, his or interest shall be inherited in equal parts by the survivors *i.e.*, his or her brothers and sisters and in case of the death of all children without issue, the property herein willed them and its increase both real and personal shall go to the nearest of kin on my side."

ITEM IX: "In case all of my children shall die leaving no children surviving, and their Mother should survive them, then I devise direct and will that all the

lands which I have herein willed to her which she has not disposed of at her decease shall return to my side of the house, and become the property of the nearest of kin."

ITEM X: "It is my will and desire that should my wife see proper to do so, she may sell and convey all the lands which I have given to my children in Township Two (2) north Range Nine (9) West and Block Four (4) in the Dismukes Addition to the Town of Lonoke said block being in the South West quarter of North West of Section Nineteen (SW¼ ofNW¼ Sec. 19) Township Two (2) North Range Eight (8) West, Said Block and lands to be sold for the benefit of my said children, and she may convey the same in fee simple, the gift to my children of said lands being subject to this right and power of sale in my said wife their mother."

ITEM XI: "It is my will and desire and I do order that all the lands which I now own in Township, One (1) North Range Nine (9) West and all that I may die seized and possessed of in that Township and Range shall become the property of my children to be owned and enjoyed by them in common as their lands absolutely to be governed in the division thereof by the provision of Item Seven of this will."

The paramount principle in will construction is to ascertain and declare the testator's intention. *Copeland* v. *Harness,* 238 Ark. 143, 379 S. W. 2d 1. This must be done from the language used as appears from consideration of the entire instrument and all of its provisions, and comparison of its various clauses. See *Booe* v. *Vinson,* 104 Ark. 439, 149 S. W. 524; *Murphy* v. *Morris,* 200 Ark. 932, 141 S. W. 2d 518; *Morris* v. *Lynn,* 201 Ark. 310, 144 S. W. 2d 472; *Layman* v. *Hodnett,* 205 Ark. 367, 168 S. W. 2d 819; *Cox* v. *Danehower,* 211 Ark. 696, 202 S. W. 2d 200; *Weeks* v. *Weeks,* 211 Ark. 132, 199 S. W. 2d 955; *McLaren* v. *Cross,* 236 Ark. 648, 370 S. W. 2d 59. The will must be viewed from its four corners. *Dyer* v. *Lane,* 202 Ark. 571, 151 S. W. 2d 678;

Dickens v. *Tisdale,* 204 Ark. 838, 164 S. W. 2d 990. If possible, it must be construed to give force and meaning to every clause and provision thereof. *Archer* v. *Palmer,* 112 Ark. 527, 167 S. W. 99; *Prall* v. *Prall,* 204 Ark. 1074, 166 S. W. 2d 1028 It should be given that construction which best comports with the purposes and objects of the testator. *Parker* v. *Wilson,* 98 Ark. 553, 136 S. W. 981; *Layman* v. *Hodnett,* 205 Ark. 367, 168 S. W. 2d 819.

When we view the will of Samuel B. Kirk from its four corners, considering its language and giving meaning to all of its provisions, it seems to us that there can be no question that Kirk clearly intended that his children have the lands in Township One North, Range Nine West in fee simple absolute. Reading of the various clauses indicates that he desired that these children be appropriately supported and educated until each had reached his or her majority and to this end desired that some person in whom he had confidence have uncontrolled discretion in the handling of personal peoperty left by him and in the collection and application of rents from his lands. To this end he established something in the nature of a trust, of which his widow had control, if living, or his eldest son in case of her death. This made it inadvisable that there be any division of real estate during this period, so he expressed the desire that this not be done until the youngest child should attain his majority. In what seems to be an obvious effort to avoid intestacy he expressly provided for division when the youngest child reached the age of twenty-one years, making provision to pass any interest of a child who died before attaining his majority and without children surviving to his brothers and sisters and if all died without issue, to his nearest of kin. It is to be noted that Item VIII first treats of the situation if any of his children should die (1) before attaining majority *and* (2) without any children surviving him. It is only reasonable to believe that consideration of the language and the objects and purposes of the testator points to his intention that the nearest of kin would share only if all his children died before attaining majority *and* without is-

sue. It does not seem reasonable that surviving brothers and sisters would not share in the interest of a deceased child unless he died before majority, but that the "nearest of kin" would benefit if all children died without issue, regardless of age of the last one when he died. It is to be noted that he devised lands in Township Two North, Range Nine West to his children, as well as lands in Township One North, Range Nine West. He also devised to his children all lands owned by him which he did not specifically devise to them or to his widow. He further provided that all lands left to his widow remaining undisposed of by her at the time of her death should go to his children, share and share alike.

It is significant that the testator gave his wife the absolute power to convey lands left to his children in fee simple, except for lands in Township One North, Range Nine West, saying that his gift of other lands was subject to this power of sale. This clause is then followed by the provision that all lands owned by him in Township One North, Range Nine West "shall become the property of my children to be owned and enjoyed by them in common as their lands *absolutely* to be governed in the division thereof by Item Seven of this will." [Emphasis ours]

Regardless then, of the meaning and effect of Items VIII and IX as to other lands, the testator could not have more clearly expressed his intention to devise a fee simple absolute to the lands in question to his children.

Appellants argue that the provisions of Item III giving testator's widow absolute control of rents from the lands and the power to rent, lease and improve the lands indicate an intention that his children take less than a fee simple absolute. We do not agree. In *Black* v. *Bailey*, 142 Ark. 201, 218 S. W. 210, this court construed a will in which a testator provided that his residuary estate be held in trust until a certain grandchild attained the age of twenty-one years, or for ten years after the

grandson's death if he died before reaching that age, for the use and benefit of his children. The trustee had full power to handle, manage and control the estate and was directed to divide the rents and profits among testator's children or their heirs semiannually. Another clause devised and bequeathed all his estate at the expiration of the trusteeship to his children, share and share alike with the provision that if any of his children should die before expiration of the trusteeship, leaving issue, said issue should take only the share that would go to his child if living. As against the contention of testator's grandchildren that they were contingent remaindermen, this court held that a fee simple title vested in testator's children, there being no language vesting the legal title in the trustee, the trust being for the purpose of control and management of the property only. It was said that it was the intention of the testator to vest the entire estate in his children with a postponement of their right to enjoy the possession thereof in severalty for a period of years.

Similarly, in *Wallace* v. *Wallace,* 179 Ark. 30, 13 S. W. 2d 810, it was held that a clause with reference to maintaining certain farms intact for 25 years did not prevent the vesting of the fee in the brothers and sisters and a sister-in law of appellant to whom he referred as his legal heirs. The cause there involved is as follows:

> "4. It is my desire and I do hereby will that my two plantations situated in Howard county, Arkansas, and known as the McDaniel and Block farm be held intact and in trust for my legal heirs for the term of twenty-five (25) years after my death. The manager or superintendent of said farm is to use my office or residence in Saratoga, Arkansas, as a residence or business office, the net proceeds of the rental of said farm to go to my legal heirs each year. After the twenty-five years have expired said lands may be sold or divided for the benefit of my said heirs."

This court said, as against the contention of a nephew that he was entitled to part of the proceeds of a sale of certain of the lands, or that he was at least a contingent remainderman who might take as one of the heirs of the testator surviving at the end of the twenty-five-year period, that there was no intention on the part of the testator expressed in the will to disinherit the "legal heirs" for a period of twenty-five years or any other time.

As a matter of fact, the testator here could and did postpone the vesting of the fee until the youngest of his children reached the age of twenty-one years, but this did not diminish the estate granted. In *Fleming* v. *Blount,* 202 Ark. 507, 151 S. W. 2d 88, it was held that where a testator devised one-third of his real estate to each of three children, but directed that none of the real estate be divided or sold for a period of eleven years, they would take title in fee simple to one-third each at the expiration of that period. There the testator stated purposes to compel frugality and education. There was a clause providing that if either of his children should die, the other two should share equally in the estate, and if two should die, the entire estate should go to the third.

The holding of this court in *Jackson* v. *Sanford,* 208 Ark. 888, 187 S. W. 2d 945, seems persuasive here. Sanford died testate, leaving six children. His wife predeceased him. Two of the children, a son and a daughter, died without issue, one leaving a widow as his sole devisee and legatee. The will contained this clause:

> "Third. At the death of my beloved wife, I direct, devise and bequeath all of said property remaining and undisposed of by her shall be divided equally, to share and share alike, between our children, as follows: Stephen Wyatt Sanford, Ollie Mae Hudson, Florrie Sanford, Robbins S. Sanford, Sloan M. Sanford, and John William Sanford; and in the event that either of said children shall die without issue, then the interest of said child so dying shall

> go to the said children living, to share and share alike."

It was contended that the son took only a determinable or contingent fee and that his share would go to the remaining children, share and share alike. The court held that the children were vested with a fee simple absolute title upon the death of the father. The court said that the lands could not be divided equally among the children if a child would take a determinable or contingent fee in his share of the estate, dependent upon the birth of issue thereafter, holding that the defeasance clause meant dying without issue before testator's death, or, if his wife had survived him, before her death. There could not be an equal division, said the court, where a child having issue would take the fee immediately and others would take a determinable or contingent fee, depending on issue in the future. This statement seems particularly applicable here.

> "* * * Here, these two without issue died six years after their father's death. They might have lived 10, 20, 30 or 40 years after his death, during which time it is easy to perceive the uncertainty of the title to their shares of said estate and their impotency to hold, use, sell or enjoy same."

It has also been held that a will provision that the residuary estate should be divided equally between a son and a daughter, but in the event of the death of either, the heirs of their body would take his or her share per stirpes meant that if they survived him, then they took the fee title. The clause with reference to death was said to mean the decease of either prior to the death of the testator. *Ramseur* v. *Belding*, 206 Ark. 415, 175 S. W. 2d 977.

In *Harrington* v. *Cooper*, 126 Ark. 53, 189 S. W. 667, it was held that a defeasance clause related to the time of death of the widow of testator. He devised cer-

tain lands to his widow and daughter during the life of the widow stating that at the death of the widow he desired and intended that the daughter should take the entire interest in her own right should she survive her mother. The defeasance clause provided that should the daughter die childless the whole should revert to his estate and be equally divided between his other children and their descendants. This resulted in the vesting of a fee simple title in the daughter upon the death of her mother. The estate would revert only if she should die without leaving a child before her mother's death.

Following the decisions hereinabove set out can only lead to the conclusion that fee simple absolute vested in the Kirk children when the last attained his majority.

If, however, it could possibly be said that this will is not clear on this point, but is doubtful, ambiguous or capable of more than one construction, still appellants could not prevail over settled rules of construction resorted to in such circumstances in this state for many years.

In case of doubt, the construction of a will is favorable to the first taker because it is against the policy of the law to tie up property. *Cross* v. *Manning,* 211 Ark. 803, 202 S. W. 2d 584. The law favors the vesting of estates as early as possible and if a will is capable of a dual construction, by one of which the estate becomes vested and by another it remains contingent, the former will be adopted. *Booe* v. *Vinson,* 104 Ark. 439, 149 S. W. 524; *McCarroll* v. *Falls,* 129 Ark. 245, 195 S. W. 387; *McKinney* v. *Dillard & Coffin Co.,* 170 Ark. 1181, 283 S. W. 16; *Doake* v. *Taylor,* 195 Ark. 490, 112 S. W. 2d 958; *Hargett* v. *Hargett,* 226 Ark. 929, 295 S. W. 2d 307.

Where any ambiguity exists in a will, such a construction should be given it as favors the heirs at law in preference to persons not so closely related to the testator. *Yeates* v. *Yeates,* 179 Ark. 543, 16 S. W. 2d 996, 65 ALR 466. See, also, 95 C. J. S. 842, Wills, § 616, and 95 C. J. S. 845, et seq., Wills, § 617b.

While the provisions of a will should be so construed as to avoid any conflict, the last clause in the will governs in ascertaining a testator's intention in case there is any conflict. *Little* v. *McGuire,* 113 Ark. 497, 168 S. W. 1084; *Gist* v. *Pettus,* 115 Ark. 400, 171 S. W. 480; *Bowen* v. *Frank,* 179 Ark. 1004, 18 S. W. 2d 1037; *Thomason* v. *Phillips,* 192 Ark. 107, 90 S. W. 2d 228; *Stayton* v. *Stayton,* 198 Ark. 1178, 132 S. W. 2d 830.

Where an estate in lands is created by will, it will be deemed to be an estate in fee simple if a less estate is not clearly indicated. *Ramseur* v. *Belding,* 206 Ark. 415, 175 S. W. 2d 977; *Ollar* v. *Roy,* 212 Ark. 682, 207 S. W. 2d 313.

All rules of construction lead to the conclusion that the chancellor was correct.

Affirmed.

CONTINENTAL CASUALTY COMPANY *v.* JOHN R. CAMPBELL

5-4224 414 S. W. 2d 872

Opinion delivered May 22, 1967

Mobley & Bullock, for appellant.

Gordon & Gordon, for appellee.

J. FRED JONES, Justice. This is an appeal from a judgment of the Pope County Circuit Court wherein a jury was waived and the trial judge, sitting as a jury, rendered judgment in favor of John R. Campbell on a health and accident insurance policy issued by Continental Casualty Company. Continental is the appellant here and designates one point for reversal, as follows:

> "There was no substantial evidence upon which the court could base its decision in favor of appellee, John R. Campbell."

In appeals to this court from judgments of Circuit Courts where the trial judge sits as a jury or enters judgment upon a jury verdict, the "substantial evidence" rule is so firmly established in this state that citation of prior decisions is not necessary. We now examine the evidence as to its substantial nature.

On February 23, 1961, appellee Campbell made application for a health and accident insurance policy through appellant's agent on a written form. The questions printed on the application form were read to appellee and his answers to the questions were written down by the agent. Questions eight and nine in the application, and the answers thereto, were as follows:

> "8. Have you to the best of your knowledge and belief ever had abnormal blood pressure, ulcers, tuberculosis, appendicitis, hernia , diabetes, cancer syphilis, goiter, paralysis, sciatica, arthritis, rheumatism, any disorder or disease of the mental, nervous, genito-urinary or digestive systems, rectum, eyes, back, spine or heart? (If so, give nature, date, period of disability, name of doctor and result)——No

"9. Have you been under observation or had medical or surgical advice or treatment, or been hospital confined during the past 5 years?——No (If so, give dates, ailment, duration and result)"

A policy was issued by appellant to appellee and became effective on March 9, 1961. Appellee continued his work as a carpenter until November 1963, at which time he became totally and permanently disabled because of cystic lung disease in the left lung and compensatory emphysema in the right lung. Appellee underwent chest surgery performed by Dr. Reiser in Joliet, Illinois in November 1963, and has been disabled since that date.

Claim was made under the policy and was denied by the appellant who contended that the condition causing the disability pre-existed appellee's application for the insurance; that appellee had knowledge of the condition and intentionally withheld the information from appellant and intentionally and fraudulently misrepresented his physical condition in his application for insurance with the fraudulent intent to deceive the appellant.

This was denied by appellee who filed suit. At the conclusion of the trial, judgment was entered for appellee for $2,819.00 accrued benefits under the policy, for attorney's fees in the amount of $940.00 and penalty in the amount of $338.40 and for costs.

At the trial of this case the appellee, as well as his wife, testified that the agent for the appellant insurance company came to their home soliciting insurance business and that the agent read the questions from the application form and then filled in the answers. Both the appellee and his wife testified that to the best of their knowledge the answer to question No. 8 was true, and that in answer to question No. 9 on the application form, appellee advised the agent that he had been hospitalized for a short period of time in Joliet, Illinois where he

was under the care of Dr. Blondis who told him he had Asian flu. Both the appellee and his wife testified that the agent remarked that this short period of hospitalization for Asian flu was of small significance and that the agent wrote "no" as an answer to question No. 9. The agent testified that he wrote the answers correctly as given to him by the appellee.

The appellee, as well as his wife, testified that to the best of their knowledge appellee was in good health and free from physical impairment or deformity at the time the application was made. Appellee introduced his income tax statements in support of his and his wife's testimony that he was regularly employed as a carpenter and that his income was rather constant and indicative of full time employment for 1960, 1961, 1962 and 1963.

Appellee denied any knowledge of lung disease prior to the operation, and denied that Dr. Blondis or any other doctor ever told him he had lung disease. He denied that Dr. Blondis told him anything other than he had Asian flu when he was hospitalized for two or three days in 1960.

Dr. Hickey of Morrilton testified that he treated appellee for fracture of the femur and had also rendered "follow up" treatment following the chest surgery. Dr. Hickey testified that in his opinion appellee's thoracic condition developed over a period of five to fifteen years, but that it was possible that appellee could have been able to perform his normal duties; that many people with such disease work right along with it.

Dr. Blondis testified by deposition that he had treated appellee in the hospital about February 1960; that he diagnosed appellee's condition as fibrocystic disease of the left lung, extensive with recurrent bronchitis and that he advised appellee of the condition. Dr. Blondis testified that he obtained a history from appellee of an automobile injury and hospitalization in the Army-

Navy Hospital in Hot Springs for injury to the right chest, and that at that time appellee was advised that he had cystic disease of the left lung; that he also obtained a history of a crushing injury to the left chest in a truck accident during World War II following which appellee was hospitalized in a government hospital in Memphis, Tennessee. Dr. Blondis testified that he relied on his own records and on hospital records for this information, but admits that some of his records were misplaced when he moved his office.

Appellee admitted he was injured in an automobile accident while in a C.C.C. Camp near Hot Springs in 1938, and that he was hospitalized in the Army-Navy Hospital in Hot Springs for that injury, but denies being told that he had cystic disease of the lung. He denied being in World War II and denied having ever suffered an injury to the left side of his chest. He denied having ever been a patient in any hospital in Memphis, Tennessee.

Both Dr. Blondis and Dr. Hickey were of the opinion that the fibrotic condition of Appellee's left lung was probably congenital in origin and Dr. Hickey testified that it was entirely possible that a person could have such condition and not know it until it became disabling.

Appellant alleged fraud in this case. It alleged that appellee knowingly gave untrue answers to questions in his application for insurance and that he did so intentionally and with purpose and intent to deceive the appellant and fraudulently procure the issuance of the insurance policy. This case was submitted to the trial court on conflicting testimony and in a situation that placed the burden of proof on the appellant.

In the case of *Aetna Life Insurance Company* v. *Mahaffy*, 215 Ark. 892, 224 S. W. 2d 21 (1949) the insured had applied and received some eight insurance policies totaling $20,000.00. The policies were life policies and waived premiums in the event of total disability be-

fore age sixty. Mahaffy made claim for the waiver of premiums under the total disability clause, alleging total disability because of blindness which constituted disability under the provisions of the policy. The insurance company disallowed the claim on the ground that Mahaffy had concealed his approaching blindness, and the company sought cancellation of the contestable portions of the policy.

Mahaffy applied for the policy in March 1942. He had started wearing glasses prior to March 1942. He had visited an eye specialist to see about new glasses and the diagnosis revealed a blinding disease but he was not told of the diagnosis.

The application form contained a question as to whether or not the applicant had any impairment of eye sight, to which Mahaffy answered "No."

In sustaining the trial court's decision in favor of Mahaffy, this court quoted with approval from the cases in *Harper* v. *Bankers Reserve Life Co.,* 185 Ark. 1082, 51 S. W. 2d 526, and *Old Colony Life Insurance Company* v. *Julian,* 175 Ark. 359, 299 S. W. 366, as follows:

> "If the applicant states what he honestly believes to be true regarding his physical condition, the fact that it turns out not to be true does not avoid the policy, as it is a representation merely. Of course, if his statements are false and known to him to be false, and are made fraudulently, they have the same effect as warranties.
>
> "The burden is on (the insurer) to establish the fraud by proving affirmatively the falsity, materiality and bad faith in the representations made by the insured in the application regarding his health."

In the case of *Old American Life Insurance Company* v. *McKenzie,* 240 Ark. 984, 403 S. W. 2d 94 (1966), the appellee was issued an insurance policy on his appli-

cation solicited by the sales manager for the appellant insurance company. The application stated that the appellee had no physical defects at that time, but further medical history on the application form revealed a disc operation in 1962. The appellee received injuries in an automobile accident and brought suit to recover medical expenses under the policy.

The company alleged a willful, fraudulent, and material misrepresentation in the application as a defense. This defense was based on the fact that between 1962 and the date of the policy, appellee had had two subsequent operations on his back. Appellee had maximum recovery from both operations prior to the purchase of the insurance policy, and in sustaining a judgment for appellee, this court quoting from 1 Appleman, Insurance Law & Practice, § 220 (1965), said:

> ". . . 'an insurer cannot complacently rely upon statements made by the insured where the type of information is of a character suggesting a cautionary investigation as to the accuracy of the statements given. And where the insured discloses that he has undergone an operation and furnished the company with the name of the attending physician, it has ample information from which to investigate further, and cannot complain that the insured failed to relate an illness ensuing upon such operation.'"

In the case of *Southern National Insurance Company* v. *Heggie,* 206 Ark. 196, 174 S. W. 2d 931 (1943), the appellant insurance company denied liability on a life insurance policy, contending that the insured had misrepresented her physical condition by stating she was in good health when she was not. The application was taken by a soliciting agent for appellant who filled out the application form, and there was a conflict in the testimony as to whether he was told by the insured that she had previously had tuberculosis.

In affirming a decision of the trial court in favor

of the validity of the policy, this court said:

"It has been frequently held by this court that, where an applicant for insurance makes to the agent of the insurer a full disclosure of the facts inquired about in the application, but the agent fails to write down the answers of the applicant correctly, and the applicant is permitted by the agent to sign the application without reading it or hearing it read, the knowledge of the agent as to the physical condition of applicant is imputed to the company and, if a policy is issued on such an application, the company is estopped in an action on said policy to set up the falsity of the answers in the application.

"The rule is thus stated in the case of *Union Life Insurance Company* v. *Johnson,* 199 Ark. 241, 133 S. W. 2d 841 (headnote 2): 'Where the facts have been truthfully stated to the soliciting agent, but, by fraud, negligence or mistake, are misstated in the application, the company cannot set up the misstatements in avoidance of its liability, if the agent was acting within his real or apparent authority and there is no fraud or collusion upon the part of the assured.'"

The cases are numerous and varied on the points here involved, and the decision in each case is of necessity based on the facts peculiar to the particular case.

In the case before us there was a direct conflict in the testimony of the appellee and his wife on the one hand, and that of the soliciting agent on the other. Much of the pertinent testimony of Dr. Blondis was based on history which appellee denied giving and the records from the Army-Navy Hospital in Hot Springs and from the government hospital in Memphis, where appellee denies he was ever a patient, were not offered in evidence. There is no question that appellee was able to work, and did work, for at least one year before, and two years following, his application.

The trial court was sitting as a jury in this case and weighed the evidence in favor of appellee. We are of the opinion that there was substantial evidence to support the findings of the trial court, and that the decision of the trial court should be affirmed.

Affirmed.

ARKANSAS LOUISIANA GAS COMPANY *v.* KATHERINE E. BURKLEY, ET AL

5-4103 416 S. W. 2d 263

Opinion delivered May 22, 1967

[Rehearing denied July 26, 1967.]

Douglas Bradley and *Robinson, Thornton, McCloy & Young,* for appellant.

Barrett, Wheatley, Smith & Deacon, for appellees.

Oscar Fendler, amicus curiae.

JAMES W. CHESNUTT, Special Justice. This is an eminent domain proceeding for the condemnation of an easement for a pipeline right-of-way eighty feet in width across lands owned by Appellees. The area involved consisted of 7.1 acres.

The Appellees, in their Answers, asked damages for the lands actually taken based on the value of the fee, together with damages to the remaining lands owned by Appellees. At the trial Appellees waived any right to severance damages and the case was presented to the jury only on the issue of damages for the taking of the pipeline right-of-way.

Appellees presented evidence that the value of the lands taken was $1,000.00 an acre. Two witnesses for the Appellant testified respectively that the lands had a value of $800.00 an acre and $780.00 an acre. Both of Appellant's witnesses testified that the lands would be worth as much after the installation of the pipeline as they were before the taking.

The parties stipulated that the right-of-way easement condemned was for underground pipelines and that Appellees would have full use and control of the surface of the easement, subject to the right of Appellant to use the surface to service, repair, and lay its underground pipelines, and further stipulated that in the event of future use of the surface of the easement by Appellant, it would pay crop damage and leave the land in the same condition it was in before future repair or construction.

At Appellees' request, the Court gave the following instruction on measure of damages:

> "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 a fee

had been taken, even though the landowner, after the pipeline has been constructed, has 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 Gas Company acquired by the condemnation proceedings herein the power to make such use of the right-of-way as to future needs required for the purpose for which the right-of-way was condemned.

The landowners herein have not complained of nor are they asking to be compensated for any damage to the remainder of the lands not included in the right-of-way easement. Therefore, you have only one element of damage to consider, which is the market value of the strip of land which was actually taken as an easement right-of-way."

The Appellant objected to the giving of this instruction and insisted that the proper measure of damages was the difference between the value of the entire tract immediately before and immediately after the partial taking.

The Appellant offered the following instruction, which was refused by the Court.

"You are instructed that it is your duty to assess the damage, if any, to the property of Katherine E. Burkley, and you will fix the amount of money which will reasonably and fairly compensate her for any of the following elements of damage sustained by reason of the plaintiff's pipeline crossing the real property described in this litigation:

1. The difference in the fair market value of the entire tract of land immediately before and immediately after the laying of plaintiff's pipeline across the said real property.

Whether this element of damage has been proved

by the evidence is for you to determine."

The jury returned a verdict for Appellees in the sum of $5,680.00. The jury obviously accepted the $800.00 an acre valuation placed on the land by one of Appellant's witnesses and multiplied this sum by the 7.1 acres condemned.

The sole issue presented on this appeal is whether the trial court was correct in instructing the jury that the landowners were entitled to the full value of the land embraced within the right-of-way easement as if fee had been taken, or whether the court should have applied the familiar "Before and After" Rule as to measure of damages.

In *Lazenby* v. *Arkansas State Highway Commission*, 231 Ark. 601, 331 S. W. 2d 705, we said:

> "Since Appellant was only seeking to recover the value of the land actually taken, it was proper to show the market value per acre. This having been done, it was only necessary to multiply that amount by the number of acres taken. There is a long line of cases in support of this rule."

See *Little Rock & Fort Smith Railway Company* v. *McGehee*, 41 Ark. 202; *Little Rock Junction Railway* v. *Woodruff*, 49 Ark. 381, 5 S. W. 792; *Fort Smith and Van Buren District* v. *Scott*, 103 Ark. 405, 147 S. W. 441; *Drainage District No.* 11 v. *Stacey*, 127 Ark. 549, 192 S. W. 904; *Baucum* v. *Arkansas Power & Light Company*, 179 Ark. 154, 15 S. W. 2d 399; and *Yonts* v. *Public Service Company of Arkansas*, 179 Ark. 695, 17 S. W. 2d 886.

In only one of the cases cited above—*Baucum* v. *Arkansas Power & Light Company*, Supra—did the Court mention the "Before and After" Rule, and then only in connection with the landowner's claim for severance damages in addition to damages for the right-of-way actually taken.

We believe that it is proper to determine the value of the land taken by determining the market value of the land actually taken when, as in this case, no claim is made for severance damages to the remainder of the land. This determination can be made by determining the value per acre and multiplying by the number of acres taken.

This view is particularly applicable to takings by private corporations in light of Article 12, Section 9 of the Arkansas Constitution of 1874, providing that compensation for such takings shall be determined irrespective of any benefit from any improvement proposed by such corporation.

The Appellant further contends that the "Before and After" Rule must be applied in this case because the Appellant is taking only an easement, and the Appellees will retain the right to cultivate the surface of the ground after the pipeline is installed and should not be awarded the full value of the fee.

In *Baucum* v. *Arkansas Power & Light Company,* Supra, a case involving an electric transmission line, this Court, quoting with approval *Kentucky Tennessee Light & Power Company* v. *Beard,* 152 Tenn. 348, 277 S. E. 889, held:

> "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. And the fact that the owner was given the permissive use of the right-of-way could not be considered in reduction of the sum to be allowed as compensation."

In *Texas Illinois Natural Gas Pipeline Company* v. *Lawhon,* 220 Ark. 932, 251 S. W. 2d 477, a case involving a pipeline easement, this Court reaffirmed *Baucum* and 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 pipeline 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. Appellant acquired by the condemnation proceedings the power to make such use of the right-of-way as its future needs required for the purpose for which the right-of-way was condemned."

The instruction given by the trial court in this case was taken almost verbatim from the *Lawhon* case.

The rule of the *Baucum* case was also followed in *Arkansas Power & Light Company* v. *Morris,* 221 Ark. 576, 254 S. W. 2d 684, another electric transmission line case, and in *State ex rel Publicity and Parks Commission* v. *Earl,* 233 Ark. 338, 345 S. W. 2d 20, a case involving easements across lands adjacent to an airport.

Appellant relies upon *Arkansas Louisiana Gas Company* v. *Howard,* 240 Ark. 511, 400 S. W. 2d 488, in which the "Before and After" Rule is mentioned as the true measure of damages for property taken by eminent domain. This case was reversed on other grounds and did not overrule *Baucum* and the other cases cited above.

The rule established in *Baucum,* that the landowner is entitled to receive full value of the fee for an easement of this type, tends to eliminate future litigation over damages sustained by reason of future additional construction on the easement, and should be sustained.

Affirmed.

FOGLEMAN, J., disqualified.

HARRIS, C. J., dissents.

CARLETON HARRIS, Chief Justice, dissenting. I respectfully dissent from the holding of the majority, my views being based on this court's rulings in *Feibelman* v. *Trunkline Gas Company*, 234 Ark. 276, 351 S. W. 2d 447 (1961), and *Ark-La Gas Company* v. *Howard*, 240 Ark. 511, 400 S. W. 2d 488 (1966).

I would reverse and remand.

HOMER L. BAILEY ET AL *v.* CLINT JONES, SECURITIES COMMISSIONER

5-4163 419 S. W. 2d 585

Opinion delivered May 22, 1967

[Rehearing denied November 6, 1967.]

Spitzberg, Bonner, Mitchell & Hays; By: *H. Mau-*

rice Mitchell and *H. Allan Horne,* for appellants.

Catlett & Henderson, for appellee.

OLIVER M. CLEGG, Special Justice. We are called upon here to answer the single legal question: May stockholders of a domestic insurance company legally create a voting trust?

Appellants are some of the principal officers, directors, and stockholders of American Foundation Life Insurance Company, a domestic insurer. Believing that a competitor was buying shares of the Company with the view of merging it into another insurer, Appellants entered into a Voting Trust Agreement in April, 1966, and actively solicited other stockholders to transfer shares to the Trust. The term of the Trust was a period of ten years during which time the Trustees would have the sole right to vote the stock so transferred. In exchange for such stock, the former stockholders were to be issued certificates of ownership in the Trust. All dividends received by the Trustees on account of the shares held by them were to be paid to the owners of the Trust Certificates. The avowed purposes of the voting trust arrangement were to prevent outside control and assure continuity of management.

Appellants then sought to register the Trust Certificates with the Appellee for intrastate sales. Both the Securities Commissioner and the lower court held that under the laws of this state stockholders in a domestic insurance company could not legally establish a voting trust in the stock of such company.

The Voting Trust arrangement has not been unknown in the statutes of this state. The Business Corporation Code of 1931 (Act 255) made provision in Section 17 (formerly § 64-215 Ark. Stats. 1947 Anno.) for voting trusts subject to certain restrictions, the principal one being a term limit of ten years. This provision was, in 1965, incorporated in the present Corporation

Code (Act 567) § 64-221 Ark. Stats. 1947 Anno. Both acts, however, exempted domestic insurance companies from their coverage.

In 1959 the legislature enacted the "Arkansas Insurance Code" (Act 148) which, according to the title, is designed as "A Comprehensive Revision, Consolidation and Classification of the Laws of the State of Arkansas Relating to Insurance Business; to Regulate the Incorporation, Formation, and Corporate Affairs of Domestic Insurance Companies", etc. No express provision was made in the Arkansas Insurance Code for the formation of voting trusts as was made in the Business Corporation Codes of 1931 and 1965.

Since the Legislature did not expressly make provision in the Insurance Code for voting trusts, are they valid under the common law, as Appellants contend, or impliedly prohibited, as Appellee contends?

In reaching the answer to this question, the Courts have considered "various statutes, such as those relating to proxies or the right to vote at stockholders meetings or for the election of directors. . . as indicative of the legislative policy approving or disapproving of voting trusts and other similar agreements". Annotation: Validity of Voting Trust or Other Similar Agreement For Control of Voting Power of Corporate Stock. 98 A. L. R. (2) 376, 384.

Thus, it was said in *Boyer* v. *Nesbitt* (1910) 227 Pa. 398, 76 A. 103, that in the leading cases on voting trusts, "the courts treat the question of public policy indicated by the statutes of the respective states as the basis for their reasoning and the foundation upon which their conclusions rest. This seems to be the sounder rule, because the public policy which should prevail in the management and control of corporations is primarily a legislative rather than a judicial question".

In *Bostwick et al* v. *Chapman et al,* (1891) 60 Conn.

553, 24 A. 32, sometimes referred to as the "Shepaug Voting Trust Cases", the Court looked to the spirit and intent of a statute dealing with stock proxies to determine the public policy relating to voting trusts. In so doing, the Court said:

> "Were this a power of attorney in formal terms, no claim would be made but that it was not only contrary to the policy of the law of this state, but in direct conflict with our statute, which says that 'no person shall vote at any meeting of the stockholders of any bank or railroad company, by virtue of any power of attorney not executed within one year next preceding such meeting; and no such power shall be used at more than one annual meeting of such corporation'. Gen. St. § 1927. This statute tends to disclose what the policy of the law of this state is, touching the matter of the surrender by a stockholder of his voting power to someone else. It would seem that it is opposed to such surrender for an indefinite period, or for a period of five years".

To like effect see: *Simpson* v. *Nielson* (1926) 77 Cal. App. 297, 246 P. 342; *People ex rel. Arkansas Valley Sugar Beet and Irrigated Land Co.* v. *Burke* (1923) 72 Colo. 486, 212 P. 837; 30 A. L. R. 1085.

Turning, therefore, to the recent enactment by the legislature of the Arkansas Insurance Code and amendments thereto, the public policy of this state has been unmistakably and emphatically stated.

Section 472 of the Arkansas Insurance Code, as originally adopted in 1959, provided:

> "(1) Every proxy of a stockholder of an insured, *unless coupled with an interest,* shall be revocable at will, and this provision cannot be waived". § 66-4220 Ark. Stats. 1947 Anno.

Under that provision an argument might have been

made that voting trusts were not in contravention of the legislatively expressed public policy since the interest to which the power is coupled may be that of protecting the proxy holder's own property interest in the corporation. *Smith* v. *San Francisco & N. P. R. Co.,* (1897) 115 Calif. 584, 47 P. 582. 19 Am. Jur. (2) 180, Corporations § 676.

But that question was clearly removed with the amendment in 1965 (the same legislative session at which the Business Corporation Code was enacted) of the original section quoted above. As so amended, the provision now reads:

> "(1) Every proxy of a stockholder of an insurer shall be revocable at will, and this provision cannot be waived".

In deleting the "power coupled with an interest" clause and thereby prohibiting, absolutely, irrevocable proxies by stockholders in domestic insurance companies, even those coupled with an interest, the public policy was made clear and unmistakable. This is particularly true since the Business Corporation Code adopted by the same legislature provided for irrevocable proxies, whether or not coupled with an interest, and, consistently therewith, expressly provided for voting trusts. *Roberts* v. *Tice,* (1939) 198 Ark. 397, 122 S. W. (2) 258; *Cordell* v. *Kent,* (1927) 174 Ark. 503, 295 S. W. 258.

We must presume that the legislative intent and purpose is consistent throughout the same enactment. This is true in the Corporation Code: Unrestricted irrevocable proxies allowed—Voting Trusts expressly allowed. Contrariwise, the policy so clearly and emphatically expressed in the Insurance Code of prohibiting irrevocable proxies must, necessarily, preclude the allowance of the Voting Trust.

The judgment of the Circuit Court is affirmed.

FOGLEMAN, J., disqualified.
BYRD, J., dissents.

DEBRA LEA, ET AL, FENTON STANLEY, GUARDIAN AD LITEM *v.* LENA NIX BYRD

5-4255 415 S. W. 2d 336

Opinion delivered May 29, 1967

Fenton Stanley, for appellants.

James C. Cole, for appellee.

CARLETON HARRIS, Chief Justice. The question in this litigation is whether a deed should be reformed because of an alleged mutual mistake of fact. Appellants, Debra Lea, Donna Sue Lea, Sandra Lea, and Michelle Lea, are minor grandchildren of appellee, Lena Nix Byrd, appellee herein. Mrs. Byrd sued in equity to reform a deed executed from Dave Wilkins and Lula Wilkins to R. D. Nix and Lena Nix on December 10, 1949.[1] Both the granting clause and the habendum clause recited that the conveyance was to R. D. Nix and Lena Nix and her bodily heirs. Mrs. Byrd instituted suit in 1966 to reform the deed, asserting that a mutual mistake of fact had been made, in that the intent of the parties was

[1]At the time of the execution of the deed, Mrs. Byrd was married to R. D. Nix. Mr. and Mrs. Nix were later divorced, and appellee married Lawrence Byrd.

that said deed convey the property purchased to R. D. Nix and Lena Nix for life with the remainder over to Carolyn Hutto (Lea), daughter of appellee by a previous marriage. Appellants, through their guardian *ad litem,* Fenton Stanley, answered, denying all allegations in the complaint (except those allegations appearing as a matter of public record), and denying that appellee was entitled to any relief. On trial, after the taking of evidence, the court found that appellee had sustained her contention, and entered a decree finding that a mutual mistake had been made in the execution of the original deed; further, that appellants had never owned any interest in the land, vested, contingent, or otherwise, and their only apparent interest was a result of the mistake made. The court ordered the deed reformed to reflect the grantees as R. D. Nix and Lena Nix for and during their natural lifetime with the remainder to Carolyn Hutto and her heirs and assigns forever. From this decree, appellants bring this appeal.

The deed, of course, created an estate tail under our statutes and decisions. The question, thus, is whether it is legally possible to reform, in this state, because of mutual mistake, a deed which created an estate tail. Arkansas has followed the policy that, as a general rule, equity will not reform a contract or a deed occasioned simply by a mistake of law. *Louis Werner Saw Mill Company* v. *Sessoms,* 120 Ark. 105, 179 S. W. 185.

Appellee, in support of the court's finding, argues, in this court, that such a deed can be reformed on proper proof, whether the mistake was a mistake of law, or a mistake of fact, though the mistake of fact argument is given greater emphasis.

Under the view that we take, it is not necessary that we discuss the question of a mistake of law, for we think that proof of a mistake of fact was established by clear, cogent, and convincing evidence, such proof being necessary before a deed can be reformed. *Meeks* v. *Borum,* 240 Ark. 805, 402 S. W. 2d 408.

Mrs. Byrd testified as follows:

She had one child, Carolyn Hutto (Lea) by a marriage previous to her marriage to Nix. In 1946, she underwent a complete hysterectomy, and knew that thereafter she would be unable to bear children.[2] In 1948, she married Nix, and the two desired to buy some land. They became interested in 200 acres owned by Mr. and Mrs. Wilkins, and decided that they would like to purchase that land. The witness had money of her own before the second marriage, which was to be used as part of the purchase price. An attorney in Malvern advised that a deed made to Mr. and Mrs. Nix would create an estate by the entirety, and the lands would become the sole property of the survivor. Appellee wanted her daughter, Carolyn, to have an interest in the property, and was not willing to purchase same without assurance that the daughter would have an interest. Another lawyer was consulted, who confirmed the opinion of the first attorney, each also telling her that to carry out her desire, the deed could be made to Mr. and Mrs. Nix for life, with the remainder to her daughter. Appellee stated that she and her husband agreed upon this type of conveyance. Upon being told that Mr. and Mrs. Wilkins had the deed ready which could be obtained at the bank at Sparkman, she and her husband went to the bank for the purpose of closing the transaction; however, she was informed that the deed named only her and her husband as grantees.

"*** When they told me the deed was made out to me and R. D., I backed out. I told them at the bank that I wanted a deed made to me and R. D. for life and then to my daughter, Carolyn Hutto. I left and went back home."

She subsequently told Wilkins the reason for the refusal of the deed.

"A few days later, I heard from the bank. Was

[2]A certificate from the Chief Medical Records Librarian of the University of Arkansas Medical Center corroborated this operation.

told that the deed and the other papers were ready. R. D. and I went to the bank. I asked if they had the papers fixed right this time and sort of laughed. He told me it was to me and R. D. for life and then to Carolyn. I didn't question it further and paid the money and signed the note."

Her recollection was that her conversation was with a Mr. Hayes at the bank, who reported that Mr. and Mrs. Wilkins had signed another deed before a Justice of the Peace, and had brought the instrument to the bank. The payments made by Nix and wife were paid to the bank, and credited on an indebtedness owed by Wilkins to that institution, and the deed was not turned over to appellee and her husband until January, 1953.

Mr. Nix and appellee were divorced in 1958, and he deeded his interest in the property to her. She stated that she did not learn about the mistake in the deed from Wilkins until early in 1966, when she had already agreed to sell the land to a Mr. Shepherd, and, in fact, had received a partial payment[3] of $5,000.00.

The testimony of appellee is rather convincing, and in line with other evidence offered, which will be hereafter mentioned. The only weak part of her contention is the fact that it was a long number of years before the mistake was discovered. Yet, this is somewhat understandable, the evidence reflecting that she and her husband did not receive the deed until over four years after its execution, the bank having had possession until the note was paid in full. It is also understandable that, having refused one deed, because it was not properly drawn, and having been assured that the second one was drawn in accordance with her request, Mrs. Byrd accepted the word of the bank official (who probably was sincere in his statement; that the deed had been pre-

[3]Apparently the status of the title was discovered at a time when title to the property was being examined preparatory to the Shepherd sale. Mrs. Byrd testified that her daughter, Carolyn, was willing to convey her interest to appellee.

pared in a manner to carry out her instructions. It must be remembered that Mrs. Byrd was not a lawyer, but a person totally untrained in, and unfamiliar with, legal terminology, and it is undisputed that the deed was prepared by someone other than an attorney or agent for appellee.

Aside from the testimony of Mrs. Byrd, there are other facts which support her version. For one, Mr. and Mrs. Wilkins, when notified of the purported error, immediately executed a Correction Deed, conveying the property in the manner contended for by Mrs. Byrd. One of the strongest circumstances in her behalf is the fact that within a month after the purchase of the Wilkins property, Mr. and Mrs. Nix also purchased 40 acres of land from Mrs. Elsie Richardson, the language in the deed being in accord with the language that Mrs. Byrd says was intended for the Wilkins deed. The granting clause states, "***do hereby grant, bargain, sell and convey unto the said R. D. Nix and Lena Nix, and upon the death of both R. D. Nix and Lena Nix, then unto Carolyn Hutto and unto her heirs and assigns forever***."

The Richardson deed was a completely typewritten instrument, evidently prepared by someone familiar with legal requirements. A warranty deed form was used by the scrivener of the Wilkins deed with the granting and habendum clauses filled in by such scrivener, apparently either an employee of the bank or the Justice of the Peace who acknowledged execution of the instrument. In *Sherwin-Williams Company* v. *Leslie,* 168 Ark. 1049, 272 S. W. 641, we held:

"***Mrs. Fowler was entitled to a reformation of the deed of trust so as to include the lands in controversy, under the uncontroverted proof that it was the mutual intention of all parties to that deed of trust that such lands should be included and that it was omitted merely through oversight of the scrivener who prepared the deed of trust."

In *Stimson* v. *Ray,* 79 Ark. 592, 96 S. W. 141, we said:

"*** According to the terms of their agreement a right of way eight feet wide, north and south, and extending due east from Depot Street, a distance of forty feet, and lying south of and adjacent to the land sold should have been conveyed. The draughtsman who drew the deed evidently did not understand the contract of the parties; and the grantor executed it without discovering the error. The evidence adduced at the hearing, clearly, unequivocally, and decisively proves these facts."

The proof is actually uncontradicted that a mutual mistake was made in the original Wilkins conveyance to Mr. and Mrs. Nix, and we consider the evidence to be clear, cogent, and convincing.

Affirmed.

FIRST AMERICAN NATIONAL BANK *v.* CHRISTIAN FOUNDATION LIFE INSURANCE COMPANY ET AL

5-4168 408 S. W. 2d 912

Opinion delivered May 29, 1967

[Petition for rehearing withdrawn December 4, 1967.]

Spitzberg, Bonner, Mitchell & Hays, for appellant.

Shaw & Shaw and *Wright, Lindsey & Jennings;* By: *George E. Lusk Jr.*, and *Pope, Pratt, Shamburger, Buffalo & Ross,* for appellees.

George Rose Smith, Justice. This is a suit brought by one of the appellees, Christian Foundation Life Insurance Company, for a declaratory judgment with respect to the validity of certain duplicate bearer bonds ostensibly issued by the First Methodist Church of Mena. That duplicate bonds were outstanding was due to the fraud of the late Lawrence Hayes, former president of Institutional Finance Company, which handled the bond issue as fiscal agent for the church. Parties to the suit include the rival owners of the duplicate bonds, the church and its trustees, the Union Bank of Mena, which acted as paying agent for the bonds, the estate of Hayes,

the receiver for Institutional Finance, and the corporate surety upon Institutional Finance's qualifying bond as a securities dealer.

The chancellor apparently viewed the case as being primarily a contest between the appellant, First American National Bank of North Little Rock, which holds $28,800 of the bonds, and Christian Foundation Life and Charles R. Richards, who purchased respectively $20,000 and $5,000 of bonds that are duplicates of some of those held by First American. The chancellor, without stating a reason for his decision, found that First American's bonds are void and that the duplicates held by Christian Foundation Life and Richards are valid.

We need state the facts only in broad outline. On January 19, 1964, the church adopted a resolution authorizing a $90,000 bond issue for the construction of a new church and employing Institutional Finance as its fiscal agent to market the bonds. On the same day the church treasurer, Bettie Jean Montgomery, in the presence of the pastor and a trustee of the church, affixed her signature to a blank sheet of paper and delivered it to Joe B. Springfield, executive vice-president of Institutional Finance, for use as a facsimile signature upon the bonds.

Two days later Springfield requested a printing company to print the bonds, which were numbered from 1 to 188 and totaled $94,000. (The record does not explain why an extra $4,000 of bonds was printed.) On January 30 the printer delivered the bonds to Springfield. They bore the facsimile signatures of Springfield and Mrs. Montgomery, with no provision for an authenticating manual signature.

Institutional Finance sold $45,000 of the bonds to members of the church but had trouble in finding buyers for all the rest of the issue. On July 3, 1964, Hayes personally borrowed $25,000 from First American National Bank and pledged as collateral, along with other

securities, $27,000 (later increased to $28,800) of the Mena church bonds. There is no sound basis for questioning the bank's standing as a good faith purchaser for value, as those terms are defined in the Uniform Commercial Code. Ark. Stat. Ann. § 85-1-201 (Add. 1961). Hayes had borrowed money from the bank on a number of occasions. The bank's president, who handled this loan, understood Hayes to be an employee of a Texas dealer in church bonds and was unaware of his connection with Institutional Finance. Nothing in the transaction warned the bank that Hayes did not own the bonds.

On February 1, 1965, Hayes fraudulently ordered the printer to print $25,000 of numbered bonds that included duplicates of some of those pledged to the bank. Later in the month Hayes, in order to complete a sale to Christian Foundation Life, had printed additional bonds in certain larger denominations requested by that insurance company. The duplicate bonds now held by Richards and Christian Foundation Life are among those obtained by Hayes in the two supplemental printings.

We find no merit in the appellant's insistence that its adversaries were not purchasers in good faith because they bought the bonds at discounts of 10 and 15 per cent. We have held that the price paid for a negotiable instrument may be so grossly inadequate as to support a finding of bad faith, *Hogg* v. *Thurman*, 90 Ark. 93, 117 S. W. 1070, 17 Ann. Cas. 383 (1909), but there is no proof in this record to indicate that the discounts offered to the appellees were so great as to arouse suspicion. Nor is there evidence to sustain the appellant's argument that the purchasers of the duplicates should have been put upon inquiry by the church's apparent inability to market the entire bond issue within a period of about a year.

Hayes's dishonesty finally became known when duplicate interest coupons were presented to the Mena

bank for payment. The paying agent refused to honor the coupons until their validity had been established. Hence this suit.

We think the chancellor should have found all bonds held by bona fide purchasers to be binding obligations of the church. It is plain enough that the church was careless in entrusting its treasurer's facsimile signature to Institutional Finance and in failing to take the precaution of requiring authentication of the bonds by a manual signature. By contrast, the holders of the bonds acquired them in the ordinary course of business and in circumstances entitling them to the protection afforded to bona fide purchasers.

The case is controlled by the pertinent provisions of the Uniform Commercial Code. Before the adoption of the Code the church might have been held liable by contract to one purchaser and in damages to the other, but the draftsmen of the Code point out in their Comment to our § 85-8-202 that the Code simply validates most defective securities in the hands of innocent purchasers, refusing to prefer one such purchaser over another.

Specifically, this controversy falls within § 85-8-205, which provides that an unauthorized signature is effective in favor of an innocent purchaser when the signing is done either by a person entrusted by the issuer with the signing of the security or by an employee of such person or of the issuer itself. By resolution the church employed Institutional Finance as its fiscal agent to handle the sale of the bonds. The first line of the printed prospectus for the bond issue identified that concern as the issuer's fiscal agent. There can hardly be any serious contention that Hayes's wrongful use of the treasurer's facsimile signature did not fall within the purview of the Code.

We are not impressed by the appellees' argument that the appellant's acquisition of its bonds was in violation of our constitutional declaration that "No private

corporation shall issue stocks or bonds, except for money or property actually received or labor done." Ark. Const., Art. 12, § 8. Even if the church is to be considered a private corporation, which we need not decide, it is confronted by the fact that its agent actually received money for the bonds. That the money did not reach the church treasury was not the purchasers' fault.

It is too early at this stage of the litigation to reach a final conclusion about the exact remedies of the bondholders. The church's refusal to pay interest was not absolute, being conditioned upon its uncertainty about the validity of the outstanding bonds. Under the Code it is liable to all bondholders who bought in good faith. It does not follow, however, that all bondholders stand in parity if it becomes necessary for them to foreclose the lien against the church property. First American's priority in time entitles it, as against the holders of duplicate bonds, to priority of lien, under the equitable maxim that as between equal equities the first in time must prevail. *Miller* v. *Mattison,* 105 Ark. 201, 150 S. W. 710 (1912). If the law were otherwise the security interest held by bona fide purchasers of a bond issue could be diluted by the later wrongful sale of duplicate bonds. The cause must also be remanded for the development of the bondholders' remedy against Institutional Finance and its surety.

Reversed and remanded.

JONES, J., dissents.

J. FRED JONES, Justice, dissenting. I do not agree with the conclusion reached by the majority in this case, nor do I agree with the decision of the chancellor.

Our Uniform Commercial Code, Ark. Stat. Ann. § 85-8-202 (3) (Addn. 1961), is as follows:

> "Except as otherwise provided in the case of certain unauthorized signatures on issue (section 8-205 [§

85-8-205]), lack of genuineness of a security is a complete defense even against a purchaser for value and without notice."

Just what constitutes the genuineness of a security is not set out in chapter 8 of the Code on investment securities, but § 85-1-201 contains forty-six numbered general definitions, one of which is as follows:

"(18) 'Genuine' means free of forgery or counterfeiting."

The First Methodist Church of Mena authorized the Institutional Finance Company to print and sell $90,000.00 worth of bonds. Under this authorization Springfield, who was executive vice-president of Institutional Finance, and who held title to church property in trust to secure the payment of the bonds, fully carried out, and in fact exceeded by $4,000.00, the authority given him by the church. He had bonds printed with consecutive numbers from 1 through 188 in the total amount of $94,000.00. Some of these identical bonds came into the hands of the appellant, First American National Bank, as a bona fide purchaser for value under the Code.

After the entire issue authorized by the church had been printed by Springfield, Mr. Hayes, the president of Institutional Finance, had printed unauthorized duplicates of the bonds authorized by the church and printed by Springfield, and without the knowledge of, or authority from, First Methodist, sold these duplicate bonds to Christian Foundation Life Insurance Company and to C. R. Richards, who were also bona fide purchasers for value under the Code.

It is my view that the duplicate bonds printed without authority and certainly with the apparent intent to defraud, were forged counterfeits of the original bonds and lacked the genuineness of the original authorized bonds, and that their lack of genuineness was a complete defense even against Christian Foundation and Reverend C. R. Richards.

The Commercial Code contains numerous definitions and comments of intention for its use and operation but, it contains no definition of "forgery" or "counterfeit" as would affect the genuineness of bonds. Black's Law Dictionary defines "forge" as follows:

> "To fabricate, construct, or prepare one thing in imitation of another thing, with the intention of substituting the false for the genuine, or otherwise deceiving and defrauding by the use of the spurious article. To counterfeit or make falsely. Especially, to make a spurious written instrument with the intention of fraudulently substituting it for another, or of passing it off as genuine; or to fraudulently alter a genuine instrument to another's prejudice."

"Forgery" is defined as:

> "The falsely making or materially altering with intent to defraud, any writing which, if genuine, might apparently be of legal efficacy or the foundation of a legal liability."

"Counterfeit" is defined in Black's as:

> "To forge; to copy or imitate, without authority or right, and with a view to deceive or defraud, by passing the copy or thing forged for that which is original or genuine."

Over one hundred years ago this court defined forgery as having a fixed legal meaning, "It is the fraudulent making or alteration of any writing to the prejudice of another man's rights, or a false making, *malo animo,* of any written instrument, for the purpose of fraud or deceit * * * to forge or counterfeit the instrument is to create or make it." *Van Horne* v. *The State,* 5 Ark. 249.

Under the majority holding in this case, once authority is given to an unscrupulous agent to print and sell a limited number of bonds over a facsimile signature, the

principal or issuer has no further protection from being bound by such individual. A revocation of authority, or even confinement in the penitentiary, would offer no protection. Such agent or ex-agent, would be able to bind his former principal, or the issuer of bonds, for as long as such agent could find innocent purchasers and access to a printing press.

I would reverse the chancellor in this case and hold that the original bonds held by First American are genuine and legal bonds, but that the duplicates sold to Christian Foundation and Reverend Richardson are forged counterfeits of the originals and are not genuine but are void as binding obligations of First Methodist.

KALE PAYNE *v.* E. LEROY JONES ET UX

5-4195 415 S. W. 2d 57

Opinion delivered May 29, 1967

Spencer & Spencer and *Don Gillaspie*, for appellant.

J. S. Thomas and *Bernard Whetstone*, for appellees.

GEORGE ROSE SMITH, Justice. This is a habeas corpus proceeding by which the appellant, Kale Payne, seeks to obtain custody of his son, Dean Thomas Payne, who was two years and two days old when Kale's petition was filed on November 24, 1965. The original defendants were the Reverend and Mrs. E. Leroy Jones, appellees, to whom the child's mother, Betty Jean Payne Ford, had attempted to give the child. Mrs. Ford intervened in the case; but she has not appealed from the decree, which found her to be unfit to have the child. The pivotal question is whether Kale has forfeited his right, as against strangers, to have the custody of his own son. We find the chancellor's conclusion that Kale is unfit to have the custody of his child to be against the weight of the evidence.

Both of the child's parents have been married three times. Kale first married his present wife, Marilyn Sue, in 1957, when they were both children—eighteen and sixteen years old. That marriage ended in divorce in August, 1959. A year later Marilyn Sue bore a son, concededly fathered by her former husband, Kale.

After that divorce Kale was drafted and served two years in the army, stationed in Texas and Kansas. He testified that he meant to remarry Marilyn Sue, but he met Betty Jean Admire in Kansas City, started going with her, and eventually married her in 1961. That marriage was not a happy one. The couple had separated five months before their child—the infant now in controversy—was born in Dallas on November 22, 1963. Kale obtained an uncontested divorce in Missouri on February 3, 1964. The decree awarded custody of the child to Betty Jean and directed Kale to pay $30 a month to support

the child. Four days later Kale remarried his first wife, with whom he has lived in apparent harmony ever since.

Betty Jean Admire was a divorcee when she married Kale in 1961. After her second divorce she married William J. Ford (whom she met in a bar) on March 4, 1965, and bore his son six weeks later. Their marriage has been marked by one or more separations. In a period of about eighteen months Betty Jean lived for a time in at least five states: Arizona, Arkansas, Georgia, Mississippi, and Texas. In July, 1965, she decided to give away both her children, because, as she testified, she was unable to support them. She gave Dean Thomas Payne to the Joneses and gave her other son, Rickey Dale Ford, to another couple who also live in El Dorado, Arkansas.

Kale learned of the situation in August or September of 1965, when he was asked to consent to his son's adoption by the Joneses. Kale refused that request and at once filed a petition in the Missouri divorce case to win back the legal right to the custody of his child. The Missouri court, after the child's mother had been served by warning order, granted the requested change of custody on November 15, 1965. Nine days later Kale filed the present habeas corpus proceeding against the Joneses, who had had the child in their home for about four months. There was almost no proof about the Joneses' fitness to have the child, but in the view we take that omission is immaterial.

To take a parent's child away from him and give it to strangers is an extreme measure—a step which the courts should and do take only when the evidence clearly justifies such a course. Here, as a practical matter, the award of custody to the appellees would in all probability deprive Kale of his child just as permanently and just as effectively as if the boy had been adopted by the Joneses. In *Woodson* v. *Lee,* 221 Ark. 517, 254 S. W. 2d 326 (1953), we said that the right of natural parents to the custody of their children, as against strangers, is "one of the highest of natural rights, and

the state cannot interfere with this right simply to better the moral and temporal welfare of the child as against an unoffending parent." We also said that "abandonment by a parent, to justify in law the adoption of his child by a stranger without his consent, is conduct which evinces a settled purpose to forego all parental duties continued for a prescribed period of time when the statute so provides. Merely permitting the child to remain for a time undisturbed in the care of others is not such an abandonment."

In the case at hand there is no sound basis for finding that Kale abandoned his son. Dean Thomas was only two and a half months old when his parents were divorced. It was to be expected that the court would award custody to the mother. Needless to say, no finding of abandonment can be based upon Kale's acquiescence in his former wife's custody of the baby. We pointed out in *Brown* v. *Brown*, 218 Ark. 624, 238 S. W. 2d 482 (1951), that a divorce decree awarding a child to the mother merely establishes the right of custody during the lives of the two parents. Upon the death of the mother (or, as here, her surrender of her claim to custody) the father's right to custody is revived.

It is argued that Kale evinced an intention to abandon his son by failing to pay part of the hospital expenses when the child was born and by frequently being late in forwarding the monthly support payments. Most of the hospital bill was paid by the Government, as Kale was in the service. Betty Jean's mother paid the rest and is not shown to have requested reimbursement. We all know that fathers are often tardy or even completely remiss in making support payments, but that does not prevent them from regaining custody of their children. In the *Brown* case, *supra,* the father was cited for contempt for his failure to support his children, but he nevertheless regained them after their mother's death. Here Kale testified without dispute that he made or tendered all the payments that accrued before Betty Jean relinquished possession of the child to the Joneses.

It is also shown that Kale did not send presents to his son and saw him only twice (once in the hospital and once in Missouri) before this proceeding came on for trial. We certainly cannot attach controlling importance to such conduct with respect to a child so young as to be unable to appreciate his father's presents or presence. Betty Jean testified that at one time Kale agreed that Ford might adopt the boy. Kale denies that statement, but even if it were true there is all the difference in the world between relinquishing a child to his mother and stepfather and relinquishing him to perfect strangers. There is concrete evidence of Kale's desire for his son in the promptness with which he brought this proceeding and in the steadfastness with which he has pursued it.

Apart from Kale's unhappy marital experiences the only testimony tending to prove his unfitness to have his son comes from the Fords and is manifestly tinged with venom. They say that Kale drank about nine cans of beer and used profanity during a protracted interview in Missouri, when the Fords succeeded in collecting four months of back support money by threatening to file suit. Kale denies that testimony, but in any event the incident was far too trival to serve as a basis for depriving Kale of his son.

On the other side of the ledger the affirmative proof of Kale's fitness is convincing. Except for his military service Kale has held the same job with General Motors for eight years, earning three dollars an hour as an assembly-line worker. He and his wife and their son live in a permanent trailer park in Kansas City. They take their son to church. Five close neighbors testified that the Paynes are of good character, that their home is clean and well kept, and that their child is neat and well behaved. The testimony of those disinterested witnesses effectively rebuts the biased statements coming from the Fords. Finally, it is of course desirable that Dean Thomas have the companionship of his half brother while the two boys are growing up.

The decree must be reversed and the cause remanded for the entry of a decree awarding custody to the child's father, with reasonable visitation rights in the mother. Since it is plainly desirable that the change of custody be made as soon as possible an immediate mandate will be ordered, as in *Tassin* v. *Reynolds,* 222 Ark. 363, 260 S. W. 2d 462 (1953), to prevent the matter from being carried over until the court reconvenes in the latter part of the summer.

HARRIS, C. J., and BROWN, J., dissent.

CARLETON HARRIS, Chief Justice dissenting. The cardinal rule in deciding child custody cases, so often stated as to need no citation of authority, is that the court makes its determination in accordance with the best interests of the child.

I cannot consider, under the testimony in this case, that the little boy's best interest is served by his custody being awarded to the father. It appears, from the evidence, that, although he had only been ordered to pay $30.00 per month for the support of the child, Payne was frequently tardy in making these payments, and there is evidence that he was at one time behind in the amount of $120.00. When the little boy, Dean, was born, the government paid part of the hospital expenses, and Payne's wife and her mother paid the balance. Apparently, no support has been paid at all since July, 1965. This father, according to the record, had not seen this child from the time that Dean was two weeks old until the time of this court hearing. Payne's present wife had never seen the child before the court hearing.

The majority opinion is somewhat critical of the witnesses who testified to the effect that appellant is not a proper person to have the custody of his son, mentioning that this testimony is "manifestly tinged with venom." I can only point out that the Chancellor saw these witnesses when they testified, and, of course, had a much better opportunity to determine which witnesses

were telling the truth. He reached the conclusion that Payne was not a proper person to have custody of the child, and that the little boy's welfare would be best served by leaving his custody with Reverend and Mrs. Jones.

It is true that there is no testimony in the record relating to the Joneses, their character, or their suitability for custody of the youngster.

Accordingly, I would remand this case to the Union Chancery Court for the purpose of taking testimony relative to the character of Reverend and Mrs. Jones, their facilities for taking care of the child, etc., as a matter of determining the propriety of placing the custody of Dean with them.

I, therefore, dissent to the reversal.

LYLE BROWN, Justice, concurring in part and dissenting in part. I agree with the majority opinion insofar as it reverses the case. However, I disagree with that part of the opinion which vests custody of the child in Kale Payne. This does not mean I would presently award custody to Rev. E. Leroy Jones. I think the ability and desire of Rev. Jones to have custody should be further explored and made a matter of record. He did not testify at the trial. The father has a two-bedroom trailer and resides at a trailer park in Kansas City. He resides there with his wife and child and proposes to take young Dean there to live. The record before us is very limited with respect to the total environment in which the child will be placed. This is true whether custody be granted to Rev. Jones or to the father.

There were two hearings before the trial court. The first one was continued by the presiding judge for the stated purpose of calling upon the child welfare division of the state welfare department for assistance. It may well be that valuable information was furnished the trial judge, but it is not in the record.

From the present state of the record we must choose between a father whose past habits are not commensurate with a wholesome atmosphere for the child, and a third party about whom we know very little. If the trial court is in the same predicament—short of his judgment of the demeanor of the witnesses—then I contend the record needs to be more fully developed. If the trial court has information which is not in the record then the cause should be reopened in order that the record can be completed.

HOME MUTUAL FIRE INSURANCE CO. *v.* WALTER HAGAR ET UX

5-4228

Opinion delivered May 29, 1967

Peter G. Estes, for appellant.

Crouch, Blair & Cypert, for appellee.

GEORGE ROSE SMITH, Justice. This is an action by the appellees upon an extended-coverage insurance policy to recover $1,131.20 for hail damage to their dwelling house and trailer. The jury returned a $1,000 verdict for the plaintiffs.

The judgment must be reversed for error in the admission of evidence. The principal damage was to the aluminum siding on the house. Over the defendant's objection the plaintiff was allowed to introduce a letter from an aluminum dealer in Missouri, stating that the damage could be repaired for $780. The author of the letter was not offered as a witness; so the letter was inadmissible, being hearsay evidence. *New Empire Ins. Co.* v. *Taylor,* 235 Ark. 758, 362 S. W. 2d 4 (1962). It was unquestionably prejudicial, for the other estimates of damage did not amount to as much as the verdict.

The appellees argue that the appellant did not properly object to the letter. Counsel stated: "Note my exceptions and objections, Your Honor, for the reason there is no proper foundation laid." We think the objection as sufficient. While counsel did not use the word "hearsay," he did indicate his contention that the letter was not admissible without some foundation or identification, other than the plaintiff's bare statement that it was an estimate from Southern Aluminum Discount Company. We used rather similar language in *Lynch* v. *Stephens,* 179 Ark. 118, 14 S. W. 2d 257 (1929), where, in commenting upon the inadmissibility of a written statement apparently made by an engineer or a bookkeeper, we remarked: "There is no explanation offered for the failure to put the engineer or the bookkeeper on the stand to testify, the only witnesses that could have testified about the amount of work done and the amount of money received."

The only other asserted errors that might recur upon a new trial (appellant's Points 1, 2, and 4) involve an interpretation of the application for the policy and the policy itself. Neither instrument is abstracted by the

appellant; in fact, the policy is not even in the record. Hence we cannot review those assertions of error.

Reversed and remanded for a new trial.

PROCTOR TIRE SERVICE INC. *v.* NATIONAL SURETY CORP.

5-4250 415 S. W. 2d 45

Opinion delivered May 29, 1967

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

Smith, Williams, Friday & Bowen; By: *Frank Warden Jr.*, for appellee.

GEORGE ROSE SMITH, Justice. Wright Contracting Company was the principal contractor for the construction of part of Interstate Highway 40 in Lonoke county. Wright executed a statutory contractor's bond, with the appellee as its surety, to guarantee the payment of claims for "materials entering into the construction or necessary or incident to or used in the course of con-

struction" of the highway. Ark. Stat. Ann. § 14-604 (Supp. 1965).

The appellant, a tire dealer at Hazen, sold $4,433.21 worth of truck tires and tubes to Flint Construction Company, a hauling concern that was working on several jobs in the vicinity of Lonoke and Pulaski counties.

One of Flint's jobs was that of hauling dirt as a subcontractor for Wright on the Interstate 40 project. With a trivial exception, none of the tires and tubes sold by Proctor to Flint were used on the Interstate 40 job or were even intended by Flint to be used on that job. Nevertheless, Proctor insists that it is entitled to recover the delinquent Flint account from the appellee, simply because Proctor believed, mistakenly but sincerely, that its tires and tubes would be used by Flint as Wright's subcontractor. The trial court, upon proof that is virtually undisputed, made findings of fact in favor of the defendant-appellee. We affirm his decision.

Flint, in the performance of its subcontract with Wright, did not use its own trucks. Instead, it leased trucks from men who are referred to as brokers—independent truckdrivers who owned and operated their own vehicles. The brokers furnished their own tires and other accessories. Their trucks bore a painted inscription, "Leased to Flint Construction Company."

Flint itself owned a fleet of trucks, based in Little Rock. All the tires and tubes sold by Proctor to Flint were delivered to Flint in Little Rock and were mounted by Flint on its own trucks. With one exception the Flint trucks were used exclusively on jobs other than the Interstate 40 project. The exception: Flint's dispatcher drove a loaded truck to the Interstate job on one occasion, but there were so many brokers waiting in line to deliver their loads that no other Flint-owned truck was ever sent to that job. The proof indicates that of 3,000 truckloads of dirt delivered to the job only that one load was carried in a Flint-owned vehicle.

Cecil Proctor, who with his wife owns the appellant company, testified that when he sold the supplies to Flint he knew that Flint was hauling for Wright as a subcontractor on the Interstate 40 contract. He made no investigation of where else Flint might be hauling. A local representative of the Goodyear Tire & Rubber Company, whose products were sold by Proctor, made a superficial investigation, but he too failed to uncover the readily ascertainable fact that Flint was working on a number of jobs in addition to the one for Wright.

The appellant, citing several federal cases construing a federal statute, puts the issue in this language: "May a supplier recover the purchase price under a construction bond for goods sold and delivered to a subcontractor where the supplier intended in good faith and reasonably believed that such goods would be used on the bonded job, or must he show that such goods were actually used in the construction of the work?" We think a better statement of the issue would be: "May a supplier compel a principal contractor or its surety to pay for supplies that were not used on the job and were never intended by the purchaser to be so used, merely because the seller erroneously concluded, upon inadequate investigation and with no element of estoppel or misrepresentation, that the supplies would be used upon that particular bonded job?" The question answers itself. We do not stop to discuss the cases cited, for they bear little resemblance to the fact situation now before us. It is plain enough that if the appellant should be held to be entitled to judgment in this case, principal contractors and their sureties would have absolutely no way to protect themselves against liability for supplies sold to subcontractors for use elsewhere.

Affirmed.

ARKANSAS LOUISIANA GAS CO. *v.* MORGAN A. MAXEY, ET UX

5-4150 415 S. W. 2d 52

Opinion delivered May 29, 1967

Henry & Boyett and *Robinson, Thornton, McCloy & Young,* for appellant.

Lightle & Tedder, for appellees.

PAUL WARD, Justice. This is an eminent domain case.

On October 20, 1964 Arkansas Louisiana Gas Company (appellant) filed a complaint in circuit court to condemn a strip of land eighty feet wide across a 1,000 acre farm, owned by Morgan A. Maxey and his wife (appellees), "for the purpose of constructing, operating and maintaining" a twenty-four inch pipe line. The actual land taken was 12.4 acres. On the same day the court, after taking testimony, authorized appellant to enter immediately upon the land for construction purposes. This was on condition that appellant deposit $820 in court to cover cost of land taken and any damages "which might accrue to the premises because of the condemnation. . ."

Nearly a year later (after the construction was completed) appellees filed their answer, alleging that "they have suffered damages by reason of the condemnation . . . and by construction of the pipe line . . . in an amount in excess of $7,500," and asking judgment for said amount.

Upon trial the jury assessed appellees' damages at $5,500 for which amount the trial court (on April 1, 1965) entered judgment. From said judgment appellant now prosecutes this appeal for a reversal, relying on two assignments of error.

One

> "Restoration cost was not a proper element for the jury's consideration in arriving at the measure of damages suffered by the landowner."

Two

> "There was no fair or reasonable basis for the opinion evidence given by Henry Plant or Dorothy Beckman."

We will not discuss Point Three, which challenges the amount of the verdict, because we find that the case must be reversed on other grounds.

One. We are unable to agree with appellant's contention that restoration cost was not a proper element to be considered by the jury in this case. The factual situation in this case is similar, in material respects, to that in *Ross* v. *Clark County,* 185 Ark. 1, 45 S. W. 2d 31. There the Court announced rules to be followed on retrial which are applicable and controlling in the case here. In the cited case we said:

> "In other words, the appellant was entitled to recover the market value of all land taken, and damage done to land not actually taken . . ."

See also *Arkansas Louisiana Gas Company* v. *Katherine E. Burkley et al,* delivered by this Court May 22, 1967.

As will be pointed out hereafter, appellees do contend their land (not taken) was damaged and, if proven, they should recover for same.

Two. We have concluded, however, this case must be reversed because improper evidence was introduced to show damages done to the land not taken, and also as to the land taken. There are two separate errors which call for a reversal.

First, appellees attempted to prove the value of timber removed from the land taken. This is not an element of damage under our decision in the *Burkley* case mentioned above wherein we held, in a case of this kind, the condemnor must pay "the full value of land embraced within the right-of-way easement as if the fee had been taken". We think it must follow, therefore, that appellant will have paid for all timber on the land taken when they pay for such land.

Secondly, without considering the error just pointed out, the case must be reversed because of incompetent testimony introduced to prove damages to the land not taken. We deem it unnecessary to point out in detail the incompetent testimony referred to. We merely call attention to the fact that the witnesses did not, in our judgment, qualify to give their opinions as to the damages. In the case of *Arkansas Highway Commission* v. *Byars,* 221 Ark. 845, 256 S. W. 2d we 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."

This rule was not complied with by appellees' witnesses in this case. We call attention to the rule so that it may be followed upon a retrial.

Reversed and remanded.

FOGLEMAN, J., disqualified.

BROWN BROADCAST, INC. *v.* PEPPER SOUND STUDIO, INC. ET AL

5-4214 416 S. W. 2d 284

Opinion delivered May 29, 1967

[Rehearing denied July 26, 1967.]

Bob Dawson, for appellant.

Gordon & Gordon and *Clark, Clark & Clark*, for appellees.

PAUL WARD, Justice. This appeal comes from litigation involving the sale of a radio station (KVEE) located at Conway. The principal issue concerns what, if any, liabilities the purchaser assumed.

The original owners of the station prior to 1964 were J. C. Willis, Hugh C. Jones, Harold J. Nichols, and William E. Cooper (referred to as "Partners"). The purchaser was Brown Broadcast, Inc., appellant. The other party involved is Pepper Sound Studio, Inc.,

a corporation domiciled in Tennessee at Memphis, referred to as "Pepper".

On April 13, 1964 Partners and Pepper entered into a written contract designated as "Creative Sales Service Agreement", referred to as "contract". The contract obligated Pepper to lease to Partners certain "sound production and promotion materials" over a period of five years—to be used by Partners for one-minute-spot advertising purposes. For said service, the contract obligated Partners to pay Pepper $1,908 in equal monthly installments of $31.80.

On July 29, 1965 Partners sold the station to appellant, the sale being evidenced by a comprehensive written instrument.

A few months after the sale to appellant the monthly payments became delinquent and Pepper filed a complaint against appellant and Partners asking for specific performance of the contract against appellant or, in the alternative, for judgment against both defendants "for the sum of $31.80 per month for December, 1966 and each month thereafter in which plaintiff (Pepper) performs its contract to KVEE". Partners answered, denying they owed appellant anything and stating they had transferred the lease agreement and all other property rights in the station to appellant who agreed to assume the contract. Replying, appellant denied any knowledge of the contract, and stated it assumed no obligations therein contained. There were other pleadings but it is not necessary to refer to them at this time.

Upon trial, the court found: (a) Partners are not released from the contract; (b) appellant and Partners owe Pepper $381.60, being the balance due for materials furnished to the station; (c) Pepper is entitled to specific performance of the contract, and; (d) appellant owes Partners for balance of purchase price of the station.

On appeal, appellant relies on four separate points or assignments of error for a reversal. They will be rephrased, and may be sufficiently examined, as follows:

One, Pepper is a foreign corporation, not authorized to do business in Arkansas, and therefore is not permitted to use the courts of this State to enforce a contract in this State. *Two,* there is no competent testimony to show appellant assumed the contract. *Three,* Partners did not come into equity with clean hands and, therefore, are not entitled to any relief.

One. It is admitted that Pepper has not complied with Ark. Stat. Ann. § 64-1201 (Repl. 1966) by filing a copy of its charter with the Secretary of State. Based on this fact appellant contends Pepper has no right, under the provisions of Ark. Stat. Ann. § 64-1202 (Repl. 1966), to maintain this action. We do not agree. If the contract here sued on was made in Tennessee it was not necessary for Pepper to comply with the section first mentioned. It was so held and fully explained in *UPI* v. *Hernreich, d/b/a Station KZNG,* 241 Ark. 36, 406 S. W. 2d 317. In Pepper's complaint it is alleged that this contract was "accepted by plaintiff at his home in Memphis, Tennessee." Appellant, in its answer, admitted the above allegation was true. The notes, themselves, show they were executed in Memphis. We find no evidence in the record to show the contract was executed in Arkansas. In *UPI,* supra, we approved 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.' "

Two. It is here insisted by appellant, in essence, that the weight of the testimony does not sustain the finding by the trial court that appellant assumed the terms and obligations of the contract made by Pepper and Partners. Again, we cannot agree.

In the first place the sales contract between appellant and Partners, in paragraphs 1 and 1 (c), provides that the "Buyer (appellant) shall acquire from Sellers . . . all contracts, agreements, franchises, leases . . . in effect currently on or on closing date, except as provided in paragraphs 11 and 12 hereof". These two named paragraphs do not exclude the contract here in question. On the contrary, paragraph 11 recites that appellant shall assume all contracts and agreements "described in paragraph 1 (c) ". We think it is made clear that appellant had knowledge of the contract.

We think the record fully supports a finding by the trial court that appellant knew of the contract and assumed the same. Mr. Hill testified that Robin Brown, president of appellant, told him the stations were using services provided under the contract after October 1, 1965. He also testified that, at the time of the trial, the "spots" were being run to the satisfaction of Pepper.

Three. The trial court, under proper pleadings, also gave Partners judgment against appellant for the balance due under the sale of the station. The only objection by appellant to the court's action is that Partners did not come into a court of Equity with clean hands. The only basis for this objection are the matters previously discussed. Considering the conclusions already reached, we find nothing to justify us in holding Partners came into court without "clean hands". Nor do we find anything in the record which reflects unfavorably on Partners.

Affirmed.

IDA WILHITE *v.* ELMER WILHITE ET AL

5-4251 415 S. W. 2d 44

Opinion delivered May 29, 1967

James F. Daugherty, for appellant.

George P. Eldridge, for appellee.

PAUL WARD, Justice. This litigation was instituted to determine if a widow has any rights, upon death of her husband, in a homestead consisting of eighty acres, which he had deeded away (without her knowledge) ten days before they were married.

The basic facts, about which there is no dispute, are as here set out. Fred Wilhite and his first wife (who died prior to 1944) had five children who are the appellees on appeal, and will be referred to as such. On April 24, 1944 Fred executed a warranty deed to appellees conveying the land in question, and had the deed recorded. On May 4, 1944 Fred was married to Ida who is the appellant herein. They lived on the land until his death, and then she remained there until the dwelling burned down. Neither appellant nor any of the appellees knew of the execution of the deed by Fred until shortly before this suit was filed on August 30, 1965.

On the above date appellees filed suit in chancery court against appellant asking for a declaratory judg-

ment to declare "that the defendant, Ida Wilhite, has no interest in the property . . ." After a trial the court granted the relief prayed, and this appeal follows.

On appeal appellant asks for a reversal on four separate grounds. We find no reversible error in the last three assignments, which are: (a) We hold there was a valid delivery of the deed to appellees in this instance under the case of *McCord* v. *Robinson,* 226 Ark. 350, 289 S. W. 2d 893. (b) Appellees are not estopped to assert their claim because of the long delay. Appellees filed their complaint herein promptly after learning of their rights under the deed. (c) The complaint described the lands as being in "Township Five (5) North" when it should have been in "Township Four (4) North" as appears in the deed. However, all the testimony clearly discloses this was merely a typographical error which can be corrected without prejudice to any one.

First Point. It is our conclusion that the case must be reversed because appellant was defrauded of her marital rights by the acts of her deceased husband. This Court has on several occasions considered matters of this nature. In the early case of *West* v. *West,* 120 Ark. 500 (p. 504), 179 S. W. 1017, it was said:

> "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."

In *Harrison* v. *Harrison,* 198 Ark. 64 (p. 67), 127 S. W. 2d 270, there appears this statement:

> "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." (citing cases)

The general rule, which appears to be in accord with our own cases, is well stated in 26 Am. Jur. page 806; Husband and Wife; Sec. 185.

There can be no doubt that the rule announced should apply in this case. Not only did Mr. Wilhite fail to tell appellant he had deeded away the property ten days before they were married, but he apparently misled her into thinking otherwise before and after the marriage.

Appellant testified they were engaged on February 14, 1944; that Fred told her before they married he owned the property, and; that she worked and helped to pay off a mortgage on the land after they were married.

The cause of action is, therefore, reversed and remanded for further proceedings consistent with this opinion.

ST. LOUIS SOUTHWESTERN RAILWAY CO. *v.* EARL B CLEMONS, ETC.

5-4185 415 S. W. 2d 332

Opinion delivered May 29, 1967

Coleman, Gantt, Ramsay & Cox, for appellant.

Wynne & Wynne and *W. C. Medley*, for appellee.

LYLE BROWN, Justice. This is an appeal by St. Louis Southwestern Railway Company from a jury verdict of $15,000 awarded Earl B. Clemons, as father and next friend of his fourteen-year-old son, Marion Lee Clemons. The boy is alleged to have received serious injuries from being struck by a metal strip protruding from a freight train. The railroad company contends the boy was a trespasser; that willful and wanton negligence, being the only predicate for liability, was not established as a matter of law; and that it was entitled to a directed verdict.

Marion Lee Clemons, sixteen years old at the time of trial, was the only eye witness presented by plaintiff. His testimony as to the occurrence is briefly summarized. He was returning from hog hunting around 11:00 a.m. and was walking on the rails and ties. When the train came into sight he stepped over to the side and kept walking. He happened to look up and saw what appeared to be a metal strip several feet in length. It was like metal strippings used to tie down logs and

boxes on flat cars. The strip was flapping, would hit the side of the car, bounce outward, and hit the side of the car again. He ran to a ditch some fourteen to eighteen feet from the track. The ditch was more than three feet below the level of the tracks. Notwithstanding this precaution the long, swinging strip struck him.

Neither *res ipsa loquitur,* lookout, nor discovered peril is an issue here. Marion Lee Clemons was a trespasser. The liability of the railroad was submitted to the jury on the theory of willful and wanton disregard.

Our court is committed to the majority rule that willful and wanton misconduct is, as a matter of law, higher in degree than gross negligence. *Froman* v. *J. R. Kelly Stave & Heading Co.,* 196 Ark. 808, 120 S. W. 2d 164 (1938). There it was said that "willful negligence involves the elemnt of conduct equivalent to a so-called constructive intent."

When the evidence in a given case gives rise to an inference of willfulness or wantonness, then the latter becomes a jury question. But such an inference must be reasonably inferrible before the trial court is authorized to submit the issue to the jury. See *Steward, Administrator* v. *Thomas,* 222 Ark. 849, 262 S. W. 2d 901 (1953).

The most strained interpretation of the evidence in this case on negligence would not raise the degree of negligence to willful and wanton disregard. The strongest inference that can be drawn is that the train had proceeded for an unknown distance with a long metal strip flapping from a freight car. The boy testified that since the accident he had seen similar loose strips. Appellee argues that since the engineer, fireman, or conductor did not inspect the train at the last terminal (Texarkana), the inference is left that a proper inspection was not made. The conductor testified on cross-examination that the inspection of the train was the responsibility of the car inspectors. Appellee's attorney

inquired if the conductor knew whether that inspection was made and the answer was a categorical "Yes." The train made no stops between Texarkana and the place of the mishap near Thornton.

In a situation where neither *res ipsa loquitur*, failure to keep a lookout, nor discovered peril is relied upon, we must have some evidence that the railroad's employees knew, or should have known, of a condition that would naturally or probably result in injury to a trespasser but proceeded in utter disregard of the danger. No such evidence is in the record. If a long metal strip were flapping from the train, we are left to speculate whether the break occurred fifty feet, or fifty miles, prior to striking the boy. As to the knowledge of the train crew, that time element would be most significant. It is a matter of common knowledge that within the right-of-way are located such objects as maintenance sheds, switch stands, signposts, whistle boards, signal light poles, and other structures upon which a long, flapping metal strip would most likely leave its mark. Yet we are not afforded any evidence in that respect.

The facts in *Kuchin* v. *Chicago & N. W. R. Co.*, 210 F. 2d 863 (1954), are analogous to the events in this case. Kuchin was walking along a cinder footpath used for a number of years by the general public. (Kuchin only had to establish culpable negligence in order to recover.) As the train approached Kuchin from the rear, he stepped a few feet out of the path and away from the train. He kept walking. He was struck in the back by an object protruding from the train. As the train, moving slowly, proceeded on, Kuchin saw a rod "sticking out" from one of the cars. In reversing a jury verdict the court said:

> "The plaintiff makes the further contention that the projecting bleeder rod was plainly visible, and that, therefore, it should have been observed by members of the defendant's crew. The plaintiff said he first saw the rod 'sticking out' when the car from

which it was projecting was six or seven car lengths south of the place where he was struck; that he 'saw it as soon as he got hit.' However, there is no indication as to how long the offending rod had been in that position. Neither is there any showing that members of the crew were so situated that they should have seen it irrespective of how long the condition had existed. No one would seriously contend that they were under an absolute duty to observe instantly every irregularity in the equipment regardless of its nature. To say that the train men should have seen the projecting rod and have avoided the accident, for no other reason than that the plaintiff saw it afterwards, is not a sufficient basis to support a reasonable inference of negligence."

Certiorari was denied. *Kuchin* v. *Chicago* N *N. W. R. Co.,* 348 U. S. 840 (1954). We cite the Kuchin case only to show that in a very similar fact situation, an appellate court held the facts insufficient to establish a lesser degree of negligence than willful and wanton disregard.

Appellee argues that a jury question was made as to "some degree of negligence." This statement is based on the assertion that the railroad "failed to inspect its equipment and its cars and had a metal strip protruding 16 feet from a car while the train was traveling 63 miles per hour." (The only concrete testimony regarding inspection was that elicited from the conductor by counsel for appellee. He testified that to his knowledge the car inspectors at Texarkana inspected the train.)

Starting with the assumption that some degree of negligence was established, appellee reasons that the exact degree is solely a matter for the jury. He relies strongly on the case of *Harkrider* v. *Cox,* 230 Ark. 155, 321 S. W. 2d 226 (1959). In this connection *Harkrider* holds that the distinction between *gross negligence* and *willful and wanton misconduct* is very narrow; because of the fine line of distinction, many cases arise where, under the facts in those cases, "the question is one for

the jury whether the negligence had become willful and wanton." Mr. Harkrider "deliberately and intentionally drove on the wrong side of the road at a speed of 66 feet per second under conditions which made it impossible for him to see more than 100 feet in front of him." As a result, Harkrider's guest was injured. *Harkrider* is not authority for appellee's contention that if *some* degree of negligence is shown the jury is permitted to raise it to willful and wanton disregard.

Appellee cites two cases in which this court approved verdicts for the plaintiffs being struck by objects falling or protruding from a train: *St. Louis & S. F. Rd. Co.* v. *Carr,* 94 Ark. 246, 126 S. W. 850 (1910), where a door or other object protruding from a train struck plaintiff; *St. Louis I. M. & S. Ry.* v. *Neely,* 63 Ark. 636, 40 S. W. 130 (1897), where a door fell from a freight train and injured plaintiff. Carr and Neely were not trespassers. Willful and wanton disregard was not an issue.

We come now to the question of whether this case should be dismissed or remanded. This court has long adhered to the rule so well reiterated in *Fidelity Mutual Life Insurance Co.* v. *Beck,* 84 Ark. 57, 104 S. W. 533 and 1102 (1907). The general rule is to remand common law cases for new trial. Only exceptional reasons justify a dismissal. One of the exceptions is an affirmative showing that there can be no recovery. *Pennington* v. *Underwood,* 56 Ark. 53, 19 S. W. 108 (1892). There it was said that when a trial record discloses "a simple failure of proof, justice would demand that we remand the cause and allow plaintiff an opportunity to supply the defect." To the same effect, see *Hinton* v. *Bryant,* 232 Ark. 688, 339 S. W. 2d 621 (1960).

The reversal at hand is based on failure of proof. It is not impossible that the defects in proof could be supplied on retrial. Our comment on the evidence surrounding the breaking of the strap and the lack of proof by appellee regarding inspection of the train justifies

that statement. In view of possible retrial we do not, in all fairness, point out other avenues which might be worthy of development.

Appellant contends the court erred in giving two instructions on negligence. Instruction No. 7 defined negligence (AMI 301). Instruction No. 8 explained the terms "ordinary care" and "negligence" with respect to a minor (patterned after AMI 304). It was redundant to give both. Ordinary negligence was charged only against the boy and No. 8 would have sufficed. The railroad was charged with willful and wanton disregard and that was covered in another instruction.

Reversed and remanded.

WARD and BYRD, JJ., dissent.

FOGLEMAN, J., would reverse and dismiss.

PAUL WARD, Justice, dissenting. For reasons set out below, I do not agree with the majority opinion.

(a) Marion Lee Clemons testified he was injured by a long metal strip attached to appellant's car. There is no direct testimony to the contrary.

(b) The undisputed testimony is that such strips are used in the regular course of appellant's business, and that they sometimes hang loose.

(c) There is no direct testimony that this particular car was inspected on this occasion and found in a safe condition.

(d) It cannot with reason be argued that such loose hanging strips would not constitute a serious hazard to a person on the right-of-way.

(e) It is not contended that this hazard was the result of the condition of appellant's premises, *i. e.* the right-of-way.

(f) It is only reasonable to assume that people do frequently walk on a railroad right-of-way, and that appellant is aware of this fact.

In view of the above factual situation, which is a matter for the jury only to consider, it is my conclusion that the case should be affirmed if the jury was justified in finding appellant was guilty of ordinary (not wanton and willful) negligence. This is in accord with our recent holding in the case of *George Lee Tatum* v. *Rester*, 241 Ark. 1059, 412 S. W. 2d 293.

BYRD, J., joins in this dissent.

JOHN A. FOGLEMAN, Justice, dissenting. I dissent only as to the remand of this case.

I agree with the academic statements of the majority with reference to remand of a law case for a new trial. The great difficulty is that none of them are applicable here. The statement from *Pennington* v. *Underwood,* 56 Ark. 53, 19 S. W. 108, is dictum. The court entered judgment for the defendant here instead of remanding.

I have found two cases where this court, under what were declared to be unusual circumstances, remanded a case for a new trial upon a reversal for failure of the trial court to direct a verdict. *Reynolds Metals Company* v. *Ball,* 217 Ark. 579, 232 S. W. 2d 441; *Hayes Brothers Flooring Co.* v. *Carter, Adm'x,* 240 Ark. 522, 401 S. W. 2d 6. On the other hand, there are numerous cases which were dismissed upon such a holding here. Some of them are: *Arkansas Cotton Oil Co.* v. *Carr,* 89 Ark. 50, 115 S. W. 925; *Arkansas Natural Gas Co.* v. *Gallagher,* 111 Ark. 247, 163 S. W. 791; *American National Ins. Co.* v. *Hamilton,* 192 Ark. 765, 94 S. W. 2d 710; *Temple Cotton Oil Co.* v. *Brown,* 198 Ark. 1076, 132 S. W. 2d 791; *Southwestern Bell Tel. Co.* v. *Casson,* 199 Ark. 1140, 138 S. W. 2d 406; *Kroger Grocery & Baking Co.* v. *Kennedy,* 199 Ark. 914, 136 S. W. 2d 470; *Missouri Pac. R.*

Co. v. *Moore,* 199 Ark. 1035, 138 S. W. 2d 384; *Pacific National Fire Ins. Co.* v. *Suit,* 201 Ark. 767, 147 S. W. 2d 346; *Tucker Duck & Rubber Co.* v. *Harvey,* 202 Ark. 1033, 154 S. W. 2d 828; *Twin City Pipe Line Co.* v. *Butler,* 203 Ark. 240, 156 S. W. 2d 222; *Brotherhood of Railroad Trainmen* v. *Drake,* 204 Ark. 964, 165 S. W. 2d 947; *Woodard* v. *Holliday,* 235 Ark. 744, 361 S. W. 2d 744; *Twin City Amusement Co., Inc.* v. *Salater,* 237 Ark. 206, 372 S. W. 2d 224.

It is true that in each one of the latter cases the court made the usual comment about the case having been fully developed, but I think the statement would be just as appropriate here. Be that as it may, I feel that this is an action which brings about an unfair situation. If the trial judge had directed a verdict, as we say he should, we would have affirmed and there would have been no chance for appellee to have a second attempt at his proof. Thus we have put a premium for plaintiffs on the erroneous failure of a trial judge to direct a verdict. This produces, in my opinion, a wholly undesirable and indefensible result and one that will haunt trial judges and this court from henceforth.

B. BRYAN LAREY, COMM. OF REVENUES *v.* JACK M. WOLFE, D/B/A WOLFE DRILLING COMPANY

5-4218 416 S. W. 2d 226

Opinion delivered May 29, 1967

[Rehearing denied July 26, 1967.]

Lyle Williams and *Tom Tanner* and *Hugh Brown,* for appellant.

Lester & Shults, for appellee.

LYLE BROWN, Justice. Appellee, Jack M. Wolfe, d/b/a Wolfe Drilling Company, is an oil and gas drilling contractor headquartered in Oklahoma. Two units, or rigs, of his drilling equipment were operating in Arkansas in 1965, and appellant, Arkansas Commissioner of Revenues, assessed a compensating (use) tax against the units. Wolfe paid the assessments under protest. After exhausting his administrative remedy, Wolfe successfully prosecuted this action to recover the assessments. The commissioner appeals.

Act 487, Acts of 1949, is the basic compensating tax act. The pertinent section is Ark. Stat. Ann. § 84-3106 (d) (Supp. 1965). As amended through 1961, the Act provided for certain exemptions from the use tax. These included manufacturing and processing machinery, replacement parts, and material and supplies used directly

in the mining and production of natural resources, provided they were (1) not available from Arkansas manufacturers and (2) not available from instate sellers' stock in trade. On all of those prerequisites for tax exemptions the trial court found Wolfe met the requirements. In that connection the chancellor made specific findings, which we shall discuss under two numbered topics.

1. *The drilling rigs were used directly in the mining, processing, and production of natural resources.* Appellant contends that a drilling contractor is not engaged in the mining of a natural resource. It may well be argued that the production of oil and gas does not come within the technical definition of "mining." On the other hand, those operations have several times been classed as mining. *Shell Petroleum Corp.* v. *Caudle,* 63 F. 2d 296 (5th Cir. 1933); *Rice Oil Co.* v. *Toole County,* 86 Mont. 427, 284 P. 145 (1930); *In re Great Western Petroleum Corp.,* 16 F. Supp. 247 (D. C. Cal. 1936); *Standard Pipe & Supply Co.* v. *Red Rock Co.,* 57 Cal. App. 2d 897, 135 P. 2d 659 (1943). But in enacting Section 6 (d) (exemptions), the legislature did not restrict the statute to technical definitions. To the contrary, the statute says the words "mining, quarrying, refining, and the production of natural resources" shall be interpreted as commonly understood within their ordinary meaning. Appellee Wolfe is a practicing geologist of twenty-six years experience in nine states. In the area where he operates, including Arkansas, he testified the drilling for oil and gas is considered as mining for natural resources. His testimony was not controverted.

2. *The property against which the tax was assessed is not available from manufacturers in Arkansas, nor is it available from instate sellers' stock in trade.* Appellee's testimony supported these findings. The commissioner did not controvert it.

Thus far we have not here discussed Act 125 of 1965, Ark. Stat. Ann. § § 84-3129—84-3134 (Supp. 1965).

The important question is whether that act eliminates the exemption to which Wolfe would otherwise be entitled. Act 125 provides, among other things, that *all tangible personal property* (including contractor's equipment such as Wolfe's) *procured from without the state for use, storage or consumption in this state, shall be subject to the compensating tax act.* Act 125 has no repealing clause. No exemptions are recited. The act provides it shall be cumulative to the provisions of Act 487 of 1949 as amended (Compensating Tax Act).

There are three cogent reasons why we do not think Act 125 repealed the exemption available to Wolfe under the provisions of the compensating tax act.

1. The legislature specifically provided that Act 125 would be cumulative. Black's Law Dictionary, 4th Ed., defines "cumulative" as "Additional; heaping up; increasing; forming an aggregate. The word signifies that two things are to be added together, instead of one being a repetition or in substitution of the other." In *Merchants' Coal Co.* v. *Fairmont Coal Co.,* 160 F. 769 (4th Cir. 1908), we find this statement:

> " 'Where one thing is cumulative on another, whether it be remedy, penalty, or power, we are speaking commonly of two things which are at least consistent, and might, without incongruity, be applied at the same time.' "

In *State* v. *Laredo Ice Co.*, 96 Tex. 461, 73 S. W. 951 (1903), it was stated that an act reciting that it would be cumulative indicates a harmonious coexistence and cooperation.

We conclude that the legislative intent was to harmonize Act 125 with the existing compensating tax law. Had the intent been to repeal any provision of the law then existing, the legislature was free to so recite in Act 125.

2. The stated purpose for the enactment of Act 125 was to make it clear that contractors are "consumers." In the last section we find this statement:

> "Whereas, contractors are deemed to be consumer under the provisions of Act 487 of 1949 (as amended) but some confusion as to this interpretation has existed, causing a hindrance to the proper administration of the Compensating Tax Law of this State . . . an emergency is hereby declared to exist . . ."

An omitted portion of the emergency clause above refers to the fact that additional funds are needed to meet the operation of state government. We assume this statement to mean that the clarification will aid in the collection of taxes already levied under Act 487.

3. The property sought to be taxed was not purchased *for use in this state.* The major component parts of the two drilling rigs were acquired some fifteen and six years ago respectively, and in Oklahoma, where they were first used. Sales tax was paid in Oklahoma. Wolfe purchased the equipment generally for use in any state where he might thereafter gain a contract. On the other hand, he did not acquire the rigs for the specific purpose of using them in Arkansas. He had no contract in Arkansas at the time of purchase, nor was he then negotiating a contract here.

An identical situation arose in New Mexico in 1955. That state has a use tax provision like ours as respects "procurement for storage, use or consumption." There the contractor was held not to be liable for the tax. *Rowan Drilling Co., Inc.* v. *Bureau of Revenue,* 60 N. M. 123, 288 P. 2d 671 (1955). Similar provisions are contained in the statutes of Iowa and Maryland. Their statutes have been similarly interpreted. *Morrison-Knudsen Co. Inc.* v. *State Tax Comm.,* 242 Ia. 33, 44 N. W. 2d 449 (1950); *Comptroller of the Treasury* v. *James Julian, Inc. et al,* 215 Md. 406, 137 A. 2d 674 (1958). All

these cases hold that whether the property is purchased for use in the taxing state "should be determinable at or near the time of its purchase."

We hold that the exemptions afforded appellant by Act 487 of 1949, Section 6, were not repealed by Act 125 of 1965.

Affirmed.

OLD AMERCIAN LIFE INS. CO. *v.* LUCY HARVEY, AN INCOMPETENT, BY HERBERT H. HARVEY, ETC.

5-4246 415 S. W. 2d 66

Opinion delivered May 29, 1967

R. D. Rouse, for appellant.

Tompkins, McKenzie, McRae & Harrell, for appellee.

JOHN A. FOGLEMAN, Justice. The only real issue here is the entitlement of appellee to recover penalty and attorney's fees from appellant.

Appellee brought suits against appellant on two insurance policies covering hospital, medical and other benefits. The two suits were consolidated for trial before the court, a jury trial having been waived. The policies were originally issued by other companies but appellant had assumed all obligation on both policies before any liability accrued on either. Appellee suffered injuries in a fall on July 2, 1965. On December 16, 1965 she underwent an appendectomy. She was in the hospital sixty days because of the injuries and ten days because of the surgery. Demand was made for $1,164.00 under one policy and $1,189.54 under the other. Appellant denied liability for these amounts before suit. The complaints sought recovery of $854.00 because of the injuries and $310.00 because of the appendectomy in the first action, and $826.23 because of the injuries and $363.31 because of the surgery in the second. The basis for recovery was set out in detail in the body of the complaints but the prayers were for the sums of $1,164.00 and $1,189.54, respectively, with penalty and attorney's fees.

In its answer to the first complaint appellant admitted liability in the sum of $525.00 and in the answer to the second, admitted liability in the total sum of $538.31. Appellant offered to confess judgment for these amounts. In amendments to its answers appellant denied that the appellee was in the hospital 61 days as a result of her injuries as alleged in the complaints and denied that the hospital was licensed as a hospital or had a graduate registered nurse on duty as required by the policy.

At the opening of the trial the attorney for appellant

admitted liability for $310.00 for the appendectomy on the first policy, but denied liability for 61 days hospitalization and for penalty and attorney's fees and said that the amended answers showed what they admitted.

Appellee offered Dr. Charles D. Avery as a witness. He testified that the Cora Donnell Hospital, at which he practiced, was a licensed hospital at the time in question and that a registered nurse was in charge of the hospital, lived next door thereto and was on call at all times. While the doctor was on the witness stand, it was discovered that there was an error in the hospital bill in that the charge for August 26th was duplicated, an error that is apparent upon inspection of the statement. After a recess for examination of the statement, appellee's attorney asked permission to amend the first complaint to ask $842.00 instead of $854.00 for the hospitalization for the injuries, the daily hospital charge being $12.00. He admitted that the hospitalization was for 60 days instead of 61. Appellant's attorney did not object, but reserved appellant's rights as to attorney's fees and penalty. Appellee's attorney stated that he did not ask to amend the other complaint, but admitted that appellee only claimed 60 days of hospitalization. At this point, after the doctor had left the witness stand, appellant, for the first time, objected to his testimony as to the qualification of the hospital under the policy.

In appellee's complaint on the second policy recovery had been sought for hospitalization for her injuries on the basis of 10 days at $15.00 per day; 21 days at $12.00 per day; and 30 days at $6.00 per day. The policy actually provided as hospital benefits for the first 30 days the expenses actually incurred, not to exceed $15.00 per day for the first 10 days and $12.00 per day thereafter. After the first 30 days, hospital benefits were 50% of the expense actually incurred, not to exceed a total of $12.00 per day. The hospital expenses incurred were more than $15.00 per day for the first 10 days and more than $12.00 per day for the next 20 days. For the last 30 days the hospital expenses were $526.25, and the

expenses exceeded $12.00 on two days by a total of $5.40. Thus, under a correct application of the policy terms, appellee would have been entitled to recover $1,249.62 rather than $1,189.54 for which judgment was prayed. Appellant offered no evidence.

In his opinion, the trial judge stated that if appellant had confessed judgment upon amendment to the first complaint, appellee would not have been entitled to recover penalty and attorney's fees, but not having done so and never having admitted liability except as set out in its answer, appellee was given judgment for the full amount prayed pursuant to amendment in open court, 12% penalty and attorney's fee of $350.00. In the second suit, the court gave judgment for the full amount sued for, saying that under the terms of the policy appellee would have been entitled to more, and that appellant would have paid less than the policy called for if it had confessed judgment for the amount sued for. In this the court apparently felt that even if the evidence showed that recovery of a larger amount was justified, appellee was limited to the amount sought by the complaint. *Hudspeth & Sutton* v. *Gray, Durrive & Co.,* 5 Ark. 157; *White* v. *Cannada,* 25 Ark. 41; *Arkansas Power & Light Co.* v. *Murry,* 231 Ark. 559, 331 S. W. 2d 98. The court gave judgment for 12% penalty and $150.00 for attorney's fee.

In the first case appellant contends that appellee was not entitled to recover penalty or attorney's fees because appellant did not continue to deny liability after the amendment reducing the claimed number of days of hospitalization was made. We cannot agree that appellant was relieved of liability for these items. Never was there any offer to confess judgment, withdrawal of answer or other manifestation on the part of appellant that it agreed that appellee was entitled to recover the reduced amount.

This court has long been committed to the rule that, in the absence of an offer by an insurance company to

confess judgment for the amount to which the recovery sought is reduced by amendment to the complaint allowed by the court during trial, claimant is entitled to recover statutory penalty and attorney's fees. In *Queen of Arkansas Ins. Co.* v. *Milham,* 102 Ark. 675, 145 S. W. 540, the insurance company asserted as a set-off an amount due it upon a premium note. The plaintiff promptly conceded that this amount should be deducted and only asked judgment for the difference. The court then said that if the insurance company wished to avoid the statutory penalty and attorney's fee it should have offered to confess judgment and thus ended the suit. This rule has been applied and followed in many cases. Among them are: *Life and Casualty Co.* v. *Sanders,* 173 Ark. 362, 292 S. W. 657; *Progressive Life Ins. Co.* v. *Hulbert,* 196 Ark. 352, 357, 118 S. W. 2d 268; *Old American Life Ins. Co.* v. *McKenzie,* 240 Ark. 984, 403 S. W. 2d 94.

But appellant says that it did not continue to deny liability in the first case after the amendment, pointing out that it did not offer any proof on the defenses set out in its answer, having rested its case immediately after appellee rested. The amount for which appellant offered to confess judgment in its original answer was not identified as to which hospitalization or on which items the company admitted liability. In the amendment appellant denied all material allegations not admitted in the answer or the amendment, but admitted liability for certain items incurred because of appellee's injury. It denied that appellee was entitled to recover $732.00 for 61 days in the hospital. The prayer of the original answer was that the offer to confess judgment for $525.00 be accepted, that appellee take nothing in excess of that amount and that her complaint be dismissed. The prayer of the amendment simply denied liability "as hereinabove set forth." The record reveals that the court heard argument of counsel for both parties but does not reveal the content of either argument. Immediately after this argument the trial judge announced his findings as to the qualification of the hospital under the terms of the policy and asked for briefs.

Appellant takes the position that the finding as to the hospital by the trial judge was unwarranted because not properly in issue. This is based on the claim that the defense was an affirmative one placing the burden on it, as asserting an exception from the coverage of the policy, so that no issue remained to be determined by the trial court, thus relieving appellant from liability for attorney's fees. We do not agree that this was an exception from the policy. The clause in question, so far as pertinent, provided:

> "If such injury or such sickness requires any Insured herein to be confined as a bed patient within a regularly incorporated or licensed hospital (except a home or institution providing primarily convalescent, nursing, ambulatory or rest-care facility, or a special unit of a hospital used primarily for the care of convalescent or ambulatory patients or charitable institutions or hospitals which are agencies of any Government) which has Graduate Registered Nurses (R. N.) always on duty * * * while this policy is in force, the Company will pay, as a result of any one disability, the Insured (or the Hospital, if so authorized) for the following items of hospital expense actually incurred, but not to exceed the amounts stated below."

There was never any indication that appellant agreed that the evidence on behalf of appellee was conclusive or that any of its defenses were abandoned. Certainly there was never at any time an offer to confess judgment for more than $525.00, plus amounts totalling $122.00 for which it admitted liability. Nothing short of an admitted liability or offer to confess judgment for the amount to which appellee was entitled to recover would have relieved appellant of liability for attorney's fees and penalty. The mere failure to offer evidence is not equivalent to an admission of liability or an offer to confess judgment.

The other case presents a slightly different situation. Appellee had misconstrued the clause on benefits under the policy after the first 30 days of hospitalization. In presenting her evidence, the discrepancy as to the number of days of hospitalization was admitted, but her attorney did not seek to amend the complaint under which recovery of $1,189.54 was sought, although it certainly must have been obvious to appellant that under a correct construction of the policy, appellee would be entitled to recover a larger amount. Here again, appellant never made any admission of liability except for $538.31 in the original answer and the additional sum of $244.23 in the amendment to the answer. Appellee admitted that she was entitled to recover only for sixty days hospitalization. Surely appellant was aware of the amount that would be due appellee for this period of hospitalization under its policy and that, if the hospital bills were correct, appellee would be entitled to one-half of the total expense, but not to exceed $12.00 for each day over thirty days, rather than $6.00 per day as stated in the complaint. At least as long as the amount of recovery sought by appellee did not exceed the amount set out in the prayer of her complaint, appellant could have avoided liability for penalty and attorney's fees only by admitting liability for that amount or offering to confess judgment for that sum, which it did not do. The policy sued on was exhibited with the complaint and introduced in evidence. Both the hospital bill and the policy were introduced without objection. Appellant did not claim to be misled by the proof offered. In this situation certain statutes are pertinent:

> "27-1155. Variance between pleading and proof—Amendment of pleading.—No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it is alleged that a party has been so misled, that fact must be shown to the satisfaction of the court, and it must also be shown in what respect he has been

misled; and thereupon the court may order the pleading to be amended upon such terms as may be just. [Civil Code § 150;]."

"27-1156. Immaterial variance—Amendment without costs.—Where the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, and may order an immediate amendment without costs. [Civil Code, § 151;]."

"27-1160. Amendment of pleadings or proceedings by court—Enlargement of time for filing answer and reply—Pleadings made definite and certain—Errors or defects in proceedings disregarded.—The court may, at any time, in furtherance of justice, and on such terms as may be proper, amend any pleadings or proceedings by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case; or when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved. * * * [Civil Code, § 155;]."

Appellant did not contend that he was misled by the variance and did not claim surprise or ask for a continuance. No objection having been made to the evidence, under our Code the complaint must be treated as amended to conform to it. *Healy* v. *Conner,* 40 Ark. 352; *Farmers Union Mut. Ins. Co.* v. *Wyman,* 221 Ark. 1, 251 S. W. 2d 819.

Appellant complains, however, that there was no amendment until some weeks later, after appellee's brief was filed. As we interpret the statute it was the duty of the court to consider the complaint amended at the time evidence was offered, in the absence of a showing by appellant that it was misled to its prejudice. On this contention, however, there would have been no error for

it has been held that amendment of pleadings to conform to the proof under the statutes quoted may even be permitted after a case has been argued to a jury. *Burke* v. *Snell,* 42 Ark. 57.

Appellant also complains that the fee allowed in the first case is excessive. The court heard testimony by appellee's attorney. In the two cases, uncontradicted testimony showed that he had spent something over 23 hours in research, accumulating six pages of notes; filed a proof of claim under one of the policies; engaged in correspondence with the companies; had two conferences with appellee's physician; prepared the complaints; had at least two telephone conversations with one of appellant's attorneys; made a 50-mile round-trip to confer with relatives of the aged appellee; had four conferences with the son of appellee who served as next friend in bringing the suit; had two conversations with a brother of appellee and a conference with a Mr. Bright. He must also have written a brief for the court pursuant to the trial judge's request. In view of the amount of time devoted to this case and the fact that the trial judge was cognizant of the services rendered, we cannot say that the allowance was excessive.

The judgment is affirmed and we allow an additional fee of $250.00 on this appeal.

BROWN, J., disqualified and not participating.

SAM MACK SNIDER JR. *v.* STATE

5257 415 S. W. 2d 53

Opinion delivered May 29, 1967

McKnight & Blackburn, for appellant.

Joe Purcell, Attorney General; *Don Langston,* Asst. Atty. General, for appellee.

J. Fred Jones, Justice. Appellant Sam Mack Snider, Jr. was charged on information filed by the prosecuting attorney in Cross County with the crimes of forgery and uttering. He was tried before a jury in Circuit Court, convicted on both counts and sentenced to four years in the penitentiary on each count.

On appeal to this court appellant relies on the following two points for reversal:

> "1. The lower court erred in refusing to direct a verdict at the close of the case in favor of Appellant on the grounds that there is a fatal variation between the Information and the proof in that the Information charged the Defendant with forging and uttering a check made payable to the order of 'F and J Hardware, Parkin, Arkansas,' and the only check introduced into evidence alleged to be forged by the Defendant was made payable to the order of 'Mrs. Ralph Johnson.'

"2. The lower court erred in refusing to grant Appellant's motion for a directed verdict at the close of the case in that the evidence to convict the Defendant was inadequate. The only evidence linking the Defendant with the crime of forgery and uttering was the testimony of Geneva Dulaney, an accomplice."

The facts are briefly as follows: The appellant met Geneva Dulaney on a street corner in Louisville, Kentucky. They drank some beer together and then traveled to Memphis, Tennessee, in an automobile driven by appellant, to visit appellant's daughter. They then drove to Parkin in Cross County and had been in Parkin two days, staying in the home of one Elizabeth Smith, when appellant was arrested.

While sitting in an automobile in Parkin, appellant wrote a check on the Cross County Bank made payable to the order of Mrs. Ralph Johnson for $20.00, and signed the check "Ralph Johnson." He gave the check to Mrs. Dunlaney and she attempted to cash it at a grocery store, where the blank check form had been obtained a few minutes earlier by one of Mrs. Smith's children. Being unable to cash the check at the grocery store, Dulaney returned to the automobile and so advised the appellant. He directed her to try cashing the check some other place, and told her that the check was good. Dulaney then proceeded directly to the F & J Hardware store in Parkin where she purchased a lawn sprinkler and some hedge shears. She paid for these items with the check and received approximately $14.00 in change. Mrs. Dulaney gave the change to the appellant who purchased some whiskey with part of the money on their return from the hardware store to Mrs. Smith's house. Ralph Johnson had no account in the Cross County Bank, neither did the appellant have an account in the bank. The appellant, as well as Mrs. Dulaney, was arrested at a filling station in Wynn.

Both the appellant and Geneva Dulaney were

charged by information with the crimes of forgery and uttering. Dulaney entered a plea of guilty to uttering and was given a five year suspended sentence. She testified as a witness for the State in appellant's trial.

The appellant had been sentenced to the penitentiary on two previous occasions for forgery and uttering in Cross County and was identified at the trial by the Sheriff of Cross County who had known him as "John Mack Snider" since 1947.

The information upon which the appellant was charged alleged the crime of forgery and uttering committed as follows:

> "The said defendant on or about the 20th day of July, 1966, Cross County, Arkansas, did unlawfully, fraudulently and feloniously forge and counterfeit a certain writing on paper purporting to be a check on Cross County Bank, which said writing on paper was and is in words and figures as follows, to wit:
>
> > "Pay to the order of F & J Hardware, Parkin Arkansas of date July 20, 1966, in the sum of $20.00 and signed Ralph Johnson
>
> with the unlawful, fraudulent and felonious intent then and there to obtain possession of the money and property of the said F & J Hardware, Parkin, Arkansas, and after forging said check did utter and publish as true to F & J Hardware, Parkin, Arkansas a certain forged and counterfeited writing on paper purporting to be a check on the Cross County Bank, as above; the said Sam Mack Snider, Jr. and Geneva Dulaney well knowing at the time they uttered said writing on paper as aforesaid that it was forged, counterfeited and not genuine."

At the close of the evidence offered by the State, the appellant's attorney moved for an instructed verdict as follows:

"MR. SHAVER: Like to move for an instructed verdict on the basis the State failed to make a case on the basis of forgery, which they have him charged with.

THE COURT: Motion denied.

MR. SHAVER: Exception."

A motion for a new trial was filed by appellant as follows:

"Comes the defendant, by his attorneys, Shaver & Shaver, and files his motion for a new trial stating:

"That the verdict of Guilty returned by the jury should be set aside and the Defendant granted a new trial for the following reasons:

1. That the verdict is contrary to the law and evidence;

2. That there is no evidence to support the verdict; and

3. That the Court erred in over-ruling the defendant's motion to instruct a verdict for the Defendant because there was no legal evidence or inferences to be drawn from said evidence that the defendant was guilty of forgery or uttering a check on July 20th, 1966 as alleged by the State.

"WHEREFORE, Defendant prays that said verdict be set aside and that he be granted a new trial."

In support of his first point, appellant argues that the lower court erred in refusing to direct a verdict in favor of appellant at the close of the State's case, on the grounds that there is a fatal variation between the information and the proof in that the information charged the appellant with forging and uttering a check made payable to order of F & J Hardware, Parkin, Arkansas,

and the only check introduced into evidence, and which was alleged to be forged by the appellant, was made payable to the order of Mrs. Ralph Johnson. Appellant cites *Houston* v. *State,* 66 Ark. 120, 49 S. W. 351, and *Wilburn* v. *State,* 60 Ark. 141, 29 S. W. 149, in support of this contention, but these cases were decided prior to the adoption of initiated Act No. 3 in 1936.

Prior to the adoption of initiated Act No. 3, the language of an indictment required,

> "A statement of the Acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended." 3328 C & M Digest.

Since the adoption of initiated Act No. 3, and because thereof, the contents of an indictment as set out in Ark. Stat. Ann. § 43-1006 (Repl. 1964) are now as follows:

> "The language of the indictment must be certain as to the title of the prosecution, the name of the court in which the indictment is presented, and the name of the parties. *It shall not be necessary to include statement of the act or acts constituting the offense, unless the offense cannot be charged without doing so.* Nor shall it be necessary to allege that the act or acts constituting the offense were done wilfully, unlawfully, feloniously, maliciously, deliberately or with premeditation, but the name of the offense charged in the indictment shall carry with it all such allegations. The State, upon request of the defendant, shall file a bill of particulars, setting out the act or acts upon which it relies for conviction." (Emphasis supplied).

Appellant in the case at bar did not request a bill of particulars and although the information charged forgry of a check made payable "to the order of F & J Hardware," and proved the forgery of a check made payable to "Mrs. Ralph Johnson," the appellant made

no objection to the introduction of this check into evidence in proof of the crime of forgery and uttering with which he was charged.

We are of the opinion that the appellant knew what check he was charged with forging and knew that it was the check offered in evidence. We conclude, therefore, that the trial court did not err in refusing to direct a verdict for the appellant at the close of the evidence produced by the State.

As to appellant's second point, no objection was offered to the testimony of Geneva Dulaney except one objection as to the hearsay nature of evidence offered as to what the witness, Mrs. Dulaney, had told appellant about her husband. Appellant requested no instructions on testimony of an accomplice, and no objection on this point was brought forward in appellant's motion for a new trial or in a bill of exceptions. The point is raised for the first time in appellant's brief in this court on appeal, but we might add, however, that we consider the testimony of Geneva Dulaney sufficiently corroborated by the other evidence offered by the State to support the conviction in this case. *Beasley* v. *State*, 219 Ark. 542, 242 S. W. 2d 961; *Burford* v. *State*, 242 Ark. 377.

Finding no errors, the judgment of the trial court is hereby affirmed.

Affirmed.

FOGLEMAN, J., disqualified and not participating.

JAMES M. CAIRNS, ET UX, *v.* JACK P. WITT, ET UX

5-4247 415 S. W. 2d 47
Opinion delivered May 29, 1967

Frank H. Cox, for appellant.

U. A. Gentry, for appellee.

J. FRED JONES, Justice. This appeal is from a decree of the Pulaski County Chancery Court sustaining a demurrer to a complaint and dismissing the complaint.

On September 8, 1965, James M. Cairns and wife as plaintiffs, filed a complaint in the Chancery Court alleging that they are the owners of Lot 8, Block 16, Midland Hills Addition to the City of Little Rock, and that the defendants, Jack P. Witt and wife, are the owners of Lots 13 and 14, Alpine Court Addition; that the recorded plats of the two subdivisions show a 16 foot alley between the plaintiffs' Lot 8, Block 16 in Midland Hills Addition and the defendants' Lot 13 in Alpine Court Addition; that the defendants are claiming ownership of the alley and have made permanent improvements therein which interferes with plaintiffs' use of their property; that plaintiffs are entitled to a judgment declaring the 16 foot strip of land between their property and the defendants' property to be a public alley and for a decree requiring the defendants to remove all structures therein.

The complaint prayed for a declaratory judgment

setting forth the status of the 16 foot strip of land between the plaintiffs' property and the defendants' property and that if it be found by the court that the strip of land is a public alley, that the defendants be ordered to remove all structures therein; and for such further relief as the court deems just and proper.

The defendants filed two demurrers to the complaint. The first demurrer was filed on September 15, 1965, on the ground "that there is a defect of parties," and in support thereof, states:

> "The alleged alley between Lot 8, Block 16, Midland Hills Addition and Lots 13 and 14, Alpine Court Addition in the City of Little Rock, Arkansas, extends north from Alpine Pass (Street) along the east boundary line of Lots 13 and 14, Alpine Court Addition, and along the west line of Lots 2 to 8, both inclusive, of Block 16, Midland Hills Addition, which has never been open since the filing of the plat of Midland Hills Addition on May 13, 1911, and permanent improvements have been made on the area designated on the respective plat as an alley by the several property owners adjoining said alley, including the plaintiffs, and all of the owners of property adjacent to alleged alley will be affected by the opening of the alley, if any, and they are necessary parties hereto."

The prayer of this demurrer was, "that the plaintiffs' complaint be dismissed; or, in the alternative, that they be required to make all of the owners of property immediately adjacent to said alley parties defendant herein; and for all other general and equitable relief. . ." No separate hearing was had or action taken on this demurrer.

On August 16, 1966, the defendants filed their second demurrer combined with their answer to the complaint. This demurrer states as grounds "that said complaint does not state facts sufficient to constitute a

cause of action." The answer denied the allegations of the complaint and alleged that the alley designated on the plats was never opened; that permanent improvements had been made by several adjacent property owners on the area so designated as an alley in the plats; that said alley was closed to public use many years before plaintiffs purchased their property; that plaintiffs knew the alley had been closed when they purchased their property; that they also knew of the encroachments complained of in their complaint when they purchased their property; that plaintiffs had suffered no injury not suffered by the public at large, and are estopped to have said encroachments removed.

The case was heard by the chancellor on September 14, 1966, at which time the plaintiff testified at length. Letters and plats were introduced as exhibits and received in evidence, and plats and bills of assurance were introduced as exhibits by stipulation and received in evidence by the chancellor. At the close of the plaintiffs' evidence, and after the plaintiff had rested, the defendant moved for dismissal with a statement as follows:

> "If the Court please, at this time I would like to move the Court for dismissal of this case and affect a demurrer to the evidence. . ."

The chancellor entered a decree as follows:

> "On this day came on for hearing the above entitled *cause,* the plaintiffs appearing in person and by their Attorney, Frank H. Cox, and the defendants appearing in person and by their Attorney, U. A. Gentry, and said cause is submitted to the Court on the pleadings and *testimony of the plaintiff, James M. Cairns, the exhibits introduced,* the stipulations of counsel, *and the demurrer to the complaint,* and the court being well and sufficiently advised finds that said demurrer should be sustained.

"It is therefore considered, adjudged and decreed that *the demurrer be, and the same is, hereby sustained* and the complaint dismissed at the plaintiff's cost." (Emphasis supplied).

Plaintiffs in the trial court are the appellants here and rely upon the following points for reversal:

"The Chancery Court erred in sustaining the Demurrer to the Complaint for the following reasons:

"1. The Appellants' Complaint stated a valid cause of action.

"2. Under the law, the Appellants are entitled to the relief sought in the Complaint.

"3. All of the necessary parties to this action were before the lower court."

The recorded plats and bills of assurance of both subdivisions are a part of the record in this case by stipulation, and the land involved in this litigation is clearly designated as a sixteen foot alley in both plats. The appellants alleged in their complaint that the land was in fact what it appeared to be on the plats and that appellees were claiming ownership of it and had placed encroachments therein to appellants' special damages, in that it interfered with appellants' use of their own property. Appellants prayed for a declaratory judgment determining the status of the alley, and that if it be found to be a public alley, that appellees be ordered to remove the encroachments therefrom. The appellees seem to concede that the declaratory judgment statute is applicable in a situation such as this, and we are of the opinion that appellants stated facts sufficient to constitute a present controversy or the ripening seeds of a controversy, and that the complaint as to cause of action stated, was good on demurrer. (*Jessup* v. *Carmichael,* 224 Ark. 230, 272 S. W. 2d 438).

This case is before us on error alleged in sustaining a demurrer, so we do not reach the second point argued by the appellants. Appellants' complaint went further than their argument on their third point. The complaint was for a "declaratory judgment setting forth the status of the sixteen foot strip of land." The other relief sought by appellants was incidental to, and dependent upon, the granting of the petition for a declaratory judgment finding the strip of land to be a public alley.

The thrust of the first half of appellees' argument seems to be that other adjacent property owners have also encroached on the alley by building improvements therein and that they, as well as the City of Little Rock, would have an interest which would be affected by the declaratory judgment sought by appellants and are therefore indispensable parties to the action.

It is difficult to determine, from the record before us, whether this argument is in support of the first demurrer filed by appellees or is in partial support of the order of dismissal. The decree before us simply recites that the cause was submitted on specifically designated pleadings, testimony, exhibits, stipulations "and the demurrer to the complaint," and then pronounces that "the demurrer be and the same is, hereby sustained..." The decree doesn't say which one of the demurrers to the complaint was submitted and does not indicate which one was sustained.

The case of *Lincoln* v. *McGehee Hotel Company, Inc.,* 181 Ark. 1117, 29 S. W. 2d 668, cited by appellants, is not in point with the case here. There was no question in anybody's mind as to the status of Bridge Street in the Lincoln case, and the suit was not for a determination of its status as a public street. We recognize the principle of law reiterated in the Lincoln case that:

> "... abutting owners of real property have a right to enjoin the council from permitting or any one from making any permanent encroachments on the

streets of the city on the ground that such encroachments constitute a public nuisance, and the abutting owners are entitled to injunctive relief where they allege and prove special injury."

The appellants in the case at bar might have followed the same procedure as was followed in the Lincoln case except for one thing: Appellants in the case at bar were not sure that the land involved was a public alley and they submitted this question to the chancellor by a petition for a declaratory judgment.

Ark. Stat. Ann. § 34-2510 (Repl. 1962) provides as follows:

"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. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the Attorney General of the State shall also be served with a copy of the proceeding and be entitled to be heard."

Where a defect in parties *appears on the face of a complaint,* there is no question that the defect can be reached by demurrer. (Ark. Stat. Ann. § 27-1115 [Repl. 1962]). In an action for declaratory judgment, however, it might appear that a demurrer based on defect in parties defendant who have or claim any interest which would be affected by the declaration, could easily run into conflict without decisions on "speaking demurrers." (21 *R. C. L,* p. 505; *Dodson* v. *Abercrombie,* 218 Ark. 50, 234 S. W. 2d 30; *Rider* v. *McElroy,* 194 Ark. 1106, 110 S. W. 2d 492, and *Lawhon* v. *American C. & C. Co.,* 216 Ark. 23, 223 S. W. 2d 806). We have indicated, however, that such defect in a petition for a declaratory

judgment may be reached by demurrer. *Johnson* v. *Robins*, 223 Ark. 150, 264 S. W. 2d 640.

The primary office of the demurrer to a complaint is to test the sufficiency of the complaint as it is written and filed. In the case at bar the first demurrer, going to a defect of parties, was filed on September 15, 1965. Although appellees argue the defect of parties in their brief, no hearing was had and no action was taken or requested on this demurrer until the second general demurrer and answer was filed on August 16, 1966. The decree recites that the cause was heard on September 14, 1966, and the record reveals that all of appellants' evidence was submitted and heard on September 14, 1966. So we can only conclude that appellees waived, or abandoned, the first demurrer as to the defect of parties when they filed their general demurrer and answer and proceeded to hearing on the case without insisting that the first demurrer be passed on by the chancellor. (Ark. Stat. Ann. § 27-1140 [Repl. 1962]; *Street* v. *Shull*, 187 Ark. 180, 58 S. W. 2d 932).

The record is not clear whether the decree was based on the first or second demurrer or both, or whether it was based on issues joined by the complaint and answer. At the close of appellants' evidence, appellees interposed an oral demurrer to the evidence. Appellees devote the second half of their argument to this demurrer apparently under the impression that it was the one sustained by the chancellor. A "written motion challenging the sufficiency of evidence" has supplanted the "demurrer to evidence" in chancery practice, under Ark. Stat. Ann. § 27-1729 (Repl. 1962) and the dismissal of the complaint in the case at bar, without leave to amend, would indicate that it was the *demurrer to the evidence* the chancellor may have considered and intended to sustain. The decree, however, merely sustained the *demurrer to the complaint* and the complaint was dismissed. That is all we have in the record before us.

Had the chancellor intended to render a decree on insufficiency of the evidence and not on the demurrer to

the complaint, he could have done so easily enough without considering the demurrers at all.

Ark. Stat. Ann. § 34-2505 (Repl. 1962) provides:

> "The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminat the uncertainty or controversy giving rise to the proceeding."

Be that as it may, we are of the opinion the appellees abandoned or waived the first demurrer when the second was filed with the answer, and hearing was had on the cause without first disposing of the special demurrer. If it was the second demurrer the chancellor sustained, we are of the opinion the chancellor erred in sustaining it for the reason that the complaint stated facts sufficient to constitute a cause of action.

If the decree was based on the issues joined by the complaint and the answer, or on the demurrer to the *evidence,* the chancellor erred in sustaining the demurrer *to the complaint.*

The decree is reversed and this cause remanded to the Chancery Court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

JOSEPH HORACE KURCK *v.* STATE

5254 415 S. W. 2d 61

Opinion delivered May 29, 1967

Don Steel, for appellant.

Joe Purcell, Attorney General; *Don Langston,* Asst. Atty. Gen., for appellee.

CONLEY BYRD, Justice. This appeal is from a conviction arising out of what the State Police describe as a "green money racket money press." The information charged appellant and one Ira Coleman Roberts jointly with obtaining personal property by false pretense, committed as follows:

> "On February 14, 1966, in Polk County, Arkansas, said defendants with intent to defraud or cheat R. M. James Jr., designedly by color of false pretense obtained money, to-wit, $5,000.00, in cash from R. M. James Jr., specifically by pretending to take money from R. M. James Jr., for the purpose of duplicating the same and returning said money to R. M. James Jr., and by absconding with said money."

The record shows that some time prior to February 14 appellant went by the home of James, the prosecuting

witness, with a $10 bill and asked James what he thought about it; that the $10 bill looked all right and James suggested that appellant take it and two other $10 bills to the bank and see if they would pass. Appellant then advised James that the $10 bill was a duplicate. Later, appellant drove James to Bald Knob to meet a friend whom he introduced as Oscar Allen. Oscar Allen took a $10 bill, and some smelly stuff out of a bottle which he spread on two pieces of paper, between which he rolled this $10 bill. Some of the color came off the bill. Allen then took the bill and soaked it in some white stuff and then in some green stuff. Then he went into the bathroom with it, came back and peeled out a wet $10 bill. The numbers on the bill were not the same as the first one. Allen explained this difference in numbers by the use of two little dots. James compared the bill produced by Allen with another $10 bill. Allen then suggested that he had only enough chemical to make one copy of the $10 bill and that he did not have enough to really develop it but one time, so he suggested that Kurck and James get up $10,000 apiece. Thereafter, Kurck and Allen drove by James' home and informed him that they had everything set up in Mena, where Allen's aunt lived.

On February 14, James got together $5,000, met appellant Kurck at the Ritz Motel in Little Rock and rode with him to Mena, where they met Allen at the Mena Cafe. At this time James showed Allen his money and Allen pointed out that two of the $100 bills would not do. This was corrected by James' going to the bank and obtaining four $50 bills for the two $100 bills. From there the parties moved to the Pines Motel at Mena.

At the motel, Kurck put up $1,400 in addition to James' $5,000. Kurck took all the money to the bathroom and wet it in the sink where they used some soap on the bills. The bills were then rinsed off in the bathtub by Allen and dipped in some brown-looking liquid. Allen then sat down at a table and started laying down a piece of white paper, a bill and a piece of white paper,

stacking it all up. When it was all stacked up Allen and Kurck took the stack into the bathroom together with Allen's bag. During this time James was lying on the bed watching Allen and Kurck from the bedroom. When James next saw the stack it was pressed between two pieces of plywood 1½ inches larger on all sides than a dollar bill. Appellant and Allen tightened up the press by the use of two small bolts. James saw this stack of paper with green in between.

After the press was tightened down, it was explained that Allen needed to go get his developing material. The press was put in the front seat of Kurck's automobile between Kurck and James, and Allen pitched his bag in the back seat. In this manner they left the motel to go to the Mena Cafe, where Allen departed, ostensibly to get his developing fluid. After waiting and driving around for an hour or so, it became apparent that Allen was not going to return, so Kurck and James returned to the Ritz Motel in Little Rock with the press in the seat between them. When they arrived at the Ritz Motel the press was opened. It was found to contain two $1 bills on one side and a $5 bill on the other side, the rest of it being play money. Kurck took the play money, flushed it down the commode and left, taking the press with him. The next day James talked to his lawyer and went by to see Kurck. Kurck told James that Oscar Allen was 55 to 60 years old and that he had met him in Newport News, Virginia in 1962.

While on the witness stand, James identified the state's exhibits 1 and 2 as photographs of the person known to him as Oscar Allen.

Carroll Page, a policeman working in the Mena area, testified that on January 5, 1966, he had met appellant Kurck and one Garner Ward in Mena, and that they complained they had lost $2,700 in a swindle known as "green money racket money press." The swindler was alleged to be a man named George Grayson whom

Kurck had met in Virginia about three years earlier. Kurck related how Grayson had demonstrated that he could duplicate a $20 bill and how they made a date to come to Mena, where Grayson was supposed to have had an aunt living. Kurck told Trooper Page that the money was placed in a press, much like the one described by James, that somehow in the shuffle the money was changed to play money, that Mr. Grayson had stated that he had to go get some more materials and would be back shortly. When Grayson did not return, they opened the press, which contained only play money. Kurck described Grayson to Trooper Page as being approximately six feet tall, weighing 170 pounds, with short gray hair, green eyes, and a large round scar on the left side of his neck just below the ear. Kurck described the scar as resembling a cancer that had been removed.

Mrs. Inez G. Bushman, who operates a drive-in on Highway 67 in Searcy, stated that in May Kurck approached her with a $5 bill which he said was duplicate money, and that thereafter he brought a Mr. King with him to talk to her about duplicating money. At this time Mr. King allegedly duplicated a $10 bill in much the same manner as that described by James. However, Mrs. Bushman was skeptical because the numbers differed and because of her observation of the two bills when placed over a lamp. Thereafter she called the treasury agents, who asked her to go through with the deal. While there were some subsequent conversations between Mrs. Bushman, appellant Kurck and Mr. King, she refused to go through with the deal because Kurck and King insisted that the duplication would have to take place approximately 70 miles west of Hot Springs.

For reversal of his conviction, appellant relies upon the four points hereinafter discussed.

POINT I. *The court erred in overruling defendant's demurrer to the information.*

We find appellant's contention that the trial court should have sustained appellant's demurrer to the information to be without merit. While the language of the information is by no means ideal, we think the information is subject to the interpretation that appellant designedly, by color of false pretense, obtained $5,000 from R. M. James Jr., by pretending to take the money for the purpose of duplicating same and (by pretending to) return said money to R. M. James Jr.

POINT II. *The evidence does not support the jury's verdict.*

Under this heading appellant argues that there is no evidence of false representation, no evidence of a fraudulent representation of an existing or past fact, and no evidence that appellant obtained $5,000 from the prosecuting witness.

We find appellant's contentions to be without merit. A close reading of the facts will show that appellant Kurck and his friend, Ira Coleman Roberts (alias Oscar Allen), falsely represented to James that his $5,000 was in the money press—*i. e.,* that his money was in between the white sheets and the two plywood boards which appellant and his friend tightened down before it was placed in the car seat between appellant and James.

We also find appellant's contention that he received no part of the $5,000 to be without merit. The circumstantial evidence shows that he and the said Ira Coleman Roberts were employing a common scheme or method to obtain money by false pretenses and the jury could logically have inferred that since he was in the business he was receiving the proceeds. Furthermore, all distinction between principals and accessories before the fact has been abolished by Ark. Stat. Ann. § 41-118 (Repl. 1964).

When the "green money racket money press" scheme used by appellant and his friend, Ira Coleman

Roberts, is viewed in its entirety, there can be no doubt that James relied upon the representation that his money was in the press when he permitted Ira Coleman Roberts to depart their company, carrying with him the bag which he had taken into the bathroom at the time the money was allegedly placed in the money press.

POINT III. *The court erred in permitting the introduction of photographs of Ira Coleman Roberts over the objection of the appellant.*

We hold this contention to be without merit. The record shows that Sgt. James Honeycutt, of the State Police, identified the person in the pictures as Ira Coleman Roberts. Trooper Carroll Page identified the person in the pictures as Ira Coleman Roberts, and James and Mrs. Bushman both identified the man in the pictures as the man Kurck had introduced to them as Oscar Allen and Mr. King, respectively. In this situation the photographs were properly admitted for identification of the man appellant had introduced as Mr. King and Mr. Allen.

POINT IV. *Trial court erred by permitting the testimony of witnesses as to other transactions.*

It will be observed that the trial court permitted the proof of the other transactions related by Trooper Page and Mrs. Bushman to go to the jury to show appellant's identity, scheme, purpose, intent, design and motive. We have consistently held that proof of other transactions is admissible for such purposes. See *State* v. *Dulaney*, 87 Ark. 17, 112 S. W. 158 (1908); *Keese* v. *State*, 223 Ark. 261, 265 S. W. 2d 542 (1954); *Alford* v. *State*, 223 Ark. 330, 266 S. W. 2d 804 (1954).

Trooper Page's testimony shows that appellant had knowledge of the manner in which the scheme worked, and that the Mr. Grayson whom appellant alleged to be his friend was described almost exactly as witness James described Mr. Allen. Mrs. Bushman's testimony

shows that she, like James, was first approached by appellant with a "duplicate" bill and that he later introduced to her the same man he had introduced to James for the same alleged purpose.

Under these circumstances, we must hold that the testimony, under the restrictions of the trial court, was competent to go to the jury.

Affirmed.

BROWN, J., disqualified.

B-W ACCEPTANCE CORP. *v.* NORMAN POLK, DBA NORM'S FURNITURE CITY

5-4166 414 S. W. 2d 849

Original Opinion delivered April 24, 1967, p. 422.

[Supplemental Opinion delivered May 29, 1967, rehearing denied.]

LYLE BROWN, Justice. On rehearing, B-WAC urges that the three trust receipts 7, 12, and 13 were in default at the time this action was filed. That fact, so it is argued, would as a matter of law, give B-WAC right of possession "as of the commencement of the action." It is true they had matured.

Norm Polk contended that with reference to matured trust receipts there was a procedure consistently followed between the parties and explained in this manner: Upon maturity of any trust receipt, B-WAC would send him—not a demand for payment—but a notice. B-WAC's field representative who serviced Norm's

would receive a copy. The affected distributor would also receive a copy of the notice and the distributor would, without notice to Norm's, pay to B-WAC a ninety day renewal charge. The representative would call on Norm Polk regularly during the first half of each month, at which time the matured accounts would be settled. Norm Polk testified that he received no notices of maturity with respect to the last due-dates of the three receipts. Appellant's credit manager and its field representative corroborated Polk's testimony in a number of respects. The credit manager also testified that the primary reason for filing the lawsuit was because "we were not allowed to check the floor plan."

Appellant asserts that evidence of this course of dealing was inadmissible because it was at variance with the terms of the contract. The appellant's position is that non-payment of the trust receipts at maturity caused appellee to be in "default" at the time suit was filed, which in turn entitled appellant to repossess the entire floor plan. The evidence of custom operated to explain the ambiguous term "default" and not to vary the dates at which the trust receipts matured. Where terms in a contract are ambiguous, or are used in a sense other than the ordinary meaning of the words, oral testimony is admissible to explain the meaning of the words used. *Paepcke-Leicht Lbr. Co.* v. *Talley*, 106 Ark. 400, 153 S. W. 833 (1913); Ark. Stat. Ann. § 85-1-205 (Add. 1961). This evidence would justify a jury in concluding that appellee was not in "default" at the time a particular trust receipt matured, but rather that further steps were to be taken by both parties before this portion of the contract became operative.

Rehearing denied.

THOMAS LINVILLE COLEMAN *v.* STATE

5274 415 S. W. 2nd 549

Opinion delivered June 5, 1967

Edward S. Maddox and *Rice L. VanAusdall,* for appellant.

Joe Purcell, Attorney General; *Don Langston,* Asst. Atty. General, for appellee.

CARLETON HARRIS, Chief Justice. This is a case initiated under the provisions of our Criminal Procedure Rule No. 1, wherein petitioner (appellant), Thomas Linville Coleman, seeks to vacate a sentence imposed by the Poinsett County Circuit Court on March 13, 1964, Coleman being sentenced to a term of 18 years in the penitentiary, following a jury verdict, which found him guilty of murder in the second degree. In his motion, Coleman asserts that his constitutional rights were violated in several respects, all of which will be subsequently discussed. The Poinsett County Circuit Court appointed counsel to represent Coleman on this petition, and, after an extensive hearing, the trial court denied the petition and remanded Coleman into the custody of the Superintendent of the Arkansas State Penitentiary. From the judgment so entered, appellant brings this appeal.

The trial judge (who did not preside at the original trial) conducted a full hearing, and, at the conclusion thereof, rendered a comprehensive opinion, probably the most extensive and thorough opinion delivered in one of these post-conviction hearings, which will be quoted from extensively throughout our own opinion.

It is first asserted that appellant was not given a preliminary examination, but there is no merit in this contention. A short time after the homicide, Coleman employed a Poinsett County lawyer to represent him. A hearing was scheduled before a magistrate, but counsel waived this hearing. This waiver, of course, has been frequently employed since prosecuting attorneys were

given the authority to charge persons with crime by information; in fact, contrary procedure (conducting preliminary hearings) is rather rare. At any rate, the prosecutor proceeded to file an information against Coleman, charging him with murder in the first degree, and a warrant was served upon appellant. Within three days, bail was fixed at $7,500.00, and Coleman, upon supplying bail, was released from jail.

It is asserted that Coleman should have been indicted by the grand jury, rather than being charged by information filed by the prosecuting attorney, as heretofore mentioned. This point has been passed upon by the United States Supreme Court, and held to be without merit. See *Hurtado* v. *California,* 110 U. S. 516. Our own court has likewise held the contention to be without substance. *Turney* v. *State,* 239 Ark. 851, 395 S. W. 2d 1.

It is alleged that Coleman was denied the right to counsel, in that his counsel was so inadequate as to amount to his being deprived of this right. The record reflects that, after employing his first attorney, appellant proceeded to employ another attorney from Cross County to assist in his defense. Let it be remembered that these lawyers were not appointed by the court, but were retained by Coleman himself. Appellant complains that his counsel did not properly select the jury,[1] refused to call several witnesses that he wanted to testify, used a witness that he (Coleman) did not want to use (and whose testimony according to appellant favored the state), and did not conduct the trial in a competent manner.[2] These complaints, as commented on by the presiding judge at the post-conviction hearing, relate to trial strategy or tactics. As stated in *U. S. ex rel Robinson* v. *Pate,* 312 F. (2nd) 161 (cert. den.):

---

[1]According to Coleman, his lawyers "had not even disqualified any of the jurors on *voir dire* examination."

[2]Coleman stated, "One objection made during the trial. * * * Just to make it look good to the court, whatever it was, didn't amount to anything."

"* * * Petitioner lists a number of purported errors of omission and commission in his counsel's conduct of the case. All of these relate to trial strategy or tactics, and involve elements of discretion and judgment on which skilled and experienced advocates might honestly disagree, particularly after the event."

The trial court also commented in its opinion that the two lawyers "vigorously defended the petitioner. This is revealed in their pre-trial study of the jury panel, the *voir dire* examination, and the challenges exercised. With reference to the failure to call witnesses, the record indicates twenty witnesses were called and examined. That a witness might not have been helpful to the defense on all counts is not unusual. Some witnesses, such as Eldridge in this case, have to be called in order to establish a chain of custody of a vital piece of evidence. That they might testify adversely in some other area cannot be avoided."

Appellant makes additional complaints against one of his attorneys. While not at all clear from the record, it seems that one or two witnesses, who testified for the state, had formerly served in the penitentiary, and appellant contended that this attorney had "Sponsored" this man (or men) when paroled. Like the trial court, we do not grasp the significance of this testimony, but this attorney, in testifying,[3] denied that he had sponsored any prisoner, and stated that he had never signed a parole agreement with anybody.[4] The trial court found that the attorney was not a sponsor of a "key" witness parolee as contended by Coleman.

Appellant further asserts that this same attorney had a conflict of interest in that Coleman sold property in order to raise money for his defense and this lawyer represented the purchaser; it is contended that a less

[3]Both lawyers, who served in the original trial, testified at length during the instant hearing.

[4]He did state that he might have filed monthly reports for the sponsor.

amount was paid for the property than had been agreed upon. The attorney denied this accusation, stating that he did not represent the purchaser of the land, but represented Coleman only and that all papers that he prepared, in connection with the sale, were prepared at the request of appellant. The trial court found:

"* * * With reference to the 'Land Sale,' it is well established that the sale was engineered by the defendant and his family to raise money for his defense. The transaction was directly with the purchaser who employed his own attorneys to complete the sale. The only thing brought out as to [the Coleman attorney's][6] participation was that he prepared the contract for the defendant. Nothing has been offered to show that the contents of the contract were anything other than that which had been agreed upon between Coleman and Miller, the purchaser."

Coleman's last complaint, relative to his lawyers, is that they did not appeal the case. Both lawyers testified that they were not paid to perfect an appeal, and one stated that he felt that Coleman had but little chance to obtain a reversal, and he advised against it. At any rate, both stated that Coleman decided to forego an appeal, and to endeavor instead to obtain a pardon from the Governor's office. The Circuit Judge commented as follows on this phase of the case:

"Counsel for the defendant did not appeal the case to the Arkansas Supreme Court as alleged by petitioner. The answer to this as ground for relief at this hearing is that they were not employed to do so. Petitioner was not indigent and could have employed his trial counsel or any other attorney for that matter to perfect the appeal. In this area it is more than apparent that the defendant, his family and advisors had come to the conclusion that they could obtain more immediate and conclusive relief from the jury's verdict by pursuing the matter politically through pardon and parole channels

[6]This terminology is used in lieu of the attorney's name to prevent possible embarrassment.

than through more appropriate legal processes. That such thinking should have considerable present day currency is deplorable. However, in this endeavor failure was met, and it is both displeasing and regrettable that this failure should be rationalized into a charge of inadequacy of counsel by petitioner."

Finally, Coleman contends that the trial judge (who tried the original case) went into the jury room and communicated with the jury after it had been in deliberation 15 or 20 minutes. Testimony to this effect was presented by Clifford Coleman and James Coleman, sons of appellant, who testified that one of the jurors asked the judge to come into the room, and the jurist at first refused. The juror then said, "Judge, we need to ask you a question," and, according to the witnesses, the judge then went into the room with the jury, stayed about 5 minutes, and came back out. One of the sons stated that the judge went into the jury room twice. This testimony was emphatically denied by the judge himself, the court reporter, and the two attorneys who represented Coleman on trial. The judge who conducted the present hearing stated:

"As to the trial judge having improperly communicated with the jury, this is a clear cut question of fact. This court believes that the trial judge did not do so. He so testified and his testimony is being accepted as true. This finding is buttressed by the belief that he would not have done so at the conclusion of a hard fought trial well knowing such a communication as testified about herein would certainly have constituted reversible error. Nothing in the record indicates anything but that the trial judge presided in a completely impartial manner."

Not only is there substantial evidence to support the findings of the trial court, but we are also of the view that the testimony weighs heavily against appellant's contentions.

All asserted errors have been examined, and we agree with the Poinsett Circuit Court that the record does not reflect that the petitioner was denied any constitutional right secured to him by either the Constitution of the United States or the Constitution of the State of Arkansas.

The judgment is affirmed.

FOGLEMAN, J., disqualified.

ST. LOUIS SOUTHWESTERN RAILWAY CO. *v.* FRANCES W. FARRELL ADM'X OF THE ESTATE OF MARGUERITE M. BOOTH

5-4184 416 S. W. 2d 334

Opinion delivered June 5, 1967

[Rehearing denied July 26, 1967.]

Barrett, Wheatley, Smith & Deacon, for appellant.

Shaver & Shaver, for appellee.

CARLETON HARRIS, Chief Justice. This appeal involves a railroad crossing accident. Frances W. Farrell, Administratrix of the Estate of Marguerite M. Booth, instituted suit against the St. Louis Southwestern Railway Company, seeking damages because of the death of Mrs. Booth, who succumbed on June 4, 1964, as a result of injuries suffered on June 1, 1964, when an automobile in which she was riding struck the third power unit of a Cotton Belt train at a crossing near the Fair Oaks community in Cross County. On trial, the jury returned a verdict for $70,000.00 against the railroad company, appellant herein, and from the judgment so entered comes this appeal. For reversal, it is asserted, first, that there was no submissible issue of negligence, and a verdict should have been directed for the Cotton Belt. In the alternative, it is contended that the court erred in refusing a requested instruction by appellant dealing with increasing care commensurate with danger.

Let it first be stated that the questions of negligence involving employees charged with operating the train, in such matters as speed of the train, ringing of the bell, blowing of the whistle, and maintaining a proper lookout, are not really involved in this appeal. The trial court dismissed the complaint against the conductor after the plaintiff had concluded its case, and dismissed

the complaint against the engineer following the conclusion of all the evidence.[1] While appellee[1A] cross-appeals from the trial court's action in dismissing the complaint against the engineer, only two paragraphs are devoted to this cross-appeal, and appellees state that they are not insisting on same "unless it should become important in this matter and we have mentioned same so that no waiver could be inferred." There is no reason to relate the testimony relative to any alleged negligence on the part of this employee, and it will suffice to say that an examination of the record supports the order entered by the Circuit Court dismissing the complaint as against him.

The main premise on which recovery was sought, and the one upon which the jury granted the recovery, was that the Fair Oaks crossing is an abnormally dangerous crossing and the railroad had not provided adequate warnings of the approach of trains.

The accident occurred at 8:35 A.M. on June 1. G. C. Booth, accompanied by his wife, Marguerite, was driving east on Highway No. 64, and the Cotton Belt train, consisting of five power units, seventy-two cars, and a caboose, was proceeding south at a speed of 60 to 65 miles per hour. The crossing was equipped with standard flashing signal lights, a bell, and an electric signal, which showed a constant vertical red S-T-O-P once the signals were activated by an approaching train. The Booth automobile, according to the evidence, skidded approximately 77½ feet into the third power unit of the train, killing Mr. Booth instantly and fatally injuring Mrs. Booth. The highway was straight, level, and at grade with the crossing. A motorist's view toward the direc-

[1]The complaint against Gerald Slocum, a signal maintainer for the railroad company was also dismissed at the conclusion of the plaintiff's case. (The Fair Oaks crossing was located in the district in which Slocum was charged with the responsibility of maintaining signal lights.)

[1A]Since all of the heirs are the real parties in interest, appellee will hereafter be referred to in the plural.

tion from which the train was approaching is obstructed by a store building, surrounded by a grove of trees, the east edge of the building being located about 75 feet from the railroad track. The sun was in the east, which, as stated, was the direction in which the automobile was proceeding. All of the evidence is to the effect that the flasher lights were working, but appellees offered numerous witnesses who testified that the lights appear dim and difficult to see when one is driving toward the sun. There was also testimony that there are trees on the railroad right-of-way that obstruct the view of a motorist traveling east, preventing such motorist from seeing an approaching train, at least during the period of time when the trees are in full foliage.

Albert Hess, who lives three miles east of Fair Oaks, testified that as one travels east early in the morning in June, the sun is about eye level; that the signal lights could very easily be overlooked, appearing dim because of the sun. This witness testified that at a time when a state trooper's patrol car was parked at the crossing with the patrol light on, he observed that that light was much brighter than the railroad signal lights.[2] Harold E. Cox, who resides a mile from the Fair Oaks crossing, stated that at certain times of the year when the sun is bright, the lights are difficult to see. This, according to the witness, is particularly true with reference to early morning travel to the east and late afternoon travel toward the west. Otha Hewitt, Chief of the Traffic Service Division of the Arkansas Highway Department, testified that early in the morning and late in the afternoon, the sun is at an angle that makes it difficult to see the lights at the Fair Oaks crossing. The Chancery Judge of the Fifth Chancery District, Ford Smith, who frequently travels over the crossing involved, said that as one travels from the west toward the east, between 7:30 and 8:30 in the morning, the glare of the sun creates difficulty in ascertaining whether the lights are blinking, and this witness also stated that

[2]This comparison was made when both the railroad lights, and the police patrol light were on (flashing).

the growth of trees, heretofore referred to, makes it difficult to observe a train approaching from the north.

Jimmy Brannan, a Highway Department resident engineer, made measurements on the railroad right-of-way for the purpose of ascertaining the type, size and density of timber growing on the right-of-way. He testified that a number of trees were at least partly on the railroad right-of-way, including some that, from their size, appeared to be about ten years old. Brannan made measurements for a distance of 1,000 feet north of the crossing, and he stated that the timber was not in a continuous line, but was "intermittent, skips." This witness also testified that the crossing lights were difficult to see when driving into the sun.

A total of nine witnesses testified that (to varying degrees) the sun definitely affected the ability of an approaching motorist to see the flashing signals at the crossing. There was also testimony by some other witnesses that the signals could be seen, but we are here only concerned with whether there was sufficient evidence to send the case to the jury.

The court was asked to submit to the jury the question of whether the crossing in question was "abnormally dangerous" and, over the objections of appellant, the following instruction was given:

"Plaintiff, Frances W. Farrell, Administratrix, contends that the Railroad grade crossing in this case was abnormally dangerous, and they have the burden of proving this proposition.

"If a Railroad grade crossing is frequently used by the traveling public, if trains pass over it frequently, and if the crossing is so dangerous because of surrounding circumstances that a reasonably careful person could not use it with reasonable safety in the absence of special warnings, then it would be an abnormally dangerous

crossing. Whether the Railroad grade crossing in this case was abnormally dangerous is for you to decide.

"If you find that the crossing was abnormally dangerous, as I have defined that term, then it is the duty of the railroad to use ordinary care to give a warning reasonably sufficient to permit the traveling public to use the crossing with reasonable safety."

The railroad contends that it had given special warnings (the signal lights), and that the signal system used meets the standards set by the American Association of Railroads, as adopted by the Bureau of Public Roads, and the Arkansas Highway Department. As to the last argument, let it be said that a railroad's compliance with safety regulations (either industry or statutory regulations) does not constitute a complete discharge of its duties toward the public. *Pennington* v. *Southern Pacific Company*, 304 Pac. 2d 22 and *Bridger* v. *Union Railway Company*, 355 F. 2d 382 (1966). In the case of *Grand Trunk Railway Company of Canada* v. *Ives*, 12 Supreme Court 679, the United States Supreme Court said:

"*** The underlying principle in all cases of this kind which requires a railroad company not only to comply with all statutory requirements in the matter of signals, flagmen, and other warnings of danger at public crossings, but many times to do much more than is required by positive enactment, is that neither the legislature nor railroad commissioners can arbitrarily determine in advance what shall constitute ordinary care or reasonable prudence in a railroad company at a crossing, in every particular case which may afterwards arise; for, as already stated, each case must stand upon its own merits, and be decided upon its own facts and circumstances, and these are the features which make the question of negligence primarily one for the jury to determine, under proper instructions from the court."

Appellant insists that it had given special warnings, but it is the sufficiency of the warnings that is here in question. In our own case of *Fleming, Administratrix* v.

Missouri and Arkansas Railway Company, 198 Ark. 290, 128 S.W. 2d 986, we said:

"It is the settled rule that whether failure of a railroad company to station a flagman at a crossing constitutes an omission of such care as an ordinarily prudent person would use under the same or similar circumstances, is a question of fact where there are obstructions which materially hinder the view of approaching trains, provided the crossing is used frequently by the public, and numerous trains are run.[3] Inasmuch as permanent surroundings may create a hazardous condition, the rule of care goes further and requires precautions where special dangers arise at a particular time. It is said that the obligation exists, at an abnormally dangerous crossing, to provide watchmen, gongs, lights, or similar warning devices not only for the purpose of giving notice of approaching trains, but such care is to be equally observed where the circumstances make their use by the railroad reasonably necessary to give warning of cars already on a crossing, whether standing or passing, as where a crossing is more than ordinarily dangerous because of obstructions to the view interfering with the visibility of the responsible train operatives, or those approaching the track."

In *Hawkins* v. *Missouri Pacific Railroad Company, Thompson, Trustee,* 217 Ark. 42, 228 S.W. 2d 642, we said:

"*** A directed verdict for the defendant is proper only when there is no substantial evidence from which the jurors as reasonable men could possibly find the issues for the plaintiff. In such circumstances the trial judge must give to the plaintiff's evidence its highest probative value, taking into account all reasonable infer-

[3]The record reflects that a traffic count made about 0.25 miles east of the railroad at Fair Oaks on U. S. No. 64 for a 24-hour period showed a volume count on July 28, 1964, of 1,772 vehicles, and on August 3, 1964, of 1,957 vehicles. The record also further reflects an average of 16.4 trains per each 24-hour period during the month of June, 1964.

ences that may sensibly be deduced from it, and may grant the motion only if the evidence viewed in that light would be so insubstantial as to require him to set aside a verdict for the plaintiff should such a verdict be returned by the jury."

We think, under the testimony adduced, that the instruction was proper, and we hold that there was sufficient testimony to make a jury question as to whether the special warnings given were adequate to warn the occupants of the Booth car of the approach of the train.

It is asserted that reversible error was committed by the court in refusing to give appellant's Requested Instruction No. 1. This proposed instruction reads as follows:

"A motorist whose visibility is impaired, or reduced, by physical or natural elements is under the duty for his safety and that of others affected by his driving to exercise ordinary care commensurate with the increased dangers present or created by natural causes."

We do not agree. It will be noted that this instruction pertains only to the duty of the *motorist, i.e.,* operator of the vehicle, the instruction setting forth his duty to himself and "others who are affected *by his driving.*" Had this litigation been instituted by the administrator of *Mr. Booth's* estate, appellant's argument might be pertinent, but since the suit was instituted by the administratrix of the passenger, and in view of the court's Instruction No. 18, appellant's argument is without weight. The court, in Instruction No. 18, after telling the jury that Mrs. Booth was required to exercise ordinary care for her own safety, and a failure on her part to do so would be negligence, then stated, in this same instruction:

"On the other hand, the negligence, if any, of G. C. Booth in operating the automobile in which Marguerite M. Booth was a passenger prior to and at the time of the

fatal accident in this case *could not be imputed* [our emphasis] to Marguerite M. Booth or to the plaintiff in this case."

This instruction was given without objection on the part of appellant, thus precluding any possible error in the court's failure to give appellant's Requested Instruction No. 1.

It might also be stated that there was no evidence in this case which would have justified the court in giving an instruction on imputed negligence. See *Rogers* v. *Crawford*, 220 Ark. 385, 247 S.W. 2d 1005.

It is finally urged by appellant that the verdict was grossly excessive, and we agree that the evidence does not justify the amount of damages awarded. The complaint sought $50,000.00 for pain and suffering of the deceased who died four days after the collision; $4,000.00 was sought for medical, hospital, doctors, and burial expenses, $3,500.00 for the market value of the Dodge automobile that was demolished, and the three children of Mrs. Booth asked $50,000.00 for mental anguish. A general verdict only was returned by the jury, and we have no way of knowing how the $70,000.00 awarded was apportioned. We are firmly of the view, however, that the established facts do not justify the recovery of a large amount for mental anguish of the children. The surviving children were Fred Welsh, Morgan Welsh, and Frances Welsh Farrell, all children of Mrs. Booth by a previous marriage. The evidence reflects that Fred Welsh was 50 years of age, married, with three children, and lives in Cincinnati, Ohio, where he is manager of the Pepsi-Cola Bottling plant. He has not lived in Searcy for 30 years, but testified that his mother visited him in his home just before Thanksgiving 1963; he has not been in her home since Thanksgiving 1962. He stated that he frequently corresponded with his mother.

Morgan Welsh, 47 years of age, who manages a newspaper in De Land, Florida, testified that he had not lived in Searcy since 1941. He said that his mother, at

the time she was fatally injured, had started on a journey to his home for the purpose of attending the graduation of his son; further, that his mother would visit him in Florida every 2 or 3 years, and he more frequently visited her in Searcy. He had not seen her since the preceding Christmas.

Frances Welsh Farrell, 44 years of age, lives in Brinkley with her husband. Her testimony reflected that she contacted her mother by mail frequently, and called Mrs. Booth over the telephone nearly every Sunday. She had last seen her mother about a month before Mrs. Booth's death. Each child, upon being notified of the accident, went to Memphis, and was present there when the mother died. Each was, of course, shocked, upon learning of the tragedy, and each testified as to mental anguish suffered because of the death of Mrs. Booth. *Peugh* v. *Oliger, Administratrix*, 233 Ark. 281, 345 S.W. 2d 610, is our landmark case on mental anguish. The opinion discusses at length what constitutes "mental anguish," and points out that the term means "something more than recovery for the normal grief occasioned by the loss of a loved one. To be grieved or to be shocked by the death of a loved one is natural, but in order to recover under the Act No. 255, one must suffer more than the normal grief." In *Mode* v. *Barnett, Administratrix*, 235 Ark. 641, 361 S. W. 2d 525, three minor sons were awarded $7,500.00 each for the mental anguish caused by the wrongful death of their father, who had been shot and killed. From the opinion:

"*** In the instant case, we have three small boys who had been in close association with their father, probably a closer relationship than in the average family, due to the fact that there was no mother present to share in the companionship. Suddenly the one remaining parent was taken away from them — and in a violent manner. According to the evidence of Cecil Barnett, husband of Mrs. Clida Barnett, the boys' grandmother, the younger boys cried many nights, and on several occasions awakened the Barnetts in the middle of the night, 'There's

been a many of nights that me and my wife would go to bed, pick them up and take them in and love them and talk to them.' The witness states that Ferrell, one of the twins, had been under a doctor's care due to extreme nervousness. The boys testified that their father was good to them, and would take them fishing, swimming, and to the picture show. Mrs. Barnett stated, 'He took the boys everywhere he went when he wasn't working, and they were not in school. If he went anywhere, they were with him, because he didn't leave them behind. And he worshipped those boys.' She also testified that their father's death affected their school work: 'They were able to continue in school but they had to stay in that same grade that year. They had to stay in that grade two years.' "

See also *Strahan* v. *Webb*, 231 Ark. 426, 330 S.W. 2d 291, where two boys, one in college, and one still in high school, had close ties with their father, who was killed in a collision.

In *Peugh* v. *Oliger, supra,* Mr. and Mrs. Albert Henley and Mr. and Mrs. Eugene H. Eubanks were all killed in an automobile collision when the auto in which they were riding was involved in a collision with a truck. Separate suits were instituted by the administrators, respectively, of the two couples, and the suits were consolidated for trial. The jury returned a verdict for Mrs. Gene Frances Oliger for $12,500.00 for mental anguish for the death of her father, Mr. Eubanks, and a like amount for mental anguish occasioned by the death of her mother. The evidence reflected that Mrs. Oliger was very close to her parents, and worked with them nearly every day in the hardware store which they owned. She fainted upon learning of their deaths. Even with this close relationship, the aforementioned verdicts were reduced to $7,500 each. The jury also returned a verdict for mental anguish damages in the amount of $2,000.00 for each of the five children of Mr. Henley, because of his death. All five children lived in distant states. The judgments for two were reversed, and their causes dismissed, and the other three verdicts were reduced

to $500.00 each. An award of $10,000.00 for mental anguish was given Mrs. Leta Ring (because of the death of Mrs. Henley) who had been reared from early childhood by Mrs. Henley. After her marriage, Mrs. Ring continued to live near her, saw her every day, and subsequently, upon moving, would write and call her foster mother. The evidence reflected that upon the death of Mrs. Henley, Mrs. Ring suffered a near nervous breakdown. The award was left undisturbed by this court.

Here, the children seem devoted to their mother, and much closer to her than the five children of Henley, mentioned in *Oliger,* but, with the exception of the daughter, were rarely with her, and their contacts could not be termed "frequent," as the word is generally used. This, of course, is due to the fact that the two sons lived in states that were far away, and the opportunities for visiting were accordingly limited. Even Mrs. Farrell, who lived only 60 miles away, does not appear, from the record, to have visited with her mother a great deal, the principal contact being by letter, and once per week telephone calls.

Of course, these children were shocked when they learned of the fatal injury of their mother, and their grief was undoubtedly very real. Yet, we find nothing in this record that indicates that their grief was considerably greater than that of the normal and average adult child, who has lived away from home for many years. There are no exceptional circumstances, or particular relationships between the children and their mother, that would justify an unusual award. After all, death is a certain fact, and Mrs. Booth had reached that age when these children surely recognized the fact that their mother, in all probability, could not live too many more years. We have concluded that the judgment is grossly excessive, and should be reduced from $70,000.00 to $50,000.00.

Accordingly, the judgment is affirmed on the condition that a remittitur is entered as indicated within

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

GEORGE ROSE SMITH, J., dissents.

FOGLEMAN, J., concurs.

GEORGE ROSE SMITH, Justice, dissenting. I think the judgment should be reversed and the cause remanded for a new trial.

Among the instructions given was AMI 1805, which, after defining an abnormally dangerous crossing, goes on to say that if the jury finds that the crossing was abnormally dangerous then it was the duty of the railroad to use ordinary care to give a warning reasonably sufficient to permit the traveling public to use the crossing with reasonable safety.

Evidently the jury found that the crossing was unduly hazardous, for the single reason that the rising or setting sun tends to blind motorists approaching the crossing. It thus became the railroad's duty to take extra precautions to warn travelers of the danger ahead. The railroad sought to discharge that duty by the installation of flashing red lights at the crossing. Under the court's instructions the decisive issue for the jury was whether the installation of those lights satisfied the railroad's obligation to give an adequate warning.

The only testimony bearing on that issue consisted of statements that the crossing lights appeared to be dim and a statement that the lights on a patrol car were much brighter than the crossing lights. It seems to me that this proof was so scanty that the jury was left to speculate about whether the crossing lights were reasonably calculated to meet the railroad's duty to warn. There is no proof that stronger or more visible lights can be bought or even that they can be manufactured. There is no proof that if brighter lights exist they would have overcome

the glare of the rising sun. There is no proof that patrol car lights are adaptable for use by the railroad. Those questions can be answered with a fair degree of certainty only by resort to skilled technical knowledge not lying within the ordinary experience of men called for jury duty. That knowledge was not made available to the jurors in the court below. Under the reasoning that we have followed in many cases, such as *Glidewell* v. *Arkhola Sand & Gravel Co.,* 21 Ark. 838, 208 S. W. 2d 4 (1948), and *Missouri Pac. R. R.* v. *Ross,* 194 Ark. 877, 109 S. W. 2d 1246 (1937), I am compelled to conclude that the jury was allowed to draw an inference of fact not based upon adequate proof—in short, to speculate.

JOHN A. FOGLEMAN, Justice, concurring, I concur in the result and agree that the case should not be reversed for failure to give appellant's requested Instruction No. 1, even though I think it is a correct declaration of law and applicable. But I believe that it affirmatively appears that no prejudice resulted because it was adequately covered by AMI 301, 303, 305 and 901. While there was no evidence on which negligence of G. C. Booth could be imputed to Marguerite M. Booth, appellant contended that the negligence of G. C. Booth was the sole proximate cause of her injuries. By these instructions the jury was told that ordinary care was the care a reasonably careful person would use *under circumstances similar to those shown by the evidence*; that it was the duty of all persons involved to use ordinary care for their own safety and *the safety of others*; that the lookout required of a driver of a motor vehicle was *that which a reasonably careful driver would keep under circumstances similar to those shown by the evidence*; that it was the duty of a driver of a motor vehicle to drive at a speed no greater than is reasonable and prudent, *having due regard for any actual or potential hazards;* and that *a failure to meet the standards of conduct required by the latter two rules was negligence.*

J. T. ARNOLD D/B/A AGGREGATES & TRANSPORTERS ET AL *v.* KOEHRING COMPANY D/B/A BUFFALO-SPRINGFIELD CO.

5-4225 415 S. W. 2d 552

Opinion delivered June 5, 1967

Gaughan & Laney, for appellants.

W. J. Walker and *Wayne Foster,* for appellees.

CARLETON HARRIS, Chief Justice. J. T. Arnold, doing business as Aggregates and Transporters, was a subcontractor under the principal contractor, W. R. Fairchild Construction Company, Ltd. The latter company held a contract with the Highway Department to reconstruct a portion of Highway No. 167 in Dallas and Grant Counties. Under the contract, Arnold was to place about 200,000 cubic feet of dirt on both sides of the road, across the Saline River bottoms, as a matter of widening the road from 30 to 52 feet. The road embankment through the bottom is 15 to 18 feet high, and the contractor had to extend the embankment 12 feet on each side. The new fill was put down in layers of 8 inches, and each layer was to be compacted to a density of 95 Proctor.[1] To obtain the proper compaction, Arnold

[1]This is a standard measurement of compaction.

had been using a D7 bulldozer to pull a sheepsfoot roller back and forth over the fill. Though this method would accomplish the task, the work was slow and expensive, it being impossible to turn a dozer and sheepsfoot roller around on a high, narrow fill. Accordingly, the dozer would have to be operated to a place where there was room to turn.

Arnold had heard or read about a pneumatic roller used to compact earth, which could be driven back and forth without turning it around, and he contacted Roy McDonald, an equipment dealer with whom he had done business. McDonald represented the manufacturer of the machine, Koehring Company, doing business as Buffalo-Springfield Company, appellee herein. At Arnold's request, McDonald and Frank Knolls, a factory representative for appellee, went with Arnold to the Saline River bottoms and inspected the four pits from which Arnold planned to obtain the dirt for the fill. Two of the pits were in the river bottom in gumbo mud; another was in sandy soil, and there was another in clay dirt. According to Arnold, these men assured Arnold that the PSR-30 machine (about which Arnold had inquired) would work satisfactorily, and get the required compaction. Arnold, stating that he relied upon their superior knowledge, signed a lease agreement on July 13, 1962, to rent this machine for 6 months for the sum of $1,600.00 per month, and the machine was placed on the job July 23, 1962. McDonald instructed the men how to operate the roller and demonstrated it by driving it himself.[2] Appellant placed the machine in use, and thereafter occurred the events which give rise to this litigation, and which will be subsequently discussed. Arnold, contending that the machine did not perform satisfactorily, never did actually pay but $1,600.00 for rent, turned the machine back in, and refused to make any further payments. Appellee then instituted suit for the balance of the rent due for the 6 months period against Arnold, Fairchild, and the Western Cas-

[2]The machine did not contain ballast, and turned over when he drove it near the edge of the fill.

ualty and Surety Company, which had executed a payment and performance bond as surety (for Fairchild Construction Company) to all who furnished material, labor, and supplies in doing the work under this contract. Fairchild and Western answered, admitting the execution of the bond, but denying all other material allegations, and Arnold answered separately, asserting that the machine would not perform the work as represented by appellee; further, that he had been damaged in the sum of $3,000.00 because the failure of the machine had delayed him in completing his contract, and his operating expense had risen because of that fact. On trial, the court, sitting as a jury, found that appellee was entitled to judgment in the amount of $7,000.00; that the Fairchild Company and Western Casualty were liable for that period of the lease agreement between July 23, 1962, and October 27, 1962 (when the machinery was being used on the Fairchild job in Grant County), in the net amount of $2,359.99;[3] that the cross-complaint of Arnold should be dismissed. From such judgment comes this appeal.

There was a no warranty clause in the lease contract, but appellant argues that this clause only warrants against latent defects in material, workmanship or capacity, and he asserts there was an implied warranty that the particular type of machine involved would obtain the compaction required. Appellant states:

"* * * The form used contains a no warranty clause but it is quite clear that the clause was not designed to relieve lessors of their obligation under the implied warranty that the machine was suitable for the use intended. The lessor and the manufacturer knew what was expected and required of the machine on this job.

It is not necessary that we discuss whether there

[3]Arnold had paid $1,600.00 in cash, and appellee had given Arnold credit for $1,000.00, because of a breakdown of the machine for 19 days. This credit was subtracted from the total sum held to be due by Western of $4,959.99.

actually was an implied warranty, for we think fact questions dispose of this litigation.

Proof on the part of appellant is to the effect that the roller would not give 95% Proctor compaction. Arnold stated that he could obtain 90, 91 and 92% Proctor compaction, but that he would then have to go back with his old machine to make the additional compaction. He said that his crew had trouble compacting the edge of the roadway, because of the fact that the machine could not get in close to the edge. Arnold mentioned that after a period of time, "the torque converter went out. * * * We were down I would say 10 days, maybe three weeks or longer, which the factory compensated us for as far as the rent was concerned. It was satisfactory how, the arrangement they made as far as that part of it was concerned."[4] Appellant testified that, in operating the roller, the directions given by McDonald were followed, that he was told "to fill it full of water. We filled it full of water. We still come up—that added more weight to it. Then they told us to put more air in the tires, on pneumatic rollers—the amount of air in the tires has something to do with the amount of compaction you get. They told us to do that. We still didn't get it. In a period of two or three weeks this same factory man came back down and he said as a last resort to get the maximum weight on this roller he said to fill it full of sand and then fill it full of water, and we did that, but we still were unable to come up to this 95 per cent Proctor compaction which was required by the State. All the time we were still having to use the sheepsfoot to get the final four or five per cent compaction, before we could put our gravel and other materials on it." Arnold took the roller off the Grant County job and sent it to Bald Knob, where he had another contract. In the meantime, he had made his rental payment on September 12. When asked why he retained the machine so long before taking it off the Saline River contract, appellant replied that he was "still in the stage of

[4]This was the instance in which Arnold was credited with the $1,000.00.

getting information from the factory," and he believed in giving the machine "a fair chance."

According to Randolph Reynolds, superintendent for Arnold on the Saline River job, the biggest trouble occurred on the shoulder. "Yes, where we had the biggest trouble on the shoulders. Take a Sheepsfoot and roll the shoulders because it hangs out a little further and get your compaction that way." He stated that the pneumatic roller could be used up to a certain point, but that the sheepsfoot would have to be then used in order to meet the specifications. He also said that there were times when this old machine would not attain the 95% compaction on the first trial. With the pneumatic roller, according to the witness, one could usually get the required compaction with sandy material. Reynolds said that the machine was top-heavy, and it was "difficult to find an operator that would run it. Most people was scared of it."

The roller, after being sent to Bald Knob, was never used, because of rainy conditions, and it was finally turned back to McDonald on November 9, according to appellant, at the request of McDonald.

Roy McDonald testified on behalf of appellee that his company was the authorized representative of Buffalo-Springfield in this territory, and rentals were remitted to that company; his organization would not receive compensation unless the lease agreement was carried out. He testified that he told Mr. Arnold how the machine should be operated, and also furnished appellant with literature relative to proper operation of the roller. The witness said that the machine "should have Calcium Chloride in the tires, ballast in the tires before it's ever put in operation, and I located the Goodrich people in Little Rock and they had the facilities for filling the tires, etc. He could go down that afternoon and I talked to Mr. Arnold, told him what the price was, availability, could be done that afternoon. I gave him

the man's phone number and Mr. Arnold said he would 'phone him right away and get him down there. * * * The more ballast you have in it the lower the center of gravity comes down." Mr. Arnold denied that anything was mentioned about calcium chloride, but the literature referred to is an exhibit and reflects directions for increasing the weight, mentioning five different increases respectively, caused by calcium chloride in tires, water ballast, water ballast and calcium chloride in tires, wet sand ballast, and wet sand ballast and calcium chloride in tires. McDonald said:

"* * * The book is pretty explicit if you want your maximum compaction you need to go to maximum weights and tire pressures and the only way to get that, fill that thing up with sand and water."

McDonald also testified that Arnold complained about the machine around the middle of August, but after a visit by the factory representative, who recommended that the moisture content be increased, he (McDonald) heard no further complaint until October. The witness, who denied that he had told Arnold to return the machine, also testified that there was no sand in it when it was returned. McDonald was insistent that the roller would have worked satisfactorily if the recommendations had been correctly complied with.

That, then, is the testimony. Let it be remembered that, this being a Circuit Court case, we are only concerned with whether there was substantial evidence to support the judgment of the Circuit Court. It is, at once, obvious that the testimony was rather conflicting. Arnold and his witness stated, in effect, that the pneumatic roller simply would not "do the job," and it is appellant's contention that there was an implied warranty that it would perform the task for which it was leased. As previously stated, the question of whether there was an implied warranty is not controlling, for the Circuit Court, sitting as a jury, could well have found that the reason for the failure of the machine (if it did actually

fail) was because Arnold did not comply with instructions in operating it. McDonald testified that he gave to appellant a copy of "condensed specifications" for this machine, and the specifications as to ballast condition (mentioned previously in this opinion) very clearly state that calcium chloride should be placed in the tires. Mr. Arnold testified that he did not do this, saying that he had not been told, but the fact remains that proper operating procedures are explained in the exhibit just mentioned. Arnold also testified that sand had been used to add weight, but McDonald, in his testimony, said that an examination of the machine, upon its return, showed that sand had never been placed in it. Specialized machinery, of course, must be operated in accord with directions in order to attain a high degree of efficiency. The court heard these witnesses on this question, and, apparently took the view testified to by appellee.

It also appears that, at the very least, some benefits were obtained by Arnold from the use of the machine. The pneumatic roller could be driven in both directions without the necessity of turning it around, and this designed characteristic certainly should have been an aid to appellant. In *Lawson* v. *Rusconi,* 296 Pac. 628 (Cal.), the court said:

"Assuming an implied warranty, as contended for, it would be to the effect that the device was reasonably fit for the purpose intended. The court found that the contracts were fully complied with by the respondent, and, even if an implied warranty be assumed, we think this finding is supported by the evidence. Such a warranty would not call for 100 per cent efficiency upon the part of the machine and process, but only for such results as would be reasonable under the circumstances. While certain machinery for certain purposes may closely approximate perfection in its operation, many kinds of machinery and processes are extremely valuable, and constitute a great improvement over prior methods of doing certain things, although, from the very nature of the case, perfect results are impossible. In such cases,

reasonable fitness for the purpose intended is to be judged by a comparative standard rather than by an arbitrary one."

Arnold had the use of the machine for approximately a month before he made his first rental payment, and, though subsequently still complaining that it had not performed satisfactorily, sent it on to another job at Bald Knob, where he evidently intended to make further use of it, but was precluded from doing so by constant rain.

It is asserted that the machine was returned at the request of appellee on November 9, and Arnold could not properly be held liable for the full 6 months rental. We do not ageee. The machine was leased for that period of time. McDonald denied that he told Arnold that he had to bring it back, and stated that he had no authority to change the lease agreement. He did say that he told Arnold that appellee would have to repossess the machine and file suit for the amount of the lease if appellant did not take steps to arrange payments.

As stated, this was a case of conflicting testimony. The Circuit Court, sitting as a jury, decided these issues in favor of appellee, and there is substantial evidence to support the finding and judgment.

Affirmed.

GUARANTY FINANCIAL CORPORATION ET AL *v.*
JAMES HARDEN ET UX

5-4230 416 S. W. 2d 287

Opinion delivered June 5, 1967
[Rehearing denied July 26, 1967.]

[redacted]

Griffin Smith, for appellant.

Brockman & Brockman, for appellee.

GEORGE ROSE SMITH, Justice, This is a suit by the appellants, Guaranty Financial Corporation and its wholly owned subsidiary, Joe-Lee Homes, Inc., to foreclose a mortgage securing a promissory note payable in 144 equal monthly installments of $75.01. The note makes no distinction between principal and interest, merely reciting the total obligation of $10,801.44 (144 x $75.01), The single question is whether the inclusion of an acceleration clause in the note made the entire transaction void for usury. The chancellor held the note to be usurious but allowed the plaintiffs a partial recovery upon an allied construction contract.

We think the chancellor fell into error in construing the promissory note all by itself, without regard to the building contract which was executed at the same time, as a part of the same transaction, and which gave rise to

the debt evidenced by the note. It is a familiar rule of law that in such a situation the two instruments are to be read together as a single contract. *Gowen* v. *Sullins,* 212 Ark. 824, 208 S.W. 2d 450 (1948); *W. T. Rawleigh Co.* v. *Wilkes,* 197 Ark. 6, 121 S. W. 2d 886 (1938). We are not here concerned with the possible status of a holder in due course of the note alone, for Guaranty Financial Corporation took the instrument from its own subsidiary. [See Ark. Stat. Ann. § 85-3-119 (Add. 1961).])

The building contract, note, and mortgage were all executed together on October 1, 1965. The building contract was the basic instrument. By that contract Joe-Lee Homes agreed to construct a specified dwelling house for the Hardens for $6,288. The contract, after reciting a down payment of $10, goes on to say: "The balance of $6,278.00, plus interest, shall be paid in monthly installments of $75.01 beginning on the 1st day of January, 1966, and on the first day of each succeeding month thereafter until the whole of said indebtedness is paid. The Owner has concurrently herewith executed a promissory note and mortgage to cover the balance."

The accompanying promissory note was in exact harmony with the building contract. As we have said, it recited a lump sum obligation of $10,801.44, payable in 144 monthly installments of $75.01, beginning January 1, 1966. There followed this acceleration clause: "In the event of default in the payment of any installment . . . the entire unpaid principal indebtedness aforesaid shall, at the option of the payee herein, become immediately due and payable without notice."

When the building contract and promissory note are read as one contract, as our decisions require us to do, it is crystal clear that the original principal debt was $6,278, with interest which can readily be calculated to be slightly less than the legal rate of 10 percent per annum. All that the plaintiffs seek to recover is the unpaid principal plus accrued interest. Hence the case falls precisely within our holding in *Mid-State Homes*

v. *Knight*, 237 Ark. 802, 376 S.W. 2d 556 (1964), where we said: "The chancellor in holding the instrument to be usurious, apparently based his decision upon the fact that the appellant had exercised its option to accelerate the maturity of future payments and had filed suit for the full amount without making any deduction for the interest that had not yet accrued. This procedure, however, did not render the transaction usurious. In such a situation the court should merely refuse to permit the creditor to recover the unaccrued interest. *Eldred* v. *Hart*, 87 Ark. 534, 113 S. W. 21; *Sager* v. *American Investment Co.*, 170 Ark. 568, 280 S. W. 654."

Reversed.

WARD, J., concurs.

HARRIS, C. J., and BYRD J., dissent.

PAUL WARD, Justice, concurring. I concur in the result reached by the majority, but only because the note itself refers to certain "covenants and agreements" which would be notice to an innocent purchaser.

CONLEY BYRD, Justice, dissenting. The sole issue raised by appellants, Guaranty Financial Corporation and Joe-Lee Homes, Inc., is whether an installment note for the gross amount of principal and interest at ten per cent is usurious because it fails to state the principal indebtedness on the face of the note and provides that upon default the entire gross amount stated shall be due and payable. The note executed by appellees, James Harden *et ux.*, is as follows:

"PROMISSORY NOTE

"$10,801.44 October 1, 1965 Pine Bluff, Arkansas

"For value received, the undersigned promise to pay to the order of Joe-Lee Homes, Inc. at its office

in the City of Pine Bluff, Arkansas, the sum of Ten Thousand Eight Hundred One and 44/100 Dollars ($10,801.44) payable in (144) successive monthly installments of Seventy-five and 01/100 Dollars ($75.01) each, the first installment payable on the First day of January, 1966, and an installment of like amount payable on the First day of each succeeding month thereafter until the said indebtedness is fully paid.

"In the event of default in the payment of any installment hereunder or in the performance of any of the covenants or agreements on the part of the undersigned contained in the mortgage securing this note, the entire unpaid principal indebtedness aforesaid shall, at the option of the payee herein, become immediately due and payable without notice.

"The makers and endorsers of this note hereby severally waive presentment for payment, notice of non-payment and protest and consent that the time of payment of the above indebtedness, or of any installment thereof, may be extended without notice and agree to pay a reasonable attorney's fee if this note is placed in the hands of any attorney for collection.

"This note is secured by a mortgage on real property in Jefferson County, Arkansas."

The mortgage, like the note, makes no reference to the building contract which was executed simultaneously with the note and mortgage. The building contract provides:

"The Owner agrees to pay for the services and material of the Builder, the sum of $6288.00 (plus, in the event of a credit sale, interest on the unpaid balance), payable as follows:

"(a) $10.00 upon signing of this agreement, receipt of which is hereby acknowledged.

"(b) The balance of $6278.00, plus interest, shall be paid in monthly installments of $75.01 beginning on the 1st. day of January, 1966 and on the 1st. day of each succeeding month thereafter until the whole of said indebtedness is paid. The owner has concurrently herewith executed a promissory note and mortgage to cover the balance."

This proceeding for foreclosure began on January 1, 1966, when appellant, Guaranty Financial Corporation, filed suit No. 36,318 in the Jefferson Chancery Court, stating, among other things, that appellees had committed a breach of their contractual obligation and therefore they accelerated the entire balance due on the note and the mortgage. The first suit was dismissed because of improper assignment of the note and mortgage. Thereafter the foreclosure proceeding now before us was instituted after the president of Joe-Lee Homes, Inc. assigned the note in question in this suit. In response to the second complaint, appellees contended, among other things, that the construction of the house, which is also a part of the subject matter of this suit, was not in conformity with the construction contract.

The trial court found that the practice of including interest on the face of the note is permissible legally where provisions are included for the determination of the correct amount of principal in the event of prior payment or default and foreclosure. However, in this case, the trial court found that the note and mortgage contained no such provisions for determination of principal amount due, and since the test for determining usury is the contract or writing itself, then in effect the lender had created a situation that was inherently usurious in event of default and foreclosure.

The chancellor held that the construction contract was valid but allowed a $1,000 credit for deficiencies in performance, and held that the contract, since it specified no rate of interest, bore interest at six per cent.

Our Constitution, Art. 19, § 13, provides as follows: "All contracts for a greater rate of interest than ten percent per annum shall be void, as to principal and interest, and the General Assembly shall prohibit the same by law; but when no rate of interest is agreed upon, the rate shall be six per centum per annum."

The first paragraph of the promissory note above does not call for a greater payment than principal and interest at ten per cent per annum. Had the note stopped here, there would have been no difficulty under the usury laws. This is because our cases hold that, in the absence of an accelerating clause, the lender can not enforce the total amount of the note on default in payment of one or some of the installments. *Fox* v. *Pinson,* 172 Ark. 449, 289 S.W. 329 (1926).

The second paragraph of the note, however, provides as follows:

"In the event of default in the payment of any installment hereunder . . . on the part of the undersigned . . . the entire unpaid principal indebtedness aforesaid shall, . . . become immediately due and payable without notice."

Can we say that the foregoing is not a contract for a greater rate of interest than ten per cent per annum? I think not, because it is obvious that where the option to accelerate is exercised before any payment is made, as in this case appellants would be obtaining much more than ten per cent per annum on their $6,278 investment. The chart hereinafter set out shows that more than ten per cent interest would be due appellants under the acceleration clause any time appellants exercised their option to accelerate the payments, including even the next to the last of such installments.

[1]Payment Number	Credit to Principal	Credit to Interest	Balance
132			$853.21
133	$67.89	$7.11	785.32
134	68.47	6.54	716.85
135	69.04	5.97	647.81
136	69.61	5.40	578.20
137	70.19	4.82	508.01
138	70.78	4.23	437.23
139	71.37	3.64	365.86
140	71.96	3.05	29.90
141	72.56	2.45	221.34
142	73.17	1.84	148.17
143	73.78	1.23	74.39
144	74.39	0.62	

Appellants rely upon *Mid-State Homes, Inc.* v. *Knight*, 237 Ark. 802, 376 S.W. 2d 556 (1964), where we said:

> "The note was payable in 72 monthly installments of $53.20 each, which included both principal and interest. The chancellor, in holding the instrument to be usurious, apparently based his decision upon the fact that the appellant had exercised its option to accelerate the maturity of future payments and had filed suit for the full amount without making any deduction for the interest that had not yet accrued. This procedure, however, did not render the transaction usurious. In such a situation the court should merely refuse to permit the creditor to recover the unaccrued interest. *Eldred* v. *Hart*, 87 Ark. 534, 113 S. W. 213; *Sager* v. *American Investment Co.*, 170 Ark. 568, 280 S.W. 654."

[1]The foregoing chart was calculated on the basis of 12 equal installations at 10 per cent per annum. No calculation was made for months having more or less than 30 days. The interest charged by appellant appears to have been slightly less than the total maximum of 10 per cent.

It is noted that the *Eldred* case, upon which we relied in the *Sager* and *Knight* cases, involved voluntary payments on the part of the borrower, which resulted in the lender acquiring more than ten per cent interest. In *Foster* v. *Universal C. I. T. Corp.*, 231 Ark. 230, 330 S. W. 2d 288 (1959), which involved an involuntary prepayment resulting in the collection of more than ten per cent interest, we distinguished the case of *Eldred* v. *Hart* upon the ground that the borrower had voluntarily prepaid the principal of the debt. In so doing we held that an involuntary prepayment would make a contract usurious where it resulted in the interest exceeding the constitutional limitation. The only difference between the *Foster* case and this case is that here there was a demand for a prepayment of principal and interest which demanded the payment of more than ten per cent interest.

In ruling on the *Knight* case, no consideration was given to the fact that the acceleration of the payments was involuntary or that the acceleration clause was a CONTRACT for the payment of interest in excess of ten per cent. Can we say that the acceleration clause is not a contract within the meaning of Art. 19, § 13 of the Constitution? I think not, because Art. 19, § 13 voids ALL CONTRACTS without distinction as to whether the contract is presently binding or arises as a result of an option exercised by the lender for which it contracted upon the making of the loan. While *Mid-State Homes, Inc.* v. *Knight, supra*, is the law of the case as far as that litigation goes, I would hold it to be overruled so far as it is contrary to the Constitution. By no logical reasoning can we remit, under Art. 19, § 13, the interest demands in excess of ten per cent per annum under the acceleration contract and refuse to do so with respect to the interest demands in excess of ten per cent in any other contract.

Therefore, I would affirm the lower court.

HARRIS, C. J., joins in dissent.

5-4237 416 S. W. 2nd 298

Opinion delivered June 5, 1967
[Rehearing denied July 26, 1967.]

Brown, Compton & Prewett, for appellant.

Mahony & Yocum, for appellee.

GEORGE ROSE SMITH, Justice. This case is a sequel to *Reynolds* v. *Bounds,* 238 Ark. 610, 383 S. W. 2d 496 (1964), where the facts are fully stated. In the present case the trial court entered a summary judgment in favor of the defendant, Travelers Insurance Company, on the theory that in the earlier case the controlling issue of fact had been established adversely to the appellants, Mr. and Mrs. Bounds. We agree with that conclusion.

John H. Davidson operated a service station in El Dorado. On August 12, 1961, Gordon Smith, an employee of Reynolds & Williams Contractors & Construction Company, brought one of his employer's trucks to Davidson's station for servicing. Davidson rode with Smith several miles towards Smith's job site, to a point where Smith was able to catch a ride with a fellow employee in another vehicle. As Davidson was driving the Reyn-

olds & Williams truck back to his station he collided with Mr. Bounds' car, which was being driven by Mrs. Bounds.

In the first case the Boundses sued Davidson, Smith, and Reynolds & Williams for personal injuries and property damage. The plaintiffs asserted that Davidson was acting as an agent, servant, or employee of Reynolds & Williams when the collision occurred. Davidson testified that he, in common with other service station operators in El Dorado, customarily accommodated his patrons by driving their vehicles to or from the station. No extra charge was made for that service.

Mr. and Mrs. Bounds recovered judgment against Davidson and Reynolds & Williams for $23,500. On appeal we set aside the judgment against Reynolds & Williams, holding that at the time of the collision Davidson was a bailee of the truck and was not acting as a servant or employee of Reynolds & Williams. In the opinion we said: "Appellee[s] [make] a commendable but strained effort to draw a fine line between the work to be done at the station and the trip back to the station, conceding in effect that during the work at the station a bailor-bailee relationship would have existed, while contending that on the trip back to the station an agency relationship obtained." We rejected that theory.

In the present case Davidson sued Travelers Insurance Company, which was the liability insurance carrier upon the Reynolds & Williams truck. The Boundses were joined as defendants. Davidson asserted that he was driving the truck with the permission of Reynolds & Williams and was therefore an insured within the terms of the policy. Travelers pleaded as its defense an exception in the policy by which coverage was not extended to "any person . . . operating . . . [a] service station, . . . with respect to any accident arising out of the operation thereof."

Travelers filed a motion for summary judgment, attaching a transcript of much of the testimony taken in

the earlier litigation. Travelers also filed affidavits to show that it had defended the case for Reynolds & Williams but had refused Davidson's request that it defend the case for him as well. In response to the motion Davidson filed an affidavit stating that the accident did not arise out of the operation of his service station; that he was returning the truck as an accommodation to Reynolds & Williams and Smith; that he received no compensation for the accommodation; and that it was contrary to his usual business practice. That final assertion was explained by his testimony in the first case; he said that he did not ordinarily go beyond the city limits in accommodating his customers.

On the particular facts of this case the court was right in granting the motion for a summary judgment, as there is no disputed question of fact. Mr. and Mrs. Bounds, who alone have appealed, bolster their argument by suggesting a hypothetical situation in which the first litigation might leave one or more issues unanswered. But that is not the case now before us. In *Reynolds* v. *Bounds, supra,* there were only two possibilities: Either Davidson was driving the truck as a servant or employee of Reynolds & Williams or he was driving it as a bailee in the course of his own business. We held the latter to be true. No third possibility has ever existed. Hence the accident arose out of the operation of the station; so Davidson was not covered by the policy.

While Travelers was of course not named as a defendant in the first case, it was actually a real party in interest. A similar question arises when an injured plaintiff sues either a master or his servant for the latter's negligence and when it is conceded that the servant was acting in the scope of his employment and that there is no basis except *respondant superior* for the master's liability. In that situation if the plaintiff loses his first suit against either the master or the servant he cannot maintain a second suit against the other. *Davis* v. *Perryman,* 225 Ark. 963, 86 S. W. 2d 844 (1956). The reason,

as we pointed out in *Frisby* v. *Hurley,* 236 Ark. 127, 364 S. W. 2d 801 (1963), is that the plaintiff has had his day in court on the issue of the servant's negligence and is not entitled to a second trial upon that exact issue.

The precise question now before us was considered in *Berry* v. *Travelers Ins. Co.,* 118 N. J. L. 571, 194 Atl. 73 (1937), where the outcome in the first case had been the same as it was here and where the service station operator sued Travelers upon a policy like this one. The court held on a motion to strike the complaint, which we take to be the equivalent of a demurrer, that the claim was barred by the exclusion of accidents arising out of the operation of the service station and that the operator was not entitled to retry the question of his agency for the owner of the vehicle. We think that decision to be sound.

Affirmed.

GERALD M. SWINDLE *v.* VALERIE M. SWINDLE

5-4253 415 S. W. 2d 564

Opinion delivered June 5, 1967

W. B. Howard and *Jack Segars*, for appellant.

Kirsch, Cathey & Brown, for appellee.

George Rose Smith, Justice. This is a child custody case between an American-born father and an English-born mother. After protracted litigation a final hearing was held on December 29 and 30, 1966. This appeal is from the ensuing decree by which the chancellor denied the father's application for a change of custody and confirmed his original award of custody to the mother. The appellant's basic contention is that the chancellor erred in refusing to permit him to prove events that occurred before November 3, 1965—the date of the last preceding hearing upon the issue of custody.

Gerald and Valerie Swindle were married in England in 1962. Their daughter Sharon was born in 1963. Upon their separation in Missouri in 1964 Mrs. Swindle returned to England with her daughter. On May 28, 1965, Gerald obtained a divorce in Greene county, Arkansas. The decree awarded Sharon's custody to Valerie, apparently without contest.

In August of 1965 Gerald went to England, took forcible possession of his daughter, and brought her back to America by air. On August 9 he obtained a temporary order awarding him custody, pending a hearing on the merits. Mrs. Swindle was not financially able to come to Arkansas to defend the case, but she received

what amounted to charitable contributions, which enabled her to make the trip.

Discovery depositions were taken at Paragould, in Greene county, on October 27, 1965, in preparation for a hearing scheduled for November 1. Gerald was present with his three attorneys, Bill Penix, John Watkins, and Jack Hoskins. Valerie Swindle was present with her attorney, Maurice Cathey.

After the depositions had been taken Penix indicated to his client that he feared that Gerald was going to lose his case. Gerald at once secretly took Sharon and went to California with his present wife, Carole, whom he married on the way on November 4. The couple concealed their whereabouts until Valerie, with the aid of private detectives, discovered them in St. Louis in December, 1966. In a habeas corpus proceeding in Missouri the court awarded temporary custody to Valerie's attorney, Cathey, pending a decision on the merits in Arkansas. Earlier in 1966 we had held that the order awarding temporary custody to Gerald was not void. *Swindle* v. *Bradley,* 240 Ark. 903, 403 S.W. 2d 63.

After Gerald's flight from Arkansas the scheduled hearing was duly held on November 1, 1965. Two of Gerald's lawyers, Penix and Watkins, were present, but they were evidently embarrassed by their client's contemptuous evasion of the court's jurisdiction. At the chancellor's direction, however, they participated in the hearing. The matter was adjourned to November 3, to give Gerald an opportunity to appear, but he failed to do so. The court canceled its August 9 temporary order and directed that custody be restored to Valerie.

At the December, 1966, hearing, now before us for review, Gerald's present attorneys offered to prove, by his testimony and Valerie's, that Valerie had given birth to an illegitimate child on June 30, 1965, that she had been guilty of illicit relations with other men in England, and that her home there was not a suitable place for

Sharon. The chancellor refused to permit proof of occurrences before November 3, 1965. (We should add, for the guidance of trial judges, that the chancellor's refusal to permit counsel to make their offer of proof by actually questioning the witnesses, and his requirement that counsel instead state what they expected the witnesses to testify, cannot be recommended as the best procedure. It leaves the record uncertain about what the witnesses would actually have said. The better procedure is to permit counsel to elicit answers from the witnesses. If the trial judge conscientiously feels that he should not hear the witnesses' answers, the offer of proof may be taken down by the reporter in the judge's absence.)

Counsel for the appellant now argue that, since the welfare of the child is of primary importance, the court should—regardless of the ordinary rules of procedure—have allowed them to prove Valerie's misconduct, even though it occurred before the November 3 hearing. Our cases do not go that far. Although the best interest of the child is the controlling point at issue, it does not follow that all procedural rules are to be thrown overboard. Specifically, we have held that when a parent fails to produce evidence available to him at one hearing, he cannot rely upon that evidence in a later effort to win a change of custody. *Riley* v. *Vest,* 235 Ark. 192, 357 S. W. 2d 497 (1962); *Henkell* v. *Henkell,* 224 Ark. 366, 273 S. W. 2d 402 (1954).

Those cases govern this one for either of two reasons. First, the preponderance of the proof convinces us that Gerald's attorneys of record properly appeared in his behalf on November 1 and 3, 1965; so he is bound by that adjudication. Secondly, even if that were not so, he cannot evade the binding force of a hearing, which was conducted at his own request, by deliberately leaving the state.

When the testimony is so limited our choice is not difficult, as the appellant seems to concede. We could not conscientiously declare that either Gerald or Valerie is

the ideal custodian for their daughter, but we must choose between the two. During the fourteen months preceding the hearing below, Gerald was guilty of marked cruelty in denying to Valerie even the barest information about her child's health and well-being. We can easily imagine the agony of a mother who knows almost nothing about her daughter for more than a year. Moreover, Carole, Gerald's second wife, wrote letters to Valerie that were so venomous as to shock the chancellor's conscience. Those letters were written in St. Louis, but by deception they were postmarked in California, in furtherance of Gerald and Carole's attempt to conceal their whereabouts. Again, in a bizarre proceeding in a California federal court, involving Sharon's custody, Gerald signed a pleading and an affidavit containing willfully and grossly false statements about Judge Bradley and Maurice Cathey. Finally, Gerald contemptuously flouted the jurisdiction of the court below. We are unwilling to say that Gerald and Carole are fit to bring up this child.

Valerie admits serious indiscretions, but we know of no case in our Reports in which a mother has so steadfastly and devotedly fought for her child in the face of comparable obstacles. There is not even a hint of misconduct on her part during the fourteen months preceding the hearing below. We can with some serenity of mind award Sharon's custody to Valerie. We could not make that assertion if our decision were otherwise.

Affirmed, with an immediate mandate to be issued as in *Payne* v. *Jones,* decided last Monday, 242 Ark. 686 415 S. W. 2d 57 (1967), without prejudice to the filing of a petition for rehearing. Our injunction of March 6, 1967, enjoining Valerie from taking Sharon out of the state, is dissolved.

Byrd, J., disqualified.

WANDA L. TUDOR *v.* RUSSELL C. ROBERTS, JUDGE

5-4287 415 S. W. 2d 557

Opinion delivered June 5, 1967

Winslow Drummond, for appellant.

Gene Worsham and *Fletcher Jackson, Jeff Mobley* and *Joe Purcell,* Attorney General; *Don Langston* and *William R. Hass,* Asst. Attys. General, for appellee.

GEORGE ROSE SMITH, Justice. This petition for a writ of certiorari to quash an order of the Faulkner Circuit Court, holding the petitioner in contempt of that court, is a companion case to *First National Bank in Little Rock* v. *Roberts, Judge,* also decided today. The petitioner contends that the evidence is insufficient to support the court's finding that she was in contempt. We sustain that contention and accordingly direct that the order in question be quashed.

On March 23, 1967, the prosecuting attorney for the Fifth Judicial District obtained an order directing that a subpoena *duces tecum* be served upon the petitioner, Mrs. Tudor. The subpoena was issued on the same day and directed that the witness appear in the Faulkner Circuit Court at nine o'clock on the morning of March 25 and bring with her "all cancelled checks, bank ledger

sheets, bank deposit slips, bank check book stubs and all other documents you have relating to the bank account in the First National Bank of Little Rock on which you were authorized to write checks during the weeks and months preceding the November general election of 1966." The subpoena was served on Mrs. Tudor in Pulaski county on March 2.

The next day Mrs. Tudor appeared with her attorney in the Faulkner Circuit Court, which was sitting at Morrilton. She did not bring any of the bank records. She testified that the bank account did not belong to her. It consisted of donations made to the campaign fund of the Republican party. She was employed by the party during the campaign; the account was placed in her name for convenience. When the subpoena was issued she was no longer an employee of the party and did not have possession of any of the requested records.

Mrs. Tudor also testified that after she received the subpoena she talked to several officials of the party (whom she named) in an effort to obtain the records. She was told: "These are not your records. How could you possibly bring something that isn't yours?" She did not go to the bank in an attempt to get whatever records that institution might still have.

At the same hearing the president of the bank testified that as far as the bank was concerned Mrs. Tudor was the owner of the account and that at her request the bank would have turned over to her such records as were available. On the basis of that testimony the court found Mrs. Tudor to be in contempt, because she had not gone to the bank to see if the records were obtainable.

The court erred in its ruling. The subpoena directed Mrs. Tudor to bring such of the specified records as "you have." It is an undisputed fact that Mrs. Tudor did not have in her possession any of the records in question. Her failure to produce the records carried on implication of

disrespect for the court or willful disobedience of its order.

It is important to note that this case does not involve a subterfuge on Mrs. Tudor's part, by which she professes to be unable to produce records that are really within her control. There is no reason in the record to question the sincerity of her conclusion that she had no moral right to surrender the records—any more than there would be to question the conclusion of a lawyer's private secretary that she should not surrender confidential files to which she might have access. In the circumstances we are not willing to say that Mrs. Tudor was guilty of contumacious conduct.

Writ granted.

LUCY GILL ET AL *v.* STATE OF ARK. EX REL JEFF MOBLEY, PROS. ATTORNEY

5280 416 S. W. 2d 269

Opinion delivered June 5, 1967

[Rehearing denied July 26, 1967.]

Darrell Hickman, for appellant.

Gene Worsham and *Fletcher Jackson, Jeff Mobley, Joe Purcell,* Attorney General; *Don Langston* & *William R. Hass,* Asst. Attys. General, for appellee.

PAUL WARD, Justice. This is a Petition for a Writ of Certiorari challenging the power of a Prosecuting Attorney to sit as a Grand Jury. The Circuit Judge of Faulkner County, on March 25, 1967, held the Prosecuting Attorney had this power. The facts out of which this issue arises are summarized below.

Lucy Gill and ten other citizens of the county (petitioners) were subpoenoed to appear before the Prosecuting Attorney to testify regarding an investigation of alleged violations of the election laws during the election in 1966 in said county. Petitioners appeared as directed, but their attorney was not allowed to be present. Then the Prosecuting Attorney directed petitioners to appear before the Circuit Judge in order to determine their rights. Petitioners and their attorney appeared as directed. It was then that the judge entered an order which, in material parts, reads:

> (1) The Prosecuting Attorney has a right to sit as a grand jury.
>
> (2) A witness does not have a right to counsel in the room inasmuch as the prosecution is sitting as a grand jury.
>
> (3) Petitioners will appear before the respondent on March 28, 1967, and answer all questions except those that would or would tend to incriminate them.

Later, petitioners refused to answer questions asked by the prosecuting attorney in the absence of their attorney.

The issue. Stripped of all nonessentials, the only issue involved here in whether petitioners had the right

to have their attorney present while being examined by the prosecuting attorney. The issue is so limited because petitioners concede that the prosecuting attorney has the right to subpoena, swear in, and question witnesses, and "sit as a grand jury" in many other respects—in fact, in all respects claimed by the respondent, except to deny them the presence of an attorney of their choice when being questioned during an investigation.

The question here involved is one of first impression in this Court. There is no statute or constitutional provision which says plainly an attorney can be, or cannot be, present in a situation here involved. We must, therefore, seek an answer to the question by considering the implications to be drawn from certain statutes, provisions of the constitution, and judicial pronouncements presently mentioned.

In 1936 the people adopted Amendment No. 21 to the Constitution which reads:

> "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."

In 1937 the legislature implemented Amendment No. 21 by Act 160, being Ark. Stat. Ann. §§ 43-801 to 804 (Repl. 1964), Section 43-801, which in material parts, reads:

> "The prosecuting attorneys and their deputies shall have authority to issue subpoenas in all criminal matters they are investigating; and shall have authority to administer oaths for the purpose of taking the testimony of witnesses subpoenaed before them; such oath when administered by the prosecuting attorney or his deputy shall have the same effect as if administered by the foreman of the grand jury." Respondent cites Ark. Stat. Ann. § 43-908 (Repl. 1964) which reads;

> "The grand jury has power, and it is their duty, to inquire into all public offenses committed within the jurisdiction of the court in which they are impaneled, and to indict such persons as they find guilty thereof."

Also cited by Respondent is *Johnson* v. *State,* 199 Ark. 196, 133 S. W. 2d 15, where, among other things, we said:

> "The prosecuting attorney of a county is a quasi-judicial officer. The law has intrusted him with power, upon what he deems sufficient cause, to institute proceedings. *He takes the place of a grand jury*; and as the law imposed upon the grand jury the duty of determining whether or not sufficient (cause) had been shown to justify an indictment against the accused."

Cited also is *Taylor* v. *State,* 220 Ark. 953, 251 S.W. 2d 588, as saying the subpoena power was necessary in order for the prosecuting attorney to properly *prepare* criminal cases. Also, Respondent appears to rely on Ark. Stat. Ann. § 43-2004 (Repl. 1964), but, at most, that section merely gives the prosecuting attorney power to coerce the attendance of witnesses at a hearing, and force them to testify "in all prosecutions."

A careful study of the above statutes together with other authorities cited and examined, and based upon our own research, leads us to the conclusion that petitioners, in this instance, had a right to have their attorney present. Set out below are reasons on which this conclusion is based.

It must be conceded—it is not argued to the contrary—that a person has a common law right to be represented by counsel at any and all times unless this right is taken away by statute. That right is taken away by statute when a person appears before a grand jury. This right has not been taken away by any statute when one is called before a prosecuting attorney. Therefore if

this Court takes that right away it must be done by implication—i.e. we must read such implication into Amendment No. 21 or into Ark. Stat. Ann. § 43-801 (Repl. 1964). This we are unwilling to do, especially since we must give the statutes a strict construction. In the case *In Re Kelley,* 209 Tenn. 280, 352 S. W. 2d 709, a similar issue was under consideration, and the Court said:

> "Such a statute, in derogation of the common law, and so drastic as to lend itself to oppression, should be strictly construed and should not be extended by construction beyond its plain language."

It takes little imagination to foresee the oppression that could result if prosecuting attorneys are given the power here sought by the Respondent.

It is argued that to give this power to prosecuting attorneys would save money for the state and counties. That may be, and must be, conceded, but that result is a far cry from a sound reason for depriving an individual of his common law rights. Nowhere is it even argued that a prosecuting attorney cannot efficiently prepare for and issue an information without denying the presence of an attorney requested by a witness.

It is significant to us that the legislature saw fit, by statute, to specifically exclude a witness' attorney before a grand jury, but it did not choose to apply the restriction to hearings before a prosecuting attorney. If this is ever done it should be done by the legislature and not this Court.

It is, therefore, our conclusion that the petitioners' request for a Writ of Certiorari should be, and it is hereby, granted.

HARRIS, C. J. and BYRD, J., dissent.

FOGLEMAN, J., concurs.

CARLETON HARRIS, Chief Justice, dissenting. I agree that prosecuting attorneys have not been granted the rights and powers of grand juries, but I do not see that it is actually necessary to reach that question in this case.

As pointed out in a concurring opinion by Mr. Justice Fogleman, the constitutional right to counsel before trial is based on protection against self-incrimination during the investigative process. I would quickly agree that, if the prosecuting attorney had subpoenaed these witnesses for the investigation of a murder, larceny, arson, or any other type of felony case, *except an election contest*, they would be entitled to an attorney who could advise them to refuse to answer any question that might involve them in the crime investigated.[1] However, Article 3, Section 9, of the Arkansas Constitution provides as follows:

"In trials of contested elections and in proceedings for *the investigation of elections*[2] no person shall be permitted to withhold his testimony on the ground that it may incriminate himself or subject him to public infamy; but such testimony shall not be used against him in any judicial proceeding, except for perjury in giving such testimony."

Obviously, if his testimony cannot be used against him, there is no reason why a witness should not answer questions propounded.

This matter reached the trial court because the witnesses refused to answer, and, in my view, the general powers granted to a Circuit Court authorize the assistance of that court in carrying out the constitutional and statutory provisions of our law.

---

[1]This, to me, is the main difference between an investigation conducted by a prosecuting attorney, and one conducted by a grand jury. In the latter instance, no witness is entitled to have an attorney present, irrespective of the charge being investigated.

[2]Emphasis supplied.

I, therefore, respectfully dissent.

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

JOHN A. FOGLEMAN, Justice, concurring. I concur in the result but reach it in a different way.

I agree that Arkansas has not conferred upon prosecuting attorneys all the rights and powers of grand juries, but I think that it might constitutionally do so.

I cannot agree that a witness subpoenaed to testify before a prosecuting attorney in a criminal investigation has any right, common law or constitutional, to have his attorney present in circumstances where, as here, he could not possibly incriminate himself. All of the holdings of the United States Supreme Court on the constitutional right to counsel before trial are based on protection against self-incrimination by in-custody interrogation. See, e.g., *Miranda* v. *State of Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R. 3d 974; *Escobedo* v. *State of Illinois,* 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977. There is no way these witnesses could incriminate themselves in this investigation of alleged election law violations because of Art. 3, § 9 of the Arkansas Constitution:

> "§ 9. Testimony in Election contest—Self-incrimination.—In trials of contested elections and in proceedings for the investigation of elections no person shall be permitted to withhold his testimony on the ground that it may incriminate himself or subject him to public infamy; but such testimony shall not be used against him in any judicial proceeding, except for perjury in giving such testimony."

I find no authority for the statement in the majority opinion in regard to the right to counsel.

Nor do I fear abuse of powers by prosecuting attorneys. This court has always, in the absence of a showing to the contrary, presumed that officers would do their duty. *Phillips* v. *Rothrock,* 194 Ark. 945, 110 S.W. 2d 26; *Jones* v. *Capers,* 231 Ark. 870, 333 S. W. 2d 242.

I find nothing, however, which authorizes the circuit court to compel a witness to testify before a prosecuting attorney unless we say that the latter has all the powers of a grand jury. There is specific statutory authority for compelling a witness to testify before a grand jury in Ark. Stat. Ann. § 43-916 (Repl. 1964) and in all prosecutions, criminal or penal actions or proceedings in §43-2004, both being sections of our Criminal Code. The former cannot, under present statutes, be extended to cover investigations by the prosecuting attorney. The latter is not comprehensive enough to include investigations. Had it been, there would have been no necessity for § 43-916 to apply to witnesses before a grand jury.

L. T. ALSTON *v.* BERTHOLA D. ALSTON

5-4232 415 S. W. 2d 578

Opinion delivered June 5, 1967

Odell C. Carter, for appellant.

Brockman & Brockman, for appellee.

PAUL WARD, Justice. This is a divorce action involving a property settlement.

The parties were married October 4, 1941 and lived together until August 30, 1963. On July 3, 1965 Berthola D. Alston (wife, appellee) sued L. T. Ralston (husband, appellant) for a divorce and a portion of appellant's real and personal property. She alleged appellant left her in August, 1963 and that he treated her with indignities, and refused to support her.

On July 28, 1965 appellant filed an Answer and a Cross-complaint. He admitted leaving appellee but denied all allegations of indignities and non-support. He also asked for a divorce on the ground of indignities.

There was a trial on April 11, 1966, and the trial court found: (a) appellee was entitled to a divorce; (b) appellee was entitled to the statutory allowance in appellant's real and personal property, and; (c) the clerk was appointed to sell said properties and divide the proceeds.

Appellant filed a Motion stating that the real property was susceptible of division in kind, asked the court to appoint Commissioners to divide the real property and give appellee a life estate in a one-third of it. The Motion was denied, and the court entered a Decree in favor of appellee in accord with its findings previously mentioned.

On appeal appellant urges two principal points for a reversal. *One*. The trial court erred in granting appellee a divorce. *Two*. The trial court erred in refusing to appoint commissioners to divide the real estate in kind.

One. Appellant here appears to rely on two arguments.

First, appellee admitted that much of their trouble arose over the fact that appellant allegedly fathered a child by another woman more than five years before the inception of this litigation. It is the position of appellant that since this "incident" happened more than five years before suit was filed, it could not be a valid ground for divorce under Ark. Stat. Ann. § 34-1208 (Repl. 1962) which says that the cause of divorce must have existed within five years before suit is filed. This is not however a valid argument in this case. Appellee does not rely on the "incident" as the sole ground for a divorce, although she does admit it was the source of many arguments which continued while they lived together. Also, there was testimony of other grounds for a divorce.

Secondly, appellant contends that the court, in granting appellee a divorce erred as a matter of law and also found against the weight of the evidence. For reasons hereafter set out, we cannot agree with this contention.

Appellee first relies as a matter of law, on *Kientz* v. *Kientz*, 104 Ark. 381, 149 S.W. 86 from which he quotes:

> "It is the duty of the husband to support and maintain his wife, even though they may live separately, and apart, *if such separation does not result through her fault.*" (Emphasis ours.)

Before appellant can take advantage of that argument he must first prove appellee was to blame for his leaving, and that is one of the issues here.

It is next contended that there was no corroborating testimony to support any other grounds for a divorce, and again we cannot agree.

At the close of the case the trial court made comprehensive findings consisting of five printed pages in the record. Among other things the court made these findings. "The plaintiff testified the defendant went to Hot Springs for treatment of a venereal disease, and the evidence supports her statement on this point." "However, the court is of the opinion that all of the testimony, when taken together, establishes a pattern of neglect on the part of the defendant toward the plaintiff that entitles the plaintiff to an absolute divorce from the defendant."

Appellee testified appellant often stayed out at night without any explanation. A neighbor testified that she had on many occasions seen appellant at the home of the woman who had given birth to his child, and that these visits extended up to 1963. Another witness said she had seen appellant and the woman above mentioned together at a local night club. Still another witness, who lived in the home of the parties at the time of the separation in 1963, testified appellant would curse and become violent toward appellee.

Considering the record as a whole, and realizing the trial court's opportunity to observe the witnesses and evaluate their testimony, we are unwilling to say the court erred in granting appellee a divorce.

"*Two.* As previously pointed out, the trial court ordered the real property sold and the proceeds divided between the parties, and denied appellant's motion to have the property divided in kind by appointed appraisers.

We have concluded that it was error for the trial court to refuse appellant the right to have appraisers appointed to see if the land could be divided in kind. The right of a land owner to have a partition, if feasible, before it is sold is statutory. In the early case of *Moore* v. *Willey,* 77 Ark. 317, 91 S.W. 184 (a suit for partition), we said:

> "But the procedure in proceedings for partition is regulated by statute in this State."

The court then proceeded to point out that "We do not think the mere failure of the chancery court in this case to appoint commissioners to ascertain whether the land could be divided rendered its judgment void." Following that statement the Court said:

> "In cases where there is doubt as to whether partition can be made we think it is well to appoint commissioners who can examine the premises and ascertain the facts and make report."

We think the above procedure should have been followed in this case. Here there was no testimony on which the trial court could make (and did not attempt to make) a judgment as to the divisibility of the land in kind. The case under consideration here can be distinguished from the case of *Champion* v. *Champion,* 238 Ark. 87, 378 S.W. 2d 648 (relied on by appellee) where this Court said:

> "Of course, a Chancery Court has full authority to order a sale of property, *provided the proof is satisfactory that no division in kind can be made...*" (Emphasis ours.)

It cannot be said here that such proof was made.

The cause is therefore reversed on the second point, and it is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

MARILYN KAY (NEELY) HILL *v.* ELMER LEE NEELY

5-4281 415 S. W. 2d 558

Opinion delivered June 5, 1967

Wilton E. Steed, for appellant.

Max M. Smith, for appellee.

PAUL WARD, Justice. This appeal culminates a long fight by a mother for the custody of her two minor children.

On December 23, 1959 Marilyn Kay (Neely) Hill, appellant, was married at the age of fourteen to Elmer Lee Neely, appellee, who was then sixteen years old. Two children, Tommy Lee and Cindy Kay, were born to them before they separated the latter part of 1961.

On January 16, 1962 appellee filed suit for a divorce on the ground of indignities. The court, on February 17, 1962 ordered appellee to pay $20 per week for support of the children pending trial. On July 20, 1962 the court granted a divorce to appellee, gave custody to appellant,

and ordered appellee to make delinquent support payments and to continue paying in the future.

On January 11, 1964 appellee (the father) filed a petition alleging appellant (the mother) "has neglected and at times abandoned said children leaving them in custody of plaintiff's (appellee's) mother and sister most of the time". After a hearing the court on May 11, 1964, gave custody of the children to Mr. and Mrs. Gerald Davidson — the latter being the sister of appellee.

After appellant had made repeated but futile efforts to regain legal custody of her children and to force appellee to make the monthly payments for support, she filed, on October 13, 1966, another petition asking for custody of her children. In this petition she alleged she had remarried, that she now had a good home for the children, and that her present husband wanted her to have custody and was able and willing to support them.

A hearing was held on the above petition and the court, on January 6, 1967, refused same, and ordered the case "continued for a period of twelve months at which time or thereafter the court will give further consideration to the matter". From the above order denying custody, appellant prosecutes this appeal.

It is our conclusion that the case must be reversed and custody of the children given to the mother.

In reaching the above conclusion we deem it sufficient to point out below certain facts and circumstances.

(a) There is, with the exception noted, no showing that the mother is not a fit person to have custody of her children. There is testimony to the effect that appellant, on one or two occasions, was heard using profane language in her own apartment. This was denied and explained by appellant.

(b) The father at no time contends he wants custody, of his children, that he is able to support them, or that he is a fit person to have custody of them.

(c) There is no reasonable showing that appellant abandoned the children. In fact appellee did not so allege. He merely alleged that she left them with his mother and sister most of the time. This allegation is, to our satisfaction, explained by the undisputed testimony While appellant had legal custody she was working to support herself and the children. During this time appellee failed and refused to make monthly payments as ordered by the court. Also, during this time appellant was compelled to spend much time with her mother who was seriously ill, and soon died. Under these circumstances we are at a loss to understand how appellant could have used better judgment than she did. It is not disputed that she visited the children "nearly every week." Webster defines the word "abandon" as "to give up with the intent of never again claiming one's rights or interest in." As previously pointed out, appellant here made repeated efforts to regain custody of her children. Under these circumstances we cannot hold appellant abandoned her children.

In the case of *Loewe* v. *Shook*, 171 Ark. 475, 284 S.W. 726, this Court made the following statement:

> "There can be no question in the law that, as between a mother and grandparents, the mother is entitled to the custody of her child, 'unless incompetent or unfit, because of poverty or depravity, to provide the physical comforts and moral training essential to the life and well-being of her child.' "

In *Kale Payne* v. *E. Leroy Jones, et ux,* 242 Ark. 686, 415 S. W. 2d 57, delivered May 29, 1967, this Court used language which is pertinent and decisive here:

"To take a parent's child away from him and give

> it to strangers is an extreme measure — a step which the courts should and do take only when the evidence clearly justifies such a course."

In the same opinion we also find this statement:

> ". . .the right of natural parents to the custody of their children, as against strangers, is 'one of the highest natural rights, and the state cannot interfere with this right simply to better the moral and temporal welfare of the child as against an unoffending parent.' "

In view of what has heretofore been said we also do not agree with the trial court that a final hearing should be continued to a future date. A further delay could only tend to make the situation more difficult for the mother, the children and the present custodian.

The cause is therefore reversed and remanded for entry of a decree consistent with this opinion, and for the imposition of reasonable visitation rights in the father.

HERMAN B. YOUNG ET AL *v.* ARK. STATE HIGHWAY COMMISSION

5-4217 415 S. W. 2d 575

Opinion delivered June 5, 1967

Harold Sharpe and *Spitzberg, Bonner, Mitchell & Hays;* By: *John P. Gill,* for appellant.

John R. Thompson and *Philip N. Gowen,* for appellee.

LYLE BROWN, Justice. This is an appeal by the landowners from a jury award in an eminent domain proceeding. Appellants Herman B. Young and wife own two rectangular tracts which are traversed by Interstate 40 in Monroe County. From one of these tracts, appellee, the Highway Commission, took fee title to 42.54 acres and temporary construction easements totaling 3.27 acres. From the other tract the commission acquired fee title to 32.50 acres and a temporary easement on 1.66 acres. The jury awarded $14,000 for the first described taking and $7,000 for the second.

The landowners advance three points for reversal. These points will be numbered, italicized, and discussed in sequence.

1. *The court erred in refusing to instruct on severance damages.*

The landowners submitted an instruction which recited that "the property condemned constituted only a part of the lands owned by the landowner" and that "the landowner is entitled to just compensation for the fair market value of the land actually taken . . . and also the actual amount of compensation for the lowering, if any, of the fair market value of the remainder land . . . " In other words, appellant sought an instruction measuring his compensation by the value of the lands taken plus damages to the remainder.

Many cases could be cited which set out our measure of damages in partial-taking cases. It has long been the difference between the market value of the whole tract before the taking, and the market value of that part which remains after the taking, less any enhancement peculiar to the lands. *St. Louis, Arkansas and Texas R. R.* v. *Anderson,* 39 Ark. 167 (1882); *Myers* v. *Arkansas State Highway Comm'n,* 238 Ark. 734, 384 S. W. 2d 258 (1964). In the case at bar the trial court gave such an instruction without objection.

Three *alternative* formulas are recognized for measuring just compensation in partial-taking cases: (i) The *value of the part taken* rule; (ii) *Value of the part taken plus damages to the remainder* rule; and, (iii) The *before and after value* rule. One authority contends the last method "more easily skirts the danger of double counting of damages and comes closer to a true approximation of the actual damage suffered by the owner." 1 Orgel, *Valuation Under the Law of Eminent Domain,* § 48-64 (2d Ed., 1953). The distinction between the second and third formulas is narrow, but the important point here is that they are *alternatives.* Therefore, it

would be inappropriate to instruct the jury as to both formulas, as requested by appellants. This does not mean that evidence of the value of the lands taken plus damages to the remainder is not admissible. In fact, it is appropriately considered by appraisers as two of the many guides for determining "before and after values." For example, all the appraisers in this case followed that procedure. All of the value witnesses diminished the value of the lands remaining because of severance.

A number of our cases point out that in a partial taking, the landowner is entitled to the value of the lands taken plus damages to lands not taken. *Clark County* v. *Mitchell*, 223 Ark. 404, 266 S. W. 2d 831 (1954); *Ross* v. *Clark County*, 185 Ark. 1, 45 S. W. 2d 31 (1932); *Hempstead County* v. *Huddleston*, 182 Ark. 276, 31 S. W. 2d 300 (1930). In *Ross*, the court in fact instructed the jury on that criteria, doubtless because of the very narrow distinction between that rule and the *before and after* rule. Whether it is error to ever use, in an instruction, the criteria in *Ross* is not before us. We do, however, hold in the case here that it was proper for the trial court to refuse to instruct on both bases of recovery.

Finally on this point, appellants contend that they were "prohibited from presenting to the jury the explanation of the law" as reflected by their proffered instruction. We know of no reason why counsel could not present to the jury a resume of severance damages which the many witnesses testified they used in arriving at the "before and after" values. The standard instruction given by the court, without objection, on *full compensation*, covered every admissible element of damage, of which severance was only one.

2. *A witness may not express an opinion on the fair market value of property if the basis for that opinion is a sale of that property itself.*

Witness H. K. McMurrough qualified as an expert appraiser and testified for the commission. In discussing

comparable sales he gave the price paid by the Youngs for the subject property. That sale was in the same year of condemnation. A recent sale of the identical property —assuming a bona fide and voluntary transaction—is admissible. Orgel, *Valuation Under the Law of Eminent Domain,* § 134 (1936); Jahr, *Law of Eminent Domain Valuation and Procedure,* § 136 (1957). McMurrough testified that he considered other sales he believed comparable.

Under Point 2, the landowners also argue the trial court erred in refusing their motion to strike the entire testimony of witness McMurrough. Particularly with reference to one of the tracts, McMurrough did not return to inspect the land after Young had apparently cleared approximately 815 acres. The clearing was completed before the agreed date of taking. A motion to strike McMurrough's appraisal on that acreage, made in proper form, would have been well taken. However, appellants' motion to strike went to the witness' entire testimony. Had that motion been granted it would have, in effect, told the jury to disregard testimony that was admissible. McMurrough described the acreage in each tract, the amount of land taken, the division of the tracts by the new highway, the amount appellants recently paid for the land, and the condition of the roads during a rainy season. That testimony was clearly admissible. When part of a witness' testimony is competent it is proper to refuse a motion to exclude his entire testimony. *Arkansas State Highway Comm'n.* v. *Carpenter,* 237 Ark. 46, 371 S.W. 2d 535 (1963); *Arkansas State Highway Comm'n.* v. *Wilmans,* 236 Ark. 945, 370 S. W. 2d 802 (1963).

3. *The jury must return separate verdicts for damages resulting from taking the fee and damages resulting from taking temporary easements.*

Appellant cites a single authority — *Jackson* v. *Denno,* 378 U. S. 368 (1963). This landmark criminal case held that the voluntary nature of Jackson's confession should be determined prior to the admission of the

confession to the jury adjudicating guilt or innocence. We fail to see the applicability of that decision to this case.

Appellant did not ask for separate verdicts. No objection was made to the use of general verdict forms. In fact, under the circumstances it would not have been appropriate to submit separate verdict forms covering the temporary easements. This is true because in evaluating damages the landowners' witnesses combined the easement acreage with the fee simple title acreage. In other words, they treated the easement acreage as a taking in fee. No witness gave the jury a separate opinion as to just compensation for the temporary construction easements.

Affirmed.

L. R. ARGO v. JOE BLACKSHEAR ET UX

5-4249 416 S. W. 2d 314

Opinion delivered June 5, 1967

[Rehearing denied July 26, 1967.]

Odell Pollard and *Jerry Cavaneau,* for appellant.

Reed & Blackburn, for appellee.

LYLE BROWN, Justice. Joe and Dessie Blackshear, appellees and parents of eight-year-old Phyllis Blackshear, recovered judgment for the death of Phyllis which occurred in a traffic mishap. Phyllis was crossing a highway in Cleburne County and was struck by a car driven by appellant, L. R. Argo. The sole question on appeal concerns the action of the trial judge in setting aside the interrogatories answered by the jury and resubmitting the case to the same jury on a general verdict.

The case was first submitted on four interrogatories. The answers found driver and pedestrian equally negligent and fixed total damages to the parents at $18,000. Each interrogatory was signed by the foreman and the jury poll verified unanimity. A conference immediately ensued between court and counsel. All of the conversation is not recorded but it is apparent that counsel for appellee parents requested the trial judge to ascertain of the jurors whether it was their intent that the parents not recover. Addressing the jury, the court inquired:

> "I have to go rather carefully on this, this is very delicate, I want to know if it was the jury's finding and your intention that you intended for your answers to reflect that the plaintiffs in this case would not recover any amount from the defendant..."

The foreman responded—and the jury affirmed by nods—that they wanted the parents to recover $18,000. The judge further inquired if that was their intention "even though you found that Phyllis Blackshear contributed 50% of the negligence to cause the accident." Again the answer was in the affirmative.

The judge ruled that the interrogatories "caused some confusion in the minds of the jury, especially as to the effect of their answers." He then proceeded to

give AMI 2102 (comparative negligence). Additional argument was allowed the attorneys to permit them to cover comparative negligence. The jury was then given a general verdict form. It returned an award of $18,000.

Counsel are not in agreement as to all that transpired between the return of the interrogatories by the jury and its reconvening to consider the general verdict. We find our recitation of events to be borne out by the record. The lawyers' disagreements are due principally to the failure to record all the conversations between court and counsel outside the hearing of the jury. However, there is no dispute about the facts we have recited and which really control the decision is this case.

The trial court committed reversible error. The cause was submitted to the jury under Ark. Stat. Ann. § 27-1741.2 (Repl. 1962), being submitted on "written questions susceptible of categorical or other brief answer . . . " Collectively the answers constitute a special verdict. If the answers are consistent with the law and the evidence, and if a poll of the jury reflects the answers to represent the findings of the jury, they must be accepted as the verdict in the case. The interrogatories, the answers, and the poll of the jury meet all these prerequisites. See, 89 C. J. S., Trial § 571. It then becomes the duty of the trial judge to enter the verdict. That verdict remains, unless of course it is subsequently set aside on statutory grounds.

When the jury was polled and further questioned by the judge as to their intentions in answering the interrogatories, at no place did they retract the findings on total damages and apportionment of negligence. The only additional information supplied was to the effect that they wanted to see plaintiffs recover the full $18,000. This pointedly illustrates the value of interrogatories. Jurors honestly answer four relatively simple questions, not knowing the legal effect will be contrary to their personal wishes. Additionally, this situation justifies the rule that for the judge to specifically inform the jurors

as to the effect of their answers on the ultimate judgment is reversible error. 90 A.L.R. 2d 1041. As said by this court in *Wright* v. *Covey,* 233 Ark. 798, 349 S. W. 2d 344 (1961): "The reason for the rule is that the special interrogatories are intended to elicit the jury's unbiased judgment upon the issues of fact, and this purpose might be frustrated if the jurors are in a position to frame their answers with a conscious desire to aid one side or the other."

In *Skidmore* v. *Baltimore & O. R. R.,* 167 F. 2d 54 (2d Cir. 1948), Judge Frank discusses extensively the pros and cons of general and special verdicts. That decision favors special verdicts and emphasizes that when special verdicts are employed, the judge should not give any charge "beyond what is reasonably necessary to enable the jury to answer intelligently, the questions put to them." Under that procedure "the appeal to the jurors' cruder prejudices will frequently be less effective."

A judgment on the general verdict was entered. We hold that judgment to be erroneous. We reverse and remand with directions to set aside that judgment and direct that the special verdict of the jury be entered.

JONES and BYRD, JJ., concur.

J. FRED JONES, Justice, concurring, I would reverse the trial court but I would remand for a new trial rather than for entry of verdict.

When this accident occurred, the appellee was traveling in a southerly direction on blacktop Highway 25. He was driving a Chevy II stationwagon weighing 3,020 pounds and was pulling a boat and trailer weighing over half as much as the stationwagon. When about 150 or 200 *yards* distance from the Blackshear residence, he saw Ella Jo, an older sister of Phyllis, come from the driveway of her home onto the highway and cross the highway from east to west. Appellee did not recall seeing or meeting other traffic in the vicinity of the accident.

Appellee testified that just *seconds* after he saw Ella Jo cross the highway, he saw Phyllis about eight or ten feet before she entered the highway, or just after she entered the highway. She had her head turned toward her left looking south on the highway when he saw her. She entered the highway running diagonally from east northwesterly across the highway and appellee applied his brakes when he first saw Phyllis. The automobile skidded 153 *feet* south, all on the west side of the highway, and struck Phyllis near the west edge of the blacktop.

With this testimony from the appellee himself, I am of the opinion that the trial court was attempting to set aside the jury verdict on the interrogatories and grant a new trial in the proper exercise of its discretion. If this was the intention of the trial court, it, of course, committed error in the manner it went about accomplishing its purpose.

Even though the trial court may still set aside the verdict and grant a new trial if it feels such procedure necessary and justified by the record in this case, I would reverse and remand for a new trial.

BYRD, J., concurs.

FRANK E. READ *v.* STATE

5261 415 S. W. 2d 560

Opinion delivered June 5, 1967

Larry S. Patterson, for appellant.

Joe Purcell, Attorney General; *Don Langston,* Asst. Atty. Gen., for appellee.

JOHN A. FOGLEMAN, Justice. This appeal comes from an order denying appellant's petition for post conviction relief from consecutive sentences of twelve years on one count of robbery and eight years on another, and a sentence of three years on a charge of burglary, to be concurrent with the latter sentence on robbery, all imposed on April 15, 1960. To all of these charges appellant had entered pleas of guilty on the day sentences were imposed, competent counsel having been appointed for him by the trial court on April 8. The trial court heard the petition on September 19, 1966. In addition to the petitioner, his mother, Mrs. Katherine Read, his father, John L. Read, his sister, Johnnie

Camp, his brother, Thomas T. Read, and his wife testified in his behalf.

The trial judge made detailed findings against the contentions of appellant. These findings were based for the most part on testimony of the following on behalf of the state: Three police officers on duty at the time of appellant's arrest, who were on the lookout for the person or persons who committed the crimes with which appellant was charged; a state police officer who took a statement from appellant on the day of his arrest; one James Puryear, an alleged victim of a felonious assault with which appellant was charged, but on which he has not been tried or sentenced; the Honorable Royce Weisenberger, now chancellor of the sixth district, the prosecuting attorney at the time of the arrest and sentencing; and the deputy prosecuting attorney at the time, Judge John Wilson, now Municipal Judge at Hope.

The points urged for reversal allege error of the trial court in its findings based upon the following contentions:

1. The sentences were based upon an invalid arrest and an invalid search and seizure;

2. The statement of appellant was coerced because appellant was held and questioned incommunicado without benefit of counsel and without being allowed to contact his family for assistance;

3. Appointed counsel was not competent because appointment was made at such a time that they were not effective to prepare his defense.

We will discuss these points in the order listed. In considering the search and appellant's statement, it is well to remember that no prejudice could result from either since he pleaded guilty and nothing was ever introduced in evidence against him. *Medley* v. *Stephens,* 242 Ark. 215, 412 S. W. 2d 823. There was substantial

evidence to support the finding of the trial court that the arrest without a warrant was lawful and the search reasonable. City police officers Shirley and Rowe and state policeman Ward were informed of certain robberies which had taken place in Hope on the night of April 7th and were patrolling the city. Ward was in the neighborhood of the Puryear and Hartsfield homes when he saw a Cadillac automobile driven across a yard and then heard something like a pistol "popping" near the Puryear home. He was behind the houses across the street when he saw the city police car turn in and the Hartsfield car backing out the driveway at the Hartsfield residence; he also saw the abandoned Cadillac. He went to the police station after the arrest. He did not see anyone interrogate Read.

Officers Shirley and Rowe (who were accompanied by Police Chief Brown, now deceased) made the arrest. Officer Shirley testified in substance: After I was given a report on the type vehicle whose occupant had committed a robbery, I saw appellant while I was standing in front of the police station after 1 a.m. I got in the police car, got an assistant and tried to overtake the vehicle in which I saw appellant but lost it in a cloud of dust as it passed a truck by going onto the right shoulder of the highway. Later, I saw the vehicle again and attempted to overtake it but while I was turning around, it passed a truck and I lost it. While trying to locate the automobile, we heard something like pistol shots and saw lights at the Puryear home and found confusion there. After a conversation with Puryear, who had some pistol wounds, we drove east on Highway No. 4 and noticed an automobile backing out of the Herbert Hartsfield driveway. I did not recognize the driver, seeing only the back of his head, but I knew it wasn't Hartsfield. After the police car was stopped so the car could not get out the driveway, I got out and stopped at the left rear fender of the car; Officer Rowe went around to the right side of the car and opened the door. I went to the left door and opened it; I recognized that this was Hartsfield's car and saw Hartsfield and his wife

inside the screen door; the appellant was arrested, searched and placed in the police car.

Officer Rowe's testimony was substantially the same as that of Officer Shirley except that Rowe said he thought the driver of the car at the Hartsfield house was Hartsfield himself and that he made the statement that he was going to ask Hartsfield, whom he knew, if he had seen anything of the party they were looking for. He said that he did not recognize that it was not Hartsfield until he had opened the car door and partially entered the car when he told appellant to stop and struck the latter with a pistol when he failed to do so.

James Puryear told of a threat by appellant to kill him after Puryear saw appellant in the driveway of the Puryear home about 3:30 or 4 in the morning. Puryear said that after the threat he grabbed appellant and the gun and that appellant shot him after a scuffle in the doorway and kitchen of the house. Puryear told of reporting the matter to officers Shirley, Rowe and Brown who came to his house immediately after the shooting.

An officer may make an arrest without a warrant when he has reasonable grounds for believing that the person arrested has committed a felony. Ark. Stat. Ann. § 43-403 (Repl. 1964); *Lane, Smith & Barg* v. *State,* 217 Ark. 114, 229 S. W. 2d 43; *Russell* v. *State,* 240 Ark. 97, 398 S. W. 2d 213.

In view of the passage of over six years, the excitement of hot pursuit of an armed felon, and the fact that officers Rowe and Shirley approached the Hartsfield vehicle from opposite sides, the minor discrepancy as to the recognition of the driver is insignificant.

Nothing was found upon search of appellant except a gun holster. The search incident to the arrest was lawful. *Draper* v. *United States,* 358 U. S. 307, 79 S. Ct. 329, 3 L. Ed. 2d 327. There was also substantial evidence to support the finding that appellant's statement

was not coerced. It was taken by Milton Mosier of the Arkansas State Police at the sheriff's office about 10:30 a.m. Mosier testified that the statement was voluntary, that he made no promises or threats to appellant, nor did he coerce him in any manner. It was taken on the same day (April 8th) appellant was taken to court. Mosier could not be sure whether the statement was before or after appellant's arraignment, but felt that it was before because he gave the original of the statement[1] to one of appellant's court appointed attorneys.

There was testimony that appellant was not interrogated en route to the city jail when he only made a statement that he could show the officers where he "ditched" a car. He was taken to the police station about 5:30 a.m. Officer Shirley said that appellant was then in a jovial mood, saying that he supposed he would get life, but there wasn't any use crying over spilt milk. Shirley and Rowe went off duty shortly thereafter and knew of no interrogation of appellant.

The only evidence of the use of any physical force was that at the time of arrest and a later assault by James Puryear on appellant, while the latter was in custody of the officers shortly after the arrest. Appellant admitted that the officers restrained Puryear after he struck appellant. Appellant also said that the officers struck him with pistols at the time of the arrest, several times rather than once. His major contention in this regard, though, was that he was questioned after he asked to be allowed to see an attorney; was not allowed to communicate with anyone, particularly members of his family; and was told by some man that if he fought, it would go harder on him, but if he would confess, they would try to get the judge to go a little easier on him. He said the man who took his statement told him it

[1]This statement was a confession of the robbery of two service stations in Hope, the attempted theft of the Hartsfield automobile, several felonies in Texas by which he attained the automobile in which he came to Hope and a pistol, and the shooting of Puryear, which he claimed to be in self defense.

would go harder if he did not confess because the judge was already mad at him.

The rules laid down in *Miranda* v. *State of Arizona,* 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, and *Escobedo* v. *State of Illinois,* 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977, do not apply here. *Johnson* v. *New Jersey,* 384 U. S. 719, 86 S. Ct. 1772, 16 L. Ed. 2d 882; *Jackson* v. *State,* 241 Ark. 850, 410 S. W. 2d 766.

Appellant also claims that he asked one of the court appointed attorneys to call his family. He states that he never heard from any member of his family before his sentencing. Neither of the attorneys could recall appellant's alleged request. Appellant's mother learned of his arrest by means of a television report on a Fort Worth station. His father heard that appellant was in difficulty near the time of his arrest from someone who heard of it on television. He was told that it took place at Hope. He made no effort to contact appellant because of a feeling that appellant would contact him if the former needed him and felt that he could help. He further testified that he did not hear from appellant until months later. Appellant's wife was advised while visiting at her mother's home through a letter from a friend. She also received a letter from appellant while he was in the county jail at Hope. None of these parties got in touch with appellant or did anything to help, although they obviously knew that he was in jail at Hope. The trial judge stated that appellant made no request on appearance in court that his family be contacted. The inaction of these members of appellant's family tends to corroborate testimony that appellant did not request that they be called.

It is undisputed that two attorneys were appointed by the trial court to represent appellant on the day of his arrest. While a statement made by appellant was promptly furnished to his attorneys, each said he made an independent investigation of the charges, talking to some of the witnesses. One of the attorneys conferred with appellant two or three times. The other partici-

pated in a thirty-minute conference with appellant and the other attorney. Although Read contended that one of them asked that he be allowed not to represent appellant, this is flatly denied by the attorney. After the investigation and conferences, both recommended that appellant plead guilty to the charges on which he was sentenced, feeling that this was to appellant's best interest. It is significant that appellant pleaded not guilty to four of the seven counts of felony with which he was charged. Four days elapsed between appointment of counsel and the entry of defendant's pleas. Another three days passed before sentence was imposed. We find sufficient evidence to support the finding that appellant had competent and effective counsel.

Appellant attacked the constitutionality of the imposition of consecutive sentences as provided by Ark. Stat. Ann. § 43-2311 (Repl. 1964). This contention appears to be without merit. It was not urged in appellant's brief nor were any authorities cited. *Maples* v. *State,* 226 Ark. 485, 290 S. W. 2d 627.

Affirmed.

BROWN, J., disqualified and not participating.

PIGGOTT STATE BANK *v.* STATE BANKING BOARD ET AL

5-4194 416 S. W. 2d 291

Opinion delivered June 5, 1967

[Rehearing denied July 26, 1967.]

Smith, Williams, Friday & Bowen, for appellant.

Glenn F. Walther, for appellee.

JOHN A. FOGLEMAN, Justice. This is an appeal from a judgment of the Pulaski Circuit Court refusing, on certiorari, to set aside the action of the State Banking Board granting a charter upon the application of Harold Jinks and others for a state bank at Piggott to be known

as Peoples Bank of Piggott. Application for the writ and the setting aside of that action was made by Piggott State Bank, a state banking institution long in business at Piggott. Two hearings were held by the State Banking Board with the same result. In the interval between them the personnel of the Board changed so that two new members participated in the second hearing.

Minutes of the Board show that the application was considered at a meeting held on March 24, 1966. At that meeting the proponents and opponents were heard separately. By a vote of 3 to 2 a motion to grant the charter, subject to approval of deposits of the new bank for insurance by the Federal Deposit Insurance Corporation, was tabled for ten days. During this period the Board recommended to the Bank Commissioner that the attorney for the opponents be permitted to file a brief summarizing objections to the granting of the charter. On April 4th a telephone poll on the granting of the charter resulted in a vote of 3 favoring and 1 opposed, the Chairman abstaining.

Appellant, an opponent, filed a petition for certiorari in the Pulaski Circuit Court. It complained that the opponents were unduly restricted in presenting their objections, having been denied a continuance and allowed only one and one-half hours to present their case. The petition was granted. After the trial court reviewed the transcript of the proceedings before the State Banking Board, it remanded the matter to the Board with directions to hold another meeting and to cause oral testimony heard to be made a matter of record for inclusion in a transcript. The circuit court also required that a quorum of the Board be present to act on the charter, holding the telephone poll to have been improper.

After the second hearing on June 9th the charter was granted, subject to Federal Deposit Insurance Corporation's approval for insurance, by the vote of four

members, the Chairman abstaining[1]. Appellant then applied to the Pulaski Circuit Court for a supplemental writ of certiorari, asking that the court approve or disapprove the application. The writ was granted, and Peoples State Bank of Piggott was permitted to intervene. After the trial court considered the record and briefs of the interested parties, it found that there was substantial evidence to support the action of the State Banking Board. The judgment dismissed the petition for certiorari and directed the granting of the charter.

The State Banking Board is required by statute, upon submission to it of an application for a charter filed with the State Bank Commissioner, to make such investigation as shall enable it to determine the fitness of the applicants, the need, from the public standpoint, for the proposed institution, and all other questions bearing directly or indirectly upon the need or desirability of the proposed institution from the public standpoint, and to promptly approve or disapprove the application. If the Board approves, the Bank Commissioner may, in the event he also approves the application, grant the charter. Ark. Stat. Ann. § 67-205 (Repl. 1966).

We find no provision for appeal to the courts from any decision of the Board, such as provided from actions of the Savings and Loan Association Board, on which the review is limited to a determination whether the findings of the Board are supported by substantial evidence. Ark. Stat. Ann. § 67-1811.

The business of banking is closely related to the public welfare and within the police power of the state. The peculiar relationship of banking corporations to the public, their depositors, is such that it is the duty of the state to see that those who embark upon the enterprise are entitled to the confidence of the public and that those who entrust their money to these institutions are protected. *Holland* v. *Nakdimen,* 177 Ark. 920, 9 S. W. 2d 307, 62 ALR 484. The power extends to the regulation or even

[1]It is stated by the parties that the Chairman, in a letter, later expressed his dissent from the action of the Board.

the prohibition of the business except on such terms as the state may prescribe. *State* v. *Huxtable,* 191 Ark. 10, 12 S. W. 2d 1.

Thus, it is essential and appropriate that an agency such as this Board be vested with broad powers and discretion on questions such as are presented on applications like this. At least two of the members are required to be active bankers. It is required that the State Bank Commissioner recommend one member, the Arkansas Bankers Association two members, the Governor appoint one without recommendation, and that the four members recommend a fifth.

The holding of this court in *Newton* v. *American Security Co.,* 201 Ark. 943, 148 S.W. 2d 311, is appropriate here. There it was said:

> "It has been uniformly held by this court that where boards are lawfully appointed and charged with the duty to investigate and determine certain facts, the court cannot substitute its judgment for the judgment of the board, and the judgment of the board provided for the purpose of ascertaining the facts is controlling unless there is evidence that it was arbitrarily exercised. *Mo. Pac. R. Co.* v. *Williams,* 201 Ark. 895, 148 S. W. 2d 644; *Jernigan, Commissioner* v. *Loid Rainwater Co.,* 196 Ark. 251, 117 S. W. 2d 18; *Lion Oil Refining Co.* v. *Bailey,* 200 Ark. 436, 139 S. W. 2d 683; *Department of Public Utilities* v. *Arkansas Louisiana Gas Co.,* 200 Ark. 983, 142 S. W. 2d 213."

In a case involving the State Banking Department when its Securities Division denied an application for a loan broker's license, (*Jernigan, Bank Commissioner* v. *Loid Rainwater Co.,* 196 Ark. 251, 117 S.W. 2d 18) this court said:

> "It must be remembered that the duty imposed by law of investigating and determining whether a license should be granted or refused is not imposed

upon this court nor upon the learned judge from whose order this appeal comes. He, in the first instance, and we, upon appeal, may review this action to determine whether there has been an arbitrary decision, or an abuse of discretion, but we should regard and uphold the decision of the Securities Division of the State Banking Department unless it be made to appear that there was an abuse of discretion or an arbitrary decision. *St. Louis S.W. Ry. Co.* v. *Stewart,* 150 Ark. 586, 235 S.W. 1003; *Rural Special School Dist.* v. *Common School Dist.,* 183 Ark. 329, 335, 35 S.W. 2d 587; Sections 170 and 171, chapter Public Officers, 22 R.C.L. 490; Sections 290, 291, and 293, chapter Officers, 42 C.J. 1033."

In view of the fact that the act in question does not require any hearing, reduction of evidence to writing, or formal findings, there might be considerable doubt whether the action of the board would support a proceeding by certiorari. See *Dixie Downs, Inc.,* v. *Arkansas Racing Commission,* 219 Ark. 356, 242 S.W. 2d 132; Annotation 102 ALR 534; 14 Am. Jur. 2d 800 et seq., Certiorari, § 24. We bypass that question, however, as a hearing was held and a transcript of the testimony made.

There is some authority that there must be substantial evidence to support the findings of certain state boards. See, e.g., *Department of Public Utilities* v. *Arkansas Louisiana Gas Co.,* 200 Ark. 983, 142 S. W. 2d 213.

Even though appellant brought out many factors which would have great bearing on the credibility of witnesses for intervenor and the weight to be given their testimony because of possible interest or bias and offered substantial evidence that there was no public need for the proposed new bank, we find that there was substantial evidence upon which the board might have based its findings. We cannot say that the action of the Board was arbitrary, or an abuse of discretion.

Harold Jinks, Special Assistant to the Regional Director of the Post Office Department, a Piggott resident and president of the proposed bank, testified. He said that while the economy was booming, Piggott was not booming; that there was more vacant space on the town square than there was in depression years; that transportation was inadequate. He made comparisons of per capita bank deposits and per capita loans in Piggott with other towns in Arkansas, showing that these amounts were lower in Piggott than in other localities, including some in Clay County in an area where banks were said to be competitive with the present bank in Piggott.[2] He expressed the opinion that banking facilities in Piggott were not adequate and that this lack contributed to a condition of stagnation in the town.

A. B. Boyd, Jr. of Campbell, Missouri, who lives eleven miles from Piggott and is a stockholder in a cotton gin at Piggott and the owner of a two-third's interest in a gin at Pollard, testified. He said that he did business with the State Bank of Campbell and Piggott State Bank. He related that the bank at Campbell is a par bank but the Piggott State Bank is not. Loans obtained by the gins from appellant were at a higher interest rate than he paid on loans at Campbell. He stated that 50% of the checks he received in his business around Piggott were drawn on banks in other localities and that a lot of banking business leaves Piggott. He asserted that appellant required a greater ratio of security than the bank in Campbell.

Myron Rodgers, former President of the Chamber of Commerce at Piggott and presently a member of the Board of Directors thereof, who is a poultry jobber operating from Helena to Crystal City and Festus in Mis-

[2]In this regard appellant pointed out that the witness had not taken into consideration the deposits in or loans by a savings and loan association. A much more favorable comparison existed when this was taken into consideration. However, it was not shown in which of the towns and cities with which this comparison was made there were such associations, except that it was testified there was no such association in certain of the towns in Clay County.

souri, in part of Tennessee and west to Newport and Pocahontas, operating 38 trucks and having a warehouse of a value of $50,000, testified on behalf of the applicants. He said that he had never made an application for a loan at the Piggott State Bank that was declined until after the application for a new bank at Piggott was filed. When he made this application, the bank there was not interested, according to him. He claimed to know of two other persons, not named, who applied for loans which were declined by the Piggott State Bank who borrowed money from another bank. He stated that two medical students, whose loans would have been guaranteed by the federal government, were refused loans at the Piggott State Bank but that after the current application was filed, one of them was loaned the money he requested.

George Cook, who was engaged in the general insurance and real estate business in Piggott, testified that he borrowed money at Caraway because he did not feel that he had had proper treatment at Piggott State Bank since he purchased stock in the new bank. He said that he had paid 8% interest at Piggott and 5% at Caraway on about the same security. He also said that people he dealt with issued 25% to 30% of their checks on banks other than Piggott State Bank. Most of them, he said, were drawn on banks in Rector and Kennett, Missouri.

Ralph Williams, farmer, cattleman, grain buyer and feed dealer, all of whose business interests were in the Piggott area, also testified for the applicants. He stated that 50% of the people with whom he dealt gave checks drawn on banks other than the bank at Piggott. Two of the principal places on which the checks were drawn were Rector and Kennett. Loans for which he had applied at the Piggott bank, more than four years previously, were declined but he obtained them from the banks at Kennett. The security offered in all instances, he said, was warehouse receipts, principally on soybeans.

E. J Latta, who had worked at a bank in Chaffee, Missouri for 22 months and for the Federal Deposit Insurance Company as a bank examiner for seven and one-half years, had worked for Piggott State Bank for four and one-half years. He stated that he had discovered, after he left Piggott State Bank, that it had the most conservative loan policy of any bank that he was ever in and that interest rates were relatively higher than in most other banks. He was recently employed by Clay County Propane Company, formerly Irby Butane Gas Company in Piggott, but presently employed with Federal Housing in Little Rock. He estimated that 40% of the checks they received from customers in the trade territory were drawn on banks other than the Piggott State Bank. He stated that Piggott State Bank did not offer savings account service on passbooks or Christmas Savings Plan, or automobile drive-in windows, but limited their facilities to checking accounts and certificates of deposit. He also stated that Missouri banks file more than half as many financial agreements (financing statements?) in the Eastern District of Clay County as do the three county banks combined.

Chester Pearman, a witness for appellant, was executive vice president and cashier of Cotton Exchange Bank of Kennett, Missouri. He stated that prior to 1960 there were two banks in Kennett, but after the third bank was chartered it had deposits of $3,500,000 and the deposits in his bank had grown $1,200,000 even though he thought they were "overbanking" when the third charter was granted. He said that this was because of division of existing business and such growth as the community had. The big bank in Kennett, he said, had increased $1,000,000 to $1,500,000.

A very persuasive case was made by appellant as to the highly competitive banking situation in the trade area in Clay and Greene Counties in Arkansas and in the neighboring territory in Missouri and the adequacy of the banking facilities in Piggott. Many of the witnesses for protestants were bank officers who, according to the testimony, were in areas where banking was competitive.

All thought the existing banking facilities were adequate and that there was no need for a new bank at Piggott and that the granting of a charter would be adverse to the public interest. But we do not determine where the preponderance of the evidence lies, nor do we determine the credibility of the witnesses or the weight to be given to their testimony, — this is all a function of the State Banking Board.

It is not the function of this court, on appeal from a circuit court, to determine where the preponderance of the evidence lies. Decisions in cases appealed from chancery courts, in which our trial is de novo, do not constitute authority on this question. Moreover, certiorari lies only for the purpose of review for errors of law, one of which may be the legal sufficiency of the evidence to sustain the judgment of the tribunal, but a court cannot review merely for errors of judgment or try the matter de novo. *Hall* v. *Bledsoe*, 126 Ark. 125, 189 S. W. 1041; *Veteran's Taxicab Co.* v. *City of Ft. Smith,* 213 Ark. 687, 212 S. W. 2d 341; *McCain* v. *Collins,* 204 Ark. 521, 164 S.W. 2d 448. It has been said that a board's action will not be set aside on certiorari unless there is an entire absence of substantial evidence, in which case the board action is deemed to be arbitrary. *Bockman* v. *Arkansas State Medical Board*, 229 Ark. 143, 313 S. W. 2d 826.

Appellant complains that the proceedings were so irregular and prejudicial to appellant as to require reversal. In part, this contention is based upon failure to follow strict rules of evidence. A hearing before a board does not cease to be fair because rules of evidence and procedure governing judicial proceedings are not followed or evidence has been improperly rejected or received. The hearing cannot be said to be unfair unless the defect might have led to a denial of justice or an element of due process is absent. *Kuhl* v. *Arkansas State Board of Chiropractic Examiners*, 236 Ark. 58, 364 S. W. 2d 790.

Another basis of this contention is the charge that one of the board members displayed bias and prejudice

toward the protestants, their witnesses and their attorney. Even though there may appear to have been some attitude of hostility on the part of this member, the chairman took steps to keep the proceedings orderly and to see that a full hearing was given. We find no statutory rule, nor is any pointed out, for disqualification of a member of this board. No effort was made to disqualify this member or to have him excuse himself, nor was any objection made to his participation in the hearing, although he was a member of the board at the time of both hearings. Nor was this contention made a basis of either the original or supplemental petition for certiorari. Even if he were disqualified, the determination would only be voidable and the irregularity is waived by the failure to object. 1 Am. Jur. 2d 863, Administrative Law, § 68. We are unable to say that there was error on the part of the trial court in failing to void this proceeding on the basis of this contention. The fact that the same result was reached at the conclusion of both hearings with the change in membership that took place has some bearing on this determination.

There is one respect in which the order of the circuit court is in excess of its jurisdiction, on certiorari, and it must be modified in that respect. The order directs the State Banking Board to forthwith issue a charter to Peoples Bank of Piggott. The State Banking Board can only approve or disapprove the application. After its approval, the Bank Commissioner may, in the event that he also shall approve the application, grant the charter. Ark. Stat. Ann. § 67-205 (Repl. 1966). The judgment of the circuit court, then, is modified to eliminate that portion directing the issuance of a charter.

Affirmed as modified.

FRED PETERS ET UX *v.* CECIL M. HUBBARD AND LARRY HUBBARD, D/B/A GEORGE HUBBARD & SON, AND NUTRENA MILLS, INC.

5-4198 416 S. W. 2d 300

Opinion delivered June 5, 1967

[Rehearing denied July 26, 1967.]

M. C. Lewis Jr. and *William W. Green,* for appellants.

Wootton, Land & Matthews and *Clayton Farrar,* for appellees.

J. FRED JONES, Justice. This is an appeal from the Garland County Chancery Court wherein Fred and Nellie Peters were plaintiffs and George Hubbard & Son and Nutrena Mills, Inc. were defendants. The suit was first filed in Circuit Court and transferred to chancery. The plaintiffs sought damages for breach of four interwoven and inter-related contracts, two of which were

alleged to be oral and two written. Both of the defendants, the Hubbards and Nutrena, demurred to each of the four causes of action in the complaint, and all the demurrers were sustained by the chancellor. The plaintiffs refused to plead further and standing upon their complaint, as amended, have appealed to this court.

Appellants designate the following as points they rely on:

"I. The court erred in sustaining the demurrer of the defendants-appellees Hubbard.

"A. The complaint as amended stated good causes of action and there was no defect.

"1. For the cause of action, it alleged an oral agreement between the parties, with definite terms, completely performed by Plaintiffs-Appellants, and breached by Defendants-Appellees.

"2. For the second cause of action, it alleged a written agreement, a copy being attached and made a part of the Complaint as an Exhibit performed by Plaintiffs-Appellants, and breached by Defendants-Appellees.

"3. For the third cause of action it alleged a written agreement, a copy being attached and made a part of the Complaint as an Exhibit performed by Plaintiffs-Appellants, and breached by Defendants-Appellees.

"4. For a fourth cause of action it alleged an oral agreement with definite terms, performed by Plaintiffs-Appellants, and breached by Defendants-Appellees.

"II. The court erred in sustaining the demurrer of the Defendant-Appellee Nutrena Mills, Inc.

"A. The Complaint as amended stated good causes of action and there was no defect.

"1. Performance by Defendant-Appellees Hubbard to two oral and two written agreements with Appellants was an original undertaking by the Defendant-Appellee, Nutrena Mills, Inc., who was a third party to each agreement and a beneficiary thereof with substantial benefits therefrom.

"2. The four causes of action were properly alleged as to be discussed under Point I."

It is difficult indeed to determine from the pleadings filed by appellants, where one cause of action stops and another begins.

As near as we can tell, from the entire record, the alleged four separate contracts, on which the four separate causes of action were based, apparently intended to cover the productive life span of chickens in successive flocks of laying hens to be perpetually renewed by culling and replacement. Apparently it was intended that the contracts were to be renewed from time to time and to continue in force until a long-term monthly payment loan from third parties to appellants, made in connection with the construction of the chicken house, was repaid in full.

Apparently recognizing the difficulty in distinguishing one alleged contract from another, the appellants have designated the four separate alleged contracts as four separate causes of action, A, B, C, and D, in their complaint, and we shall so deal separately with each cause here.

More in nature of pointing up the problem than in stating the solution, the complaint, as amended, is set out here in some detail.

Under cause "A" the complaint alleges:

"That the plaintiffs, Fred Peters, and Nellie Peters, are owners of real estate known as Route 1, Box 140, Pearcy, Arkansas; that the Defendants are engaged in the poultry, chicken, egg and feed business; that in December of 1962, the Plaintiffs and the Defendants entered into an agreement, for and in consideration of the promises of the Defendants jointly for automatic contract renewals of egg production agreements, and pullet feeding agreements, with the furnishing of feed and chickens by the Defendants, the Plaintiffs entered into an agreement with the Defendants under which the Plaintiffs were to construct a large chicken house with a 6,000 chicken capacity and to purchase equipment including a feeder, which equipment was necessary for the operation of the chicken houses and maintenance of a poultry and egg producing farm; that in reliance upon the promises and agreements of the Defendants, the Plaintiffs borrowed money and mortgaged their property and constructed a 6,000 capacity chicken house at a cost of $3,220.80, not including the labor of the Plaintiff, Fred Peters, which was in addition to the other costs, and purchased a Big Dutchman feeder at a cost of $1,047.81; that in order to do the construction and in order to make the purchase of the equipment, it was necessary for the Plaintiffs to mortgage their home and property and to go in debt with large monthly payments; that the Defendants knew that it was necessary for the Plaintiffs to borrow money for the chicken house construction and the purchase of the equipment, and agreed with the Plaintiffs and represented to them that they would furnish chickens to the capacity of the Plaintiffs' chicken houses and furnish feed and provide an outlet for the eggs and poultry and agreed with the Plaintiffs that the pullet raising and egg production agreements would be automatically renewed.

"That the Plaintiffs were instructed by the Defendants to secure as long financing terms as were possible, that in reliance upon the agreements by the Defendants and those instructions, the Plaintiffs borrowed money on a long-term basis; that the Plaintiffs completely performed by constructing the 6,000 capacity chicken house and purchasing the feeder and equipment necessary for the feeding and raising of poultry and the production of eggs.

"That under the agreement 6,000 chickens to the capacity of the Plaintiffs were to be furnished on January 1, 1963; that the Defendants entered into a partial performance, but did not deliver any chickens until March 2, 1963, and then did not deliver and never have delivered 6,000 chickens to the capacity of the Plaintiffs and in accordance with the agreement.

"That subsequently the Defendants breached individual egg production and pullet raising agreements and completely breached their covenant to automatically renew such agreements; that as a result of the failure to completely perform and as a result of the breach of the Defendants of the agreement with the Plaintiffs, the Plaintiffs have been greatly damaged; that their chicken house has become worthless to their damage in the amount of $3,220.00; that the feeder has become worthless to their damage in the amount of $1,000.00; that as a result of the breach by the Defendants, the Plaintiffs have incurred a net loss of earnings in the amount of $295.00 per month, totaling $13,570.00, after allowing credit for earnings from partial performance by the Defendants. That the Plaintiffs are entitled to recover from the Defendants jointly and severally the total sum of $17,790.00 for the Defendants' breach of contract."

In response to a motion to make more definite and certain, appellants amended this cause of action "A" as follows:

"The Agreement entered into in December of 1962 by and between the Plaintiffs and the Defendant, Nutrena Mills, Inc. and the Defendant, Cecil M. Hubbard and Larry Hubbard, a partnership, d/b/a George Hubbard & Son, was an oral agreement;

"The duration of the agreement was for the length of time it took to clear the cost of construction of the chicken house and to pay for the special feeder equipment, and for the length of time that it took to repay the money and mortgage necessary to construct the chicken house and purchase the equipment; that Plaintiffs specifically performed within one year their original duties under the agreement by purchasing the equipment and constructing the chicken house and obtained long term financing in accordance with the instructions of both Defendants."

The amendment to this cause of action then continued with eight additional lengthy paragraphs relating, primarily, to additional poultry and egg producing contracts and agreements to renew the contracts, and to Nutrena's agreement to guarantee that Hubbard & Son would carry out their agreements. To copy the amendment in full would unduly lengthen this opinion and a full copy is not necessary for a determination of the question before us.

The Arkansas statute of frauds, Ark. Stat. Ann. § 38-101 (Repl. 1962), provides as follows:

"No action shall be brought; . . . to charge any person, upon any special promise, to answer for the debt, default or miscarriage, of another; * * * to charge any person upon any contract, promise, or agreement, that is not to be performed within [1] year from the making thereof; unless the agreement, promise or contract, upon which such action shall be brought, or some memorandum or note thereof, shall be made in writing, and signed by the party

to be charged therewith, or signed by some other person by him thereunto properly authorized."

Appellant's cause of action "A," as amended, alleges that the agreement was oral and that its duration was until a long term indebtedness for the chicken house is paid off. This cause of action also alleges that the Hubbards agreed to enter into additional contracts and then the complaint alleges damages for breach of apparently the same contracts appellants allege that appellees agreed to enter into.

We conclude that the complaint in cause of action "A" does not state a cause of action on a contract to be performed within one year and that the chancellor was correct in sustaining the demurrers to this cause of action.

For their cause of action "B" appellants alleged:

"That on the 22nd day of January, 1963, the Defendants entered into a pullet feeding agreement with the Plaintiffs, a copy of which is attached as Exhibit 'A' and made a part hereof as though set out herein word for word. That under said agreement Defendants were to furnish 3,690 pullets on or about January 17, 1963; that in accordance with said agreement, the Defendants were to furnish the Plaintiffs with the necessary feed, grit and poultry medication for the purpose of proper feeding and care of the pullets; that in the agreement it was provided that the pullets were to be cared for and left with the Plaintiffs until they reached twenty weeks of age; that the Plaintiffs were to be paid one cent per bird per week for their services in growing and caring for said birds; that the Plaintiffs fully complied with the agreement, but that the Defendants breached the agreement by failing to comply with said agreement to the Plaintiffs' damage in the amount of $738.00, which Plaintiffs should recover from the Defendants."

By amendment to this cause of action, appellants alleged:

> "Defendants, George Hubbard & Son, never delivered the pullets as called for in Exhibit 'A.' "

Exhibit "A" to the complaint on this cause of action is designated "pullet feeding agreement," and although dated January 22, 1963, under its terms appellee, George Hubbard & Son, agreed to deliver to appellants 3,690 pullets on or about January 17, 1963, which appellants agreed to grow and care for until 20 weeks of age. Under the terms of this agreement, appellants were to receive for their services one cent per bird per week, based on the total of salable birds at 20 weeks of age on March 2, 1963. This written agreement is signed by the appellee, Hubbard & Son, as well as the appellants, and by amendment to their complaint appellants allege "defendants, George Hubbard & Son, never delivered the pullets as called for in Exhibit 'A'."

We conclude that cause of action "B" in appellants' complaint, was good against appellee, Hubbard & Son, on demurrer, and that the chancellor erred in sustaining the Hubbard demurrer to this cause of action.

For their cause of action "C" appellants alleged:

> "That on the 2nd day of March, 1963, the Defendants entered into an egg production agreement with the Plaintiffs, a copy of which is attached as Exhibit 'B' and made a part hereof as fully as though set out herein word for word. That under said agreement, Defendants were to furnish 3,561 Hyline chickens as layers on that date; in accordance with said agreement, the Defendants were to furnish feed and the Plaintiffs were to furnish services and collect eggs for which the Defendants were to pay; that in the agreement it was provided that only the feeds of Nutrena Mills, Inc. were to be used; that said layers were to be left with the Plaintiffs until they reached the laying age of eighteen months and

thereafter so long as it was economically sound; that the Plaintiffs were to pay five cents per dozen for medium to large eggs and three cents per dozen for peewee and small eggs; that Plaintiffs fully complied with the agreement, but Defendants breached said agreement by picking up said layers on May 26, 1964, when there was still four months to go on said contract to Plaintiffs' damage for loss of earnings in the amount of $1,214.08, which Plaintiffs should recover from the Defendants."

The amendments to this cause of action add nothing to its validity on demurrer, but Exhibit "B" filed with the complaint is entitled "Dealer-producer egg production agreement." Under this agreement, appellee, Hubbard & Son, agreed to furnish to appellants approximately 3,561 twenty weeks old chickens and to supply the chickens with feed, and to pay appellants specified amounts for various size eggs produced by the chickens. Appellants were to feed and care for the chickens and gather, sort, and crate the eggs. This agreement was to remain in effect until the 20 weeks old birds reached the age of 18 months. This agreement contained a provision for continuing the agreement if the birds continued to be productive after they became 18 months of age. This agreement was dated March 2, 1963, and was signed by appellants and the appellee, Hubbard & Son. Appellants allege that appellee breached this contract by picking up the chickens on May 26, 1964, and four months before the expiration of the agreement under the terms of the agreement.

We conclude that cause of action "C" in appellants' complaint, was good against appellee, Hubbard & Son, on demurrer, and that the chancellor erred in sustaining the Hubbard demurrer to this cause of action.

For their fourth cause of action "D" appellants alleged:

"That in May of 1963, the Defendants entered into an egg production agreement with the Plaintiffs

whereby Defendants were to furnish 2,200 laying hens by August, 1963; that subsequent to the delivery of the 2,200 chickens, the Defendants also delivered to the Plaintiffs 200 additional chickens to be layers; that Plaintiffs fully performed, but the Defendants breached the contract by picking up said layers on May 26, 1964, when there was eight months production to go under the agreement as to laying age; that by the breach of the contract by Defendants, Plaintiffs incurred a loss of earnings and were damaged in the sum of $1,365.60, which they should recover from the Defendants."

And by amendment to this cause of action, appellants alleged:

"The agreement of May, 1963 was an automatic renewal of the agreements attached as Exhibit 'A' and Exhibit 'B' of the original Complaint; the agreement was made on or about May 1, 1963, and the terms were the same as the terms of the written agreements Exhibit 'A' and Exhibit 'B'; the duration of the specific agreement as to 2,200 chickens was to be the same as that under the written agreements in Exhibit 'A' and 'B;' the agreement made on or about May 1, 1963 was an oral automatic renewal of the written agreements listed as Exhibit 'A' and Exhibit 'B'; the 2,200 chickens were delivered on or about May 16, 1963 and were approximately one month old when delivered.

"The 200 additional chickens were delivered on or about June 30, 1963, and were approximately four months old when delivered.

"The damages in the amount of $1,365.00 were computed on a basis of average production of the chickens being 113.8 cases at $1.50 a case or $170.70 per month for a loss of eight months production, based on production average, totaling $1,365.60."

The oral agreement alleged in this fourth cause of action "D" appears to be based on an agreement to renew the two written agreements, Exhibits "A" and "B," sued on under causes of action "B" and "C."

Apparently the oral contract alleged in cause of action "D" was to take effect immediately and during the life of the two written contracts, and was intended to renew the written agreements some several months before they were to expire by their own terms.

In any event, the written egg production agreement as set out in Exhibit "B" under cause of action "C," was to commence when the chickens were twenty weeks old and terminate when they were eighteen months old, a period of more than one year. The performance under this oral contract in cause of action "D" being for a period of more than one year, it falls within the statute of frauds and we conclude that the chancellor correctly sustained the demurrers to this cause of action.

If Nutrena's alleged agreement to guarantee performance by Hubbard was an oral agreement, it falls within the statute of frauds. We find nothing in this entire record to even remotely indicate that the appellee, Nutrena Mills, Inc., ever entered into a written contract agreeing to do anything. A contract by appellants and appellee, Hubbard, and *witnessed* by an agent of Nutrena does not make Nutrena a party to the contract.

We conclude that the chancellor was correct in sustaining the demurrers filed by Nutrena to all four of the causes of action alleged in the complaint.

The decree of the chancellor sustaining the demurrers of appellee, Nutrena Mills, Inc., to all causes of action alleged in the complaint is hereby affirmed, and the cause dismissed as to appellee, Nutrena Mills, Inc.

The decree of the chancellor sustaining the demurrers of appellee, Hubbard & Son, to the first and fourth causes of action "A" and "D" is hereby affirmed.

The decree of the chancellor sustaining the demurrer of appellee, Hubbard & Son, to second and third causes of action on the written contracts in causes "B" and "C" is hereby reversed and this cause remanded for further proceedings toward a trial on the merits in causes of action "B" and "C" alleged against the appellee, Hubbard & Son.

Reversed and remanded.

JOHN DIX *v.* CLEDA OLDS, ET AL

5-4209 415 S. W. 2d 567

Opinion delivered June 5, 1967

M. V. Moody, for appellant.

Lookadoo, Gooch & Lookadoo, for appellee.

J. FRED JONES, Justice. This is an appeal from a decree of the Garland County Chancery Court wherein John Dix was awarded a money judgment against Louis E. Dodd, Irene Dodd and Paul G. Goodwin for $1,395.25 balance due on a street or roadway surfacing contract, but which denied a materialmen's and laborer's lien on

the land. Dix has appealed from that portion of the decree denying the lien.

On January 23, 1959, Lessie Plemmons conveyed the land involved to Goodwin and wife by warranty deed with lien retained to secure the balance of purchase price in the amount of $20,000.00. On May 22, 1961, Plemmons assigned the note and lien to Donnelly, and on July 7, 1966, Donnelly sold and assigned the note and mortgage to Cleda Olds.

On July 7, 1961, the Goodwins sold the property to Dodd, reserving in the deed of conveyance a vendor's lien to secure the balance of purchase price in the amount of $40,000.00, and in October 1961, Dodd platted the property into lots and blocks to be known as "Wooded Hills Subdivision" and executed and filed a bill of assurance in connection therewith. The bill of assurance, or a part of it, is of record in this case, it refers to a plat and survey as being attached and made a part of the bill of assurance, but the plat and survey is not in the record before us.

On or about April 30, 1962, Dix entered into a contract with Dodd and his wife through their agent, Goodwin, under which Dix agreed to furnish materials and labor in black topping streets and roadways in the subdivision. This contract apparently was an oral contract and upon completion of the work, Dix was paid a part of the amount due under the contract leaving a balance of $1,395.25.

Dix filed his suit in Chancery Court against the Dodds and Goodwin asserting the balance of indebtedness due and a lien on all the lands, premises, and improvements described in the bill of assurance, and Dix prayed judgment for the balance due on his contract and for a foreclosure of the lien claimed.

The Dodds and Goodwin filed answer admitting that they contracted with Dix for an asphalt surface on a

certain road in the subdivision, and alleging that Dix had breached the contract as to quality of asphalt to be used. They counter claimed for cancellation of the contract and damages for breach and denied all other allegations of the complaint.

With the issues thus joined between the parties here, the matter apparently lay dormant on the Chancery Court docket for a period of four years. In the meantime numerous other suits, counter claims, and cross complaints, by intervention and otherwise, were filed in connection with the property involved, including a petition to foreclose the original purchase mortgage lien held by Cleda Olds. A pretrial conference was held on February 15, 1966, and all the causes of action were consolidated.

A decree was entered on July 14, 1966, reciting that all parties were present in person or by attorneys; that the cause was submitted on the petition and on the record and the argument of counsel, and the chancellor found that a lien should be denied to Dix, but that he was entitled to judgment for $1,395.25 and a decree and judgment was entered accordingly against Louis E. Dodd, Irene Dodd and Paul G. Goodwin.

Dix has appealed and relies on two points as follows:

> "I. The lower court erred in refusing the award to the plaintiff, John Dix, a laborer's and materialman's lien on the property described in appellant's statement, for labor and material furnished by him and used in constructing, laying, surfacing and pouring of asphalt on the streets, roads and roadway between the 30th day of April, 1962 and the 22nd day of October, 1962, prior and superior to all other liens and claims against the said described properties.
>
> "II. The within cause is not fully developed and the appellant should be granted a lien and the

properties determined among all the claimants."

The record indicates that this case was submitted to the chancellor on the petition and on the record and on the argument of counsel. There is no testimony or other evidence in the record pertaining to the contract between the appellant and appellees as to the balance due on the contract, and no evidence as to the alleged breach of the contract and damages claimed by the appellees. A contract for the surfacing of a road in the subdivision is admitted by appellees, and appellees have not appealed from that portion of the decree awarding a money judgment against them for the balance claimed by appellant, and from the record before us we are unable to say that the issues before the chancellor as between the parties here, were not fully developed.

The complaint alleges labor performed and materials furnished in the surfacing of streets and roadways in the subdivision and claims a lien on all the lots and blocks in the entire subdivision. The answer admits a contract for the surfacing of one roadway in the subdivision. The record contains no evidence of what lots or blocks abut on the streets where the labor was performed and materials furnished and there is no evidence in the record as to what portion, if any, of the subdivision was improved.

Apparently the lien claimed by appellant in this case was under our general Mechanics' and Materialmen's Liens statute, Ark. Stat. Ann. § 51-601 (1947), providing as follows:

> "Every mechanic, builder, artisan, workman, laborer or other person who shall do or perform any work, or furnish any material, fixtures, engine, boiler or machinery for any building, erection, *improvement upon land,* or upon any boat or vessel of any kind, or for repairing same, under or by virtue of any contract with the owner or proprietor thereof, or his agent, trustee, contractor or subcontractor, upon complying with the provisions of this act

> [§§ 51-601, 51-604—51-626,] *shall have for his work or labor done, or materials*, fixtures, engine, boiler or machinery *furnished a lien upon such* building, erection or *improvement, and upon the land belonging to such owner* or proprietor *on which the same are situated, to the extent of one acre; or if such* building, erection or *improvement be upon any lot of land in any town, city or village then such lien shall be upon such* building, erection or *improvements, and the lots or land upon which the same are situated*; or if such erection or improvement be upon any boat or vessel, then upon such boat or vessel, to secure the payment of such work or labor done, or materials, fixtures, engine, boiler or machinery furnished as aforesaid. Any original or principal contractor or his assignee who shall be paid the contract price or any portion thereof, and who shall fail or refuse to discharge the liens created by this section, to the extent of the contract price received by him, shall be deemed guilty of an offense and punishable as follows:'' (Emphasis supplied).

The Materialmen's Lien Law is in derogation of the common law and must be strictly construed. *Scott* v. *LeGrande,* 225 Ark. 1022, 287 S.W. 2d 456.

It is true, as pointed out by appellant, this court in the case of *Leiper* v. *Minnig,* 74 Ark. 510, 86 S. W. 407, held that a labor and material bill for the construction of a sidewalk, over which the public had an easement, across the front of three privately owned lots was secured by the statutory lien properly perfected. We can find no instance, and appellant has cited none, where this court has ever extended the application of this lien statute to bills for labor and materials used in improvements made on public streets. Even in the sidewalk cases the lien only applies to the lot on which the sidewalk is located and this court has never held, and insofar as we have been able to determine no other court has ever held, that a statutory lien for im-

provement in building a sidewalk on a city lot attaches to all the lots and blocks in an entire addition or subdivision.

We conclude that if the legislature had intended to create a statutory lien on *all land* that may be improved by labor and materials, it would have separated the improvement from the land subject to lien, and would have said "improvement *to* land" instead of "improvement upon land," and would have extended the lien to the land so improved rather than confine it to the land "upon which the same are situated."

Although the record before us reveals no testimony, the decree recites that all the parties were present in person or by attorneys and that said cause was "submitted to the court on said petition and on the record in this cause and the argument of counsel," so we are unable to say that the decree is against the preponderance of the evidence.

The decree of the chancellor is affirmed.

FOGLEMAN, J., concurs.

JOHN A. FOGLEMAN, Justice, concurring. I concur in the result in this case because the lien claimant failed to make any proof as to the location of the roadways, streets, etc., built by him. The burden of showing on which property he was entitled to a lien was on him. If there had been any evidence on which to base the same, I would hold that appellant was entitled to a lien upon the rights of the owner in the streets and roadways, subject, of course, to the public easement, and on the lots abutting the same, still owned by appellees at the time of the making of the improvement, on the authority of *Leiper* v. *Minnig,* 74 Ark. 510, 86 S. W. 407.

The interest which the public acquires by dedication of land for a highway or street is merely an easement

or right of passage over the soil, the original owner still retaining the fee and all rights of property not inconsistent with the public use. *Taylor* v. *Armstrong,* 24 Ark. 102; *Lincoln* v. *McGehee Hotel Co.,* 181 Ark. 1117, 29 S. W. 2d 668. When the streets are vacated or abandoned, they revert to the abutting owner. *Town of Hoxie* v. *Gibson,* 150 Ark. 432, 234 S.W. 490. The statute providing for mechanic's and materialmen's liens is remedial in nature and must be liberally construed in favor of the lien claimant. *White* v. *Chaffin,* 32 Ark. 59; *Buckley* v. *Taylor,* 51 Ark. 302, 11 S. W. 281; *Wildwood Amusement Co.* v. *Stout Lbr. Co.,* 178 Ark. 977, 12 S. W. 2d 911; *Brown* v. *Turnage Hardware Co.,* 181 Ark. 606, 26 S.W. 2d 1114; *Geisreiter* v. *Standard Lbr. Co.,* 187 Ark. 893, 63 S.W. 2d 347; *Rea* v. *Lammers,* 212 Ark. 792, 207 S.W. 2d 740; *United States* v. *Westmoreland Manganese Corp.,* 134 F. Supp. 898.

[redacted]

GENE WIRGES *v.* STATE

5216 415 S. W. 2d 548

Opinion delivered June 5, 1967.

[redacted]

G. Thomas Eisele, for appellant.

Joe Purcell, Attorney General; *Lance L. Hanshaw,* Asst. Atty. General, for appellee.

CONLEY BYRD, Justice. Appellant, Gene Wirges, contends, among other things, that his first-degree perjury

conviction should be dismissed because the alleged false statement in the indictment was not sustained by the proof.

The indictment charged Gene Wirges with the crime of perjury in the first degree in that he did willfully testify falsely while under oath in the Conway County Circuit Court case of *Scott* v. *Wirges*, by stating "*that he, the said Gene Wirges, did not write any portion of the Bird Town Birdie Column, which appeared in the July* 4, 1963 *issue of the Morrilton Democrat.*"

The proof offered by the state was that, in the trial of the *Scott* v. *Wirges* case, appellant testified as follows:

"Q. How long have you been the editor and publisher of those papers?

A. For the last six years.

Q. You are the defendant in this lawsuit in which Mr. Judge Scott is suing you for $200,000.00?

A. That's correct.

Q. Now, there is an article complained of. Have you read it?

A. Yes, sir.

Q. Did you write it?

A. No, sir."

In *Blevins* v. *State,* 85 Ark. 195, 107 S. W. 393 (1908), Mr. Blevins was convicted of perjury upon an indictment alleging that he had falsely testified that he had paid to E. B. McGuire the sum of $445. The proof showed that Blevins had testified that he met a man who pretended to be E. B. McGuire and paid him the money and took his receipt therefor. In dismissing the conviction, we there held that the proof must, in order to

sustain a perjury indictment, conform to the allegations thereof; otherwise an acquittal of the charge would follow. See also *Clemons* v. *State*, 150 Ark. 425, 234 S.W. 475 (1921), where we said:

> "...We think that the result of a substantial variance between the allegations and the proof is necessarily a failure of proof, for the proof must conform to the allegations, and, unless it does, there is no evidence to sustain the verdict. . . ."

We think this case is governed by our holding in the *Blevins* case, *supra,* for there is a great difference in asking a man generally if he wrote an article and asking him specifically if he wrote any portion of it. Therefore, because of the variance between the allegation and the proof with respect to the statements allegedly made by appellant, this cause is reversed and dismissed.

Our dismissal of this cause upon this point makes it unnecessary to discuss other alleged errors.

Reversed and dismissed.

ST. LOUIS SOUTHWESTERN RAILWAY CO. ET AL *v.* WARD JACKSON, ADM'R ET AL

5-4096 416 S. W. 2d 273

Opinion delivered June 5, 1967.

[Rehearing denied July 26, 1967.]

Barrett, Wheatley, Smith & Deacon, for appellant.

Gordon & Gordon, for appellee.

CONLEY BYRD, Justice. Appellants, St. Louis Southwestern Railway Company; W. D. Simpson, B. O. Hankins and J. A. Massey, the crew on the train in question; and Gerald Slocum, the signal maintainer for the "Cotton Belt" Railroad, appeal from a judgment in favor of administrators of the estates of Tommy N. Jackson, Catherine Jackson, Tommy N. Jackson, Jr., and Melinda Jackson, all deceased. The Jackson automobile was the third car in a two-week period, from June 1 to June 14, 1964, to collide with a southbound train at the Fair Oaks crossing in Cross County where Highway 64 crosses the "Cotton Belt" tracks. In each of the three collisions the automobiles were driving into the sun either toward the east in the morning or toward the west in the afternoon; in each instance the automobiles hit either the second or third diesel of a southbound train; and in each instance all of the occupants of each automobile were killed. The flasher lights erected by the Arkansas State Highway Department in 1940 and maintained by the railroad since that time were activated and blinking in each instance.

Highway 64 runs almost due east and west for a considerable distance on either side of the railroad, which runs in a northeast-southwest direction. Highway 39 from the north parellels the east side of the railroad tracks, and after intersecting Highway 64 eighty feet east of the tracks it crosses over and parallels the railroad on the west going south. There is also a gravel road south from Highway 64 which parallels the railroad on the east for approximately one half mile. About a half mile south of Highway 64 the "Cotton Belt" Railroad crosses the Missouri Pacific Railroad tracks. There was testimony showing that a westbound motorist traveling on Highway 64 could not see a southbound train until he was within 150 feet of the tracks, and that the view of an eastbound motorist was obstructed until he got within 50 feet of the tracks.

POINT I. *The jury panel should have been quashed because the panel had served at the preceding term of the court.*

Appellants rely upon Ark. Stat. Ann. § 39-225 (Supp. 1965) and *Edens* v. *State,* 235 Ark. 178, 359 S.W. 2d 432 (1962). We hold that the contention is not well taken because the Second Division of the Conway Circuit Court was temporarily established by Act 96 of 1965. This act specifically provided that jurors impaneled by the First Division were eligible to serve in the Second Division. In this situation the jury selected at the October term of the First Division was properly serving at the time of trial, even though the Second Division began a new term on the date in January when the case was tried.

POINT II. *The trial court committed error in its ruling upon several points.*

POINT II(1). *Permitting testimony of two other accidents which occurred at the crossing during the preceding two weeks.*

Appellees contend that evidence of the prior accidents shows that they *occurred under substantially similar conditions* and that they were admissible to show *a dangerous condition and notice of that condition on behalf of the railroad.*

The facts show that for many years the railroad was approximately two and one half feet above the elevation of the highway and that, because of the difference in elevation, automobiles had to slow down to cross over the "hump." During the latter part of 1963, Highway 64 was improved to the extent that it is now a 24-foot asphalt pavement with two shoulders, and the elevation has been raised practically even with the railroad so that automobiles no longer slow down to cross the railroad.

Following the improvement of Highway 64, on June 1, 1964, at 8:35 a.m. and on June 6, 1964, at 6:15 a.m. fatal

accidents occurred at this same crossing. In each of these accidents a motor vehicle collided with either the second or third diesel unit of a southbound freight train. The accident at issue here occurred on June 14 at 5:25 p.m. and the motor vehicle also collided with the second diesel unit of a southbound freight train. All three accidents occurred under substantially similar conditions, in that the sun was rising and setting almost directly in line with the highway and was rather low on the horizon. The only difference in the factual situations is that the Jacksons were traveling west while the other two vehicles were traveling east. The obstruction to visibility of motorists to the north as they approach the crossing is substantially the same whether they are traveling east or west.

The railroad, through a request for admission of fact, admitted that C. C. Mitchell, Claim Agent for the "Cotton Belt," following the first two collisions and before the collision in question, called the State Highway Department on June 10, 1964, and asked that a representative of the Highway Department go with him to check the Fair Oaks crossing. Mr. Mitchell at the time suggested that the trip be made during the week of June 21, but on June 15 he again called the Highway Department and made arrangements for Lester Jester of such Department to accompany him to Fair Oaks on June 17.

At the close of the trial, appellees offered the following instruction:

> "You are instructed that evidence of prior accidents cannot be considered by you as evidence of negligence on behalf of the railroad company or its employees.
>
> "Evidence of prior accidents is only admissible to show a dangerous condition and notice of that condition on behalf of the railroad company and its employees.
>
> "Evidence of signs erected by the Highway Department after the accident cannot be considered by you

as evidence of negligence on behalf of the railroad company or its employees.

"Such evidence can be considered by you only for the purpose of showing whether or not Tommy Jackson and Catherine Jackson were in the exercise of due care as they approached the crossing."

When appellants objected to the giving of the instruction it was withdrawn.

The annotation in 70 A. L. R. 2d 170 points out that 38 states and several of the federal courts have held evidence of a prior similar accident at the same place as the accident admissible to establish a dangerous or defective condition at the place in question, where the dangerous condition of the place in question is at issue. In addition, 36 such states and several of the federal courts have held such evidence admissible to show defendant's notice of the existence of the defect.

The annotation, 70 A. L. R. 2d 170, 172, states that the strongest attack on evidence of the type here considered has been based upon grounds of trial convenience rather than upon its lack of relevancy. In the earlier cases, the courts expressed the fear that if the evidence were received the trial would be disrupted by the necessity of investigating all the circumstances of the various incidents in question, and concluded that the most desirable solution was to exclude all such evidence. However, in more recent decisions the tendency has been to leave it to the trial judge in each case to determine whether the evidence should be excluded on the ground that it is collateral and to determine the extent to which the earlier accident can be investigated.

In *Lindquist* v. *D. M. Union Ry. Co.,* 239 Iowa 356, 30 N. W. 2d 120 (1948), defendant had parked a box car on a crossing. It was charged that the railroad had failed to exercise ordinary care for plaintiff and others using the highway by knowingly creating a hazardous

condition. In holding that the trial court erred in excluding testimony of other accidents, near-accidents, and observations of witnesses at the same place under the same or similar circumstances, the court said:

> " . . . One of the principal reasons for the rejection of such testimony is that it injects collateral issues into the case on trial. However, this evidence is not offered upon any theory of liability on the part of appellee. No dispute is made as to the accidents, no recovery asked on account thereof, no increase in damages sought. It is merely showing that an accident did happen at the same place under substantially similar circumstances. It is no more an injection of collateral issues in this type of case than in other types of negligence cases in which we have upheld the admissibility of such type of evidence. See *Moore* v. *City of Burlington,* 49 Iowa 135; *Frohs* v. *City of Dubuque,* 109 Iowa 219, 80 N. W. 341; *Spurling* v. *Incorporated Town of Stratford,* 195 Iowa 1002, 191 N. W. 724 (defective sidewalk cases); *Larson* v. *Stanton State Bank,* 202 Iowa 333, 208 N. W. 726 (other fraudulent representations to show fraud in instant case); *Crouch* v. *National Livestock Remedy Co.,* 205 Iowa 51, 217 N. W. 557 (ill effect of defective hog remedies upon other hogs); *Graeser* v. *Jones,* 217 Iowa 499, 251 N. W. 162 (evidence of a conversation, otherwise hearsay, to show the conversation was actually had).
>
> "While the weight and credibility of such evidence is for the trier of fact, it would appear that it is relevant to the issues involved (the existence of a hazardous condition and notice thereof to the defendant); that by the great weight of authority, and based upon sound principle, such evidence is admissible as an abstract proposition . . . "

In *Sterling Stores, Inc.* v. *Martin,* 238 Ark. 1041, 386 S. W. 2d 711 (1965) the issue was whether appellant had notice or knowledge of defective or dangerous condition

of a swinging door. In holding evidence of prior occurrences admissible, we said:

> "Where knowledge or notice of a danger or defect is in issue, evidence of the occurrence or near-occurrence of other accidents or injuries at a particular place or from the doing of a particular act or the employment of a particular method or appliance on occasion prior to the one in question is admissible to show that the person charged knew or should have known of the danger therein or thereat. . . . "

The issue in *Colyar* v. *Little Rock Bottling Works,* 114 Ark. 140, 169 S. W. 810 (1914), was whether the bottling company had notice or knowledge of the defective or dangerous condition of an exploding bottle by which Mrs. Colyar was injured. One Sallie, a former employee of the bottling company, testified that during the three and one half years that he worked for the company, it was a common occurrence for bottles to explode while he was handling them without their having come into contact with anything; that he had instructions to replace customers' broken bottles with bottles containing soda pop; and that he had cautioned his employer that too many bottles were exploding. Judge Frank Smith; writing the majority opinion, held that the issue of negligence upon the foregoing evidence should have been submitted to the jury.

In *State* v. *Dulaney,* 87 Ark. 17, 112 S. W. 158 (1908), we held that the court should have permitted evidence showing that Dulaney had accepted bribes on other occasions, to show that the money received in the instant case was received under the same scheme and for the same purpose.

In *Hall* v. *State,* 161 Ark. 453, 257 S. W. 61 (1923), a prosecution for larceny for wrongful conversion of warrants issued by the state auditor, proof that defendant on prior occasions had procured similar warrants of others and cashed them was held admissible to show intent or guilty knowledge.

Appellees here contend that the crossing was abnormally dangerous; that the railroad was negligent in operating its train at excessive speed because of the knowledge it had with respect to the alleged defective condition of the crossing; and that the railroad failed to use ordinary care to give a warning of the train's approach reasonably sufficient to permit the traveling public to use the crossing with reasonable safety. Thus it is seen that the evidence of prior similar accidents on June 1 and June 6 was relevant to show both the abnormally dangerous condition of the crossing and the railroad's notice or knowledge that there was something abnormally dangerous about the crossing.

In all the cases cited herein in which this court has held that evidence of prior occurrences was properly admitted or should have been admitted, no trial difficulty has been experienced regarding the investigation of collateral matters. It therefore appears that the expressed fears of the earlier decisions, that if such evidence were received the trial would be disrupted by the necessity of investigating collateral matters, are unfounded. The record here indicates that the proof of the two prior collisions and their similarity was taken up with the trial court at a pretrial conference. When the matter is thus handled, no surprise is forthcoming to either party and the trial court, by determining who the witnesses are going to be and substantially what their testimony will be, can at that time exercise his discretion to determine whether admission of the testimony will inject too many collateral issues.

Consequently, we hold that the trial court did not err in admitting testimony concerning the two prior accidents that occurred under substantially similar conditions for the purpose of showing the railroad's knowledge of the condition of the crossing. Nor can we find anything in *Fleming, Adm'x* v. *Missouri & Ark. Ry. Co.,* 198 Ark. 290, 128 S. W. 2d 986 (1939), which holds that such evidence may not be introduced to show notice and knowledge where the substantial similarity of the prior collisions to the present collision is shown.

POINT II(2). *Allowing evidence of changes made in the signal lights and in the highway signs subsequent to the accident.*

The first point under this topic is that appellees were permitted to introduce evidence on direct examination that the signal lights were much brighter after the accident. Appellants also complain that such evidence was brought out on cross examination of their witnesses who had viewed the signal lights three days after the accident. The objection to such testimony is that changes were made in the signal lenses subsequent to the accident as part of a system-wide railroad changeover to new standard equipment and that the testimony that the lights were brighter after the accident was to suggest by inference to the jury that something had been done to the signal lights.

The record also shows that after the other two accidents and before this one, an experimental lens was installed on the top of the signal light on the southwest side of the crossing, but that the particular signal light was directed toward motorists traveling north on Highway 39 and could not be seen by those traveling west on Highway 64.

Appellees admit that evidence of subsequent repairs or precautions taken by the alleged tort feasor after an accident is not admissible to show negligence, but contend that evidence of subsequent changes, repairs, or precautions is admissible to show conditions at the time of the injury and for impeachment purposes. There is also a suggestion that it was admissible for purposes of the witnesses' comparison of the lights before and after.

The direct testimony on changes in the signal lights at this railroad crossing poses a problem in the trial of a lawsuit where considerable time elapses between the collision and the trial. It would be almost impossible to impanel a jury, some or many of whom have not observed signal lights at crossings where appellants' changeover lights have been installed. Jurors are expect-

ed and instructed to use their common sense and observations in determining the fact issues between parties. In this situation a conscientious juror who has become accustomed to the brighter and improved lights after the changeover may have good reason to doubt testimony about dimness of the signal lights at the time of the collision, unless he is made aware of the changes made after the collision and before trial for purposes of showing the conditions at the time of the injury.

The admissibility and inadmissibility of evidence is the subject of annotations in 170 A.L.R.7 and 64A.L.R. 2d 1296. The many cases there cited permit testimony to show changed conditions of matters viewed by jurors. See *Panagoulis* v. *Philip Morris & Co.*, 95 N. H. 524, 68 A. 2d 672 (1949), change in condition of handrail between time of injury and view by jury; also *Agler* v. *Schine Theatrical Co.*, 59 Ohio App. 68, 17 N. E. 2d 118 (1938), alteration to signboard after accident to show condition at time of injury.

An example of the direct testimony involved in the instant case is that of witness Bennie Holmes:

> "Q. Was there any change in the lights after June 14, 1964, with reference to their intensity?
>
> A. The lights are a lot brighter."

Under the circumstances we hold that the trial court did not abuse its discretion in admitting the testimony to show conditions at the crossing at the time of the collision. Appellants did not ask that it be limited to that purpose, and they are not now in a position to allege error.

Because this issue is apt to arise on a new trial, we point out that such testimony was not admissible for purposes of comparison of the intensity of the signal lights. This does not mean, however, that appellees cannot use the one experimental lens installed for use of northbound traffic on Highway 39 for purposes of com-

parison. That lens does not fall into the category of subsequent repairs or precautions since it existed at the time of the collision.

The evidence elicited by appellees on cross examination of appellants' witnesses Lester Jester and Lee Gibbons falls into a different category. After it was shown that their testimony concerned their observations made on June 17 following the collision on June 14, appellees were certainly entitled by way of explanation or rebuttal to determine whether any changes had been made in the signal lights between the date of the collision and the date of their observations.

Appellants allege error in the admission of evidence relative to changes in the highway signs following the accident. Of course this testimony is not subject to the exclusion of subsequent repairs, because these changes were not made by appellants but by the State Highway Department. Further, such testimony was certainly admissible to explain that the signs and markings in the photographs introduced by appellees were placed there after the accident.

Appellants' alleged error with respect to introduction of an inter-office memorandum of the State Highway Department arose in this manner. Lester Jester and Lee Gibbons, employees of the State Highway Department in the Planning and Research Division, testified that on June 17, 1964, at the request of the railroad's Chief Claims Agent, they visited the Fair Oaks crossing; that the signal lights were visible from a distance of 1,500 feet back from the crossing; and that they made no recommendations, as a result of their visit, requesting any action by the railroad. On cross examination appellees brought out an inter-office memorandum prepared by the two witnesses. The memorandum in part states:

> ". . . Three accidents have occurred at this location within the past two weeks resulting in seven fatalities. In all cases the vehicles involved hit the train with a hard impact indicating the drivers had not

been made aware of the railroad crossing and the apparent danger. This section of highway has recently been widened and resurfaced and as a result the speed of vehicles has increased. It is believed that the proposed measures, in addition to the signs erected this week by Traffic Services Division, will properly alert the motorists of the railroad crossing involved. . ."

* * *

"Additional observances will be made with a representative of the railroad company on June 22nd and 23, 1964, to study measures that may be taken by the railroad company."

Under the circumstances existing when the inter-office memorandum was presented, it was certainly admissible to impeach the testimony of the witnesses about the adequacy of the signal lights and to explain their statement that they had made no recommendations requesting any action by the railroad.

POINT II(3). *Permitting testimony showing that Tommy Jackson, driver of the automobile involved, was a good and careful driver.*

This contention is without merit. See *Bush* v. *Brewer*, 136 Ark. 246, 206 S. W. 322 (1918) and *Arkansas Power & Light Co.* v. *Cummins*, 182 Ark. 1, 28 S. W. 2d 1077 (1930). We there held that where negligence is charged, the care and caution of the one charged therewith is relevant and a circumstance tending to disprove negligence. Likewise, it would be admissible to show that a person charged with negligence was a reckless driver as a circumstance tending to prove the fact.

POINT II(4). *Permitting expert testimony relative to the coefficient of friction and that the crossing was abnormally dangerous.*

For the purposes of showing the stopping distance of a vehicle traveling 60 miles per hour when approaching the crossing, appellees used the Safety Director for the Pepsi Cola Bottling Company of Tulsa, Oklahoma. The court permitted Mr. Coulson to testify about his experiments to determine the coefficient of friction and the stopping and braking distance of cars traveling 60 miles per hour when approaching the crossing. Appellants complain that these experiments were made in an automobile of a different make from that driven by the Jackson family. In this we find no error, for the coefficient of friction can be scientifically established. Furthermore, in this instance the witness stated that the make or model of the automobile involved would not make any appreciable difference.

We hold that the trial court erred in admitting the expert testimony about the abnormally dangerous condition of the crossing. The facts submitted to the witness for the basis of his opinion were as follows:

1. The type of highway.

2. The speed of automobiles approaching the crossing.

3. The approach to the crossing—namely, a straight level highway running due east and west.

4. The advance warning signs.

5. The number of vehicles that daily cross the crossing.

6. The number of trains that pass the crossing daily.

7. The speed of the trains.

8. The angle of the approaches—namely, right angles.

9. Obstruction to vision of motorist.

10. Obstruction to vision of train crew.

11. Previous accidents that had occurred recently under similar conditions.

12. Distraction elements to motorists.

13. Railroad crossing signals.

14. The kind of day.

15. The position of the sun.

Not a single one of the foregoing facts taken individually is beyond the comprehension of the average juror; nor can we find any reason to say that an average juror would not be competent to determine from the facts when considered together whether the crossing was abnormally dangerous. We have consistently held that it is prejudicial error to admit expert testimony on issues which could conveniently be demonstrated to the jury from which they could draw their own conclusions. See *S & S Construction Co.* v. *Stacks,* 241 Ark. 1096, 411 S. W. 2d 508 (1967). Therefore we hold that the trial court committed reversible error in admitting the expert testimony on the abnormally dangerous crossing.

POINT II(5). *Allowing railway regulations entitled "Special Instructions No. 2" to be introduced in evidence.*

Appellees, over the objection of appellants, introduced a document entitled "Special Instructions No. 2." These are detailed instructions which govern railroad employees in train, engine, yard, station and telegraph service as well as in maintenance of way and structures. Appellees' counsel, when placing the document in evidence, advised the trial court that he did so in order to show the limitation on speed that the railroad had estab-

lished at certain crossings other than the Fair Oaks Crossing.

No factual background was laid for the introduction of the document—*i.e.*, no showing of relevancy was made, relative to controls or conditions at other crossings, at the time the document was introduced or later. While we agree with appellees that they are entitled to show on the issue of speed that appellants have slowed down at similar crossings where they had had notice of a dangerous condition, we think that before introducing regulations involving other crossings, there should first be a foundation laid to show some similarity of conditions. Furthermore, we think it was too great a burden on the railroad to introduce a document regulating the speed of trains at every crossing in its whole system. It would be a Herculean task to furnish rebuttal testimony for the myriad causes requiring reduction of speeds on all such crossings in the whole system.

Questions involving the admission into evidence of safety regulations to show negligence usually arise where there is a violation of the regulations, and such regulations are admitted as some evidence of the measure of caution which ought to be exercised in situations to which the rules apply. 50 A. L. R. 2d 16; 44 Am. Jur. *Railroads* § 626. The relevancy of the safety regulations to the issue on negligence is often shown by the regulation itself, but such is not the case here. The fact that the railroad has regulations requiring the reduction of the speed of trains at other crossings has no probative value to the issues here involved until it is shown that the reduction in speed was caused by a railroad safety policy toward the public. Thus it can readily be seen that a regulation requiring the reduction of speed at another crossing, because of a municipal ordinance, has no probative value where the issue is a violation of a company safety policy toward the public.

Therefore, we hold that it was error for the trial court to permit introduction of the document without a foundation having first been laid and without limiting

the document to crossings on which the foundation had been laid. In view of the fact that we are reversing this case because of the error set forth in Point II(4) above, we need not decide whether this error was prejudicial. We make the explanation because the record is not clear that any portion of the document was read to the jury.

POINT II(6). *Giving an instruction on excessive speed of trains.*

The record, as will be pointed out under Point II(7), *infra,* shows that there was sufficient evidence to go to the jury on an abnormally dangerous crossing. There is testimony that the view of the railroad track to the north by an approaching motorist was obstructed until the motorist got within 150 feet of the tracks. Many witnesses testified that the signal lights were dim and that when approaching the crossing when headed into either the early morning or late evening sun it was almost impossible to see the lights unless one was looking for them. One witness who worked nearby stated that it appeared to him that motorists traveling the highway often saw the train before they saw the lights. Furthermore, the testimony shows that there had recently been two similar accidents in which it appeared that the motorists were not made aware by the signal lights of the train's approach, and that following these accidents the chief claims agent for the railroad called the State Highway Department and made an appointment to inspect the crossing some two weeks from that time.

While the testimony is that the motorists's view of an approaching train was obstructed until he was within 150 feet of the track, we do not take this to mean that he could not have seen a train in any situation until he got within 150 feet of the track. In fact, the exhibits introduced and the inferences from the testimony indicate that when a train moves within a distance of approximately 200 feet or less to the highway, it is visible to a motorist at a distance greater than the 150 feet from the crossing.

Therefore, in view of the fact that the railroad and its train crew were put on notice that something was wrong at the particular crossing, and the fact that the sight distance by a motorist of an approaching train increased as the train approached within 200 feet of the highway crossing, we hold that the issue of excessive speed was properly submitted to the jury. See *Sherman, Adm'x.* v. *Missouri Pac. Ry. Co.,* 238 Ark. 554, 383 S. W. 2d 881 (1964) and *Harper* v. *Missouri Pac. Ry. Co.,* 229 Ark. 348, 314 S. W. 2d 696 (1958). Under the circumstances here excessive speed of the train became a question of fact for determination by the jury.

POINT II(7). *Submitting issue of abnormally dangerous crossing to jury.*

Our abnormally dangerous crossing instruction, AMI 1805, being based on our decision in *Fleming, Adm'x* v. *Missouri & Ark. Ry. Co.,* 198 Ark. 290, 128 S. W. 986 (1939), which was given in this instance, provides as follows:

> "Plaintiffs, Ward Jackson and Charley Eddy, Administrators, contend that the railroad grade crossing in this case was abnormally dangerous, and they have the burden of proving this proposition.
>
> "If a railroad grade crossing is frequently used by the traveling public, if trains pass over it frequently, and if the crossing is so dangerous because of surrounding circumstances that a reasonably careful person could not use it with reasonable safety in the absence of special warnings, then it would be an abnormally dangerous crossing. Whether the railroad grade crossing in this case was abnormally dangerous is for you to decide.
>
> "If you find that the crossing was abnormally dangerous, as I have defined that term, then it was the duty of the railroad to use ordinary care to give a warning reasonably sufficient to permit the travel-

ing public to use the crossing with reasonable safety."

Here the record shows a daily traffic count on Highway 64 at the Fair Oaks crossing from a low in May of 1,141 to a high in August of 1,899 cars per day. An average of 16.4 trains per day traveled over the crossing.

When we consider the obstructions to the motorist's view of approaching southbound trains, the testimony relative to the dimness of the signal lights, and the frequency of use of the crossing by both motorists and trains, we hold that the evidence was sufficient to warrant the giving of the abnormally dangerous crossing instruction to the jury.

We do not construe *Fleming, Adm'x* v. *Missouri & Ark. Ry. Co., supra,* and *Harper* v. *Missouri Pac. Ry. Co., supra,* as holding that a railroad has discharged its duty to give a warning at an abnormally dangerous crossing where the signal lights are found, upon sufficient evidence, to be inadequate to give a warning to approaching motorists.

POINT II(8). *Permitting grandparents to recover damages for mental anguish occasioned by the death of grandchildren where the father of such children survived them.*

Appellants' contention here is based on the premise that Tommy Jackson lived some few moments after the death of his children. Based on this premise, appellants, relying on *Peugh* v. *Oliger, Adm'x,* 233 Ark. 281, 345 S. W. 2d 610 (1961), which limits recovery of mental anguish to the "heir at law" of a decedent, and *Smith* v. *Smith,* 229 Ark. 579, 317 S. W. 2d 275 (1958), contend that any cause of action for mental anguish died with Tommy Jackson.

There is testimony elicited from the conductor, J. A. Massey, and the brakeman, F. E. Senyard, Jr., from which the jury could find that all occupants of the auto-

mobile were killed instantly, and under these circumstances the issue was properly submitted to the jury.

It is true that when we had our mental anguish statute before us in *Peugh, supra,* we there limited recovery for mental anguish to "heirs at law" of the decedent. However, where a whole family is killed in a matter of moments, as is the situation here, the bench and bar should not expect a too literal interpretation of the words "heirs at law" as the same are used in *Peugh.* Act 255 of 1957, creating the right to recover for mental anguish, certainly did not intend that right to be so limited.

POINT II(9). We can find no merit in appellants' contention that the case should have been submitted to the jury upon interrogatories. This is a matter within the sound discretion of the trial court. *St. Louis S. W. Ry. Co.* v. *Robinson,* 228 Ark. 418, 308 S. W. 2d 282 (1957).

POINT II(10). We agree with appellants that it was error for the trial court to submit to the jury a form of verdict which required verdicts against all the defendants, including the employee defendants, if against any defendant.

POINT III. *The court should have directed a verdict for employee defendants.*

Appellees agree that the only negligence chargeable to W. D. Simpson, B. O. Hankins and J. A. Massey under the issues in this case was the issue of excessive speed.

J. A. Massey, the conductor, was in charge of the train, and along with the engineer, W. D. Simpson, was responsible for the operation of the train. In view of the fact that we are holding that the issue of excessive speed was properly submitted to the jury, we must hold that the trial court properly denied the directed verdict as to them. However, there is no showing that B. O.

Hankins, the fireman, was charged in any way with the speed at which the train was run. Consequently we hold that he was entitled to a directed verdict in his favor.

The signal maintainer, Gerald Slocum, was charged with negligence in failing to properly maintain the signal lights in that they were so defective they could not be seen. On this issue there is testimony showing that he had repaired the lights between the June 6 collision and the present collision on June 14, but that the lights were so dim that they did not comply with standards established by the Association of American Railroads and adopted by the Highway Department. Under the circumstances we are unwilling to say that he was entitled to a directed verdict.

POINTS IV and V. *The court should have directed a verdict for all of appellants and the verdict of the jury was against the weight of the evidence.*

As has been pointed out, there was sufficient evidence to submit to the jury the issues of excessive speed and abnormally dangerous crossing, and, except for the errors committed, the evidence was sufficient to sustain the jury verdict.

Therefore, for the errors heretofore set out, this case is reversed and remanded for a new trial against all defendants except B. O. Hankins. It is reversed and dismissed as to B. O. Hankins.

WARD, BROWN, and FOGLEMAN, JJ., concur.

JOHN A. FOGLEMAN, Justice, concurring. I concur in the result but not all the bases for reaching it nor in those holdings overruling certain assignments of error.

I would reverse on Points I, II(1), II(2), II(4), II(5) and II(10). I would also reverse on failure to direct a verdict for appellant Hankins. On Point II(1) I think

the proper distinction is made in *Railway Company* v. *Harrell,* 58 Ark. 454, 25 S. W. 117. Such evidence is admissible only to show use of defective machinery and equipment and the knowledge of such use by the owner or operator, when it is impossible or impracticable to obtain direct proof of the particular fact. The evidence was not offered for this purpose and there was other evidence actually used to show that this was an abnormally dangerous crossing. With the proper foundation it might be used to show that machinery or appliances were defective and that the operator had knowledge thereof.

On Point II(2) I do not think there was any jury view that required explanation, nor do I think we should assume that the jury was familiar with the conditions at the time of trial. After witnesses testified as to conditions on a later date, it was certainly proper to show the differences between conditions existing on the two dates. It was also proper to show which of the highway signs shown in pictures of the crossing were not in place at the time of the collision.

ST. PAUL FIRE & MARINE INS. CO. *v.* WOOD ET AL.

5-4148 416 S. W. 2d 322

Opinion delivered June 5, 1967

[Rehearing denied July 26, 1967.]

Wright, Lindsey & Jennings, by *Isaac A. Scott, Jr.,* for appellant.

Rose, Meek, House, Barron, Nash & Williamson and *Murphy & Arnold* and *H. David Blair,* for appellee.

CONLEY BYRD, Justice. This appeal calls for construction of § 40 of the Workmen's Compensation Act (Ark. Stat. Ann. § 81-1340 [Repl. 1960]) to determine whether an employee can settle his common law cause of action in negligence against a tort feasor free of any claims of his employer's Workmen's Compensation carrier, where the settlement documents specifically preserve all rights of the carrier.

The facts giving rise to this litigation show that on November 17, 1964, appellee Hershel Wayne Wood was injured while employed as a truck driver by Southern Farmers Association when a hydraulically operated auger on his truck came into contact with a high voltage line maintained by appellee First Electric Cooperative Corporation. As a result of the injury Wood was horribly and terribly burned, shocked, and injured; both feet have been amputated; and a hole was burned in his skull, with undetermined effects on his mind. Appellant St. Paul Fire & Marine Insurance Company, the Workmen's Compensation carrier for Southern Farmers Association, has expended in weekly benefits and medical payments through May 4, 1966, the sum of $26,116.68. In its pleading, St. Paul estimates that its expenditures will reach $50,000.

Following the injury, Wood filed an action against First Electric Cooperative Corporation for the sum of $500,000, alleging negligence on its part in the construc-

tion and maintenance of its power lines in many respects. Appellee, Employers Mutuals of Wausau, is the liability carrier of First Electric and as such is the real party in interest as between it and First Electric.

Appellant St. Paul Fire & Marine Insurance Company intervened in Wood's suit against First Electric under § 40 of the Workmen's Compensation Act, seeking a lien in accordance with the act upon any recovery by Wood for compensation paid and to be paid him.

Before trial of Wood's suit against First Electric, Wood and First Electric agreed on a figure which to their minds represented a fair settlement of the Wood phase of the case, but First Electric and St. Paul were unable to agree on a fair settlement of St. Paul's subrogation claim. It was and is St. Paul's position that it is entitled to receive, after payment of litigation costs and counsel fees, two thirds of any amount Wood might receive, up to the amount of St. Paul's obligations under the Workmen's Compensation Act.

The figure which Wood was willing to receive and Employers Mutuals was willing to pay for Wood's end of the case was $78,000, provided Wood did not have to repay to St. Paul the Workmen's Compensation benefits paid, and provided further that this would not affect his right to further compensation. Employers Mutuals was willing to pay said amount to Wood provided such payment would not make it automatically liable to St. Paul for compensation paid.

In an attempt to accomplish this purpose, Wood, First Electric and Employers Mutuals entered into an escrow agreement pursuant to which Employers Mutuals deposited with a bank at Batesville as Escrow Agent the sum of $78,000, and Wood deposited with the Escrow Agent his Release in the form hereinafter mentioned. The agreement provided in substance that, when it was determined by Wood and his attorney that Wood could receive this sum without being required to reimburse St.

Paul for compensation paid and to be paid, then the Escrow Agent would deliver the $78,000 plus accrued interest to Wood, and the Release to First Electric and its carrier. But if it be determined that Wood could not accept the money and deliver the Release free of St. Paul's claim, then the Escrow Agent would deliver the money plus interest back to First Electric and its carrier, and the Release to Wood.

It was further provided in the Escrow Agreement that if it were determined that the effect of the proposed transaction would be to subject First Electric to liability to St. Paul for compensation paid or to be paid, without regard to negligence on the part of First Electric—that is, automatically—then the Escrow Agent would deliver the money plus accrued interest to Employers Mutuals and the Release to Wood. It was also agreed that if these various determinations were not made until after the statute of limitations had barred another suit by Wood against First Electric, then First Electric and its carrier, Employers Mutuals, would waive the defense of limitations; that if the settlement was consummated, Wood would dismiss his suit without prejudice, and such dismissal would not prejudice St. Paul's right to pursue its claim against First Electric; that nothing in the agreement was intended to or should affect St. Paul's right to do so, and that nothing in the agreement should constitute an admission of liability on the part of First Electric.

Finally, it was agreed that in any suit by Southern Farmers Association or St. Paul against First Electric to recover on its subrogation right under the Arkansas Workmen's Compensation Act, First Electric would not plead as a defense the Release referred to, except as it might be necessary to do so in order to avoid a recovery of more than had been and would be expended by St. Paul.

The proposed Release is in conventional form, except that it contains recitals to the effect that the rights of Southern Farmers Association or St. Paul, which it may have by way of subrogation against First Electric, spe-

cifically including all the rights given under § 40 of the Act, shall not be affected by the Release, and it recites the intention of the parties to leave unimpaired St. Paul's right to litigate against First Electric in order to recover all Workmen's Compensation benefits, past, present and future, paid to or for the benefit of Wood in discharge of its obligation under the Compensation Act.

Wood, to determine his rights under the escrow agreement, filed a cross-complaint, in the pending action, against St. Paul for a declaratory judgment. In this proceeding Wood sought to determine whether he could receive the settlement free of any claims of St. Paul; whether it would affect his rights to receive Workmen's Compensation benefits in the future; and whether St. Paul would be free to assert its own cause of action against First Electric for compensation paid and to be paid.

The case was submitted upon a stipulation of the parties reciting, *inter alia,* the foregoing facts and also reciting that St. Paul took the position outlined in its letter of October 21, 1965, to the Workmen's Compensation Commission, that there was a controversy between the parties as to the legal effect of the proposed settlement. St. Paul's position in said letter was that it understood the case had been settled for $78,000; it claimed a lien thereon under the Act, for compensation paid and payable; and it requested permission to suspend payment of future compensation and future medical. The settlement, of course, has not as yet been consummated, but it is St. Paul's position that if Wood accepts the money and executes the proposed Release, he will have to repay it for compensation paid and payable.

It was also stipulated that First Electric recognized St. Paul's right to pursue its own statutory cause of action against First Electric as provided by law, and that if St. Paul did so, First Electric would not plead in bar of said cause, or as a defense thereto, the release from Wood, except as it might be necessary to prevent recov-

ery for a sum in excess of compensation paid and to be paid. First Electric and Employers Mutuals acknowledge that the proposed settlement, if consummated, will not prejudice or impair such cause of action by St. Paul.

First Electric and Employers Mutuals by stipulation are parties plaintiffs to the cross-complaint filed by Wood against St. Paul.

Upon the pleadings and the stipulations, the trial court approved the proposed settlement as fair and reasonable and entered a declaratory judgment as prayed for.

For reversal, St. Paul relies on one point—*i.e.,* the court should have denied the action of plaintiff for a declaratory judgment and granted St. Paul's statutory lien against the settlement proceeds.

Section 40 of the Workmen's Compensation Act (Ark. Stat. Ann. § 81-1340 [Repl. 1960]) provides:

> "*Third party liability.*—(a) *Liability unaffected.*
>
> (1) The making of a claim for compensation against any employer or carrier for the injury or death of an employee shall not affect the right of the employee, or his dependents, to make claim or maintain an action in court against any third party for such injury, but the employer or his carrier shall be entitled to reasonable notice and opportunity to join in such action. If they, or either of them, join in such action they shall be entitled to a first lien upon two-thirds [⅔] of the net proceeds RECOVERED in such action that remain after the payment of the reasonable costs of collection, for the payment to them of the amount paid and to be paid by them as compensation to the injured employee or his dependents.
>
> "(2) The commencement of an action by an employee or his dependents against a third party for

damages by reason of an injury, to which this act [§§ 81-1301—81-1349] is applicable, or the adjustment of any such claim shall not affect the rights of the injured employee or his dependents to recover compensation, but any amount RECOVERED by the injured employee or his dependents from a third party shall be applied as follows: Reasonable costs of collection shall be deducted; then one-third [⅓] of the remainder shall, in every case, belong to the injured employee or his dependents, as the case may be; the remainder, or so much thereof as is necessary to discharge the actual amount of the liability of the employer and the carrier; and any excess shall belong to the injured employee or his dependents.

"(b) *Subrogation.* An employer or carrier liable for compensation under this act [§§ 81-1301—81-1349] for the injury or death of an employee shall have the right to maintain an action in tort against any third party responsible for such injury or death. After reasonable notice and opportunity to be represented in such action has been given to the compensation beneficiary, the liability of the third party to the compensation beneficiary shall be determined in such action as well as the third party's liability to the employer and carrier. After RECOVERY shall be had against such third party, by suit or otherwise, the compensation beneficiary shall be entitled to any amount recovered over and above the amount that the employer and carrier have paid or are liable for in compensation, after deducting reasonable costs of collection, and in no event shall the compensation beneficiary be entitled to less than one-third [⅓] of the amount RECOVERED from the the third party, after deducting the reasonable cost of collection.

"(c) *Settlement of claims.* Settlement of such claims under subsections (a) and (b) of this section must have the approval of the Court or of the Commission, except that the distribution of that portion of the settlement which represents the compensation

payable under this act [§§ 81-1301—81-1349] must have the approval of the Commission. Where liability is admitted to the injured employee or his dependents by the employer or carrier, no cost of collection shall be deducted from that portion of the settlement under subsections (a) or (b) of this section, representing compensation, except upon direction and approval of the Commission. [Init. Meas. 1948, No. 4, § 40, Acts 1949, p. 1420.]" (Emphasis ours.)

Section 40(a) (1) recognizes the employee's common law tort action against third persons. It gives the compensation carrier a first lien upon two-thirds of the net proceeds "RECOVERED" in such action. Likewise, § 40(a) (2) provides that the employee's commencement or adjustment of any such action against a third party shall not affect the rights of the injured employee to compensation benefits, but that any amount "RECOVERED" by the injured employee, after the reasonable costs of collection, shall be divided one-third and two-thirds to the employee and the carrier respectively, up to the amount paid or to be paid by the carrier.

Section 40(b) gives the compensation carrier the right to maintain an action in tort against any third party responsible for an injury to an employee. In doing so it provides that after "RECOVERY" shall be had against such third party "*by suit or otherwise*" the employee shall (after deducting the reasonable costs of collection) be entitled to any amount recovered over and above any amount paid or payable by the carrier. Furthermore it provides that in any event the injured employee is entitled to one-third of the amount "RECOVERED" from the third party after the deduction of the reasonable costs of collection.

Section 40(c) was before us in *Winfrey & Carlile* v. *Nickles,* 223 Ark. 894, 270 S. W. 2d 923 (1954). There a recovery was had upon a suit brought pursuant to § 40(a), and the issue was whether an attorney's fee could be allowed upon the net recovery as determined by

the circuit court or whether its allowance was prohibited by the second sentence of subsection (c) as determined by the Workmen's Compensation Commission. We there held that subsection (c) applied only to *compromise settlements* and that the prohibition on the allowance of a fee therein did not apply to a recovery under subsection (a) (1).

It is observed that when dealing with the rights of the compensation carrier under subsections (a) and (b), the statute uses the words "RECOVERED" and "RECOVERY." "RECOVERY" is defined in Black's Law Dictionary (3rd ed.) as follows: "In its most extensive sense, a recovery is the restoration or vindication of a right existing in a person, by the formal judgment or decree of a competent court, at his instance and suit, . . . " Therefore by applying this technical definition to "RECOVERED" and "RECOVERY," except where they are specifically qualified in subsection (b) by the use of the prepositional phrase "*by suit or otherwise,*" we can reach not only a practical construction of the statute, but one consonant with our prior decisions.

In *Barth* v. *Liberty Mutual Insurance Co.,* 212 Ark. 942, 208 S. W. 2d 455 (1948), we had before us a consent judgment releasing in full the third party wherein the money had been paid into the registry of the court. Under the technical definition of the word "RECOVERED" above set out, the distribution of the funds in accordance with the provisions of subsection (a) was proper.

In *Winfrey & Carlile* v. *Nickles, supra,* we made the distinction of a compromise settlement under subsection (c) and a "RECOVERY" under subsection (a). The distribution there made is consonant with the technical definition of "RECOVERY."

In *Maxcy* v. *John F. Beasley Construction Co.,* 228 Ark. 253, 306 S. W. 2d 849 (1957), a compromise settlement fully releasing the third party had been reached

after a suit, pursuant to subsection (a), had been filed in federal court. The matter came to this court from an order of the Workmen's Compensation Commission distributing the proceeds which first deducted the reasonable costs of collection and distributed the balance, one-third to the injured employee and the remaining two-thirds to the compensation carrier. We pointed out the Commission's authority to make the distribution of a compromise settlement under subsection (c), and approved as correct a distribution made in accordance with the statutory scheme authorized in subsections (a) and (b). Since the compromise extinguished the rights of the compensation carrier, it was tantamount to a recovery, and the Commission, under such circumstances in approving the same, properly followed the statutory scheme of distribution; but in so holding, it does not follow that every compromise settlement is a "RECOVERY" within the meaning of subsections (a) and (b).

It is the policy of the law to encourage compromise settlements. If we should accept appellant's construction of the statute, we would be discouraging them in many instances. In discussing the problem in *Lang* v. *Williams Bros. Boiler & Mfg. Co.*, 250 Minn. 521, 85 N. W. 2d 412 (1957), it was said:

> "The vice of preventing settlement at all without the consent of the employer or his insurer is that the employee may then be put in a position where, against his will, he must face the uncertainties of a trial. While both employer and employee face the risk that the result of the trial will not equal the amounts offered in settlement or the amount which must be paid in compensation, the employee's burden probably is greater than that of the employer in that ordinarily the employee has no great resources upon which to rely if the gamble of a trial fails, whereas the insurer not only has greater resources but the case as to it is only one of many."

Therefore the most reasonable and practicable construction of subsections (a) and (b) of § 40 is that the

mandatory provisions thereof control where the action is prosecuted to judgment and that subsection (c) is controlling where there is any type of termination prior to the rendition of a judgment against the third party.

While § 40 recognizes that either the injured employee or the compensation carrier may initiate a tort suit against a third party, it requires that reasonable notice of the initiation of such cause of action be given to the other party. Thus there is but one cause of action. In this situation, can we hold that the rule against splitting a cause of action prohibits the compromise settlement here proposed by Wood and First Electric? The answer is that the rule against splitting a cause of action is for the benefit of the defendant to protect him against a multiplicity of suits, and in this instance First Electric and its insurance carrier have specifically agreed to a splitting of the cause of action between St. Paul and Wood.

It is observed that Wood, as an employee, is not obligated under § 40 to further pursue the present action. Nothing therein prevents him from taking a voluntary non-suit, nor would such action on his part affect his right to continue to receive compensation benefits.

In conclusion, we hold that St. Paul, as the compensation carrier, has no lien upon the proceeds of the compromise settlement here negotiated. Under the terms of the proposed compromise, St. Paul has all of the right of subrogation against First Electric that was given to it by law and that it would have had if Wood had taken no action whatsoever. It follows that the trial court properly approved the proposed settlement between Wood and First Electric upon the terms and conditions there set out. To interpret § 40 in the manner suggested by appellants would require us to hold that the statute gives the employer or his compensation carrier a first lien upon RECEIPTS OF ANY MONIES RECEIVED FROM THE THIRD PARTY BY SUIT OR OTHERWISE. The statute does not so read.

Therefore the judgment appealed from is affirmed.

GEORGE ROSE SMITH, J., concurs.

HARRIS, C. J., and BROWN & JONES, JJ., dissent.

GEORGE ROSE SMITH, Justice, concurring. I should like to emphasize, somewhat more than the majority have done, the extent to which the equities in the case favor the claimant, Wood. Under the proposed settlement he will receive $78,000 in settlement of a claim which might well be worth $200,000 if he won the case before a jury. The Co-op's liability, however, is by no means certain; in the event of a trial Wood might recover nothing. As a matter of simple justice he ought to be able to settle his claim as best he can.

On the other hand, St. Paul stands, after the settlement, exactly as it did before the settlement. That is, it is free to sue the Co-op in Wood's name, so that as far as the jury is concerned the case will ostensibly be a genuine lawsuit brought by Wood. Yet, in attempting to block the settlement, St. Paul is in the attitude of being unwilling either to take the risk itself that it would force Wood to take or to indemnify Wood (as he has requested) for the loss of $78,000 if Wood proceeds with his lawsuit against the Co-op and loses. In such a situation our rule that the compensation act must be construed liberally in favor of the workman is peculiarly and demonstrably just.

J. FRED JONES, Justice, dissenting. I cannot agree with what I consider to be the majority's misinterpretation or misapplication of the workmen's compensation law in this case.

Arkansas was the 47th state to adopt a workmen's compensation law and the legislation in this field, as well as the philosophy upon which it is based, both in England and in this country, has a long and interesting history.

All Workmen's Compensation Acts are in derogation of the common law and all of them provide for benefits to an injured employee during disability caused by industrial injury regardless of any negligence, and in spite of contributory negligence involved in causing the injury.

The laws vary to some degree in the various states. In some states the employer pays into a state fund out of which an employee is paid benefits during disability caused by injury sustained during the course of his employment. In other states, including Arkansas, an employer is required to carry insurance protecting the employee against compensable injuries, or the employer may, if he so desires, bear his own losses by qualifying under the law as a self insured.

In some states when an employee is injured while in the course of his employment, but by the common law negligence of some third party, the employee must elect whether he will accept compensation benefits from his employer or the employer's compensation insurance carrier, or whether he will pursue his claim against the third party tort-feasor. In Arkansas the injured employee may do both. He may claim his compensation benefits from his employer or the employer's insurance carrier and at the same time he, or his employer, or both of them together, may pursue the claim against the third party tort-feasor under Ark. Stat. Ann. § 81-1340 (Repl. 1960).

It is the text and intent of § 81-1340, that the employer, or his insurance carrier, shall be liable in any event to the injured employee for injury growing out of, and occurring within the course of the employment. It is also the text and intent of § 81-1340, that the employer, or his insurance carrier, recoup all or a part of the losses they pay in compensation benefits, out of damages recovered from the third party tort-feasor whose negligence caused the employer, or his insurance carrier, to be liable for the compensation benefits and whose negligence caused the employee to suffer injuries and damages. In such a case both the employer and the employee have been

damaged by the same tort-feasor and in the same accident, and by the same negligent act, and they share in the same recovery by action, settlement, or otherwise.

It should be remembered that the very same act that gives the employee his right of recovery against his employer regardless of fault, and at the same time preserves his common law right of recovery from a third party causing his injury, also gives to the employer a right to share in the recovery from the third party causing the injury, to the extent and only to the extent, of what the employer has been forced to pay and will be forced to pay, because the injury caused by the third party and through no fault of the employer.

It is my view that when appellant joined in the action in this case, it perfected its lien on two-thirds of the net proceeds recovered, or that will be recovered, from the third party tort-feasor (or its insurance carrier) in this case under the plain wording of paragraph (a) (1) of Ark. Stat. Ann. § 81-1340 (Repl. 1960), and I am of the view that except for the majority opinion in this case, it would require an act of the Arkansas Legislature to remove that lien. It is my further opinion that even an act of the legislature could not remove the lien that has already attached in *this case.*

The employee's right of action against a third party and the employer's share therein are carefully and clearly set out in Ark. Stat. Ann. § 81-1340 (Repl. 1960). This statute is sound in logic; it is sound in principle, and the plain wording of the statute has been fully administered in Arkansas and its plain meaning never questioned until now. But now, by what I consider a strained interpretation of the word "recovered" the majority destroys not only the subrogation rights of an employer, or his insurance carrier, in the first $78,000.00 of a recovery from a third party tort-feasor, but destroys and repeals a statutory lien fixed by law on that amount.

Ark. Stat. Ann. § 81-1340 (a) (1) is as follows:

"The making of a claim for compensation against any employer or carrier for the injury or death of an employee shall not affect the right of the employee, or his dependents, to make claim or maintain an action in court against any third party for such injury, but the employer or his carrier shall be entitled to reasonable notice and opportunity to join in such action. *If they, or either of them, join in such action they shall be entitled to a first lien* upon two-thirds [⅔] of the net proceeds recovered in such action that remain after the payment of the reasonable costs of collection, for the payment to them of the amount paid and to be paid by them as compensation to the injured employee or his dependents." (Emphasis supplied.)

All of the recovery against a third party tort-feasor in a compensation case, simply does not belong to the injured employee. That part of the recovery for injury which the employer has already paid, belongs to the employer, or his insurance carrier, and by joining in a cause of action against the third party the employer perfects his statutory lien.

The legislature carefully preserved the employee's right to compensation benefits from his employer under the act, regardless of the action or its results against the third party, and the legislature carefully and definitely set out how the amount recovered from the third party, either in an action for damages or the adjustment of a claim, shall be divided between the employee and the employer, or its insurance carrier. Ark. Stat. Ann. § 81-1340 (2), is as follows:

"*The commencement of an action* by an employee or his dependents against a third party for damages by reason of an injury, to which this act [§§ 81-1301—81-1349] is applicable, *or the adjustment of any such claim* shall not affect the rights of the injured employee or his dependents to recover compensation, but any amount recovered by the injured employee

or his dependents from a third party shall be applied as follows: Reasonable costs of collection shall be deducted; then one-third [⅓] of the remainder shall, in every case, belong to the injured employee or his dependents, as the case may be; the remainder, or so much thereof as is necessary to discharge the actual amount of the liability of the employer and the carrier; and any excess shall belong to the injured employee of his dependents." (Emphasis supplied.)

Thus it is seen that the rights of the employer, or his insurance carrier, and the rights of the employee are merged into a single cause of action against the third party tort-feasor causing the injury and loss. These two subsections (a) (1) and (2) not only place the employer and injured employee in common interest with a single cause of action against the third party, these subsections specifically spell out how the recovery from the tort-feasor is to be divided between the employer and employee where the employee brings the action or compromises the claim. Where the employer, or his carrier, *joins in the action,* a lien is perfected under (a) (1) and where they do not join in the action or where there is no action brought for them to join in, the employer, or his insurance carrier, is still entitled to the same amount under (a) (2), but no lien can be perfected.

If for any reason the employee is satisfied with compensation benefits and does not see fit to pursue his claim against the third party tort-feasor, the employer, or his insurance carrier, may do so. But in that event, the employee must be notified, so that he may employ his own counsel if he desires to do so. The injured employee is not required to intervene at all in the cause of action brought by the employer or insurance carrier. The employee may simply continue to receive his compensation payments and do nothing in the third party action and still be entitled to exactly the same division of any recovery as he would be entitled to had he brought the action and the employer had intervened under (a) (1), or had

sued or settled without joinder of action under (a) (2). Ark. Stat. Ann. § 81-1340 (b) (Repl. 1960) is clear and unambiguous as to the rights of the parties where the employer, or carrier, brings the action, and this section is as follows:

> "An employer or carrier liable for compensation under this act [§§ 81-1301—81-1349] for the injury or death of an employee shall have the right to maintain an action in tort against any third party responsible for such injury or death. After reasonable notice and opportunity to be represented in such action has been given to the compensation beneficiary, the liability of the third party to the compensation beneficiary shall be determined in such action as well as the third party's liability to the employer and carrier. After recovery shall be had against third party, by suit or otherwise, the compensation beneficiary shall be entitled to any amount recovered over and above the amount that the employer and carrier have paid or are liable for in compensation, after deducting reasonable costs of collection, and in no event shall the compensation beneficiary be entitled to less than one-third [⅓] of the amount recovered from the third party, after deducting the reasonable cost of collection."

Thus we see that there are three methods of procedure in third party compensation cases: (a) (1)—The employee may commence the action and the employer, or his carrier, join and perfect its lien. (a) (2)—The employee may bring an action or compromise with or without action and the employer, or carrier, do nothing. (b) —The employer, or carrier, may bring an action and the employee do nothing.

Under the provisions of § 81-1340, the division of the proceeds between the employee and his employer, or carrier, recovered from the third party is exactly the same whether the employer joins in an action brought by the employee under (a) (1), or doesn't join in action

brought or adjustments made by the employee under (a) (2), or is brought by the employer or his insurance carrier alone under (b). The only difference being that the employer has a *lien* when he intervenes or joins the employee in a cause of action under (a) (1).

When the compensation carrier joined in the action in the case at bar, it fixed its statutory "first lien upon two-thirds [⅔] of the net proceeds recovered in such action that remain after the payment of the reasonable costs of collections, for the payment to them of the amount paid and to be paid by them as compensation to the injured employee or his dependents."

The injured employee in this case has a right to adjust his claim against the tort-feasor for $78,000.00 and such adjustment "shall not affect the rights of the injured employee or his dependents to recover compensation, but any amount recovered by the injured employee * * * *should be* (the statute says 'shall be') applied as follows: Reasonable costs of collection shall be deducted; then one-third [⅓] of the remainder shall in every case belong to the employee * * * ; the remainder, or so much thereof as is necessary to discharge the actual amount of the employer and the carrier; and any excess shall belong to the injured employee * * * ."

Winfrey & Carlisle v. *Nickles* cited by the majority is anemic precedent for their holding in this case. In the Nickles case the compensation carrier was paid its two-thirds of the recovery as has always been done until now, and no question arose as to that being the proper distribution under the law. The argument in the Nickles case was whether the court or the commission would approve the attorney's fees on that portion of the settlement representing compensation. Section (c) of Ark. Stat. Ann. § 81-1340 is not involved in the case at bar.

I am unable to follow the reasoning of the majority on their construction of this court's holding in *Barth* v. *Liberty Mutual.* In the Barth case the claimant drew all

he was entitled to draw under the Compensation Act. He then attempted to defeat the employer, or compensation insurance carrier's, rights in two-thirds of the recovery against a third party by simply bringing an action for pain and suffering (not compensable under the act). He settled his claim by consent judgment and this court simply affirmed the trial court in holding that the compensation carrier was entitled to the enforcement of its lien on two-thirds of the net recovery.

All the Arkansas cases cited by the majority recognize the lien right of the employer, or his compensation carrier, to two-thirds of the net proceeds recovered from the third party tort-feasor. *Maxcy* v. *Beasley* cited in the majority opinion is as good as any Arkansas case on the point. In the Maxcy case, in distributing the proceeds of a third party settlement under section (c), the commission approved a fifty per cent fee to be first deducted as a part of the cost of collection from the proceeds of the recovery. One-third of the remainder was then distributed to the injured employee and the remaining two-thirds to the compensation insurance carrier. The claimant's attorney claimed an additional fee from the compensation carrier's two-thirds of the recovery. This was denied by the commission, the Circuit Court, and this court, and in connection with the compensation carrier's rights under (a)(1) and (2) of the act, this court set out these two sections of the act and then said:

> "It seems clear to us that the above section, after giving an injured employee the right to sue a third party for his injury and providing that the employer may join in such action and thereby be entitled to a first lien on two-thirds of the net proceeds recovered, and providing that the commencement of such action should not affect the employee's right to recover compensation, there is the further provision that any amount recovered by the employee from a third party shall be applied after deducting reasonable costs of collection: '—One-third of the remainder shall in every case belong to the injured employee

or his dependents as the case may be; and the remainder or so much thereof as is necessary to discharge the actual amount of the liability of the employer and the carrier; and any excess shall belong to the injured employee or his dependents.

"It is our view that the order of the commission directing distribution, after allowing reasonable costs of collection, in the circumstances here is strictly in accordance with the above statutory authority and is correct.

"As indicated, the settlement here was effected without the suit being contested in federal court. It was a voluntary compromise settlement and we think the commission, under the authority of Section 81-1340 (c) had the right to approve the allowance of attorney's fee and other reasonable costs of collection where, as here, a voluntary settlement was made. The commission, after allowing Whetstone $142.40 expenses, itemized as follows:

$ 16.50	Court Costs
100.10	Court Reporter
15.00	Clerk Costs
2.00	Marshal's Fee
8.80	Pictures

allowed Maxcy one-third of the balance of $4,851.60, or $1,617.20, and allowed the insurance carrier, Liberty Mutual, $3,234.40 which was $495.96 less than it had paid Maxcy in compensation benefits."

The injured employee in the case at bar filed a suit in tort against the third party defendant, and the employer's compensation carrier joined in the action. The employee and the defendant are attempting to adjust (by

declaratory judgment) the third party claim by payment of $78,000.00 rather than hazard the verdict of a jury. The defendant has agreed to pay $78,000.00 and the employee has agreed to accept $78,000.00 *net to himself* and unencumbered by the first lien of the employer's compensation carrier. In other words, the injured employee and the third party defendant are reasonably close to a settlement in this case. Only the amount due the compensation carrier stands between the employee and the third party in reaching a settlement figure.

The employee in this case sustained horrible injuries and the amount of medical expenses the employer's compensation carrier has paid, and will continue to pay, is eloquent enough testimony as to extent of injuries. The compensation carrier has refused to relinquish its first lien on the proceeds of the proposed compromise settlement, and perhaps has not gone as far as it should toward sharing in a loss by compromise. But, we are confronted with a matter of law in this case, and the law was not designed to fit this case alone.

I would continue to follow the procedure laid down in § 81-1340, supra, as I interpret it, and as has been followed without question in all cases to date where a division of a third party recovery is involved. I would continue to follow the procedure that was followed in *Winfrey & Carlile* v. *Nickles,* 223 Ark. 894, 270 S. W. 2d 923; *Barth* v. *Liberty Mutual Insurance Co.,* 212 Ark. 942, 208 S. W. 2d 455; *Maxcy* v. *John F. Beasley Construction Co.,* 228 Ark. 253, 306 S. W. 2d 849; *Gilbert* v. *Missouri Pacific Railroad Co.,* 208 Ark. 1, 185 S. W. 2d 558; *McGeorge Contracting Co.* v. *Mizell,* 216 Ark. 509, 226 S. W. 2d 566.

I would reverse.

HARRIS, C. J., and BROWN, J., join in dissent.

BARRETT HAMILTON, INC. *v.* HEUBLEIN

5-4252 416 S. W. 2d 309

Opinion delivered June 5, 1967

[Rehearing denied July 26, 1967.]

Catlett & Henderson, for appellant.

Smith, Williams, Friday & Bowen; By: *B. C. Clark,* for appellee.

CONLEY BYRD, Justice. Appellant, Barrett Hamilton, Inc., pursuant to Ark. Stat. Ann. § 48-1316 (Repl. 1964), brings this appeal to question the Alcoholic Beverage Control Board's action in approving the transfer by appellee, Heublein, Inc., of Smirnoff Vodka from appellant to Central Distributors, Inc.

Appellee, Heublein, Inc., is a distiller of spirituous liquors. Its brands include Smirnoff Vodka, Relska, Bell's Scotch, Heublein Vermouth, Pop-Off Vodka and Hilshire Gin.

Barrett Hamilton, Inc., is a wholesale liquor distributor which, prior to 1965, was Arkansas wholesaler of all of appellee's products and those of four other major distillers. In February, 1965, Heublein, with Barrett

Hamilton's reluctant consent, transferred some of its brands (not Smirnoff) to Central Distributors, Inc.

Central Distributors, Inc., is a wholesale liquor distributor which in June, 1966, handled part of the Heublein products as well as those of three other distillers.

Ark. Stat. Ann. § 48-1311 (Repl. 1964) authorizes the Director of Alcoholic Beverage Control to adopt rules and regulations to carry out the intent and purposes of the act creating the Alcoholic Beverage Control Board (Ark. Stat. Ann. §§ 48-1301—48-1321 [Repl. 1964]). Pursuant to this authorization Regulation 118, here involved, was adopted. The regulation provides:

> "All wholesale liquor distributors shall register their brands of alcoholic beverages handled and distributed in this State with the Director of Alcoholic Beverage Control, and no wholesale liquor distributor shall add an additional brand to his stock without first securing the written approval of the Director of Alcoholic Beverage Control; *no distiller,* rectifier, importer or other person *shall be permitted . . . to transfer a brand from one wholesale liquor distributor to another . . . without reasonable cause,* which cause must be submitted to the Director of Alcoholic Beverage Control in writing." (Emphasis added.)

In notifying the Director of the proposed transfer, Heublein assigned the following reasons:

> 1. Barrett Hamilton, Inc., represents other major distillers which, of necessity, require considerable attention from the management of the company.
>
> 2. The move would increase the sales potential for all Heublein products.
>
> 3. The move will afford Heublein products opportunities to reflect sales gains in keeping with national gains.

4. The move will be in the best interest of Arkansas.

The Director approved the transfer after a hearing on June 21, 1966. In so doing, he found:

> "That Barrett Hamilton, Incorporated, had been the Distributor for Smirnoff Vodka in the State of Arkansas for approximately twenty years and that the sales of such vodka has shown a favorable increase over this period; that Heublein, Incorporated, has other brands of alcoholic beverages that have been distributed by Central Distributors, Incorporated, for the past few years, and that it is the desire of Heublein, Incorporated, to have the same distributor to handle all of their brands in this State; that some unpleasantry had developed between employees of Heublein, Incorporated, and Barrett Hamilton, Incorporated, which is not conducive to good business; that the relationship heretofore existing between Heublein, Incorporated, and Barrett Hamilton, Incorporated, was *not contractual* but *permissive* and subject to cancellation and termination at will by either party; and that Heublein, Incorporated, has shown reasonable cause to transfer the account as required by Regulation 118 and should be allowed to transfer all of its brands, including the Smirnoff Vodka account from Barrett Hamilton, Incorporated, to Central Distributors, Incorporated."

On appeal to the Board, additional testimony was taken and on that testimony and the record made before the Director, the action of the Director was affirmed. From the circuit court's affirmance of the Board's action, Barrett Hamilton brings this appeal, relying upon the following points:

1. No proof appellant neglected Smirnoff Vodka in favor of other lines.

2. No proof that transfer would afford greater sales potential for Smirnoff Vodka.

3. Transfer would penalize refusal to violate law.

4. There being no evidence to support orders below, transfer of the line constitutes error of law.

5. Quasi-judiical proceedings should be fair—*i. e.*, the Alcohol Beverage Control Board was not an impartial and disinterested tribunal.

Appellant is faced with the limited scope of review permitted here by Ark. Stat. Ann. § 48-1316 (Repl. 1964), which provides:

> "Within thirty (30) days after the mailing of the order of the Board, the licensee, if dissatisfied with the decision of the Board, may appeal to the Circuit Court of Pulaski County. The appeal shall be taken by the filing with the Clerk of the Circuit Court a transcript of the proceedings before the Board. The Circuit Court shall hear no new evidence on this appeal and shall render its judgment only on errors of law. An appeal from the judgment of the Circuit Court may be taken to the Supreme Court of Arkansas."

We interpret the statute to mean that the Board's action on matters of fact must be affirmed if supported by any substantial evidence.

We understand the phrase "reasonable cause" used in Regulation 118 to refer to that ordinary business care and prudence exercised by business men in general.

POINT I. We agree with appellant that there is no substantial evidence to show that it neglected Smirnoff Vodka in favor of other lines. However, we do not interpret the orders of the Director and the Board approving the transfer as standing or falling on this one issue.

POINT II. On the issue that the transfer to Central Distributors would increase the sales potential for all

Heublein's products, we hold that there was substantial evidence to support the Board's finding that Heublein had reasonable cause to transfer Smirnoff Vodka to Central Distributors.

The testimony of I. L. King-Riggs, southwest regional manager for Heublein, is that the portion of its lines transferred to Central Distributors in March, 1965, had shown a dramatic increase in sales after the transfer. From July through December, 1964, Barrett Hamilton handled Relska Vodka and sold 78 cases, while from July through December, 1965, Central Distributors sold 271 cases. From July through December, 1964, Barrett Hamilton sold 392 cases of Heublein Cocktails and for the same period in 1965 Central Distributors sold 564 cases. Barrett Hamilton, from July through December, 1964, sold 19 cases of Heublein Vermouth, while Central Distributors for the same period in 1965 sold 25 cases. Based on these comparisons, it was King-Riggs' opinion that if the remainder of the Heublein line were transferred to Central a similar increase in sales would be experienced.

Opposed to the testimony of King-Riggs was that of Barrett Hamilton, showing that Smirnoff Vodka sales had advanced under its wholesale distributorship from 38 cases in 1947 to 17,386 cases in 1965. For the period from July 1, 1965, to June 13, 1966, appellant had sold 18,000 cases of Smirnoff Vodka.

When all the testimony is viewed in the light of the limited review allowed under § 48-1316, above, we must find that the testimony of King-Riggs was sufficient to substantiate the Board's findings that appellee had reasonable cause to transfer its Smirnoff brand to Central Distributors.

POINT III. Appellant, by way of an affirmative defense, undertook to prove that the transfer of Smirnoff Vodka was being made to Central Distributors because appellant had refused to encourage its salesmen to violate the liquor Fair Trade Law.

In support of this defense, Malcolm Webre, appellant's sales manager, testified that on April 28, 1966, Heublein's representative, Judd Lynn, told him about a national sales drive for Smirnoff; that Heublein wanted appellant to increase its Smirnoff sales for March, April, May and June, 1966, by 25 per cent; that Lynn wanted the drive to commence in May; that when Webre explained the figures were unrealistic, Lynn suggested that appellant give its salesmen a $500 bonus; that Webre replied that if they gave that kind of a do-or-die bonus the salesmen would violate the Fair Trade Law by buying the business from the retailer, and Mr. Lynn agreed; and that Webre pointed out that since March and April had passed, appellant would have to make a 34 per cent increase in May and June to meet the quota.

Judd Lynn testified for appellee that he talked to Webre about the sales drive in March and told him the 25 per cent increase was to be made during the month of January through June; that Smirnoff was running about an 18 per cent increase in the first three months; that the 25 per cent increase was a little less than 10,000 cases; that the amount sold in January and February was to be subtracted from the 10,000 cases and the balance was to be sold for March, April, May and June; and that if each salesman made the goal, each salesman would receive $500. He did not tell Webre that the reason for presenting the program was to force Webre's salesmen to make deals with their bonus money.

Based on the premise that the 25 per cent increase was for the four months of March through June, appellant demonstrably argues that the figures were so excessive that the actual reason for the transfer of Smirnoff was that appellant refused to encourage its salesmen to violate the Fair Trade Law. On the other hand, Heublein points to its exhibit No. 1, notes allegedly in the handwriting of Bob Brewster, an employee of appellant, as corroborating Lynn's testimony that the program was for a six-months period. On the basis of a six-months period with credit being given for increased January

and February sales already made, appellee argues that the 25 per cent quota was not unrealistic or beyond attainment.

The Board gave credit to Judd Lynn's testimony and found that Barrett Hamilton had failed to sustain the burden of showing that the sales incentive program was calculated to induce Barrett Hamilton to violate laws and regulations for the purpose of accelerating sales of Smirnoff Vodka.

We find that there is substantial evidence to support the decision of the Board.

POINT IV. Appellant argues that since there is no evidence to support the orders of the Board, the transfer of the Smirnoff Vodka constitutes error of law. In this we find no merit, for as we have already shown under Point II, there was substantial evidence to support the Board's finding.

POINT V. Appellant argues that the Alcoholic Beverage Control Board was not an impartial and disinterested tribunal.

At the start of the Board hearing, each of the three Board members was sworn and responded quite frankly to appellant's examination. It was shown that the present transfer had been mentioned or discussed generally at a prior Board meeting; the chairman testified he had no opinion on the change of brands from one wholesaler to another which evidence would not change; another was of the same opinion; and the third stated he did have an attitude about changing brands because he had had experience with it some years ago, but he had made no final decision on the matter at hand. Their testimony further reflects that one Board member had owned Central Distributors which he sold in 1955, and that Heublein had bought some cars from an automobile company in which another Board member owned a 20 per cent interest.

No provision is made in the Alcoholic Beverage Control Act for disqualification of Board members for bias, prejudice or preconceived opinion. Actually, appellant does not argue bias and prejudice, but preconceived opinion. The Alcoholic Beverage Control Board, like most administrative bodies, is expected to be manned by persons having some knowledge of the problems involved and in this situation one would not expect to find a member who would not have some preconceived idea about the problems involved in transferring brands from one wholesaler to another.

Even if appellant argued bias and prejudice in addition to preconceived opinion, we do not find sufficient facts in the record to warrant a conclusion that the Board members were so partial or interested that justice was nullified or barred.

For the reasons stated we find no merit to this contention.

Affirmed.

WILLIAM H. JONES, ET AL *v.* JACK ETHERIDGE, ET AL

5-4284 416 S. W. 2d 306

Opinion delivered June 5, 1967

[Rehearing denied July 26, 1967.]

Arnold, Hamilton & Streetman, for appellants.

W. C. Medley and *Brown, Compton & Prewett,* for appellees.

CONLEY BYRD, Justice. This is a wet and dry local option election contest between appellants, William H. Jones et al, the contestants, and appellees, Jack Etheridge et al, the contestees. The legal issues involved are:

(1) Can a local option liquor election be held within three years of a prior such election;

(2) The sufficiency of a petition for contest which does not charge any specified vote was illegally cast but contains only generalities or conclusions to the effect that illegal votes were cast; and

(3) Can a petition for the contest of an election be amended, after the expiration of the time limitation set forth in Ark. Stat. Ann. § 48-820 (Repl. 1964) for contesting an election, so as to set forth the names of the voters alleged to have voted illegally and to state that if the named votes were purged the election would be 1,008 for and 1,185 against the sale of alcoholic beverages.

The original petition alleged (1) that the election on November 8, 1966, was not valid, being barred by the

three-year limitation period contained in Ark. Stat. Ann. § 48-818 (Repl. 1964), because a prior local option election was held in 1964; (2) that numerous election irregularities occurred which allowed individuals to vote who were not qualified, not properly registered, under a disability of incompetency, not registered in the voting precinct in which they voted, and residing outside the county, or were incompetents; (3) that a number of votes were not counted; and (4) that if the alleged illegal votes were not included, the majority of the votes cast would be against the manufacture and sale of intoxicating liquors.

The county court overruled the contestees' demurrer and an appeal was taken to the circuit court. There the contestants filed a motion for summary judgment under § 48-818, *supra,* and more than ten days after the vote certification filed their first and second amendments to their petition, wherein they listed for the first time the names of the persons alleged to have voted "wet" who were not bona fide residents of the county; who voted outside of their legal voting precincts; who were not registered as required by law at time of voting; who were permitted to vote by marking "X" for their signatures although not qualified voters; who voted "wet" by absentee but were not actually absent from their precincts on the date of election; and alleged that 1,199 votes were cast and certified for legal sale and 1,185 were cast and certified against legal sale of alcoholic beverages at the election, and that if the 191 alleged illegal votes were purged, the results would be 1,008 votes for and 1,185 against legal sale of alcoholic beverages.

From orders of the circuit court overruling contestants' motion for summary judgment, sustaining a demurrer to the original petition, and striking contestants' first and second amendments to the petition, contestants appeal, relying upon the points above stated.

POINT I

For their contention that a local option election cannot be held within three years of a prior election, contestants point out that a local option election was held in November, 1964, where the election was in favor of the "drys" [see *Titsworth* v. *Mayfield,* 241 Ark. 641 409 S. W. 2d 500 (1966)]; and rely upon § 48-818, *supra,* which states: "The election or elections herein provided for shall not be held for any county, city, town, district or precinct oftener than once in every three years."

We hold contestants' position to be without merit. *Grubbs* v. *Rowland,* 226 Ark. 874, 296 S.W. 2d 201 (1956). Ark. Stat. Ann. § 48-802 (Repl. 1964), being Initiated Measure 1942, No. 1 § 2 Acts 1943, p. 998, and enacted subsequent to § 48-818, *supra,* specifically provides that only two years must elapse between such elections. Contestants argue that § 48-802 is only cumulative to § 48-818, but in view of the unavoidable conflict between the two statutes the argument is untenable.

POINT II

We have repeatedly held that a petition for contest of an election does not state a cause of action where it does not charge that any specified vote was illegally cast, or does not contain sufficient information which would identify any such illegal voter, and contains only generalities or conclusions of law to the effect that illegal votes were cast. See Ark. Stat. Ann. § 48-820(2) (Repl. 1964); *Craig* v. *Barron,* 225 Ark. 433, 283 S. W. 2d 127 (1955); and *Countz* v. *Roe,* 231 Ark. 108, 328 S.W. 2d 353 (1959). Therefore we hold that the original petition, above set out, did not state a cause of action and was subject to demurrer.

POINT III

We agree with the trial court that the amendments to the petition, which were filed after the ten-day period set forth in § 48-820, *supra,* were properly struck from

the record. As has been pointed out in Point II above, the petition failed to state a cause of action, and to permit amendments setting forth names of the alleged illegal voters who voted "wet" so as to state a cause of action would, in effect, permit contestants to assert for the first time their cause of action after expiration of a ten-day period. *Wheeler* v. *Jones,* 239 Ark. 455, 390 S. W. 2d 129 (1965). It should be noted that the ten-day period is not from the date of the election but is from the date the votes are certified by the county board.

It places no burden on contestants to require them to state the names of the voters who allegedly voted "wet" and illegally and to show that if alleged illegal votes were purged it would change the election results. Before one can in good faith contest an election, he must have knowledge of the persons who voted illegally, some knowledge of how the persons allegedly voted, and he must be able to show that if the votes were purged it would make a difference in the outcome of the election. Otherwise, an election contest would become a fishing expedition. An election by the people should not be so lightly impugned by those who only hope to find enough information to change the result of an election.

Contestants rely on *Wassell* v. *Sprick,* 208 Ark. 243, 185 S.W. 2d 939 (1949); to substantiate their contention that the supplying of the names amounted to nothing more than a permissible amendment to the petition. A close reading of *Wassell* v. *Sprick* shows that no objection was there made to the amendments and that they were not an issue before this court. We know of no reason why the matter of amendments after the time could not be waived, and it is altogether possible that the contestee, Sprick, in that case preferred that the matter be tried on its merits rather than to stand on the technicalities of the period of limitations for filing a petition.

Finally, appellants in their reply brief argue that Ark. Stat. Ann. § 27-1117 (Repl. 1962) provides that a

party may amend his pleadings before trial where a demurrer thereto has been sustained; and that if we fail to permit such amendment in this case it will deny to contestants the equal protection guaranteed to them under the 14th Amendment to the U.S. Constitution. We disagree with contestants' position, for the statute applies alike to all petitioners contesting local-option elections. *Moore* v. *Childers,* 186 Ark. 563, 54 S.W. 2d 409 (1932).

Affirmed.

THE FIRST NATIONAL BANK IN LITTLE ROCK *v.* RUSSELL C. ROBERTS, JUDGE

5-4286 416 S. W. 2d 316

Opinion delivered June 5, 1967

[Rehearing denied July 26, 1967.]

Smith, Williams, Friday & Bowen, for appellant.

Gene Worsham and *Fletcher Jackson* and *Jeff Mobley* and *Joe Purcell,* Attorney General; *Don Langston & William R. Hass,* Assts. Attys. General, for appellee.

CONLEY BYRD, Justice. Petitioner, The First National Bank, filed herein a Petition for Writ of Prohibition to test the validity of a subpoena issued by the Faulkner County prosecuting attorney summoning the bank to appear before him and bring with it records pertaining to the bank account of Wanda L. Tudor; and to challenge the validity of the order of respondent, Russell C. Roberts, judge of the Faulkner County Circuit Court, directing petitioner to furnish to the prosecuting attorney, pursuant to the subpoena, copies of (1) the account card referred to as a signature card, (2) all deposit slips, and (3) all ledger sheets in connection with the bank account of Wanda L. Tudor.

In view of the importance of the issues, we are treating the petition as one for certiorari, as suggested by petitioner. This same procedure was followed in *Wasson, Bank Comm'r* v. *Dodge, Chancellor,* 192 Ark. 728, 94 S.W. 2d 720 (1936).

The record shows that, as directed by Senate Resolution No. 29 of the 1967 legislature, the prosecuting attorney began an investigation into alleged vote buying in Faulkner County during the 1966 general election. During his investigation, he acquired photostats of some checks drawn on the bank account of Wanda L. Tudor in the First National Bank in Little Rock which con-

tained the notation "door knocker." This litigation arose when the prosecuting attorney petitioned the circuit court to direct the bank to produce the information and documents sought by the subpoena the prosecuting attorney had issued under the authority of Ark. Stat. Ann. § 43-801 (Repl. 1964).

For relief from the order directing petitioner to produce the (1) account card, (2) deposit slips and (3) ledger sheets, petitioner relies upon four points which we will discuss in the order set out by petitioner.

POINT I

THE CIRCUIT COURT IS WITHOUT JURISDICTION TO AUTHORIZE AND EMPOWER THE PROSECUTING ATTORNEY TO SIT AS A GRAND JURY, IN THE ABSENCE OF THE PROSECUTING ATTORNEY'S COMPLIANCE WITH THE PROVISIONS OF ARK. STAT. ANN. § 43-801 (REPL. 1964)[1]

Ark. Stat. Ann. § 43-801 provides as follows:

> "The prosecuting attorneys and their deputies shall have authority to issue subpoenas in all criminal matters they are investigating; and shall have authority to administer oaths for the purpose of taking the testimony of witnesses subpoenaed before them; such oath when administered by the prosecuting attorney or his deputy shall have the same effect as if administered by the foreman of the grand jury. The subpoena herein provided for would be issued by the prosecuting attorney or his deputy and shall be substantially in the following form:
>
> "The State of Arkansas to the Sheriff of..... County: You are commanded to summon..... to attend before the Prosecuting Attorney at .....

[1]Petitioner does not challenge the proceedings used by the prosecuting attorney to enforce compliance with his subpoena.

on the ....., A.D. 19....., at .....M., and testify in the matter of an investigation then to be conducted by the said Prosecuting Attorney growing out of a representation that ..... has committed the crime of.....in said County. Witness my hand this ..... day of ..... A. D. 19.....

.....
Prosecuting Attorney

By .....
Deputy Prosecuting Attorney''

The subpoena issued by the prosecuting attorney is as follows:

''PROSECUTING ATTORNEY'S

WITNESS SUBPOENA

''THE STATE OF ARKANSAS TO THE SHERIFF OF PULASKI COUNTY:

''You are commanded to summons the First National Bank in Little Rock, Arkansas, or its duly authorized representative to attend before the Prosecuting Attorney in the Faulkner County Courthouse, Conway, Arkansas, on or before the 16th day of March, 1967, and/or to furnish to him the following information and documents: The name and address of all individuals authorized to sign checks on the bank account on which Wanda L. Tudor and others jointly with her had or have in your bank; the date said account was opened; the dates and amounts of all deposits made in said account; the source of said deposits whether by cash or by check, and if by check, upon whose account and on what bank drawn, the total number of checks written on said account for a period of 120 days next preceding November 17, 1966, by each person authorized to sign checks on said account; photostat copies of all

checks, front and back, reflecting that they were cashed, deposited or presented for payment at or through any and all banks in Faulkner County, Arkansas, and then and there present said documents, information and testimony in the manner of said investigation then and there to be conducted by the said Prosecuting Attorney growing out of a representation of alleged election law violations having been committed in Faulkner County, Arkansas.

"WITNESS my hand this 22nd day of February, 1967.

/s/ Jeff Mobley

PROSECUTING ATTORNEY"

Petitioner's argument under this point is that the "Prosecuting Attorney's Witness Subpoena" does not specify the crime committed nor the name of the person charged with the crime and that it, therefore, is not in substantial compliance with Ark. Stat. Ann. § 43-801; that the General Assembly must have had a specific purpose for setting forth in the statute the form of subpoena used by a prosecuting attorney; and that this purpose must have been to avoid harassment of innocent parties and the invasion of personal rights.

This is an investigation of an alleged election fraud. While we have a number of election laws making it a crime to bribe voters or otherwise expend money in a campaign, the prosecuting attorney does not know whether a specific election law has been violated or who violated which law. Thus, it is easily seen that, after investigation, the prosecuting attorney may determine that no election laws have been violated. In such instance, he would have committed a grave injustice had he alleged in his subpoena that any certain individual had committed a specific crime.

Furthermore, while we recognize that all delegation of authority to a public official to act on any matter is

subject to being perverted to an unlawful use by the unscrupulous, we believe that petitioner's fears of harassment of innocent parties and the invasion of personal rights are overemphasized. It must be remembered that the prosecuting attorney is powerless to force testimony from a witness without applying to the judiciary, where certainly the witness would have an opportunity to prevent harassment and invasion of his personal rights.

Therefore, with respect to the issues raised by petitioner, we hold his contention on this point to be without merit.

POINT II

THE PROSECUTING ATTORNEY'S SUBPOENA COMMANDS PETITIONER TO PRODUCE RECORDS NOT IN ITS POSSESSION.

While this would be a good defense in a contempt action against petitioner, it is not here in a position to claim that it does not have the records which it was directed to produce. Petitioner's president[2] specifically stated that on advice of counsel he had not examined the bank account in question to determine what records the bank had.

We do not understand the court order to direct petitioner to furnish records that it did not have on the date the subpoena was issued.

---

[2]In taking this position, Mr. Vinson, petitioner's president, stated: "I wanted it to be clear our bank has no intention of obstructing anything, the prosecuting attorney or this Court in what they are attempting to do. Our bank is only interested in trying to protect the sanctity of what we consider to be a trust, and I believe the majority of people—most of us have bank accounts, and we would always appreciate a bank taking that position, and I want to state again we have no interest in any of this affair at all. If there are two sides, we don't have any interest in either side, only the bank records, and, again, it is a historic thing, not something that happened yesterday."

POINT III

THE PROSECUTING ATTORNEY'S SUBPOENA IS UNREASONABLE AND UNCONSCIONABLE IN THAT IT WOULD REQUIRE THE PETITIONER TO SPEND LARGE SUMS OF MONEY EXAMINING VOLUMINOUS RECORDS AND REPRODUCING RECORDS AND WOULD DISRUPT THE PETITIONER'S DAY-TO-DAY OPERATIONS AND DUTY ASSIGNMENTS OF PETITIONER'S EMPLOYEES, THE CUMULATIVE EFFECT OF WHICH WOULD CONSTITUTE A VIOLATION OF THE PETITIONER'S RIGHTS UNDER AMENDMENTS 4 AND 14 TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE 2, SECTIONS 3 AND 15 TO THE CONSTITUTION OF THE STATE OF ARKANSAS.

We find this contention to be without merit because on cross-examination it was established that petitioner regularly furnishes these same records to the FBI and the IRS agents when they have the written request or authorization of the owner of the bank account. Furthermore, the prosecuting attorney recognized that there would be a cost involved in the production of some of the documents and offered to get a commitment from the county for the payment of such expenses prior to the production of said documents. The bank, for purposes of determining the right of the prosecuting attorney to reach such records, requested him not to take any action on cost commitments until the issues in this litigation were determined.

Wanda L. Tudor's testimony established that the bank account was in her name and that only she was authorized to draw checks on the account. In this situation, petitioner stated that as far as it was concerned, Mrs. Tudor was the owner of the bank account.

After establishing that the bank does furnish such records to the FBI and the IRS under the circumstances

mentioned, the prosecuting attorney asked petitioner's president the following question and obtained the answer set out below:

> "Q. Mr. Vinson, I will ask you whether or not you would turn over to the Prosecuting Attorney's office of this district, the Fifth Judicial District, the records that have been requested concerning the account in your bank in the name of Wanda L. Tudor, which has been testified to and under discussion in this litigation? Would you turn these records over to the Prosecuting Attorney's office if Miss Wanda L. Tudor furnished you her written permission to do so?
>
> "A. I believe I have previously testified, Mr. Mobley, that we do allow examination of bank records upon written request or authorization of the owner of the account, provided our bank gets a proper request, and by that I mean a request signed by Mrs. Tudor, the owner of the account, that the Prosecuting Attorney be allowed to examine, or reproduce, the records in our bank, we would comply with Mrs. Tudor's request, and we would make available to you all the records pertaining to this account. I would not want to tell you we would reproduce them all. That would be a matter of cost. We would make all records available to the Prosecuting Attorney Attorney upon her written order. Yes sir."

Having established through Mr. Vinson that a statement in open court by Mrs. Tudor authorizing the bank to release the records would satisfy its policy of requireing a written request or authorization of the owner of the account, and having established that Mrs. Tudor did give her consent in open court for the delivery of these records, the court entered the oral order here involved, which is as follows:

"Mr. Bank President, you produce on or before 5:00 o'clock p.m., Tuesday afternoon, March 28, 1967, the following:

"(1) Bank ledger sheet covering the account of Wanda Tudor from its inception to the present date —I mean from the day the account was opened to the present time. You will produce a copy of the authorization as to who has authority to sign checks against that account. If there is more than one person who has authority to write checks on that particular account, you will so produce a copy of it. I am saying copy from the standpoint I know that you don't want to get rid of your originals. Mr. Mobley, I take it that a copy—a photostat will suffice?"

* * *

"In addition, it is the requirement of this Court that you produce copies of deposit slips made by Wanda L. Tudor, or deposit slips made by anyone else. These deposit slips, of course, would show whether the deposit was made by check, money, or so forth.

"Now, this does not mean that you will not be ordered in the future to comply with further orders of this Court, and at this time I withhold my orders as to you as to any future things which may be required."

Following this order, counsel for petitioner asked Mrs. Tudor if she had any objection to the bank furnishing the items in the order, whereupon counsel for Mrs. Tudor stated, "We have no objection."

Under the circumstances, we think there was no abuse of discretion by the trial court in ordering the production of the documents. However, we would point out that petitioner would be entitled to the cost of

the production of the records before it could be held in contempt of court for failure to do so.

POINT IV

THE PROSECUTING ATTORNEY HAS NOT SHOWN THAT THE INFORMATION SOUGHT IN THE SUBPOENA FROM THE PETITIONER IS NOT OTHERWISE AVAILABLE TO THE PROSECUTING ATTORNEY.

The record does not sustain this contention. What the record shows is that Mrs. Tudor had these documents in her possession at the Republican Party headquarters in the Tower Building before she went to work in Governor Rockefeller's office at the capitol following his inauguration; that when she went back to get the records she was unable to find them or to determine who had the records. Her testimony is that she was informed by the folks working at the party headquarters that since she did not have the records she consequently could not be held in contempt for failure to produce them.

Therefore, it appears to us that the record does not show that the information sought is otherwise available to the prosecuting attorney.

For the reasons stated herein, the petition is denied.

STATE *v.* SUSAN EPPERSON AND N. H. BLANCHARD

5-4127 416 S. W. 2nd 322

Opinion delivered June 5, 1967
[Rehearing denied July 26, 1967.]

[redacted]

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

Warren & Bullion, for appellee.

PER CURIAM. Upon the principal issue, that of constitutionality, the court holds that Initiated Measure No. 1 of 1928, Ark. Stat. Ann. § 80-1627 and § 80-1628 (Repl. 1960), is a valid exercise of the state's power to specify the curriculum in its public schools. The court expresses no opinion on the question whether the Act prohibits any explanation of the theory of evolution or merely prohibits teaching that the theory is true; the answer not being necessary to a decision in the case, and the issue not having been raised.

The decree is reversed and the cause dismissed.

WARD, J., concurs. BROWN, J., dissents.

PAUL WARD, Justice, concurring. I agree with the first sentence in the majority opinion.

To my mind, the rest of the opinion beclouds the clear announcement made in the first sentence.

DAN CUMMINGS AND BESSIE CUMMINGS *v.* JIM O. BOYLES, PAUL ROGERS AND METTIE ROGERS

5-4113 415 S. W. 2nd 571

Opinion delivered February 27, 1967

[Rehearing denied, June 5, 1967]

PER CURIAM. The appellees, within the time allowed for the filing of a petition for rehearing, filed a motion for clarification of the opinion, which is in substance a petition for rehearing. It is contended that the court was in error in modifying the chancellor's decree and that the decree should have been affirmed.

This contention is well taken. The modification was based upon a finding that part of Beaver Dam Island had formed within the appellants' original boundaries and, therefore, belonged to them by operation of Ark. Stat. Ann. § 10-202 (Repl. 1956). That theory of the case was not argued by the appellants as a basis for reversing the chancellor's decree. The statute was mentioned only in connection with the appellants' request that if the decree should be affirmed the cause should, nevertheless, be remanded for a determination of what changes, if any, in the channel of the river might have been made by the Corps of Engineers after the trial of this case. It is a familiar rule of practice that an appellant waives any contention not argued in his brief. *Johnson* v. *Gammill,* 231 Ark. 1, 328 S. W. 2d 127 (1959); *Bowling* v. *Stough,* 101 Ark. 398, 142 S.W. 512 (1911). Although chancery cases are tried *de novo,* we do not reverse the decree upon a ground not argued by the appellant.

The decree is affirmed, without prejudice to the assertion by either party of any new cause of action that may have arisen since the trial as a result of the activities of the Corps of Engineers.

JOHN A. FOGLEMAN, Justice, dissenting. I respectfully dissent from the per curiam opinion of the court which eliminates the modification of the trial court's decree provided for in our original opinion. I agree that the motion for a clarification should be considered as a petition for rehearing. It is also proper that the former opinion should be corrected, as we never intended to award to appellants the title to land they never acquired either by deed or by accretion or island formation within their original boundary.

I would correct the original opinion to direct that the lower court's decree be modified to award to appellants so much of Beaver Dam Island, as it now exists, which lies within the original boundaries of the following land description:

> Section 32 and the SW ¼ of the NW ¼; the NE ¼ of the SW¼; the NW¼ of the SW¼ and the NW ¼ of the SE ¼ of Section 33, as well as that part of the SE ¼ of the NW ¼ of Section 33 bounded on the south by the NE ¼ of the SW ¼ of Section 33, and on the north by the "chute" of the Arkansas River, which flows or lies south of Beaver Dam Island, as such chute existed on March 10, 1923; all in Township 4 North, Range 14 West in Pulaski County, Arkansas.

Appellants acquired title to so much of the SE¼ of the NW¼ of Section 33 that lies south of Beaver Dam Island and south of the chute (once the Arkansas River) on the south side of Beaver Dam Island as accretions to the NE¼ of the SW¼ of Section 33 under order of the Pulaski County Circuit Court dated March 10, 1923, appearing at page 81 of the abstract of title

filed as exhibit 11 to the record in this case. I find no merit in the contention by appellees, made for the first time in this court, that appellants' title to the SW¼ NW¼ of Section 33, except for railroad right-of-way, is not good because of a void description.

I also agree with the chancellor's finding that no avulsion did, in fact, occur in 1957, and agree that a "chute" or at least water of some description of varying depth, width and movement has existed on the south side of Beaver Dam Island since the late 1800's. The findings of the chancellor that Beaver Dam Island was never an accretion to land owned by appellants, and that appellants failed to prove title to Beaver Dam Island by adverse possession are not against the preponderance of the evidence. The evidence seems to me to establish beyond question that a part of the island formed within appellants' boundaries, possibly by accretion to the island. In his holding to the contrary, I feel that the trial judge was in error.

But the majority, in their action on rehearing, say that my proposed action cannot be taken because this theory of the case was not argued as a basis for reversing the decree and that the appellants waive any contention not argued in their brief. Trials of appeals from equity courts are de novo and this court determines where the preponderance of the evidence lies. Bringing a chancery case to this court for review opens the whole case as if it had never been tried, as to all the points made in the court below. *Woodruff* v. *Core,* 23 Ark. 341. The appeal brings up the whole case and the court passes upon the record as to the facts as well as the law. *Mccrite* v. *Hendrix College,* 198 Ark. 1149, 133 S. W. 2d 31. In this court, the law and the facts are examined the same as if there had been no decision at *nisi prius* and this court renders its decree based upon such record. *Arkansas Bankers' Ass'n.* v. *Ligon,* 174 Ark. 234, 295 S. W. 4; *Grayson* v. *Bowie,* 197 Ark. 128, 122 S. W. 2d 536.

Of course, this does not mean that we will search the transcript and decide the case on the basis of that search. Trial de novo is upon the evidence as abstracted and not the original record. *Smock* v. *Corpier*, 226 Ark. 701, 292 S.W. 2d 260.

Although no assignment of errors is required by Act 555 of 1953, I agree that we should require compliance with Rule 9 (c) which requires that appellant list and number the points relied upon for reversal of a decree. I would not propose that the trial de novo be converted into a search for error. I agree that we can consider points not raised as waived, for this court cannot be expected to place itself in the position of the appellant and decide in just what respect a decree erroneously affects him adversely. While appellants did not list as a separate point the error of the lower court in finding that no part of the island formed within their original boundaries, they listed the following point:

> "Alternatively, if appellants' position is not sustained in this appeal, this cause should be remanded with directions to modify the decree herein to determine the interests of the appellants in accretions subsequent to the trial of the case for the reason that the construction of revetments by the U.S. Corps of Engineers has altered the natural flow of the river, so that subsequent accretions are not the natural result of gradual deposits."

The evidence showed certain of these revetments to be within appellants' original boundaries in a river chute between their lands on the mainland and that portion of Beaver Dam Island within their original boundaries. While I think appellants were in error as to the remedy in asking that the cause be remanded, they recognized that a determination of just what they were entitled to under existing conditions could be determinative of their rights in subsequent deposits in the chute. An examination of the exhibits will reveal that these deposits will likely be more valuable than the present rights of appel-

lants in the island. I say that the question was presented in their argument under this point. I say this, even though I think they should have recognized that this is a trial de novo and asked for relief here by way of fixing the extent of their rights within their original boundaries. The portions of this argument that I deem to raise the question are:

> "Should it be determined that the appellants do not own the land in question because it is not an accretion, there still remains the difficulty of determining the ownership of lands accreting to the lands of appellants because the construction of revetments by the U.S. Corps of Engineers has been such as to alter the natural flow of the river, and in effect to cause deposits which are not the result of the natural, gradual action of the stream. An examination of the aerial photographs introduced into evidence in this case show that several of these stone and wood revetments have been constructed which will in time eliminate the flow of water through the chute.
>
> * * *
>
> * * *If the lands in dispute are determined not to have arisen by accretion to the land of the appellant the natural effect of such a decision will be a finding that they are accretions to the island claimed by appellee Boyles.
>
> Ark. Stats. Ann. § 10-204 provides: The title to all lands which have heretofore formed, or may hereafter form, in the beds of non-navigable lakes, or in abandoned river channels or beds, whether or not still navigable, which alluvian or reformed lands are above the ordinary high water mark, shall vest in the riparian owners to said lands and shall be assessed and taxed as other lands."

If there were no reference to the statute under which

appellants are entitled to the part of the island within their original boundary, in their abstract or brief, I would concur. *Bowling* v. *Stough*, 101 Ark. 398, 142 S.W. 512 (on rehearing).

A further examination of appellants' abstract and brief, then, is in order. In the statement of the case appellants assert that they claim a tract lying south of the present channel of the Arkansas River alleged by them to be formed by accretions. There is no question but what the claim to the lands I would direct be awarded to them was asserted in an amendment to appellants' complaint shown in the abstract. There they claimed this part as that portion of Beaver Dam Island which formed within the boundaries of land owned by them and their predecessors in title.

This case, then, presents a situation that I think calls for the action I would take. This court has held a brief not subdivided according to the points for reversal listed was not a deficiency so serious as to require summary affirmance. *Tumlison* v. *Harville,* 237 Ark. 113, 372 S.W. 2d 385. This court also granted a rehearing in a case where it originally took statements in a brief of appellee designating a certain tract as the tract in controversy as abandoning its claim to an adjoining tract. *Sadler* v. *Campbell,* 150 Ark. 594, 236 S.W. 588.

While it might be said that in this manner appellee had no chance to respond, appellee actually did respond and claimed under the authority of an Illinois case and a Kansas case that an addition or extension of the island by accretion became the property of the owner of the island.

I thoroughly agree that we should correct mistakes in our original holding on rehearing, but the approach taken here to deny appellant relief granted in the original decision by first finding that there was waiver of the point on which that relief was based on rehearing seems to me to be without precedent. I would not categorically

say that it was never appropriate, but under the circumstances of this case I deem it improper.

J. Fred Jones, Justice, dissenting. I agree that the petition for clarification was correctly treated as a petition for rehearing in this case and I agree that the petition was properly granted.

I do not agree with the majority in denying to the appellants the title and possession of the land they bought and paid for and to which they proved their record title at the trial of this case. The effect of the majority opinion as I view it, is to divest appellants of the proven title to a part of their land simply because they argued in their printed briefs that they claimed more land by accretion than they proved by purchase and failed to argue the record title to the land their deeds called for. It is my position that when this court tries a case de novo on appeal from a Chancery Court it should do so on the record and not on the briefs.

I can abide a rule of practice that would prevent an appellant from adding land to his record title on a theory not argued in his brief, but I cannot abide a rule that would divest a proven record title in a case where more land is claimed by accretion than is proven by deed of conveyance simply because the *theory* of acquisition by accretion is argued in the brief rather than the *fact* of acquisition by deed of purchase as proven in the record.

Appellants proved their title to the southwest quarter of the northwest quarter of section 33 by deed of conveyance and also proved their title to that portion of the southeast quarter of the northwest quarter of section 33 south of the so-called chute which was formerly considered the Arkansas River. If any part of Beaver Dam Island falls within the boundary lines of the southwest quarter of the northwest quarter as the exhibits in the record indicate that it does, it is my opinion the appellants should be awarded possession of the lands

enclosed within such boundaries even if they did acquire it by purchase as proven at the trial rather than by accretion as argued in their briefs. If appellees have cut and sold timber from any of this land, it is my opinion that the amount of timber cut should be determined and damages awarded.

I agree that the activities of the U.S. engineers in the area of this land either past, present or future have nothing to do with this lawsuit.

I would award possession of the above described lands to the appellants as prayed in their complaint and would remand for a determination of damages for timber, if any, cut and sold from said lands.