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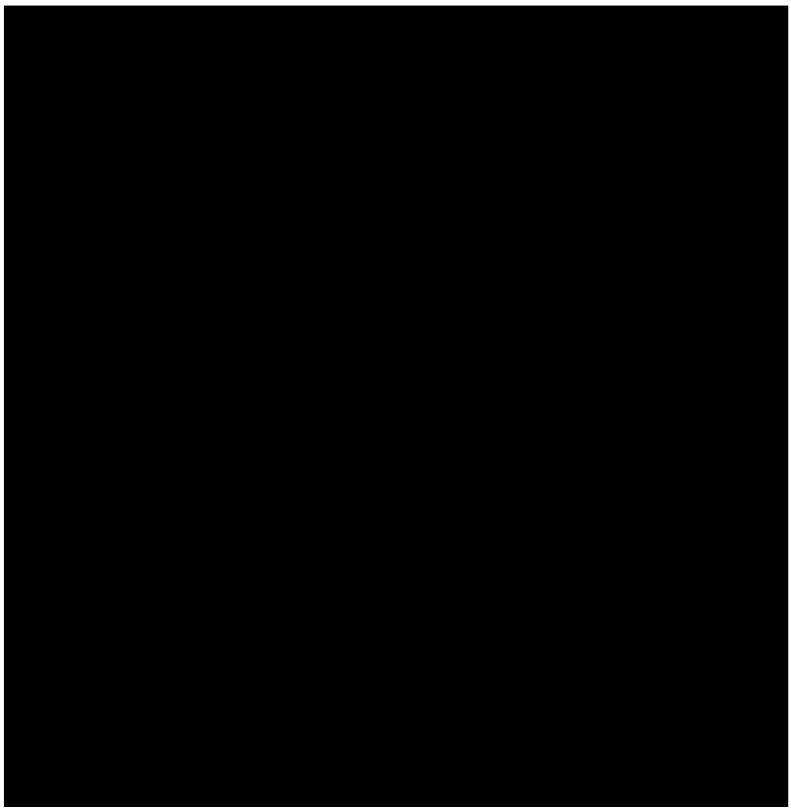

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GENE G. McCOY *v.* GUY H. STORY ET AL

5-4389 417 S. W. 2d 954

Opinion delivered September 11, 1967

John P. Gill, for appellant.

John W. Bailey, for appellees.

CARLETON HARRIS, Chief Justice. This appeal relates to the validity of an Executive Proclamation issued by the Governor of Arkansas on May 24, 1967, and directed to the Pulaski County Board of Election Commissioners, calling a special election for November 7, 1967. The pur-

pose of the special election is to elect a County Judge for Pulaski County, Arkansas. Appellee, Guy H. Story, instituted a taxpayer's suit against the Board of Election Commissioners, seeking to restrain expenditures by the commission for such an election, and further seeking a declaratory judgment that the Governor's proclamation was null and void. Gene G. McCoy, a voter, and appellant herein, by leave of the court, intervened, and sought judgment declaring the Governor's proclamation to be valid. After the filing of additional pleadings by the parties, a written stipulation of fact was entered into, and the cause submitted to the trial court. That court held that the Governor's proclamation was null and void, and of no effect, and the appellant's intervention was denied and dismissed for the reason that there is no statute authorizing the election. From the the judgment so entered, appellant brings this appeal. For reversal, it is contended that Article 19, Section 5, of the Arkansas Constitution authorizes the election as called by the Governor.

Background of the litigation is as follows:

R. A. (Arch) Campbell duly assumed the office of County Judge on January 1, 1965, which term of office would normally have expired on January 1, 1967.

Tom Gulley was elected to the office of County Judge of Pulaski County, Arkansas, at a general election held on November 8, 1966, for a two year term beginning January 1, 1967. Mr. Gulley died November 24, 1966, prior to qualifying for the office to which he was elected.

R. A. (Arch) Campbell, the incumbent County Judge for Pulaski County, held over in office, and is still holding said office, pursuant to the Supreme Court decision in *Justice* v. *Campbell,* 241 Ark. 802, 410 S. W. 2d 601.

Article 19, Section 5, relied upon by appellant, provides as follows:

"All officers shall continue in office after the expiration of their official terms until their successors are elected and qualified."

Appellant asserts that this provision is self-executing, *i. e.*, it requires no implementation by the General Assembly, and this is the sole contention advanced by by appellant.

In *Griffin* v. *Rhoton,* 85 Ark. 89, 107 S. W. 380, quoting Judge Cooley, we stated:

"* * * A Constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law."

It is at once apparent that the constitutional language here under discussion, to paraphase *Griffin,* only indicates a principle, viz., that a successor should be elected, and it is equally clear that no rules are laid down concerning such election which can be given the force of law. In other words, no method or procedure is afforded by which the right to elect may be enjoyed. Mainly, there is no mention of *when* such an election should be held, and the importance, and necessity, of this requirement will be subsequently pointed out. In fact, the reasoning set forth in this paragraph explains why, in *Justice* v. *Campbell, supra,* after holding that Article 19, Section 5, contemplated the filling of the term by an election, that we further stated:

"There are numerous instances in which legislation is appropriately enacted to implement the requirements of the Constitution."

Appellant now asserts that our holding, in effect, interpreted Article 19, Section 5, to read:

"All officers shall continue in office after the expiration of their official terms until their successors are elected *at a special election* and qualified."

We do not agree. Article 7, Section 29, of the Arkansas Constitution provides that the judge of the county court shall be elected by the qualified electors of the county for a term of two years. This election is covered in Article 3, Section 8, which sets out that general elections shall be held biennially, and the General Assembly may fix the time.[1] Amendment 29 to our Constitution[2] provides for the filling of vacancies, but here, of course, all parties agree that no vacancy exists, and appellant likewise agrees that there is no statutory provision for a special election under the circumstances here at issue.

In urging that this court should adopt the interpretation (of Article 19, Section 5) set out in the italicized phrase, appellant states:

"In the instant case, if the judgment below is affirmed, the Legislature will indeed be authorized to continue any officer in office for an indefinite period simply by not providing for elections for his successor."

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[1]Originally, Section 8 set the general election for the first Monday of September, but the General Assembly, under the authority of the amendment, changed the date of such elections to the Tuesday next after the first Monday in November, in every second year, and this applies to all elective state, county, and township officers "whose term of office is fixed by the Constitution or General Assembly at two (2) years."

[2]Amendment 29 provides that vacancies (except those occurring in the offices of Lieutenant Governor, members of the General Assembly, and Representatives in the Congress of the United States) shall be filled by appointment by the Governor. It will be observed that except for the offices enumerated in parenthesis, the people, in passing this amendment, set forth this manner of filling vacancies in constitutional offices, rather than by special elections.

Two cases from other states[3] are cited as authority by appellant for his position, but we consider neither case in point, and at any rate, our own cases are contrary to appellant's position.

Let it first be said that the quoted argument is plainly erroneous, for failure of the Legislature to act will *not continue the present Pulaski County Judge in office for an indefinite period of time*—rather, the failure to act only continues him in office until the general election in November, 1968.[4] Our early case of *Merwin* v *Fussell,* 93 Ark. 336, 124 S. W. 1021, uses language which is entirely pertinent to the case at hand. There, quoting McCrary on Elections, we said:

" '* * * it must be conceded by all that time and place are the substance of every election,' and that 'it is, of course, essential to the validity of an election that it be held at the time and in the place provided by law.' "

It is further stated:

"The authority to hold an election at one time will not warrant an election at another time, and an election held at a time not fixed by the law itself will be void."

The matter is governed purely by statute, of course, because the system of elections followed in the United States was unknown to the common law.

Article 19, Section 5, of our Constitution does not specifically order an election, nor does it fix any time for holding such an election, and this being true, the language of our court in *Simpson* v. *Teftler*, 176 Ark. 1093, 5 S. W. 2d 350, is completely applicable:

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[3]*State* v. *Thoman*, 10 Kansas 191 (1872); and *Gray* v. *Bryant*, 125 So. 2nd 846.

[4]Of course, the successor to the present judge would not take office until the following January.

"The Legislature alone had authority to provide for an election, and any election held without authority is a nullity."

Justice v. *Campbell, supra,* is here controlling. In that opinion, we stated that implementary legislation by the General Assembly was necessary; had we felt otherwise, we would simply have held that the Constitution directed that an election be held forthwith.

Affirmed.

CARLISLE SCHOOL DISTRICT No. 3 OF LONOKE COUNTY *v.* CARLISLE DEVELOPMENT CO. ET AL

5-4242 417 S. W. 2d 952

Opinion delivered September 11, 1967

J. B. Reed, for appellant.

James M. Thweatt and *Joe P. Melton,* for appellees.

George Rose Smith, Justice. The appellant school district and the principal appellee, a residential development company, own large adjoining tracts of land in the city of Carlisle. The development company's property lies immediately east of the school tract. In 1966 the development company, seeking an outlet for the street system within its subdivision, asserted the right to connect one of its streets with a network of streets that had been in existence upon the school lands for more than fifteen years.

The district resisted the company's proposal on two grounds: First, the district contended that its streets were private thoroughfares not open to indiscriminate use by the public. Secondly, the district insisted that along the entire length of its eastern boundary there was an undedicated buffer zone, varying from 12 to 29 feet in width, which separated its street network from its east boundary line and which the development company was not entitled to cross in order to obtain an outlet for its own street system.

When the development company refused to recognize its neighbor's contentions the school district brought this suit against the company and two of its officers, to restrain them from carrying out their proposal. After a trial the chancellor found in favor of the defendants, holding that there was actually no buffer zone along the edge of the school land and, secondarily, that even if such a strip existed the amount of land taken by the development company's connecting street would be so small as to bring the case within the *de minimis* doctrine. This appeal is from the ensuing decree.

In this court the appellees concede that the chancellor was in error in applying the rule of *de minimis* to a controversy involving real property. In a case

markedly similar to this one, *Brown* v. *Land, Inc.* 236 Ark. 15, 364 S. W. 2d 659 (1963), which turned upon the existence of buffer zones between subdivisions, we adhered to our earlier cases rejecting the *de minimis* principle with respect to the ownership of land.

Upon the remaining issue we find the preponderance of the evidence to be against the chancellor's conclusion that there was actually no buffer strip of undedicated land between the school district's east boundary line and a gravel north-south street running close to that boundary.

There is no contention that the north-south street in question had ever been formally dedicated, so that its exact location might be determined by referring to a plat. To the contrary, this gravel street was simply a part of the network that the school district created upon its own campus for the use of its patrons and others having occasion to visit the school grounds. The county surveyor, testifying for the district, declared positively that the buffer zone east of the north-south street does exist. His testimony was corroborated by a plat prepared by the development company's own civil engineer, which clearly shows the buffer zone. While it is true that this engineer's plat was introduced only for the limited purpose of showing "the physical layout of the school and its campus and the thoroughfares . . . or streets," we think that the question of the correct location of the north-south street falls within the purpose for which the plat was received in evidence.

Furthermore, other testimony shows without dispute that the district's eastern boundary line was marked by an old fence and by a ditch lying between that fence and the north-south road. Opposed to the convincing proof that supports the school district's position there is only the testimony of the development company's officers that when they bought their tract they thought the north-south road to be the boundary. We

quote a typical excerpt from the testimony of the development company's president:

Q. State, sir, where you consider your property line to be, the development company's property line to be with respect to the north-south road or street.

A. We considered the north-south road was the line.

Q. Was this based on any survey or engineer's work that was done by you?

A. No, sir.

Q. Based on general idea of you and the public generally?

A. Yes, we just supposed the road was the line.

Our study of the record persuades us that the decided weight of the evidence supports the school district's position. However, in remanding the case for the entry of a decree in favor of the district, we point out that the chancellor's preliminary injunction was much too broad in that it prohibited the defendants from entering upon the school property at any time whatever —even, for example, to attend a football game. There is no need for the decree to go beyond protecting the buffer strip from intrusion.

Our conclusion makes it unnecessary for us to decide whether the district's streets are public or private thoroughfares.

Reversed.

Opinion delivered September 11, 1967
[Rehearing denied October 16, 1967.]

Paul K. Roberts, for appellant.

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

LYLE BROWN, Justice. Johnny Edington was adjudged guilty of voluntary manslaughter. The first of two points advanced for reversal is that the court should have held appellant Edington's "confession" inadmissible. The facts incident to this contention are brief.

Theodias Jimmy Turner died as a result of a knife wound received at the home of Gracie Broughton. Mrs. Broughton was taken to the police station in Fordyce for questioning. She disclosed that Edington was the only adult in the room with Turner at the time of the

stabbing. An officer immediately located Edington at home and in bed. Edington was not then aware the knife wound had proved fatal to Turner. When the officer and Edington walked into the room in City Hall, Mrs. Broughton advised Edington of Turner's death and asked why he stabbed Turner. Edington responded that "he loved her" and was jealous of Turner. The officers did not instigate the conversation nor did they make any effort to stop it. They recounted the conversation in an in-chambers hearing. There the court held the conversation to be admissible.

Appellant argues that the recited testimony of the officers should have been excluded under *Escobedo* v. *Illinois,* 378 U. S. 478 (1964) and *Miranda* v. *Arizona,* 384 U. S. 436 (1966). He insists that these decisions require the warnings in *Miranda* to be given at the moment a suspect is first taken into custody. This is not required in every instance of arrest or detention. The officer who went after Edington was merely instructed to bring him to headquarters. The officer did not interrogate Edington and consequently had no reason to give Edington the *Miranda* warnings. Nor is this a situation where officers set up a conversation between the suspect and another in order to obtain an admission of guilt. The trial court heard evidence of a spontaneous admission by the suspect to his friend, Mrs. Broughton. The trial court correctly admitted the evidence. See *Turney* v. *State,* 239 Ark. 851, 395 S. W. 2d 1 (1965).

Secondly, appellant urges that the eyewitness testimony of Mrs. Broughton's eleven-year-old son constituted reversible error. The boy was in the fourth grade and had never failed in school. He attended Sunday School and named his teacher. He was questioned about the effect of an oath. His account of the incident of the stabbing was coherent. Rigid cross-examination failed to disturb him. The trial court, in its discretion, concluded that the boy met the oft-recited tests of understanding the obligations of an oath and had the ability to receive

and transmit accurate impressions of the events. *Batchelor* v. *State,* 217 Ark. 340, 230 S. W. 2d 23 (1950).

Affirmed.

MARCELLUS A. SMITH *v.* STATE OF ARKANSAS

5275 418 S. W. 2d 627

Opinion delivered September 11, 1967
[Rehearing denied October 16, 1967.]

Allan Dishongh and *Harry Robinson*, for appellant.

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

JOHN A. FOGLEMAN, Justice. Appellant was convicted of involuntary manslaughter alleged to have been committed on September 5, 1964. The information charged that Audrey Marie Barnes died as the result of having been struck by an automobile being driven by appellant Smith in reckless, willful and wanton disregard for the safety of others.

The State offered evidence tending to show that appellant was under the influence of intoxicating liquors at the time of the collision from which the death of Audrey Marie Barnes resulted. The evidence on behalf of the State included the testimony of Officer Gachot of the Little Rock Police Department regarding the results of a "Breathalyzer" test given appellant. This test was administered within a reasonably short time after the collision for the purpose of determining the alcoholic content of appellant's breath.

As a basis for reversal appellant contends that the trial court committed error in allowing the officer to testify regarding the test and its results. It is further contended that the trial judge committed error in mak-

ing the following statement in the presence of the jury after an objection by appellant's attorney:

> "I will sustain you on that last objection, as far as that goes, but I am going to hold this man is competent to give these tests. He has given thousands of them. Go ahead."

In support of appellant's first ground for reversal he contends that the results of the test were inadmissible because the State failed to show that the test was a chemical analysis made by a method approved by the Director of the State Board of Health and/or the Director of Arkansas State Police as required by the provisions of Ark. Stat. Ann. § 75-1031.1 (Supp. 1963). We think that such a showing is a part of the foundation to be laid for the introduction of the results of such tests or analyses. At the time the result of the test was offered in evidence, appellant made no specific objection to its introduction because of this deficiency. At that time there was a general objection and a specific one. The latter was only upon the ground that the witness was not qualified, was incompetent to testify upon the workings of the machine and had no special training to operate it. Obviously, the specific objection had nothing to do with the lack of proof of the required approval of the method. A general objection ordinarily is sufficient to raise questions as to the competency or relevancy of testimony, but it does not reach the absence or insufficiency of the foundation necessary or appropriate for its introduction because it fails to apprise the court of the deficiency or give the adverse party an opportunity to supply it. *Vaughan* v. *State,* 58 Ark. 353, 24 S. W. 885; *Western Union Telegraph Co.* v. *Alford,* 110 Ark. 379, 161 S. W. 1027, 50 LRA 94 (ns); *Linn-McCabe Co.* v. *Williams,* 116 Ark. 307, 172 S. W. 895.

The only time when any question was raised as to the failure of the State to show that the "Breathalyzer" test was a method approved by proper authority was in

appellant's objection to the giving of an instruction advising the jury of the rebuttable statutory presumption that appellant was under the influence of intoxicating liquors if there was 0.15 per cent, or more, by weight of alcohol in appellant's breath. This was too late. *Warren* v. *State*, 103 Ark. 165, 146 S. W. 477.

The second ground for reversal is based upon the contention that the trial court erred in holding that the witness was a competent operator of the machine, qualified to testify as to the results of the test. Neither the propriety of the procedure followed, the operating order of the equipment, or the condition of the materials used in making the test was questioned.

It seems to be conceded that the qualification of the operator is one of the necessary components of a proper foundation for the introduction of the results of such a test. See *Stacy* v. *State,* 228 Ark. 260, 306 S. W. 2d 852. Officer Gachot testified that he had been operating the machine as a part of his duties for three and a half years and couldn't count the number of sobriety tests he had given. He supposed that he had given hundreds and hundreds of them. He briefly outlined the operation of the machine, admitting that he did not know how the "inside" worked. He said that he did know how to work it and had been to school to learn to operate it.

The qualifications of a witness, the competency of whose testimony depends on his skill in a particular field, are largely within the discretion of the trial judge. His determination will not be disturbed by this court except in extreme cases where there is manifest error or abuse of discretion resulting in prejudice to the complaining party, even though this court might have decided differently. *Roark Transportation, Inc.* v. *Sneed,* 188 Ark. 928, 68 S. W. 2d 996; *Ratton* v. *Busby,* 230 Ark. 667, 326 S. W. 2d 889, 76 ALR 2d 751; *Fireman's Ins. Co.* v. *Little,* 189 Ark. 640, 74 S. W. 2d 777; *Lee* v. *Crittenden County,* 216 Ark. 480, 226 S. W. 2d 79; *Arkansas*

Power & Light Co. v. *Morris,* 221 Ark. 576, 254 S. W. 2d 684. While we think that the testimony as to the qualification of this officer was minimal, we are unwilling to say that there was any abuse of discretion in admitting the evidence of the test on this ground.

Affirmed.

BYRD, J., not participating.

JAMES GIVENS *v.* STATE OF ARKANSAS

5276 418 S. W. 2d 629

Opinion delivered September 11, 1967
[Rehearing denied October 16, 1967.]

Fred A. Newth Jr. and *Harry Robinson,* for appellant.

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

J. Fred Jones, Justice. This is an appeal from the Jefferson County Circuit Court denying appellant's motion to discharge the appellant and dismiss the information filed against him, and in overruling appellant's subsequent motion to set aside a jury verdict and grant a new trial.

The record reveals the following facts: On April 4, 1966, informations were filed by the prosecuting attorney in Jefferson County, charging the appellant Givens, and also one Martin, with armed robbery, and a bench warrant was issued for the appellant. The warrant was served and appellant taken into custody on July 13, 1966. Appellant remained in custody, unable to make bail, until his jury trial on January 23, 1967.

On January 23, 1967, prior to trial, the appellant filed a motion for his discharge and for dismissal of the information filed against him, because he had been in jail since his apprehension and had not been permitted to enjoy the right of a speedy trial as provided in the state and federal constitutions. The motion was overruled by the trial court, the jury returned a verdict of guilty and fixed punishment at seven years in the penitentiary. Appellant waived the forty-eight hour delay in sentencing and was sentenced to seven years in the state penitentiary by order of the court entered on January 23, 1967. Appellant's subsequent motion for a new trial was overruled and this appeal is from the orders denying the motions.

Appellant sets out two points he relies on for reversal, as follows:

"1. Defendant's incarceration in Pulaski County jail under hold order and subsequent incarceration in Jefferson County jail, with trial passed twice over defendant's strong objections was in violation of defendant's civil, state, and federal rights to a speedy and public trial as guaranteed by the Arkansas and United States of America Constitutions.

"2. Once such right accrued to defendant the court erred in overruling defendant's motion to discharge the accused and dismiss the information filed herein."

All the evidence, in the record before us, is directed to the delay in trying the case after appellant was arrested. On July 14, 1966, appellant's attorney wrote a letter to the prosecuting attorney requesting that the case be placed on docket for an early trial. On August 9, 1966, appellant's attorney again wrote to the prosecuting attorney calling attention to an agreement to try the case as soon as possible and requesting the prosecuting attorney to contact the trial judge in an effort to get the case set for trial. On October 21, 1966, appellant's attorney advised the appellant that his case had been set for trial on December 1, 1966.

The record indicates that the appellant and his co-defendant may have been tried together. In any event, no motion for severance is in the record and the record reveals that an attorney was appointed by the court to represent appellant's co-defendant, and that the court, on its own motion, passed the cases for trial on December 1, 1966, because the co-defendant's counsel had not had time to prepare for trial following appointment. On December 7, 1966, appellant's counsel wrote a letter to to the Circuit Judge requesting a jury trial at the earliest possible date and the case was tried on January 23, 1967.

A second postponement in the trial of the case was mentioned at the hearing on motion in chambers and is

referred to in appellant's brief, but the record is not clear as to any other specific dates the appellant's case was set for trial except on December 1, 1966, when it was passed, and on January 23, 1967, when it was tried.

Appellant concludes his brief as follows:

> "The question here is whether an incarceration from April 4, 1966, to January 23, 1967, with accused constantly demanding trial, and with trial passed over twice over defendant's objections, despite only two trials in eight months, is a violation of appellant's constitution guarantees of speedy trial."

The record before us does not sustain the contention that appellant was incarcerated from April 4, 1966, to January 23, 1967, on the charges for which he was tried. The sheriff's return on the bench warrant is as follows:

> "I hereby certify that I have executed the within Bench Warrant by taking the body of the within named James Givens C. M. who is now in custody subject to the orders of the Court, this 13th day of July, 1966."

The appellant argues in his brief t' at he had been held in jail for eight months awaiting trial, but he testified on the day of his trial that he had been in custody about six months.

A trial court has a great deal of discretion in the postponement of trials under Ark. Stat. Ann. § 43-1705 (Repl. 1964). This is necessarily so in the orderly conduct of the business of the courts in the various counties of a district, and the work of a trial judge in a four court district cannot be accurately measured by the number of jury trials alone, conducted in any one of the courts of the district. We find no abuse of discretion by the trial court in the case before us, and we are of the

opinion that appellant's right to a speedy trial was not violated in this case.

Information was filed, warrant issued, and the appellant taken into custody during the March 1966, term of Jefferson County Circuit Court, and appellant was tried in the following October 1966 term. (Ark. Stat. Ann. § 22-310 [Repl. 1962]).

Ark. Stat. Ann. § 43-1708 (Repl. 1964) provides as follows:

> "If any person indicted for any offense, and committed to prison, shall not be brought to trial before the end of the second term of the court having jurisdiction of the offense, which shall be held after the finding of such indictment, he shall be discharged so far as relates to the offense for which he was committed, unless the delay shall happen on the application of the prisoner."

and Ark. Stat. Ann. § 43-1709 (Repl. 1964) limits the time a person may stand indicted without trial while free on bail.

We do not agree with appellant's argument that Ark. Stat. Ann. § 43-1705 "is unconscionable and not attune with recent decisions of the United States Supreme Court." Section 43-1705 provides for postponement of trial "upon sufficient cause shown by *either* party" and the cases indicate that defendants have invoked the provisions of this statute far more often than the prosecution.

The United States Supreme Court case of *Klopfer* v. *State of North Carolina,* 35 Law Week 4248, cited by appellant, is not in point with the case here.

In the Klopfer case the defendant was indicted for criminal trespass on February 24, 1964. He was tried in March of 1964, but the jury failed to reach a verdict

and the case was continued for the term. Prior to the April 1965, session of the court, the prosecuting attorney informed the defendant that he intended to have a "*nolle prosequi* with leave" entered in the case, but instead, the prosecuting attorney moved to continue the case for another term and the motion was granted. The case was not set for trial in the August 1965 session and the defendant filed a motion to have the charge pending against him permanently concluded in accordance with the applicable laws of the state of North Carolina and the United States as soon as is reasonably possible, noting that some 18 months had elapsed since the indictment. In response to the motion, the trial judge considered the status of the defendant's case in open court in August 1965, and at that time the prosecuting attorney moved the court that the state be permitted to take a "*nolle prosequi* with leave," and the court granted the motion over the defendant's objections.

Nolle prosequi with leave under the North Carolina practice procedure was simply a method whereby an accused was permitted to remain free *under indictment* indefinitely or until such time, as the prosecuting attorney *in his discretion,* saw fit to reinstate the case and try the accused on the charge for which he stood indicted.

North Carolina did not have a statute for the protection of the accused like our Ark. Stat. Ann. § 43-1708, supra. We are of the opinion that this statute is sufficient security in Arkansas for the speedy trial contemplated by the constitutions of Arkansas and the United States, and we find nothing in the record before us that would justify the shortening of that period by our decision in this case.

The judgment and orders of the trial court are affirmed.

JIM PATE CHANDLER *v.* STATE OF ARKANSAS

5279 417 S. W. 2d 957

Opinion delivered September 11, 1967

Alfred Featherston, for appellant.

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

CONLEY BYRD, Justice. Appellant, Jim Pate Chandler, was convicted upon a charge of possessing an illicit still, Ark. Stat. Ann. § 48-936.1 (Repl. 1964). In his motion for new trial he listed six points upon which he relies for error here. Appellant in his brief has argued the six points under two general headings—*i. e.,* (1) sufficiency of the evidence and (2) prejudice of his case by the trial court through comments on the evidence and in the manner in which he intervened to correct and question witnesses.

The evidence shows that on September 20, 1966, early in the morning Deputy Sheriff Lewis Tollett, learning of a still in the vicinity of appellant's home some three miles east of Dierks, drove by there accompanied by State Police Sergeant Ernest Hawthorne. Observing that appellant's vehicle was not there, they parked some distance away and proceeded to a gravel pit. The still

was found about a hundred yards south of the gravel pit near a pond and approximately 440 yards northeast from appellant's home. The officers concealed themselves in the briars and waited. In about thirty minutes they heard a door slam and a pickup drive off in the direction of appellant's home. About fifteen minutes after the door slammed, appellant came to the still from over the pond bank, walked straight past the first two barrels and took the cover off the third barrel. Appellant then walked toward the cooker from the barrel and back to the barrel. When appellant was arrested he was filling a glass jug in the third barrel. He told the officers that he was just passing by, smelled the mash and stopped to get a drink.

Upon further investigation the officers determined that the mash in the first two barrels, which appellant had walked by, was not as sour and milky-looking as that in the third barrel.

From the still, two well-beaten paths were observed. The one up over the dam to the pond was the most used but after that it petered out. The other path went southwesterly through the woods toward appellant's house down an old road running parallel with the road that runs north and south in front of appellant's house.

Sergeant Hawthorne testified that according to appellant's reputation he was definitely involved in liquor. Other testimony showed that in 1955 he had pleaded guilty to having a still, had subsequently been fined for having untaxed liquor, and had recently been drunk on numerous occasions.

Under the circumstances, we hold that there was sufficient evidence to make a jury issue on the possession of a still.

Appellant's contention that the trial judge showed his bias and prejudice against the defendant arises, principally, from the conduct of the trial judge during the prosecution's examination of Deputy Sheriff Lewis Tollett and during defendant's examination of his witness Harmon Chandler.

Upon the examination of Deputy Tollett, in answer to a question as to whether appellant had a reputation as to dealing or trafficking in illicit liquor, the witness had stated "Yes," whereupon the following occurred:

"Q. What is that reputation?

A. He drinks it.

THE COURT: (To witness) No, just what they say about him dealing in it. Not whether he drinks it or not.

A. He drives up and down the road drunk.

THE COURT: (To witness) I don't think you understood his question. He asked if he had a reputation for dealing in intoxicating liquors in that area, and you said he did have a reputation. Now, he wants to know if that reputation is good or bad.

A. Bad."

During defendant's examination of witness Harmon Chandler, counsel for defendant was attempting to elicit what appellant's reputation was when the following occurred:

"MR. HARDEGREE: Your Honor, we object to any further questioning unless properly founded.

THE COURT: Yes, sir. If there was evidence showing he had a reputation for drinking it shouldn't have been introduced. It could have been without objection. I think the question

was, did he deal and traffic in intoxicating alcoholic beverages.

MR. FEATHERSTON: No testimony that he did, so if the Court would rule to exclude that other testimony, I now move that you do, and the jury consider no testimony on reputation, because he had no reputation of possessing or having anything to do with an illicit still. We need no further testimony on that.

THE COURT: Mr. Featherston, I am not permitted to comment on the evidence. I can say there was evidence introduced concerning his reputation for dealing in intoxicating beverages in recent times. There was evidence to that effect, by reputation only, and that's all that is permitted, of course.

MR. FEATHERSTON: Then if the Court will let that testimony stay, then we are entitled to offset it.

THE COURT: You are entitled to show he has a reputation for being a peaceable, law abiding citizen if you desire to."

The record fails to show any objection on appellant's part with respect to any conduct of the trial judge challenged by appellant. In *Graves* v. *State*, 155 Ark. 30, 33, 243 S. W. 855 (1922), we held that the failure to make such an objection or exception waived the alleged error on appeal. This is in accordance with our procedure, 15 Ark. L. R. 69, and we accordingly hold that appellant's contention is without merit.

The judgment is affirmed.

NATIONAL INSURANCE UNDERWRITERS
v. ANNIE MAE MATTHEWS, EX'X OF THE ESTATE OF J. M. MATTHEWS, DECEASED, AND INDIVIDUALLY

5-4293 418 S. W. 2d 391

Opinion delivered September 18, 1967

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

Marion S. Gill, for appellee.

CARLETON HARRIS, Chief Justice. This litigation involves airplane insurance. J. M. Matthews owned a 1959 Piper Apache Airplane, and on April 1, 1966, purchased a policy of insurance from appellant company, National Insurance Underwriters, the company being hereafter referred to as "National," or appellant. Under the policy, appellant agreed to pay to Matthews the sum of $15,000.00 (with a $1,000.00 deductible provision) in

event the airplane was totally destroyed by coming into contact with the ground, subject, however, to certain exclusions, which form the basis of this litigation. On April 28, 1966, in Desha County, near Winchester, Arkansas, the plane, with Matthews as the sole occupant, crashed, killing Matthews, and totally destroying the aircraft. Thereafter, appellee, Annie Mae Matthews, widow, and executrix of her husband's estate, made due proof of the loss of the plane, but National declined to pay the $14,000.00, tendering, however, the return of $840.09 in premiums. Suit was instituted to recover for the loss, and appellant defended the litigation upon the basis that such loss, due to an exclusion clause in the policy, hereinafter discussed, was not covered. The cause was submitted to a jury, which returned a verdict against appellant in the amount of $13,159.91. From the judgment entered on this verdict, National brings this appeal. For reversal, only one point is relied upon, *viz.*, "There is no substantial evidence to support the verdict of the jury upon which the judgment entered was given."

The exclusion in the policy of insurance relied upon by appellant, and which was pleaded as a defense, provides as follows: "This policy does not apply under Part III A. to loss * * * during or as a result of its the airplane's operation:

* * *

(3) under Instrument Flight Rule (s) (IFR) conditions unless the pilot possesses a valid Instrument rating and is proceeding in accordance with Instrument Flight Rules; * * *"

The parties stipulated that Instrument Flight Rules conditions were conditions other than those authorized for visual flying under Visual Flight Rules, or conditions other than Visual Flight Rules (VFR) conditions. Matthews did not have an instrument rating, and was only authorized to fly by Visual Flight Rules. The pertinent portion of these rules provides as follows:

"(a) Distance from clouds.***, no person may operate an aircraft under VFR—****

(4) Outside controlled airspace at an altitude of more than 1,200 feet above the surface, at a distance less than 500 feet below or 1,000 feet above, and 2,000 feet horizontally from, any cloud formation; or

(5) Outside controlled airspace at an altitude of 1,200 feet or less above the surface, unless the aircraft is clear of clouds.

(b) Flight Visibility.**** no person may operate an aircraft under VFR—

* * *

(3) Outside controlled airspace, unless flight visibility is at least one statute mile."

It was stipulated that the crash occurred about four miles west of Winchester in an area not "known as controlled airspace area." Appellant simply contends that the airplane was being operated under conditions controlled by the exclusion in the policy and that is the sole question for determination in this case.

Appellant concedes that the issuance of the policy, and the payment of the premium thereon, being established by appellee, the burden shifted to it to establish that the loss of the aircraft "was caused by a condition existing at the time by virtue of an incompetent pilot operating the aircraft under IFR conditions when he did not hold an instrument rating. * * *"

Five witnesses, residents of the area in which the mishap occurred, testified, three on behalf of appellant, and two on behalf of appellee. The testimony reflects that the plane circled several times before getting out of control, and the witnesses described sounds which indicated that the engine was not properly functioning. According to Shelby Appleberry:

"Yeah, and then it would, you could hear it backfire, or pop, or whatever they do after I guess it was when he shut the throttles off. I don't know all that much about it, but anyway when he would open this thing wide open it sound like and when he would close it down it would backfire and it done that two or three times."

Morris Newton, who heard the noise and went outside his house, stated:

"When I first went outside the engines wasn't running wide open there, they sounded like they were popping, cutting out. * * * It sounded more to me like they were opened up but stalling out."

Virgil Abston testified:

"Well, I heard the plane make, go by my place in a generally southwesterly direction at which time I didn't pay too much attention except that it did change the tone of the engines and I had during the daytime on other occasions noticed that some passenger planes had changed, would change their direction due to a cloud formation that they wanted to go around, nevertheless I didn't go out to see until after this plane had made this pass in a southwesterly direction and turn and came and then went pretty well back in a northeasterly direction which was practically the opposite direction where I first heard it. In a few moments I noticed that the plane begin to make some unusual noises for a plane in the air at night or for that matter, in the daytime * * *

* * *

Q. You made some mention of an unusual noise, you noticed something unusual about the motors, please explain that?

A. After I had gone out in the yard and before the airplane appeared there was an unusual thing happened in my opinion, for an airplane and that is it appeared that

the engines were either cut back or that they were idled back to just idle speed, and almost immediately then there was a pop or a normal cough for an engine whichever you want to say, and in a very few moments is when the airplane, I saw the airplane it was just almost in a vertical position, yes sir."

All witnesses agreed that there were no storm conditions in the area where the crash occurred, nor was there wind, rain, or fog. There was also evidence that many of the farms had "night lights" which were burning.[1] The plane crashed at a very slight angle, almost completely vertical. Though there was some testimony to the effect that the witnesses, on going outside of their homes to observe what was happening, could not at all times see the plane (and the time was "dusk dark"), *not a single witness testified that he saw the aircraft emerge from a cloud.* They could not state (when unable to see the aircraft) whether the plane was above a cloud, or in it, or whether the pilot simply did not have the plane's landing lights on at all times.

Arthur L. Mayer, an airplane pilot, who lives at Dumas, testified as an expert. The witness has been flying 27 years, and has more than 27,000 hours flying time. He has frequently acted as an instructor, but does not have an instrument rating. He explained the regulation here in question by pointing out on a diagram that flying by Visible Flight Rules simply means that a person is:

* * * flying five hundred feet below the clouds and this one means a thousand feet above the clouds; in other words, there wouldn't necessarily have to be two clouds here, that is just to show the point. He could fly under the cloud at five hundred feet, two thousand feet

[1]Appellee points out that these lights would have aided Matthews in locating his position, and it is argued that this is another circumstance indicating that the plane was "in trouble," rather than lost.

horizontally or one [statute] mile[2] visibility outside a controlled zone, but he must stay a thousand feet above it."

The witness stated that darkness, wind, and rain, in themselves, have nothing to do with Instrument Flying Rules conditions, and that IFR and VFR regulations are affected only by clouds and visibility.

Weather reports from Memphis, Little Rock, and Pine Bluff were introduced into evidence, and Mayer, after examining these, testified that the weather conditions existing, as shown in the reports, did not constitute Instrument Flight Rules conditions, because there was a minimum for visual flight. Mayer testified that he personally could have flown a plane under the conditions reflected by the weather reports without violating Instrument Flight Rules. The witness further stated that on the night of April 28, around 7:30 P.M. (the approximate time of the crash) he was returning home to Dumas from Belco Lake; that the moon and stars were shining, and there were only a few scattered clouds; that the conditions existing did not constitute IFR conditions.

Of course, it was the function of the jury to pass upon the facts, and we are only concerned with whether there was substantial evidence to support the verdict. Furthermore, as stated in *Glens Falls Insurance Company* v. *Browning, et al,* 228 Ark. 1087, 312 S. W. 2d 335, the testimony must be viewed in the light most favorable to appellee. When we consider these facts, it is evident that appellant has not met the burden of establishing that this plane was being operated in violation of the exclusive provision listed in the insurance policy. There simply was no proof as to the altitude of the plane, and not a single witness was able to say that the plane was ever flying in the clouds. Actually, there is

[2]According to the witness, a statute mile is 5,280 feet, *i.e.*, the pilot must be able to see one mile.

as much, if not more, evidence that the crash was caused by engine trouble.

Appellee requests an additional attorney's fee in this court, and we are of the opinion that this should be allowed in the amount of $1,000.00.

It is so ordered.

Affirmed.

CARL W. WIDMER *v.* ROY G. WOOD ET UX

5-4248 420 S. W. 2d 828

Opinion delivered September 18, 1967
[Substituted opinion delivered November 13, 1967.]

Carl W. Widmer, pro se, for appellant.

Hardin, Barton, Hardin & Jesson, for appellees.

GEORGE ROSE SMITH, Justice. We cannot reach the merits of this case. The timely filing of a notice of appeal is essential to our jurisdiction. Ark. Stat. Ann. § 27-2106.1 (Repl. 1962); see *General Box Co.* v. *Scurlock,* 223 Ark. 967, 271 S. W. 2d 40 (1954). Here the notice was filed too late.

The appellant, acting *pro se,* filed his complaint in the Sebastian Circuit Court for damages arising from an asserted breach of a contract by which the appellees sold him certain land in Oklahoma. After a series of interlocutory proceedings the court entered its final judgment on September 13, 1966, sustaining the defendants' demurrer and motion to strike and dismissing the complaint for failure to state a cause of action.

On October 7 the plaintiff filed a motion asking the court to rescind its order of September 13 and to enter a summary judgment for the plaintiff. On November 17 the trial judge denied that motion. Two days earlier, on November 15, the plaintiff had filed his notice of appeal from the September 13 judgment. That filing was after the expiration of the thirty days allowed by the statute, *supra.* On November 23 he filed a second notice of appeal, referring both to the September 13 judgment and to the November 17 denial of his motion.

The motion to rescind the September 13 judgment is to be treated as a motion for a new trial. *Hill* v. *Wilson,* 216 Ark. 179, 224 S. W. 2d 797 (1949). Such a motion to vacate does not extend the time for appealing from the original final judgment; for if that were so the appellant could obtain a review of the judgment even though he had not taken his appeal within the time allowed by statute. *Sheffield* v. *Brandenburg,* 190 Ark. 60, 76 S. W. 2d 984 (1934); *Pearce* v. *People's Sav. Bk. & Tr. Co.,* 152 Ark. 581, 238 S. W. 1063 (1922).

Nor has the appellant brought himself within Act 123 of 1963, Ark. Stat. Ann. §§ 27-2106.3 to 27-2106.6 (Supp. 1965), which we construed in *St. Louis S. W. Ry.* v. *Farrell,* 241 Ark. 707, 409 S. W. 2d 341 (1966). As we said there: "Section 1 of Act 123 requires that any motion for a new trial be filed within the time provided by law. That time is ordinarily a period of fifteen days after the rendition of the verdict. Section 27-1904." In the case at bar the plaintiff's motion to rescind the judgment, which, as we have seen, was in substance a motion for a new trial, was not filed within fifteen days after the entry of the September 13 judgment. Section 27-1904 provides for an extension of the fifteen-day limit in exceptional circumstances such as an unavoidable delay, but no such showing is made here. It follows that the belated filing of the motion to rescind did not bring the appellant within the purview of Act 123.

The clerk of this court was right in accepting the record when it was tendered for filing, for on its face there was a timely notice of appeal from the trial court's denial of the motion to rescind. That denial, however, did not extend the time for appealing from the original final judgment or from prior interlocutory orders, and no other error is asserted.

Affirmed.

RONNIE LEE ELSER *v.* STATE OF ARKANSAS

5284 418 S. W. 2d 389

Opinion delivered September 18, 1967

Roy Mitchell, for appellant.

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

George Rose Smith, Justice. This is a petition for post-conviction relief under our Criminal Procedure Rule No. 1. 239 Ark. 850a. The trial court denied the petition.

In October, 1965, the appellant, Ronnie Lee Elser, and a codefendant, Victor Houk, were charged with having robbed two motels in Garland county. At the arraignment Elser declined the offer of the trial judge, P. E. Dobbs, to appoint counsel for him. Elser pleaded guilty to one charge and not guilty to the other. No evidence was introduced except written statements by the two defendants, both of whom said that Elser had nothing to do with the robbery of one of the motels, the Sands. The trial court nevertheless found Elser guilty upon both counts and imposed a sentence of imprisonment for fifteen years, with five years suspended on condition of good behavior.

Two months later Elser filed his present petition, in which he asserted his complete innocence of both offenses. He attributed his earlier plea of guilty to bru-

tality on the part of the Little Rock police when he was first arrested and to his fear of similar mistreatment by the Hot Springs police if he insisted on his innocence. When the Rule 1 petition was filed Judge Dobbs appointed Earl Mazander, a member of the Garland county bar to represent Elser. After a hearing, at which Elser and several police officers testified, the court entered an order finding that Elser had committed perjury and that the relief sought should be denied.

For reversal it is argued that in the original arrest and arraignment the appellant's constitutional rights were violated in several respects. We do not reach those issues, because, unfortunately, it is apparent from the record that Elser did not receive in the court below the impartial hearing to which he was entitled. It is evident that from the outset Judge Dobbs had a preconceived conviction that the assertions in the Rule 1 petition were false. Again and again he intervened in the presentation of the evidence, exhibiting such unmistakable bias and such a prejudiced demeanor as to render his findings of no value to this court. To make our point clear we think it sufficient to quote a few excerpts from the record.

> The Court: Now you've filed a petition in here because your rights have been violated by—under the Constitution. You're representing him. I appointed you to represent him?
>
> Mr. Mazander: That's correct, you honor.
>
> The Court: You know I'm getting tired of you guys coming in here to court and I've got to appoint somebody to represent you. All right, put on your evidence.
>
> Circuit Clerk, Mr. Hilliard [to Elser]: Will you raise your right hand and be sworn please, sir?
>
> The Court: I don't think that would do any good but go ahead and swear him.

* * *

The Court: Do you mean to tell me that you still don't admit that you robbed the Holiday Inn?

A. I did not rob the Holiday Inn.

The Court: You walked in there and knocked a poor old man in the head with a pistol and you don't admit it?

A. I did not.

* * * * *

The Court: Just a minute, answer my question. You were identified as the person who used a pistol and beat this poor old man over the head, aren't you?

A. We were identified.

The Court: Okay . . . I know more about this case than you do, just about as much about it.

* * * * *

The Court: Just a minute. He's a thug [referring to Houk, the codefendant] just like you are, isn't he? Uh? You want to admit it?

A. I don't know as I'm a thug, your honor.

The Court: If you wasn't a thug why did you go down there and take a pistol and hit an old man over the head?

A. I denied that.

The Court: I know you denied it, but it's the truth. Just like I am right now, I'm a little bit worked up, too.

* * * * *

The Court: Mr. Whittington [the prosecuting attorney], I think he's admitted everything he wanted to. I want to file a perjury charge against him. But he's admitted everything—

Mr. Whittington: Sir, we haven't made a liar out of him yet.

The Court: Huh?

Mr. Whittington: Give me about five minutes, sir.

The Court: Okay . . . I would like to sentence him now for 20 more years. [To this point no one had testified except Elser, who denied his guilt.]

* * * * *

The Court: Let me say this to you, Mr. Mazander. There was no warrant. I issued the warrant the next day.

Mr. Mazander: Your honor, I'm just trying to make a record. We allege in this petition that it was an illegal arrest, and I think I ought to be able to put in evidence that this Lieutenant—

The Court: How is there going to be an illegal arrest? You just answer me one question, how is it going to be illegal arrest when two thugs come in here and beat an old man with a pistol?

* * * * *

Mr. Mazander: That's all the testimony, your honor.

The Court: I want him to stand up. At the time I gave you a sentence I gave you fifteen years, five suspended. Now since you came in here and lied like a dog against all the police officers and everybody I'm going—you know what—I'm going to put that up five year, 'cause you in my opinion, you've just

lied like nobody's business. You admit it's your pistol, don't you?

A. I did not admit that was my pistol.

Q. You admitted you had one, didn't you?

A. I had a pistol.

Q. And you admit robbing the Holiday Inn?

A. I deny that.

Q. You do, eh? I tell you what I'm going to do. I'm going to suspend this other five years. I want you to go down for fifteen more years and don't come back up here before me again. Now that's all I've got to say—I'm going to suspend—I gave you ten and I suspended five of it trying to give you a chance. And you've come up here and lied before all the officers and everybody else. I want you to go back down there where you belong. The Sheriff will take him back down there and lock him in the cell and deliver him to the penitentiary. I want you to take him to the penitentiary yourself, for somebody—

Mr. Mazander: If it please the court, your honor, I'd like to enter into the record the objection to the changing of the original sentence.

The Court: Mr. Mazander, I think you know that I retained your assistance.

Mr. Mazander: That's correct, your honor, but I want the objection in the record.

The Court: Okay, you can object, 'cause I'm going to give him another five years down there for coming back up here.

As we have indicated, we attach no weight to the trial court's findings. It is evident that the trial judge

should have withdrawn from the case when the petition came on to be heard. A new hearing is accordingly necessary. Even though the testimony has been extensively developed and is before us, in cases at law it is not our province to decide issues of fact when the evidence is in conflict. *Boatner* v. *Gates Bros. Lbr. Co.*, 224 Ark. 494, 275 S. W. 2d 627, 51 A. L. R. 2d 326 (1955). Of course we do not imply that Elser's uncorroborated testimony outweighs that of the five police officers who testified for the State, or vice versa. The circuit judge who hears the case on remand (Judge Dobbs having retired) will pass upon contested issues of fact.

Reversed.

JULIUS N. DeLAUGHTER ET AL *v.* W. R. BRITT

5-4256 418 S. W. 2d 638

Opinion delivered September 18, 1967
[Rehearing denied October 16, 1967.]

R. D. Rouse, for appellants.

Hugh Lookadoo, for appellee.

PAUL WARD, Justice. This litigation grew out of two written lease agreements (covering a period of fourteen years) wherein the (alleged) owners gave W. R. Britt (appellee) the right to use a total of 445 acres of land for farm and ranch purposes. Since the leases and the ensuing legal proceedings are somewhat lengthy and complicated, we summarize below, for a better understanding of the issues involved, the pertinent and undisputed facts.

(a) The first lease, dated January 6, 1956, was from Julius N. DeLaughter and his wife Lois DeLaughter (appellants) as lessors to appellee as lessee. In paragraph 10 of the lease appellants warranted that they were the absolute owners of all the 445 acres of land and that they would hold appellee harmless "against the unlawful claims of any and all persons". (b) Later, during this litigation, it was revealed that appellants had title to only thirty acres and that the remaining 415 was owned by their minor son Julius N. Jr. who is an Intervenor herein. By the terms of the first lease it was to terminate on December 31, 1960 but it continued, by oral agreement, until a second lease was executed on April 14, 1964. (c) The second lease was executed by the same parties as the first and contained the same warranty of title, and, with few minor exceptions, the terms of the two leases were the same.

Pleadings and Issue. We deem it sufficient at this point to summarize the twelve separate pleadings filed in the Chancery Court, following an alleged breach of

the lease by appellee. (a) On December 18, 1965 appellants asked the court to enjoin appellee from interfering with their sale of gravel located on the land. On January 18, 1966 they amended the pleading, and asked the court to cancel the second lease and give them possession of the property. (b) Appellant answered, denying any breach of the lease contract, asked for peaceful possession of the land, and asked that appellants be enjoined from selling gravel during the term of the lease. Then each party filed another amended pleading relative to the same issues. (c) On February 2, 1966 the minor (by his mother as next of kin) filed an Intervention, alleging that he was sixteen years old, and that he was the owner of all the land except thirty acres belonging to his parents—appellants. His prayer was that the lease be cancelled, that he be given immediate possession, and that he recover from appellee the rental value of his 415 acres of land. (d) In his answer appellee denied Interpleader was the owner of the land. Appellee also filed an amendment to his original answer and a cross-complaint against appellants setting out the warranty clause and alleging payments of rent to them, and asked the court, in event it was decided Intervenor was the true owner, that he recover against appellants $1,500 for rents paid and $5,000 for damages suffered for breach of warranty in the leases.

Decree. After a lengthy hearing (during which time the trial court made a personal inspection of the premises) and after the court had made detailed findings of facts, it entered, in substance, the following decree:

> (a) Appellee is not to interfere with appellants' removal of gravel from the thirty acre tract, but they shall not damage the portion maintained by appellee as a meadow.
>
> (b) Intervenor is awarded judgment against appellee in the sum of $6,150 with interest at 6 %from date of decree.

(c) Appellee is awarded judgment against appellants in the sum of $6,150 BUT ONLY after he has fully satisfied the judgment in favor of Intervenor —then the judgment in favor of appellee to bear 6% interest.

Appellants and Intervenor now prosecute this appeal, urging the points hereafter considered.

One. Intervenor urges that the court failed to allow interest on his judgment from January 1, 1956—the date when he was first deprived of the use of his land. For reasons presently stated, we are unable to grant any relief under this point.

The record discloses that on the margin of Intervenor's recorded judgment there appears this notation: "Judgment in favor of Intervenor, Julius N. DeLaughter, Jr., in the sum of $6,150 paid and satisfied in full this 23rd day of August, 1966. R. D. Rouse, attorney of record for Intervenor." Thus, the Intervenor has already accepted the benefits of the decree and therefore cannot question its validity on appeal. It was so held in *Ark. State Highway Comm.* v. *Marlar,* 236 Ark. 385, 366 S. W. 2d 191; *Baker* v. *Adams,* 198 Ark. 482, 129 S. W. 2d 597, and; *Jones et al* v. *Rogers, Trustee, et al,* 222 Ark. 523, 261 S. W. 2d 649.

Two. We find no merit in appellants' contention that appellee's "pleadings do not justify the judgment rendered in his favor against appellants". As pointed out heretofore, in appellee's amended answer [page 26 of the Record], he alleged damages in the amount of $6,500, and prayed judgment against appellants for said amount. Also, if the pleadings were not explicit the trial court had the right, without objection, to treat the pleadings as amended to conform to the proof. *Callahan* v. *Farm Equipment, Inc.,* 225 Ark. 547, 283 S. W. 2d 692.

Three. Likewise we find no merit in appellants' argument that appellee was not entitled to damages

against them because they and appellee were *Pari Delicto,* [equally at fault] in dealing with lands which belonged to Intervenor. Conceding for the sake of argument that appellee knew when the leases were signed that most of the land belonged to appellants' minor son [a fact not clearly shown by the Record], we cannot disregard the fact that paragraph ten of the first lease and paragraph eleven of the second lease contain identical language which reads:

> "Lessors warrant that they have an absolute and indefeasible title to said lands and warrant that they will, during the term hereof, defend the title to said lands and *hold harmless* said Lessee against the lawful claims of *any and all persons* or parties Whomsoever or whatsoever." [*Emphasis added.*]

Four. Finally it is contended by appellants that the trial court erred in finding the fair rental value of the thirty acres was $30 per year.

This is a fact question to be decided by the weight of the evidence disclosed by the record. We have read the record relating to this issue and are unwilling to say the finding of the trial court is against the weight of the evidence. We find no convincing testimony as to the rental value, however the value fixed is comparable to the value placed on all the land by the terms of the lease—$500 a year for 445 acres. We also take note that the trial court, before fixing this value, made a careful, personal inspection of the lands.

Affirmed.

SMITH, BROWN & FOGLEMAN, JJ., dissent.

LYLE BROWN, Justice, dissenting in part. I would modify the judgment of the trial court in one respect. I think the minor is entitled to interest on the rent monies due him, calculated on the basis of each annual

due date. Ample authority for this conclusion is cited in Justice Fogleman's dissent and is not here repeated.

JOHN A. FOGLEMAN, Justice, dissenting. I must respectfully dissent from the decision and opinion of the majority.

In treating what they designate as appellants' Point One, I feel that they have misapplied the very wholesome doctrine that one who has accepted benefits of a judgment or decreee cannot question the validity thereof. The validity of the judgment was not questioned by the minor appellant. He only contended that he was entitled to a greater amount in that the court failed to include in the damages for detention of his property interest on the amount found to be the annual fair rental value thereof. There was no cross-appeal as to the amount of these damages. His appeal could have only resulted in either an affirmance as to this amount or an increase and there was no hazard of a reduction of the amount of his recovery.

There is no doubt that the acceptance of benefits of a decree which are inconsistent with the relief sought on appeal bars the appeal and requires its dismissal. In addition to cases cited in the majority opinion, see *Wolford* v. *Warfield,* 170 Ark. 82, 278 S. W. 639; *Mathis* v. *Litteral,* 117 Ark. 481, 175 S. W. 398 and *Anderson* v. *Anderson,* 223 Ark. 571, 267 S. W. 2d 316. The same rule applies when the benefits accepted can only be enjoyed by abiding by the judgment of the court. *Stanley* v. *Dishough,* 50 Ark. 201, 6 S. W. 896. The doctrine does not apply, however, when the benefit accepted is not inconsistent with the claim asserted by appellant on appeal. *M. H. McCown* v. *Nicks,* 171 Ark. 260, 284 S. W. 739; *Bass* v. *John,* 217 Ark. 487, 230 S. W. 2d 946; *Kelley* v. *Laconia Levee Dist.,* 74 Ark. 202, 85 S. W. 249; *Cranford* v. *Hodges,* 141 Ark. 587, 218 S. W. 185. The rule is well stated in an early case, *Bolen* v. *Cumby,* 53 Ark. 514, 14 S. W. 926, frequently cited in later cases, in these words:

> "* ** Again, a party may prosecute his appeal from a judgment partly in his favor and partly against him even after accepting the benefit awarded him by the judgment, provided the record discloses that what he recovers is his in any event."

The acceptance of an amount less than appellant contends is due him is an estoppel against his appeal only when, by seeking to gain more by the appeal, he risks a smaller recovery on reversal. *Coston* v. *Lee Wilson & Co.,* 109 Ark. 548, 160 S. W. 857. See also, *Jones* v. *Hall,* 136 Ark. 348, 206 S. W. 671 and *Gate City Bldg. & Loan Ass'n.* v. *Frisby,* 177 Ark. 252, 6 S. W. 2d 537.

The acceptance by appellants of a credit on a judgment against them for an amount becoming due them from an appellee after the rendition of the decree awarding the judgment was held not to be inconsistent with their appeal on which they only contended that they had not been allowed sufficient credits in arriving at the amount of the judgment. *Poe* v. *Walker,* 183 Ark. 659, 37 S. W. 2d 866. A wife challenging a decree of divorce in her favor for failure to award her certain personal property and because it placed a time limit on monthly alimony payments was not estopped to prosecute her appeal by acceptance of the monthly alimony payments provided in the decree where there was no cross-appeal questioning the amount of alimony to be paid each month. *McIlroy* v. *McIlroy,* 191 Ark. 45, 83 S. W. 2d 550.

This appeal, being a trial de novo to decide whether interest should have been included in the junior DeLaughter's damages, could not have resulted in the recovery of a smaller amount on reversal, so appellant was not estopped to appeal.

There is another reason why the son's appeal is not barred. This appellant is a minor and subject to the disabilities of minority. An estoppel is not operative against one under legal disability. *Wood* v. *Terry,* 30

Ark. 385; *Tobin* v. *Spann,* 85 Ark. 556, 109 S. W. 534; *Rowe* v. *Allison,* 87 Ark. 206, 112 S. W. 395 and *Arkansas Reo Motor Car Co.* v. *Goodlett,* 163 Ark. 35, 258 S. W. 975.

The language of the opinion of this court in *Hart* v. *Wimberly,* 173 Ark. 1083, 296 S. W. 39, is particularly appropriate here. The probate court had ordered the sale of lands of a decedent for payment of his debts. The property constituted the homestead of his minor children. Two of them accepted their share of the proceeds of sale remaining after the payment of his debts. There it was said:

> "Neither can the doctrine of estoppel be invoked by appellant from the fact that while yet minors two of them were paid their share of the money left from the sale of the homestead after paying the debts, and deposited with the clerk by the administrator. It would be a weak safeguard of the minor's homestead rights, if the constitutional and statutory protection thrown around such rights could be destroyed by estoppel as is claimed here."

The damages to which this appellant is entitled are those which would be due to a landowner from a trespasser. The measure of damages for appropriation of the use of land by a continuing trespass is the worth of the use of the property. *Combs* v. *Lake,* 91 Ark. 128, 120 S. W. 977 and *Quality Excelsior Coal Co.* v. *Reeves,* 206 Ark. 713, 177 S. W. 2d 728.

The worth of use of this type of land is its fair rental value. *Quality Excelsior Coal Co.* v. *Reeves, supra.* The rule has been recognized in Arkansas for a long time that the measure of damages to the owner for lands wrongfully withheld is the rental value of the land, if it has such value. *Jacks* v. *Dyer,* 31 Ark. 334; *McDonald* v. *Kenney,* 101 Ark. 9, 140 S. W. 999; *Crowell* v. *Seelbinder,* 185 Ark. 769, 49 S. W. 2d 389. As a part of the damages, the minor appellant was entitled to in-

terest calculated from the end of each year to the date of judgment. *Nunn* v. *Lynch* (on rehearing), 89 Ark. 41, 115 S. W. 926; *McDonald* v. *Kenney, supra,* and *McDonald* v. *Rankin,* 92 Ark. 173, 122 S. W. 88. The minor landowner was entitled to have this interest added to the rental value for each year and I would remand the case for this addition to the judgment in his favor.

As to Point Two, I agree that the pleadings are sufficient to form a basis for judgment in favor of appellee against the adult appellants who were parents of the minor appellant and who are appellants here.

Where the right to recovery necessarily follows as a consequence of the decision of the court upon the allegations of a complaint, recovery may be had under the general prayer for relief. *Cunningham* v. *Ashley,* 16 Ark. 181. In chancery practice, where there is a prayer for specific relief and a prayer for general relief, if the state of the case as presented by the bill should not be sustained in evidence or the court should, upon principles of equity, refuse the specific relief, it may, notwithstanding, give to the complainant under his general prayer any relief warranted by the facts set forth in his bill, if the latter is framed to put the facts in issue so that there is no surprise to the adverse party. *Cook* v. *Bronaugh,* 13 Ark. 183; *Kelly's Heirs* v. *McGuire,* 15 Ark. 555; *Ross* v. *Davis,* 17 Ark. 113; *Shields* v. *Trammell,* 19 Ark. 51; *Chaffe & Bros.* v. *Oliver,* 39 Ark. 531; *Albersen* v. *Klanke,* 177 Ark. 288, 6 S.W. 2d 292; *Morgan* v. *Scott-Mayer Comm. Co.,* 185 Ark. 637, 48 S. W. 2d 838, and *Grytbak* v. *Grytbak* (on rehearing), 216 Ark. 674, 227 S. W. 2d 633. Even the omission of a prayer is not fatal if the relief to which a party is entitled is apparent from the allegations of the pleadings. *Sannoner* v. *Jacobson & Co.,* 47 Ark. 31, 14 S. W. 458. If an issue is made by the pleadings and proof directed thereto, the complaint should not be dismissed but the prayer should be treated as amended to conform to the relief justified by the facts. *Ashley* v. *Little Rock,* 56 Ark. 391, 19 S. W. 1058 and *Waterman* v. *Irby,* 76 Ark. 551, 89 S. W. 844.

The first argument advanced by these appellants on this point is based on the failure of appellee to specifically pray for judgment over against them for any amount for which judgment was awarded the minor appellant. The pleading filed by appellee, however, alleged that if the lease be set aside that he should have judgment against the adults for $1,500.00 for repayment of rent, attorney's fees and costs and damages for the loss of the pasture in the amount of $5,000.00. Prayer was for judgment for $6,500.00, plus attorney's fees and costs and "for all other just and proper relief." While appellee was in error as to the measure of his recovery, he did put in issue his right to recover for his loss under the indemnity clause in the lease between the parents and appellee. I do not see how appellee could have been surprised by the proof and the judgment granted.

In another respect, however, the judgment was erroneous in that the maximum *amount* of recovery is limited to the *amount* set out in the complaint and it is error to render judgment for a greater amount. *Hudspeth & Sutton* v. *Gray, Durrive & Co.*, 5 Ark. 157; *White* v. *Cannada,* 25 Ark. 41; *Cohn* v. *Hoffman,* 45 Ark. 376 (damages in ejectment); *Western Union Telegraph Co.* v. *Byrd, Admx.*, 197 Ark. 152, 122 S. W. 2d 569; *Turner* v. *Smith,* 217 Ark. 441, 231 S. W. 2d 110 (chancery case); *Thudium* v. *Dickson,* 218 Ark. 1, 235 S. W. 2d 53; *Arkansas Power & Light Co.* v. *Murry,* 231 Ark. 559, 331 S. W. 2d 98; *Abel of Arkansas, Inc.* v. *Richards,* 236 Ark. 281, 365 S. W. 2d 705. For this reason I would reduce the judgment in favor of appellee to $6,500.00, if the judgment itself were not erroneous and void for still another reason.

The decree rendered provided that appellee have judgment against the adult appellants after, and only after, he had fully satisfied the judgment against him by the intervenor, their son. Such a decree is without authority of law and void. *Bank of Commerce* v. *Goolsby,* 129 Ark. 416, 196 S. W. 803. Judgments take their

validity from the action of the court on existing facts and not from what may happen in the future after the court has rendered its judgment. *Brotherhood of Locomotive Firemen and Enginemen* v. *Simmons*, 190 Ark. 480, 79 S. W. 2d 419.

This is not to say that appellee has no right of recovery against the senior DeLaughters, either in this action or a subsequent one. The void contingent judgment should be reversed, however, and the cause remanded for further proceedings. In all other respects I concur with the majority.

I am authorized to state that George Rose Smith, J., joins in this dissent.

JAMES LLOYD BOSTIC *v.* CITY OF LITTLE ROCK, ARK.

5288 418 S. W. 2d 619

Opinion delivered September 18, 1967

Harry C. Robinson, for appellant.

Joe Kemp, Little Rock City Attorney; *Perry Whitmore,* Asst. City Atty., for appellee.

JOHN A. FOGLEMAN, Justice. This is the second appeal in this case. In the first (241 Ark. 671, 409 S. W. 2d 825), appellant's conviction of keeping a gambling device in violation of Ark. Stat. Ann. § 41-2003 (Repl. 1964) was affirmed. The case was there tried de novo on appeal from a conviction in the Municipal Court of Little Rock. The gambling device in question was a "pinball" machine on which appellant was found guilty of "paying off" for free games accumulated on the machine by players using it. Appellant there contended that these machines were not among the gambling de-

vices prohibited by the above mentioned statute. This question was resolved against appellant on the previous appeal.

The machine was ordered destroyed by the municipal court. The circuit court did not order its destruction in the judgment from which the first appeal was taken. After affirmance, the mandate of this court was issued on January 27, 1967. Thereafter the circuit court entered an order on March 1, 1967, ordering the Little Rock Chief of Police to forthwith cause the machine seized to be publicly burned. This appeal comes from that judgment upon the contention that the court erred in ordering the machine burned or destroyed.

The principal argument advanced by appellant is that after appellant's conviction was appealed, the trial court lost jurisdiction over the case and, not having ordered the destruction in its judgment entered upon the jury verdict, could not do so after the transcript of the record on appeal was filed in this court.

It is true that a trial court does not have jurisdiction of its judgment or sentence during the pendency of an appeal for the purpose of modification or alteration. *Fletcher* v. *State,* 198 Ark. 380, 128 S. W. 2d 997. It is also true that the trial court has no jurisdiction to modify or vacate a judgment or sentence in a criminal case after affirmance by this court. *Freeman* v. *State,* 158 Ark. 262, 249 S. W. 582; *Mitchell* v. *State,* 232 Ark. 371, 337 S. W. 2d 663. The real purpose of the rule is to prevent the trial court from varying the judgment rendered or examining it for any purpose other than execution thereof. *Fortenberry* v. *Frazier,* 5 Ark. 200; *Mitchell* v. *State, supra.* The trial judge, however, has a continuing right to enforce appropriate orders after the filing of the mandate of this court and jurisdiction is reacquired following affirmance on appeal. *Scaife* v. *State,* 210 Ark. 544, 196 S. W. 2d 902.

It is also stated in appellant's brief that the recitation by the trial court in its order of destruction that appellant was initially served with a warrant issued out of the municipal court directing that the machine be burned is not supported by anything in the record on either appeal. A search of the transcripts on the two appeals does not reveal any warrant. Even though the municipal court had not ordered the destruction of the machine, the absence of a warrant in the record is not necessarily fatal to the judgment from which this appeal is taken. For instance, if a seizure of the machine had been made without a warrant because it was publicly exhibited and operated, an order to destroy it would be proper. *Garland Novelty Co.* v. *State,* 71 Ark. 138, 71 S. W. 257. Provisions of the statute authorizing destruction of property used in violation of § 41-2003 have been referred to as a summary remedy in the exercise of the police power to suppress gambling, which has been declared to be a nuisance. *Furth* v. *State,* 72 Ark. 161, 78 S. W. 759; *Garland Novelty Co.* v. *State supra.* Section 41-2009 authorizes destruction of any device which is made unlawful to keep by § 41-2003. *Steed* v. *State,* 189 Ark. 389, 72 S. W. 2d 542. While some of the earlier cases indicate that only those devices which are both made and kept *solely* for the purpose of gambling are subject to destruction,[1] later cases base the application of the statute on the use to which the device is put. See *Burnside* v. *State,* 219 Ark. 596, 243 S. W. 2d 736; *Albright* v. *Karston,* 206 Ark. 307, 176 S. W. 2d 421. In *Albright* v. *Muncrief,* 206 Ark. 319, 176 S. W. 2d 426, a teletype machine being used to transmit race horse information to various gambling houses, was held to be subject to destruction, even though the information was also used for other purposes. The court said that the evil effects to be suppressed were just as great in the use of instrumentalities designed for lawful use as when they were designed for the unlawful use to which they were put. This holding was partially based

[1]See, *e.g., Garland Novelty Co.* v. *State,* 71 Ark. 138, 71 S. W. 257.

upon that section of the statute requiring that in construction of the "anti-gambling" statutes, the court shall adopt that construction "in favor of the prohibition and against the offender". Ark. Stat. Ann. § 41-2017 (Repl. 1964) [Chapter 44, Div. 6, Art. 3, § 13, Revised Statutes]

Appellant does not question the status of this machine as a gambling device and that issue has been conclusively resolved against him on his former appeal. Such a device is not a lawful subject of property but has been declared contraband under the laws of this state. *Bell & Swan* v. *State,* 212 Ark. 337, 205 S. W. 2d 714. The owner of contraband is not entitled to its return, even though the seizure was not lawful, so long as the article is held by an officer for the court or brought into court. *O'Neal* v. *Parker,* 83 Ark. 133, 103 S. W. 165; *Ferguson* v. *Josey,* 70 Ark. 94, 66 S. W. 345; *Dodge* v. *United States,* 272 U. S. 530, 47 S. Ct. 191, 71 L. Ed. 392. Even though the fact that the property procured might not be admissible in evidence because of an unlawful search, the court's jurisdiction is based on the actual or constructive possession of the court. *Strong* v. *United States,* 46 F. 2d 257, cert. denied 284 U. S. 691, 52 S. Ct. 27, 76 L. Ed. 583. The fact that the seizure was without a search warrant and in violation of the Fourth Amendment to the Constitution of the United States would not entitle one claiming the contraband seized to its return. *Trupiano* v. *United States,* 334 U. S. 699, 68 S. Ct. 1229, 92 L. Ed. 1663.

Ark. Stat. Ann. § 41-2009 authorizes the destruction of devices the keeping of which is prohibited by § 41-2003. This being so, a delay of destruction of such device until its character has been determined to be within the purview of the statute has been held proper. *Garland Novelty Co.* v. *State,* 71 Ark. 138, 71 S. W. 257. While it was not necessary for the trial court to have done so, it was not error to withhold the order of destruction until its determination that the keeping of the

machine was prohibited by § 41-2003 had become final on appeal, for it might have been necessary to have the machine as evidence if the case should have been reversed. During all of the time the machine had been in the custody of the officers, and particularly between the affirmance of the case in this court and the order of destruction, appellant might have sought a remedy, if it were wrongfully held, in replevin or trespass. *Furth* v. *State,* 72 Ark. 161, 78 S. W. 759. Nothing in this record indicates that he did.

The judgment is affirmed.

RALPH BURK SHADDOX *v.* STATE OF ARKANSAS

5291 418 S. W. 2d 780

Opinion delivered September 25, 1967

Robert Brockman, for appellant.

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

CARLETON HARRIS, Chief Justice. Ralph Burk Shaddox was charged with the offense of assault with intent to kill, the Information charging that Shaddox shot Johnny Younes on August 9, 1966, in Boone County, with the intention of killing Younes. On trial, the jury returned a verdict of guilty, and fixed appellant's punishment at five years imprisonment in the State Penitentiary. From the judgment so entered, Shaddox brings this appeal.

For reversal, it is first asserted that the evidence was insufficient to sustain a conviction for the offense alleged. We do not agree. Evidence on the part of the state was to the effect that Shaddox was indebted to Younes, who operated an automobile supply store in Boone County. On August 9, Younes was visiting at a service station operated by Clyde Loftin, when Shaddox drove into the station. Both men spoke, and Younes then inquired of Shaddox "why he hadn't been in to see me, and he knew what I meant because everytime I see someone who owes me and who is past due, I say why haven't you been in and he said he had it on him, then he said do you want to try to take it off me—those were the words he used." Younes testified that the words were spoken in an unfriendly manner, and that he stepped over to the front of appellant's car, and, opening the door, reached in for the purpose of complying with Shaddox's invitation, *i.e.,* to take the money "off him." Younes was not armed, and the witness testified that he had no intention of harming appellant. As he reached in, grabbing hold of appellant's shirt, Shaddox fired a pistol, striking Younes in his right chest. The victim stated that he said something to Shaddox to the effect that the latter had shot him, and he testified that appellant said, "Yes, I will kill you, too." Dr. Jean Gladden,

who removed the bullet, testified that if the shot had "been a little over the other way" the wound would have been fatal; that a large blood vessel was perforated in the lung, and that if Younes "had been very far away from a hospital, I think he would have died." Clyde Loftin testified:

"Ralph had brought me a jack, a big hydraulic jack, and I was going around the car to get the jack and I walked up on the right side of the car and Ralph told me the jack was between the seats and I was going behind the car, around to get the jack* * *

"I walked up to the right side of Ralph's car, that's when he told me the jack was there between the seats and I did look inside the car."

Loftin stated that he observed "a pistol laying in the front seat. Laying about the middle of the seat." Within seconds, he saw Younes reach into the car, and heard the report of the pistol. Shaddox testified that he thought Younes had cut him, and that he was only trying to scare the prosecuting witness. In *Farrar* v. *State,* 240 Ark. 447, 400 S. W. 2d 289, we said:

"It was within the province of the jury to determine the true facts in the case, and certainly, there was substantial evidence to support the verdict. The facts and circumstances of the assault, as related by Staudt, indicated an intention by Farrar to kill the prosecuting witness, or to cause great bodily harm. The weapon used, a 12-gauge shotgun, and the extent of wounds on the body, together with the state of feeling existing between the parties prior to the difficulty, were all matters to be considered by the jury. *Davis* v. *State,* 206 Ark. 726, 177 S. W. 2d 190."

Here, likewise, the jury was entitled to consider the state of feeling existing between the two men prior to the difficulty, the nature of the wound on the body, the

weapon used, and the fact that it was in the seat beside Shaddox, ready for instant use. The evidence was sufficient to sustain the conviction.

It is next asserted that the court erred in denying appellant's motion for mistrial due to the special prosecutor's manner of questioning Shaddox concerning alleged prior acts of misconduct by appellant. This point is well taken, and the error committed calls for reversal.

The transcript reflects a long line of questioning during cross-examination relative to convictions, including references to arrests. Ark. Stat. Ann. § 28-605 (Repl. 1962) permits evidence of former convictions of crime as a matter of going to the credibility of the weight to be given a defendant's testimony.[1] See also *Johnson* v. *State,* 236 Ark. 917, 370 S. W. 2d 610, and cases cited therein. However, the special prosecutor went far afield in this particular cross-examination. The prosecutor was evidently holding a "rap sheet"[2] in his hand, and several times made reference to this paper. On one occasion, Shaddox was asked if he had been in Albany, California, and the witness replied that he didn't remember being there, but "if you say I did, I was." The prosecutor then replied, "I don't say, I am reading from a paper that has been furnished me." Again, the prosecutor said:

"These notes here shows that Ralph Burk Shaddox, and gives the number of the case on June 17, 1953, while

[1]This is true, unless there is a statutory prohibition. For instance, see Ark. Stat. Ann. § 75-1012 (Repl. 1957), and our cases relative to this section.

[2]When a man is arrested and charged with crime in this state, under the usual procedure, he is fingerprinted, and a copy of the prints sent to the Department of Justice in Washington. That department then sends back to the arresting officers a copy of the defendant's record, if any, which shows both previous arrests and convictions. This is sometimes referred to as a "rap sheet." It is not clear in the instant case whether the special prosecutor was actually holding a copy of appellant's record in his hand, or whether he had taken notes from the record, and was using those notes.

you were in the Public Health Service Hospital at Lexington, Kentucky you were charged with unlawfully mailing narcotics and the notes show you were sentenced to two years in the penitentiary."

Appellant's attorney objected, and the court replied, "Mr. Shouse, don't refer to the amount of the sentence, just was he convicted." Defense counsel then moved for a mistrial, and the motion was denied. We think the court erred in not granting this motion. The reference to the "notes" undoubtedly could influence members of the jury to feel that the state's attorney was holding irrefutable evidence of previous convictions, and could well have been prejudicial. We commented on a similar matter in *Shroeder* v. *Johnson,* 234 Ark. 443, 352 S. W. 2d 570. This was a civil case, but the principle likewise applies here, if not more so. In that case, Shroeder denied using a room in his hotel for immoral purposes, and counsel then stated, "Mr. Shroeder, do you want to keep for your own information this rap sheet here. Just stick it in your pocket." In reversing the case because of this occurrence, we stated:

"In the case under consideration, as in most situations of this nature, we cannot say with certainty that the jurors were prejudiced by the reference to the 'rap sheet,' but we are less sure that they were not. Definitely the manner in which the reference was made was improper, and it left open to the jury a broad field of speculation as to appellant's character and possibly his criminal record. The admonition of the court did not tell the jury what and to whom the 'rap sheet' referred, and if it had done so the prejudice probably would have been even greater."

Here, of course, the paper did tell "what and to whom the 'rap sheet' referred," and we agree that the prejudice may well have been much greater than in *Shroeder, supra.* Not only that, but in the cited case, the court did admonish the jury to disregard the reference to the paper, though we held that the admonition

was insufficient to cure the prejudice that had resulted.[3] Here, no such admonition was given. In addition, it will be quickly observed that the prosecutor's statement was, in effect, testimony—unsworn—and hearsay. The court should have granted the motion for a mistrial.

Other errors complained of are not likely to arise again in another trial.

Because of the error herein discussed, the judgment is reversed, and the cause remanded to the Boone Circuit Court.

DOSSIE COX *v.* STATE OF ARKANSAS

5294 418 S. W. 2d 799

Opinion delivered September 25, 1967

[3]In *Shroeder*, this court quoted a Kansas case, as follows: "There is, however, a class of cases which present argument and remarks so flagrantly prejudicial, or counsel may be so persistent in their impropriety, that the commendable efforts of the trial judge to eradicate the evil effects of them will be unavailing. In such event, then, a new trial is the only way to remove the prejudice, notwithstanding the judge may have reprimanded, or even fined, the offending attorney and positively and emphatically instructed the jury to disregard the prejudicial statements."

Otis Turner, for appellant.

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

George Rose Smith, Justice. In 1948 the appellant was convicted of murder and sentenced to life imprisonment. He was still confined to the penitentiary when he filed the present petition under Criminal Procedure Rule No. 1, asserting that his constitutional rights were violated at the original trial. The trial court, after affording the petitioner the hearing contemplated by Rule 1, made the required written findings of fact and conclusions of law. The court dismissed the petition, holding that there was no showing that Cox's constitutional rights had been infringed. At Cox's request this appeal was taken.

We affirm the judgment, finding the appeal to be wholly without merit. At the original trial Cox was represented by competent counsel employed by his family. The jury found him to be guilty. At the Rule 1 hearing Cox made no complaint about his original trial and had no competent new evidence to offer. He admitted that "The only thing I can say is that I didn't do it." He conceded that he had a chance to make that denial before the jury in 1948. Two other witnesses testified. Cox's sister stated that Cox's daughter or stepdaughter, who was two years old in 1948, had said that Cox's wife later admitted that she was the guilty person. Needless to say, such hearsay evidence is not admissible. Cox's niece testified that if a certain witness living in Indiana were produced he would testify that he was with Cox when the crime was supposedly committed. Even so, the matter of Cox's asserted alibi was an issue of fact that was or could have been raised at the trial in 1948. Rule 1 is not intended to provide the petitioner with a new trial

simply because a jury found him to be guilty, on conflicting testimony.

Affirmed.

BROWN, J., disqualified.

WILLIE JOE CHILDS ET AL *v.* STATE OF ARKANSAS

5253 418 S. W. 2d 793

Opinion delivered September 25, 1967

Willis V. Lewis, for appellants.

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

PAUL WARD, Justice. Appellants, Willie Joe Childs, Frankie Matthews, and Tommy Matthews, charged with stealing $500 from Kroger Stores, were convicted of grand larceny on December 5, 1966 and sentenced to serve nine years in the penitentiary.

There is no contention by appellants here that they did not commit the crime but they seek a reversal based solely on the grounds that the trial court committed three separate errors during the process of the trial.

We have carefully examined each of the alleged errors and, as explained hereafter, find no merit in any of them.

One. It is first urged that the court erred in admitting in evidence the confession made by appellants "without the benefit of counsel".

The undisputed testimony of the State Police Investigators (to whom the admissions of guilt were made by Tommy and Frankie Matthews) is that appellants were advised of their rights to have an attorney and to refuse to answer questions, and that if they did make any admission of guilt it might be used against them.

Appellants, for a reversal, rely on *Miranda* v. *Arizona,* 384 U. S. 436, citing the following statement:

> "If an individual held for interrogation by a law enforcement officer indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking, there can be no questioning."

At no time did Tommy or Frankie Matthews in any way indicate they wanted to consult with an attorney.

With reference to Childs' confession the situation was different. Bill Mitchell (a criminal investigator) testified:

> "I advised him that he didn't have to tell me anything unless he had an attorney present and that if he did tell me something it might be used against him. That if he didn't have funds for an attorney I would be glad to get him one."

After a conference in chambers between the court and the attorneys the witness further testified:

> "Q. When you asked Willie Joe Childs whether or not he wanted an attorney, what was his reply?
>
> "A. He said that he did, and he agreed to go ahead and talk to me.
>
> "Q. He agreed to go ahead and talk to you?
>
> "A. Yes, sir.
>
> "Q. After you asked him if he wanted an attorney and you advised him of his other rights you have outlined?
>
> "A. Yes, sir."

Following the above the witness testified to what Childs told him.

Again, no objection was made to the above testimony, and no exception was saved. Thus, if it be admitted for the purpose of this opinion that the court erred in allowing the confessions in evidence, such cannot be reviewed on appeal. *Criner* v. *State,* 236 Ark. 220, 365 S. W. 2d 252 and *Norman* v. *State,* 236 Ark. 476, 366 S. W. 2d 891.

Also, we point out our holding in the case of *Slaughter & Scott* v. *State,* 240 Ark. 471, 400 S. W. 2d 267, where we said:

> "However, this is a personal right and the accused may knowingly and intelligently waive counsel either at a pretrial stage or at the trial."

Two. It is next contended that the court erred in allowing the state to introduce testimony showing appellants were "habitual and consistent criminals".

The question in issue arose in this manner. After the State Investigator had testified at some length regarding his connection with the investigation of the case, he made this statement: "I advised both subjects [Matthewses] of their rights, of their right to counsel, of their rights under the Fifth Amendment to the Constitution, and during the interview were advised that they had committed a till tap . . . ."

Thereupon appellants' attorney objected ". . .unless he can show they had an attorney present when they made the statement". The trial court overruled the objection and exceptions were saved by appellant.

A "till tap", as explained by the State Investigator, is where one person attracts the attention of the guardian of the "till" while his accomplice takes the money. In other words, that is one way of committing larceny to which these appellants confessed. We find no reversible error for the reason, as previously pointed out, the Matthewses at no time requested an attorney although they were fully advised of their right to have one.

Three. Finally, appellants contend the trial court committed reversible error in refusing to declare a mistrial because of a certain statement made by the State's Attorney in his closing argument to the jury. The essence of the statement was that the defendants do not live in the county, "they came in here. They stole somebody else's money, money that other people worked hard for. All you folks worked hard for your money. They didn't—They don't; They won't. Send them to the Arkansas Penitentiary for 21 years".

We find no reversible error. The jurors were evidently not too much impressed with the argument—they

gave the defendants nine years and not twenty one. No objection was made to the argument at the time, but only after the jury had announced its verdict. Therefore the trial court had no opportunity to admonish the jury, even had it been necessary to do so and we don't think it was. In the case of *Reynolds* v. *State,* 220 Ark. 188, 246 S. W. 2d 724, we find his statement:

> "Our rule is that we do 'not reverse for the mere expression of opinion of counsel in their argument before juries, unless so flagrant as to arouse passion and prejudice, made for that purpose, and necessarily having that effect' ".

To the same effect see *Freeman* v. *State,* 238 Ark. 804 (p. 808), 385 S. W. 2d 156.

Affirmed.

FOGLEMAN, J., concurs.

BYRD and BROWN, JJ., dissent.

JOHN A. FOGLEMAN, Justice, concurring. I concur in the result reached by the majority, but my reasons for doing so are different from theirs insofar as points two and three are concerned.

POINT TWO

As I understand appellants' position, they question the admissibility of the testimony of officer Atkinson that one of appellants stated, in response to a question, that he hadn't worked for four or five years and that appellant had conducted "till taps", "pigeon drops" and "con games" throughout about three or four states, and that the statement was substantiated by this appellant's wife. The officer had previously stated that a "till tap" was a "con game" in which one of the "crew" by which it is conducted diverts the attention of the owner or manager of a place of business while an-

other goes into the cash box or drawer and removes the proceeds, the method allegedly used by appellants in this case. Appellants made an objection to the introduction of this testimony, were overruled and noted their exceptions. They urged in the motion for new trial and in their brief that the impropriety lay in permitting the state to attempt to show evidence of other offenses by appellants and to attack the character of appellants. I deem this testimony to be proper to show a series of similar offenses and a system of operation in the execution of a common plan, scheme, design, purpose and conspiracy of appellants. *Setzer* v. *State,* 110 Ark. 226, 161 S. W. 190; *Nichols* v. *State,* 153 Ark. 467, 240 S. W. 716; *Middleton* v. *State,* 162 Ark. 530, 258 S. W. 995; *Larman* v. *State,* 171 Ark. 1188, 286 S. W. 933; *Puckett* v. *State,* 194 Ark. 449, 108 S. W. 2d 468; *Rowland* v. *State,* 213 Ark. 780, 213 S. W. 2d 370; *Mouser* v. *State,* 216 Ark. 965, 228 S. W. 2d 472.

POINT THREE

I agree that objection to the argument of the State's attorney should have been made in time for appropriate admonition to the jury. I do have serious question as to propriety of the argument made. I deem it unnecessary to approve it in deciding this case. Not only did appellants make no objection to the argument at the time it was made, but the question was first raised by motion for mistrial, after the jury had retired. Even this is not carried into the motion for new trial, so the question is not here for review. *McConnell* v. *State,* 227 Ark. 988, 302 S. W. 2d 805; *Randall* v. *State,* 239 Ark. 312, 389 S. W. 2d 229.

Conley Byrd, Justice, dissenting. I dissent only from the affirmance of the conviction of Willie Joe Childs, based on the holding in *Miranda* v. *Arizona,* 384 U. S. 436 (1966). At page 471 of the *Miranda* decision the court said:

"Accordingly we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege we delineate today. As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, this warning is an absolute prerequisite to interrogation. No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead. Only through such a warning is there ascertainable assurance that the accused was aware of this right.

"If an individual indicates that he wishes the assistance of counsel before any interrogation occurs, the authorities cannot rationally ignore or deny his request on the basis that the individual does not have or cannot afford a retained attorney."

At page 473 the court elucidated further as follows:

"Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot ob-

tain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent."

Commencing on page 160 of the transcript, the record shows the following proceedings before the court:

"Q. Did you advise him of his civil rights?

A. Yes, sir, I did.

Q. How did you do that?

A. I advised Childs that he didn't have to tell me anything unless he had an attorney present—

Q. Did you advise him if he did tell you something that it might be used against him?

A. Yes, sir, I did.

Q. What else did you tell him?

A. I told him if he didn't have funds for an attorney I would be glad to get him one.

Q. And what was his reply to these assertions?

MR. HARTJE: Your Honor, I'm going to object to any testimony that he might give in view of the fact that Willie Joe Childs did not have an attorney present at the time of the statement.

MR. McCLINTON: That is not a proper and correct statement of the law, Your Honor.

THE COURT: The objection will be sustained. Go ahead.

MR. McCLINTON: I beg your pardon.

THE COURT: To that portion.

MR. McCLINTON: What portion?

THE COURT: That portion which an attorney was not present at the time. The witness will be advised.

Q. Will you go ahead, Mr. Mitchell, and tell us what further you found through your investigation?

MR. HARTJE: Now, I'm going to object. The Judge sustained my motion.

THE COURT: As to the objection that there is no attorney present at that time. Let's go in Chambers.

(The Court, attorneys, and court officials retired to Chambers, where the following things were said and done:)

THE COURT: The rule is when you arrest a man you advise him of his rights and ask him if he wants a lawyer, and if he says he does not—It is not clear here in this case whether he did or didn't.

MR. McCLINTON: Whether he did or did not say he wanted an attorney.

THE COURT: That's right.

(The Court, attorneys, and court officials returned to the courtroom, where the following things were said and done in open Court:)

Q. When you asked Willie Joe Childs whether or not he wanted an attorney, what was his reply?

A. He said that he did, and he agreed to go ahead and talk to me.

Q. He agreed to go ahead and talk to you?

A. Yes, sir.

Q. After you asked him if he wanted an attorney and you advised him of his other rights you have outlined?

A. Yes, sir."

Thereafter, Trooper Mitchell was permitted to testify about his conversation with Willie Joe Childs. Appellant's objection to Trooper Mitchell's testimony was renewed as a motion for mistrial. (See pages 166 and 167 of the record.)

Trooper Mitchell did not comply with the *Miranda* case when he continued the discussion with Childs following Childs' indication that he did wish an attorney present. Nor can I find anything in the record to show a waiver within the limits set by the *Miranda* case. The matter of a waiver in such instances is fully discussed in the *Miranda* case at page 475 as follows:

"If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. *Escobedo* v. *Illinois,* 378 U. S. 478, 490, n. 14. This Court has always set high standards of proof for the waiver of constitutional rights, *Johnson* v. *Zerbst,* 304 U. S. 458 (1938), and we re-assert these standards as applied to incustody interrogation. Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders.

"An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed

simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained. A statement we made in *Carnley* v. *Cochran,* 369 U. S. 506, 516 (1962), is applicable here:

> 'Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not a waiver.' "

Obviously, a person in custody can waive his right to have an attorney present during interrogation. But in view of the strong language quoted above from the *Miranda* case, I can not find such a waiver in this instance. Instead, it appears that the trooper, after going into the formalities of stating to Childs his constitutional rights, persisted in talking him out of his rights by continuing his interrogation after Childs had made known his desire to have counsel present during the interrogation.

It is true that counsel for appellant Childs did not save his exceptions to the rulings of the trial court, which under our antiquated system, 15 Ark. L. Rev. 69, is considered necessary for review in criminal cases before this court. However, as has been pointed out by the United States Supreme Court in *Henry* v. *Mississippi,* 379 U. S. 443 (1965), the procedural failure to save one's exceptions to a trial court's ruling on an objection does not necessarily waive one's federal rights. When we fail to recognize this adjudicated law in cases involving claims of federal rights here, we put this court in the position of having placed its stamp of approval on a conviction that the federal district courts will be required to review on a habeas corpus action.

Under the rulings of *Townsend* v. *Sain,* 372 U. S. 293 (1963), and *Henry* v. *Mississippi, supra,* courts in

habeas corpus actions are directed to disregard procedural defaults which do not affect the substantive rights of the parties. Our failure to recognize United States Supreme Court rulings in such matters puts the federal district judges of our state in the position of writing opinions and fact findings overruling, in effect, opinions by this court. Therefore, I maintain that this court, in ruling on issues which raise federal questions, should treat the issues in the same manner that the federal district court will be required to treat them, so that the federal district judges may rely on the considered opinions which we have given to the same records.

Of course, the illegally obtained evidence from appellant Childs in this case does not affect the convictions of appellants Frankie Russell Matthews and Tommy Matthews. *Wong Sun* v. *United States*, 371 U. S. 477 (1963).

For the reasons stated, I would reverse and remand for a new trial as to Willie Joe Childs.

BROWN, J., joins in dissent.

AUGUSTUS RAY STUDDARD *v.* STATE OF ARKANSAS

5297 419 S. W. 2d 134

Opinion delivered September 25, 1967
[Rehearing denied October 30, 1967.]

Paul K. Roberts, for appellant.

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

PAUL WARD, Justice. Appellant, Augustus Ray Studdard, was charged with grand larceny for stealing a Ford pickup truck on December 4, 1966. By agreement, a jury was waived and the case was tried before the presiding judge. Appellant was found guilty and sentenced to serve five years in the State Penitentiary—the last two years being suspended with certain contingencies.

It is not disputed that the truck was taken from its owner, in Hot Springs, in the late afternoon of the 4th and that it was found (almost a complete wreck) near the main highway near Mt. Ida at about midnight of the same day.

In general terms, we here set out briefly below the opposing versions of appellant and the State.

Appellant, who testified at the trial, contends: he met some boys in Hot Springs about seven p.m. on the 4th who said they were headed for Fort Smith; he decided to go with the boys because six boys were after him and he wanted to get out of town, and also because he wanted to see a girl friend; when they went to the car (being driven by the boys) he saw a pickup truck attached to the rear end; on the way to Ft. Smith the boys told him the truck was "hot"; just before they reached Mt. Ida the truck broke loose from the car and ran off the road; then he told the boys he didn't want

to get into trouble, and that he was going back to Hot Springs, and; he returned in a car driven by Jerry White at his invitation.

The State, in essence, contends: appellant's story about the taking and wrecking of the truck is not true; appellant's own statement to others shows that he took the truck, and; that he was driving it at the time it was wrecked.

On appeal appellant's only contention for a reversal is that the testimony "is not sufficient to sustain a verdict of guilty. . ."

For reasons hereafter set out, we are unable to agree with appellant's contention.

Appellant takes the position that he was convicted solely on circumstantial evidence, citing (among other cases) *Reed* v. *State,* 97 Ark. 156, 133 S. W. 604; *Johnson* v. *State,* 210 Ark. 881, 197 S. W. 2d 936, and; *Taylor* v. *State,* 211 Ark. 1014, 204 S. W. 2d 379. In all these cases the convictions were reversed, there being only circumstantial evidence to support the convictions. We agree that, in such cases, the evidence must be strong and convincing—as was well stated in the *Taylor* case, *supra,* where we find this statement:

> "This demands that, in a case depending upon circumstantial evidence, the circumstances relied upon must be so connected and cogent as to show guilt to a moral certainty and must exclude every other reasonable hypothesis than that of the guilt of the accused."

Although, in the case under consideration here, no one saw appellant actually take the truck, we think there is more than circumstantial evidence to support the conviction—as presently pointed out.

(a) Appellant does not deny that he rode back to Hot Springs with Jerry White: White testified as follows:

Q. "Would you tell the court what he had to say?

A. "Well, right after we picked him up he said that he was the driver of the truck and he said he didn't want to say anything until he got to know us a little bit but being we was so nice to him he was going to tell us, he said he thought we ought to know.

Q. "You mean he told you he was the driver of the truck there that had been wrecked?

A. "Yes, sir."

Again, White testified:

Q. "And he explained to you that after these six boys got after him he had time to go steal a truck, is that right?

A. "If I recollect right he said he had to find a way to get away from them. These boys was wanting to fight him or something there and he was trying—I didn't ask him all the details because I didn't figure it was none of my business."

Appellant, at the time he was arrested by an officer on his return to Hot Springs, admitted that he picked up the truck "and wrecked it".

Although this case was tried before the trial court, by agreement, still we must view the sufficiency of the evidence as though it was tried before a jury.

Appellant stresses the fact that, as was admitted by the trial court, there were discrepancies and contradictions in the testimony of some of the State's witnesses—such as: White could not remember whether appellant

was with him when he went from the wreck back to Mt. Ida before returning to Hot Springs; White's story differed as to just where he picked up appellant; White was not sure whether the truck was a G.M.C. or a Chevrolet; the witnesses did not agree as to the extent of damages to the truck, and; appellant denied he told White he was the driver of the truck when it was wrecked. It is also shown that appellant made contradictory statements as to how he got back to Hot Springs.

In any event, these contradictions in the testimony posed questions of fact for the trial judge (sitting as a jury) to resolve. In our opinion the evidence was sufficient to support the verdict.

Affirmed.

STATE OF ARKANSAS *v.* WILLIE GENE JACKS

5285 418 S. W. 2d 622

Opinion delivered September 25, 1967

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

John Harris Jones, for appellee.

LYLE BROWN, Justice. The State, through the attorney general, prosecutes this appeal under the authority of Ark. Stat. Ann. § 43-2720 (Repl. 1964), contending the ruling of the trial court should be corrected to preserve uniformity in the administration of the criminal law. Willie Gene Jacks, defendant below, successfully moved to quash an information charging him with failure to discharge mechanics' and materialmen's liens in violation of Ark. Stat. Ann. § 51-640 (Supp. 1965).

Jacks' motion to the trial court raises two points. First, he contends § 51-640 is unconstitutional in that it attempts to establish a prima facie case of intent to defraud when a contractor fails to discharge a lien within ten days after receipt of payment. Second, after he is alleged to have received the money, Jacks was adjudged a bankrupt by the United States District Court; that

adjudication, so Jacks contends, placed his person and property within the exclusive jurisdiction of the bankruptcy court. The two contentions must be separately considered.

Prior to 1963, the penalty statute for failing to satisfy the involved liens was controlled by Ark. Stat. Ann. § 51-601 (1947). That section was declared unconstitutional in *Peairs* v. *State*, 227 Ark. 230, 297 S. W. 2d 775 (1957). The absence of the requirement that intent to defraud be established in a prosecution was the basis for the holding in *Peairs*. Apparently for the purpose of filling the void, the Legislature enacted a new penalty statute in 1963, Ask. Stat. Ann. § 51-640 (Supp. 1965). This is the law under which Jacks was charged. It contains the element of "intent to defraud" and in addition contains this sentence:

> "In any prosecution under this act [§§ 51-640, 51-641] as against the person so receiving payment when it shall be shown in evidence that any lien for labor or materials existed in favor of any mechanic, laborer or materialmen and that such lien has been filed within the time provided by law in the office of the circuit clerk or other officer provided by law for the filing of such liens, and that such contractor, subcontractor or other person charged has received payment without discharging the said lien to the extent of the funds received by him, the fact of acceptance of such payment without having discharged the same lien within ten [10] days after receipt of such payment or the receipt of notice of the existence of such lien, whichever event shall occur last, shall be prima facie evidence of intent to defraud on the part of the person so receiving payment."

Appellee asserts that the statutory presumption of intent to defraud is unconstitutional. He cites *Bailey* v. *Alabama*, 219 U. S. 219 (1910) and *Pollock* v. *Williams*, 322 U. S. 4 (1944). The statute in *Bailey* was struck

down on other grounds. First, it was found to be in violation of the federal anti-peonage statutes. Secondly, Alabama had a rule of evidence that would prohibit Bailey from testifying as to uncommunicated intentions. Combining that rule with the "prima facie evidence rule," it is readily seen that Bailey's defense was literally "blocked in." Finally, it was found to be the fundamental purpose of the Alabama statute "to compel, under the sanction of the criminal law, the enforcement of the contract for personal service. . ." *Pollock* involved a statute classified by the court as a peonage statute and in the context of the type of legislation the presumption section was held unconstitutional. The court said the presumption in *Pollock* "in a different context might not be invalid. Indeed, we have sustained the power of the state to enact an almost identical presumption of fraud, but in transactions that did not involve involuntary labor to discharge a debt. *James-Dickinson Farm Mortgage Co.* v. *Harry,* 273 U. S. 119." (1927)

The general rule, well established in many jurisdictions, including the United States Supreme Court, is well stated in *O'Neill* v. *United States,* 19 F. 2d 322 (1927):

> "The general principle is well recognized that even in criminal prosecutions, Congress or a state Legislature may with certain limitations enact that when certain facts have been proved they shall be prima facie evidence of the existence of the main fact in question. . . The limitations are these: There must be some rational connection between the fact proved and the ultimate fact presumed; the inference of the existence of the ultimate fact from proof of the other fact must not be so unreasonable or unnatural as to be a purely arbitrary mandate; and the accused must not be deprived of a proper opportunity to present his defense to the main fact so presumed and have the case submitted upon all the evidence to the jury for its decision."

The case at bar clearly cannot be classified as a peonage statute. It is more comparable to our law making it an offense to execute an overdraft which likewise contains the presumption clause. Ark. Stat. Ann. §§ 67-720—24 (Repl. 1966). This court said in *Edens* v. *State,* 235 Ark. 284, 357 S. W. 2d 641 (1962) that the only effect of the presumption clause in § 67-722 is to place the burden on the defendant to go forward with the case. The burden of proof is not shifted.

Further protection is afforded Jacks by the holding in *Reno and Stark* v. *State,* 241 Ark. 127, 406 S. W. 2d 372 (1966), where we held that it is improper for the trial court to advise the jury of the presumption provision. *Reno and Stark* involved the charge of failure to discharge materialmen's liens.

We hold that the presumption clause has a rational connection with the balance of our statutes governing mechanics' and materialmen's liens. It is not arbitrary. The accused is not deprived of opportunity to present his defense on the main fact. The presumption of innocence remains with the accused and the burden of proof on the whole case is in the State. The accused is merely required to go forward with his proof when the lien is established, payment is proven, and the failure to satisfy the lien is shown.

We can quickly dispose of the argument that if one violates a state law of this nature and before prosecution is adjudged a bankrupt, he gains immunity from the violation. That is the substance of the second point raised by Jacks. If a contractor receives payment which under valid legislation is required to be used to discharge lawful liens, but instead, misappropriates the payment *with criminal intent,* he is subject to prosecution. The federal bankruptcy law is a civil proceeding enacted for the relief of persons financially distressed and certainly does not purport to pre-empt our state penal statutes.

Reversed and remanded.

BYRD, J., dissents.

CONLEY BYRD, Justice, dissenting. It is my position that the prima facie presumption of intent to defraud in Ark. Stat. Ann. § 51-640 (Supp. 1965) is invalid; and that, because of the manner in which the statute is drawn, the invalid sentence containing the prima facie presumption cannot be picked from between the violation sentence and the penalty sentence without destroying the whole section, which was enacted as one paragraph. Section 51-640 provides:

> "It shall be unlawful for any contractor . . . who has performed work . . . for the improvement of any property where such work or materials may give rise to . . . materialman's liens . . . *knowingly to receive payment* of the contract price . . . *without applying the money so received to the discharge of any such liens known* to the person receiving such payment . . . with the intent thereby to deprive the . . . person so paying the said contractor . . . of his funds without discharging the said liens and thereby to defraud the said owner or person so paying. In any prosecution . . . as against the person so receiving payment when it shall be shown . . . that any lien for materials existed in favor of any . . . materialmen and that such lien has been filed within the time provided by law . . . and that such contractor has received payment without discharging the said lien to the extent of the funds received by him, the fact of acceptance of such payment without having discharged the same lien within ten (10) days after receipt of such payment or the receipt of notice of the existence of such lien . . . shall be *prima facie* evidence of intent to defraud on the part of the person so receiving payment. If the amount . . . shall exceed . . . ($25.00) the party so receiving shall be

deemed guilty of a felony. . . If the amount so received does not exceed . . . ($25.00) the party shall be deemed guilty of a misdemeanor. . .'' (Emphasis supplied.)

The above section must be construed together with Ark. Stat. Ann. §§ 51-601 (1947) and 51-613 (Supp. 1965). The first section (51-601) gives a lien to any mechanic or materialman furnishing labor or materials for any improvement upon land, and by its very terms extends to suppliers of materials furnished by subcontractors. The second section (51-613) gives the materialman 120 days from the date the material is furnished in which to file a lien. We have construed this 120 days to apply from the date the last item in a running account was furnished. *Kizer Lbr. Co.* v. *Mosley,* 56 Ark. 516, 20 S. W. 409 (1892) and *Streuli* v. *Wallin-Dickey & Rich Lbr. Co.,* 227 Ark. 885, 302 S. W. 2d 522 (1957).

The statute under which appellee was here charged makes it an offense not to receive money but to fail to discharge known liens after he has received the money under his building contract, with intent ti defraud the owner. This same statute provides (and as interpreted by the majority) that when the prosecution has shown the contractor's receipt of the payment and his failure to discharge the materialman's lien within ten days after receipt of notice of its existence, a prima facie presumption arises that the contractor intended to defraud the owner so making the payment. If the presumption arose only as to the liens of which the contractor had knowledge at the time he received the funds, I would agree with the majority that there was a rational connection with the balance of the statutes governing mechanics' and materialmen's liens. But the prima facie presumption is not so limited—it permits a conviction upon the contractor's failure to discharge a lien within ten days after he has notice of its existence. In this situation it permits a conviction where proof of guilt is lacking. *Pollock* v. *Williams,* 322 U. S. 4, 15 (1955).

That the presumption here created permits a conviction without proof can be more clearly seen by a look at the manner in which buildings are constructed. This is the age of specialization and home building contractors, like others, have had to take advantage of such specialization. Today's home building contractor seldom does any direct physical labor in house construction. Usually he subcontracts the cement work (the foundation and sometimes the floor if the house is placed on a slab); the framing; the roofing; the plumbing; the electrical work; the heating and air conditioning; the sheet rock; the painting; the flooring; and the landscaping. Since Arkansas laws furnish no provision for advance notice by laborers and materialmen claiming liens, the contractor, in paying subcontractors, has to rely almost entirely on the integrity of the many small businessmen with whom he deals. Obviously a contractor does not expect to make a living from only one building; therefore, he builds a number of homes during a year. Because the materialman's lien exists in secret for 120 days, the contractor must to some extent rely on the subcontractors' assertions that their bills have been paid. There is no practical way for the contractor to know about the existence of such a lien until it is filed. Often he finds that he has paid the same subcontractor for work on subsequent building jobs before discovering that the subcontractor has neglected to pay his suppliers on a prior job. Thus it is seen that under the interpretation given to the prima facie presumption sentence in the statute, it is entirely possible to send a building contractor to jail, not upon proof that he defrauded the owner for whom he constructed a building, but because he was unable to pay his debts. This to me constitutes an imprisonment for debt contrary to our constitution, *Peairs* v. *State,* 227 Ark. 230, 297 S. W. 2d 775 (1957). I fail to see the rational connection in this case between the presumption and the balance of the statutes governing mechanics' liens, which exists in the "hot check" statute, where the offense is complete upon the giving of the check. Here the offense is not complete until the

contractor has failed to pay the lien within ten days after receipt of notice of the lien, even though he did not know of its existence until 100 days after receipt of the money.

Furthermore, because of the 120 days given to materialmen to file liens, an owner can harass a building contractor by prosecution under the statute for his failure to discharge such a lien before taking bankruptcy; and can stand aloof from a suit for malicious prosecution by asserting that all he knew was that he had paid the contractor and the latter had not discharged the lien within the ten days allowed by the statute.

Nor can I agree with the majority opinion that the federal bankruptcy act does not purport to pre-empt our state penal statutes. If the sentence containing the prima facie presumption is continued in the statute as being valid, then it would appear that a contractor, irrespective of his conduct, would not be violating the statute if he could within ten days after knowledge of a lien get enough money to pay the materialman's lien. In this situation the threat of prosecution would exist if he took bankruptcy at any time before the time for filing materialmen's liens expired, because the effect of bankruptcy is to give the bankruptcy court complete control of all the bankrupt's assets—thereby making it impossible for him to comply with the terms of the penal statute. Thus the statute in effect threatens the contractor with prosecution if he takes bankruptcy at any time after receiving the money and before any liens are discharged, irrespective of his knowledge of such liens. Certainly a state statute making it a criminal offense to exercise a right given by a federal statute as directed by the United States Constitution is invalid.

Therefore, I would affirm the trial court.

CURTIS L. HAYNIE *v.* CITY OF LITTLE ROCK, ARKANSAS ET AL

5-4264 418 S. W. 2d 633

Opinion delivered September 25, 1967

Lesley W. Mattingly, for appellant.

Joe Kemp, Little Rock City Attorney; *Perry V. Whitmore,* Asst. City Atty., for appellees.

JOHN A. FOGLEMAN, Justice. This appeal questions the correctness of a decree dismissing the complaint of appellant, a captain in the Little Rock Fire Department, against the City of Little Rock and its Mayor and Board of Directors. Appellant had sought to enjoin appellees from granting promotions and increases in salaries under what is sometimes called a "merit system". He further asked that they be directed to increase his salary to the top pay provided for captains in the Little Rock Fire Department and for judgment for $630.00 for the difference in his salary and that top pay since the time he claims to have become entitled to it.

Captain Haynie was promoted to that rank on March 25, 1964, after having passed the required civil service examination. His salary after promotion was $425.00 per month. Some other captains were being paid $445.00 per month at that time. Subsequently his pay increased in two stages until it reached $485.00 per month while the pay of other captains was raised to $510.00 per month.

Pay increases are given in the fire department under what the city refers to as a "pay classification schedule". The schedule next preceding the filing of this case was adopted August 1, 1966. Each position in the fire department carried a "class number", a "class title", a "range number" and "monthly pay range". Each job "class title" for all employees of the city carried six steps within the pay range—"A" to "F". Under the class title, "Fire Captain", the "pay range" was from $425.00 per month to $535.00 per month. The district fire chief "pay range" was from $485.00 per month to $610.00 per month.

On May 1, 1966 the pay of eight captains,[1] some of whom had been promoted to the rank subsequent to ap-

[1]In some places in the record the number is given as nine. Since the actual number is immaterial, we will continue to refer to the number as eight.

pellant's promotion, was advanced to the top "monthly pay grade" for captains. All of these men, including appellant, were at all times receiving a salary set forth in a current schedule of "monthly pay ranges". No captain was paid more than the maximum or less than the minimum "monthly pay range" currently shown for the job class title. None of the salary advances mentioned, except for original promotion, was given following, or on the basis of, a competitive civil service examination. The increases in pay were given the other eight captains upon the recommendation of their superiors only.

The city contends that these pay scales were established and the increases given pursuant to its Ordinance No. 10,881 approved December 15, 1958, adopting a position classification and pay plan for the City of Little Rock. This ordinance required a grouping into classes of positions of approximately equal difficulty and responsibility, which required the same general qualifications and which could be equitably compensated "within the same range of pay under comparable working conditions". It also required an identifying class title description of the work of the class. It was specified that titles used to indicate authority, status in the organization, or "administrative rank" might continue to be used for such purposes. The classification plan is to be used as a basis for giving examinations, fines (lines) of promotion, and determining salaries for various types of work. The city manager is made responsible for preparation and maintenance of the classification plan, with authority to amend and revise, with approval of the Civil Service Commission for civil service positions. A schedule of standard salary ranges, to be changed only by the Board of Directors of the City, prescribed fifty pay range numbers. Then an official salary plan was adopted and each job or "class title" was given a class number and a pay "range number". Between that time and the institution of this action, the class title "Fire Captain" was advanced from "pay range" 21 to "pay range" 26 and "District fire Chiefs" from "range"

24 to "range" 29. Since § 2 of the ordinance is particularly pertinent here, we quote it in full:

> "COMPOSITION OF THE CLASSIFICATION PLAN: The classification plan consists of:
>
> A. A grouping into classes of positions which are approximately equal difficulty and responsibility, which require the same general qualifications, and which can be equitably compensated within the same range of pay under comparable working conditions.
>
> B. A class title, descriptive of the work of the class, which identifies each class.
>
> C. Written class specifications for each class of position, containing a description of the nature of the work and of the responsibility of the positions in the class, examples of work which are illustrative of duties of positions assigned to the class, requirements of work in terms of knowledges, abilities, and skills necessary for performance of the work, a statement of experience and training desirable for recruitment into the class, and, in certain cases, necessary special qualifications."

It is the contention of appellant that this ordinance and plan, as applied to his "class title", is in violation of the civil service laws of Arkansas. The increase of the salaries of the eight captains in the same pay grade within the designated pay range without civil service examination is the particular application to which he objects. It is his contention that Ark. Stat. Ann. § 19-1603 (Supp. 1965) prohibits this practice as a promotion. This is § 3 of Act 28 of 1923, our basic civil service law for first class cities. The section required each board of civil service commissioners to prescribe and enforce rules and regulations governing fire departments. One of the statutory requirements is that the rules shall provide:

"9th. For promotion based upon open competitive examinations of efficiency, character and conduct, lists shall be created for each rank of service and promotions made therefrom as provided herein, and advancement in rank or increase in salary beyond the limits fixed for the grade by the rules of said commission shall constitute a promotion."

The rules and regulations adopted by the board of civil service commissioners of Little Rock require open competitive examinations twice a year for creation of lists of those eligible for employment or promotion "for each rank" in the fire department. (Art. II, § 1) The use of the word "rank" in other sections of the regulations makes the conclusion that the board considered the job "class titles" as "ranks" inescapable. For example:

1. In speaking of eligibility to take examination for advancement from a "lower to a higher *rank*", an applicant must have "served at least one year in the next lower *rank*" and have "a good record in the lower ranks in which he has served". (Art. II, § 5)

2. A probationary period is provided after each promotion during which the probationer may be "reduced to his former rank". (Art. II, § 8)

3. For the purpose of determining eligibility to take examinations for promotion, it is specifically provided that all "holding the *rank* of captain shall be eligible to take the examination for promotion to assistant chief," all "holding the *rank* of junior captain" to "the *rank* of captain", and "all hosemen, laddermen and drivers", to "the *rank* of lieutenant." (Art. II, § 14)

4. In establishing a "Bureau of Efficiency" it is required that it be composed of members of the department with the "*rank* of captain or with a higher *rank*". (Art. IV, § 3)

5. Discharge or reduction "in *rank* or compensation" is prohibited without a trial procedure. (Art. V) [Emphasis ours]

Appellant first contends that an increase in pay within a pay range is an advancement in rank under § 19-1603, requiring an examination. As a basis for this contention, he asserts that the word "in" should be construed to mean "within". We do not agree. We take it to be the intention of this section of the statute to define what constitutes a promotion. If appellant's construction were used, "promotion" would not include an elevation from one rank to another and competitive examination would not be required by the Act. The expressions "in regard to", "respecting", "with respect to", "as to", are also synonyomus with the word "in". See Rodale's "The Synonym Finder". The words "advancement in rank" then should denote an advance with respect to rank, or from a lower rank to a higher one. This is a common-sense construction and in keeping with the intention of the Civil Service Act.

Appellant's next contention is that the eight other captains had received an "increase in salary beyond the limit fixed for the grade by the rules of the commission" in violation of Ark. Stat. Ann. § 19-1603. He argues that the quoted paragraph from § 19-1603 should be interpreted to mean that salary increases from one step to another within a pay range constitute a promotion and require competitive civil service examinations. This assumes that the words "the grade" in that section mean a "grade" or pay "step" within the pay range for the particular job "class title" which really designates the competitive class. On the other hand, the city and the lower court have construed the word "grade" to be synonymous with the word "rank" in the same section of the Act. We agree with the latter construction. We do not find the word used in any other place in Act 28 of 1933. We do find the words "rank" and "position" used in other parts of the Act. The word "grade" is synonymous with "rank". Rodale's "The Synonym Finder". It appears that the drafter of the Act must have used the word "grade" to avoid repetitious use of the word "rank" in the same sentence for there is nothing else in

the Act to which the former could relate or be related. Courts of other jurisdictions having similar language in civil service laws have held that an increase in salary does not constitute a promotion unless the resulting salary is beyond the limits fixed for the grade in which the office or position is classified. *People* v. *Tully,* 47 Misc. Rep. 275, 95 N.Y.S. 916; *Stohl* v. *Horstmann,* 64 Cal. App. 2d 316, 148 P. 2d 697. It has also been said that an increase in salary is not a promotion where no top salary limit has been fixed. *Mandle* v. *Brown,* 5 N. Y. 2d 51, 152 N. E. 2d 511. We hold this rule to be sound and applicable here.

In this connection, appellant asserts a violation of the quoted paragraph of § 19-1603 in that the compensation rates and ranges for the Fire Department have been fixed by the Board of Directors of the City and not by the Board of Civil Service Commissioners. Section 19-1617 (§ 17 of Act 28 of 1933) states that the City Council or Board of Commissioners shall from time to time fix the number of employees and the *salaries* to be drawn by each *rank* in the fire departments of their respective cities. Under Little Rock's "city manager" form of government, all the powers and duties (except executive powers) of the Mayor and City Council under the "council" form were vested in the Board of Directors. Consequently, the Board of Civil Service Commissioners did not abdicate any authority when it stated that fixing the number of employees and the salaries to be drawn by each rank was the duty of the Board of Directors. (Art. II, § 16)

The propriety of a pay range within a rank is also in question. Under similar civil service laws, the courts of California have said that it is well settled, where a city council is empowered to fix salaries, reasonable variations therein for persons holding the same rank will be upheld. See, *e. g., Banks* v. *Civil Service Comm.,* 10 Cal. 2d 435, 74 P. 2d 741; *Stohl* v. *Horstmann,* 64 Cal. App. 2d 316, 148 P. 2d 697. The courts of New York

have recognized ranges of salaries for a rank with a "pay grade". *Beggs* v. *Kern,* 284 N. Y. 504, 32 N. E. 2d 529.

If there is an inequity in the Little Rock "merit system" as provided for in the ordinance above referred to, appellant's complaint should be addressed to the city officials or the general assembly. The wisdom of the policy adopted is not a judicial problem.

The judgment is affirmed.

BYRD, J., disqualified and not participating.

JOHN RHODES AND PATRICIA DRENNAN
v. CITY OF LITTLE ROCK

5281 418 S. W. 2d 783

Opinion delivered September 25, 1967

John W. Walker, for appellant.

Joe Kemp, Little Rock City Attorney; *Perry V. Whitmore,* Asst. City Atty., for appellee.

CONLEY BYRD, Justice. Appellants John Rhodes and Patricia Drennan were convicted under § 25-121 of the Little Rock Code of Ordinances. They were arrested by two officers at the residence of appellant Rhodes. The

officers, by the process of shining a flashlight through a venetian blind covering a window, had observed them in bed in a state of undress. There is no contention that the garage apartment where appellants were arrested constitutes a "public place."

The ordinance under which appellants were convicted provides as follows:

> "It is hereby declared to be a misdemeanor for any person to participate in any public place in an obscene or lascivious conduct, or to engage in any conduct calculated or inclined to promote or encourage immorality, or to invite or entice any person or persons upon any street, alley, road or public place, park or square in Little Rock, to accompany, go with or follow him or her to any place for immoral purposes, and it shall be unlawful for any person to invite, entice, or address any person from any door, window, porch or portico of any house or building, to enter any house or go with, accompany or follow him or her to any place whatever for immoral purposes.
>
> "The term 'public place' is defined to mean any place in which the public as a class is invited, allowed or permitted to enter, and includes the public streets, alleys, sidewalks and thoroughfares, as well as theaters, restaurants, hotels, as well as other places. The term 'public place' is to be interpreted liberally.
>
> "Any person found guilty of violating the provisions of this section shall, upon conviction, be fined in any sum not less than ten dollars, nor more than two hundred and fifty dollars, or imprisoned for not less than five days nor more than thirty days, or both fined and imprisoned."

For reversal, appellants, in addition to a number of constitutional grounds, contend that the evidence was in-

sufficient to sustain conviction under the ordinance in the absence of a showing that they participated in their activities in a "public place."

The City of Little Rock, on the other hand, takes the position that the ordinance stamps as illegal four separate and distinct courses of conduct, and that the common denominator throughout the ordinance is conduct which has as its purpose unacceptable sexual behavior.

Only when the first paragraph of the ordinance is read in its entirety can it be observed that the conduct therein described is limited to unacceptable sexual behavior. Otherwise, if we accept each phrase as a separate standard, we are left to the dictionary definitions of the words "immoral" and "immorality." Some of the definitions given for these words in Webster's Third Edition cover a multitude of sins not necessarily connected with sexual behavior. Therefore, in accordance with our rule of strict construction of penal statutes, we hold that the ordinance condemns the conduct therein described only when it occurs in a public place.

Reversed and dismissed.

FOGLEMAN, J., dissents.

JOHN A. FOGLEMAN, Justice, dissenting. I cannot subscribe to the construction given the ordinance by the majority. To me it is clear beyond doubt that the ordinance condemns four distinct courses of conduct, two of which are misdemeanors only when committed in a public place and the others an offense wherever committed. Persons are prohibited:

1. "to participate in *any public place* in any obscene or lascivious conduct"
2. "to engage in any conduct calculated or inclined to promote or encourage immorality"

3. "to invite or entice any person or persons upon *any street, alley, road, or public place, park or square* in Little Rock, to accompany, go with or follow him or her to any place for immoral purposes"

4. "to invite, entice or address any person from any door, window, porch or portico of any house or building, to enter any house or go with, accompany or follow him or her to any place for immoral purposes." [Emphasis ours]

Appellants were clearly convicted for violation of the second prohibition.

The majority justify their action by saying that any other construction than that given by them would require resort to a dictionary for definition. I cannot see how their construction changes the situation, nor do I see how resort to a dictionary is either objectionable or unusual in determining the meaning of criminal statutes. Resort to the dictionary for this definition is no less required under their construction. I find no difficulty in finding the appropriate definition for this word in this ordinance.

To me, the conclusion that the city council deliberately omitted to require that the acts condemned in the second and fourth alternates must have been in a public place in order to constitute an offense seems inescapable. In order to reach this result, the majority must add the words "in a public place" to this clause. This cannot be arbitrarily done by the court merely to give the effect we might think the lawmakers might have intended. *Snowden* v. *Thompson,* 106 Ark. 517, 153 S. W. 823. Words may not be inserted if the ordinance is intelligible without them. 2 Horack's Sutherland Statutory Construction, 3d Ed. 457, § 4924; 82 C.J.S. 689, Statutes, § 344; 50 Am. Jur. 221, Statutes, § 234. Since words regarding public places are stated clearly in the

first and third clauses, but not the second and fourth, the view that their omission was intentional is substantiated. Where the legislative intent is clear from the words used, there is no room for construction, and no excuse for adding to or changing the meaning of the language employed. *Berry* v. *Sale,* 184 Ark. 655, 43 S. W. 2d 225; *Call* v. *Wharton,* 204 Ark. 544, 162 S. W. 2d 916. The rule which should be applied here is aptly stated in *McCaa Chevrolet Co.* v. *Bounds,* 207 Ark. 1043, 183 S. W. 2d 932, where it was said:

> "* * * Courts may only interpret and enforce laws as they are enacted by the legislative branch. And, in construing a law, a court is not at liberty to read something into the law that was not put therein by its framers, even if such a course may seem necessary in order to prevent an apparently unjust result in the case being considered."

If it could be said that there was any ambiguity whatever about the intention of the lawmakers in this regard, then the qualifying words are to be applied only to the words or phrase immediately preceding and are not to be extended to following words or those more remote. 2 Horack's Sutherland Statutory Construction 448, § 4921; 82 C.J.S. 671, Statutes, § 334; 50 Am. Jur. 258, Statutes, § 268.

Nor do I see any difficulty in arriving at the meaning of the word "immorality" in the ordinance. "Immorality" is, specifically, "unchastity". Webster's New International Dictionary, 2d Ed. "Unchastity" means "quality or state of being unchaste, lewdness, incontinence". Webster's 2d. Among the synonyms for "immorality" are "sexual impurity", "unchastity", "lewdness", "lasciviousness", "sexual promiscuity", "act of lust, rape, fornication, adultery, indecency". Rodale's, The Synonym Finder. In the context of this ordinance there is no doubt but what the word relates only to improper sexual relations. Certainly a man and a

woman, each married to another, occupying the same bed in a state of at least partial undress were engaging in conduct calculated or inclined to promote or encourage unchastity.

In order to arrive at the meaning of a word, if it is susceptible of more than one definition, we must consider the connection and context in which it is used and the evident purpose of the lawmakers. *Rose* v. *W. B. Worthen Co.*, 186 Ark. 205, 53 S. W. 2d 15, 85 ALR 212; *McClure* v. *McClure*, 205 Ark. 1032, 172 S. W. 2d 243. A reading of this ordinance will eliminate any possible doubt that this definition was intended.

The meaning of this ordinance is certainly no more vague or indefinite than §§ 41-3202 and 41-3203, Ark. Stat. Ann. (Repl. 1964) sustained against a charge of indefiniteness in *Dillard* v. *State*, 226 Ark. 720, 293 S. W. 2d 697. This statute prohibited, among other things, one from entering or remaining in any house, place, building, tourist camp, or other structure for the purpose of prostitution, lewdness, or assignation. "Lewdness" was defined in the act to include any indecent or obscene act. The court quoted one dictionary definition of "indecent" as "morally offensive". There the acts held to constitute the offense consisted of appellant's registering at a tourist court under a fictitious name and address, registering the woman accompanying him as his wife when she was not, and staying in the cabin alone for the remainder of the night.

The correctness of this construction of this ordinance, as to the meaning of the word "immorality", is further indicated by an examination of the city's authority to legislate. No other definition would properly fit into the municipal lawmaking authority. If there is any question about the construction of this ordinance, then it is our duty to give it a constitutionally valid construction as opposed to a possible construction constitutionally invalid. On this subject this court, in *State*

v. *Moore,* 76 Ark. 197, 88 S. W. 881, 70 L.R.A. 671, quoted from Cooley's Constitutional Limitations as follows:

> "* * * 'The duty of the court to uphold a statute when the conflict between it and the Constitution is not clear, and the implication which must always exist that no violation has been intended by the Legislature, may require it in some cases, where the meaning of the Constitution is not in doubt, to lean in favor of such a construction of the statute as might not at first view seem most obvious and natural. For as a conflict between the statute and the Constitution is not to be implied, it would seem to follow where the meaning of the Constitution is clear, that the court, if possible, must give the statute such a construction as will enable it to have effect.' The same presumption is indulged in favor of the legislative enactment with reference to the form of the statute and the constitutional prerequisites and conditions as to the subject-matter of the legislation."

The only power of the city to legislate in this field is to adopt such ordinances as shall be necessary for the suppressing of indecent and disorderly conduct. Ark. Stat. Ann. § 19-2401 (Repl. 1956). This same section of the statute includes the general power of the city legislative body to adopt such ordinances as to them seem necessary to improve the morals, order, comfort and convenience of the city and its inhabitants. If the ordinance were to be given a wider scope than this, it would be invalid. Legislative language will be interpreted on the assumption that the legislative body was aware of existing statutes, the rules of statutory construction and judicial decisions. 2 Horack's Sutherland Statutory Construction 327, § 4510. We should construe the ordinance to be valid if we can and this requires the construction I propose.

Appellants also raise the question of the validity of their arrest, it not having been based upon a warrant.

The disputed question is whether, under the circumstances, a misdemeanor was committed in the presence of the officers, since whatever they saw was observed while they were on private property on which a garage apartment then occupied by appellants was located. It is undisputed that the officers went there on the basis of a report only. While an unauthorized arrest is at the peril of the officer making it, there is no basis for the dismissal of the charge because of it. *Perkins* v. *City of Little Rock,* 232 Ark. 739, 339 S. W. 2d 859. Although it is speculated in the cited case that incriminating evidence obtained as a result of such arrest might be suppressed, here there was no motion to suppress the evidence nor was any objection made to the testimony of the officers as to what they saw at the time of the arrest. The only time that any question as to the admissibility of this testimony was raised was on a preliminary motion to dismiss the charges[1] and in a motion for new trial. The necessity of an objection to preserve a point for review in this court has been stated by this court many times See *Randall* v. *State,* 239 Ark. 312, 389 S. W. 2d 229. Any other rule would permit an accused to withhold objection for tactical reasons, speculating on a favorable jury verdict and subsequently raise the question in seeking a new trial.

The wisdom and appropriateness of this provision in this ordinance is a legislative question, not a judicial one.

I would affirm the judgment of the lower court.

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[1]The record discloses no objection to the action of the court overruling this motion. No objection is pointed out in appellants' brief to either the overruling of the motion or the introduction of testimony.

MRS. EARL DOOLEY ET AL *v.* WILMER WELCH ET AL

4262

Opinion delivered September 25, 1967

Wayne Jewell, for appellants.

J. S. Brooks and *R. H. Peace,* for appellees.

CONLEY BYRD, Justice. This litigation was commenced by appellees Wilmer Welch *et ux* against appellant Mrs. Earl Dooley to determine the west boundary line of the Welch property and the east boundary line of the Dooley property. After Mrs. Dooley's answer was filed, appellees Jewell Darden *et ux* filed an intervention to reform a deed, claiming a one-acre tract lying within the lands claimed by Mrs. Dooley in her answer. Appellant Marvin Darden, Jewell Darden's grantor, was made a party defendant to the intervention. W. T. Darden, father of Mrs. Dooley, Marvin Darden and Jewell Darden, was also an uncle of appellee Wilmer Welch and is the common source of title of all lands involved.

The trial court awarded appellees Wilmer Welch *et ux* the lands described in their deed, (which they had received by mesne conveyances from W. T. Darden), subject to a 15-foot easement for the purpose of ingress

to Mrs. Dooley's home, and directed that Mrs. Dooley's house, which encroached on the lands, be removed. In the controversy between Jewell Darden and Mrs. Dooley and Marvin Darden, the court reformed the deed to describe the lands in Section 26 instead of Section 35 as set out in the deed. Mrs. Dooley and Marvin Darden have appealed.

In the boundary dispute between the Welches and Mrs. Dooley, the testimony shows that W. T. Darden conveyed to one Bert Wilson, by metes and bounds description, the land now owned by Wilmer Welch; and that, by the same metes and bounds description, Bert Wilson conveyed to the Welches in 1959. After Bert Wilson took possession of the property he constructed a fence approximately 35 feet east of his west boundary. The fence still existed at the time of the trial. Mrs. Dooley acquired her property in 1962 through Marvin Darden, (who had acquired it under his father's will), by deed which described the lands as the fractional SE¼, SE¼ Sec. 26, T 17, R 17, containing 8 2/3 acres. Mrs. Dooley caused F. M. Methvin, the County Surveyor, to survey her lands in 1963, using the fence line as the boundary. Thereafter she tore down the old Darden home and rebuilt her present home, which encroaches some five feet on the metes and bounds description contained in the Wilmer Welch deed.

With the record showing the conveyance of the Welch lands by the metes and bounds description, the burden was cast upon Mrs. Dooley to show her alleged adverse possession. Obviously, she has not had possession long enough for the seven-year statute to run, and the record is void of testimony that anyone held adversely to the Welches prior to the time Mrs. Dooley received her deed. The use of the premises for a roadway by Mrs. Dooley and her predecessors would give them only a right of prescription for roadway purposes, and this was recognized in the trial court's decree. Therefore we affirm the chancellor's decree as to the boundary dispute.

Regarding the reformation of the deed, appellants contend that the court erred in awarding to intervenors the one acre of land out of the tract purchased by Mrs. Dooley without notice of intervenors' claim, and that the trial court should have awarded the intervenors judgment against appellant Marvin Darden.

There is ample testimony, corroborated by persons not party to the litigation between intervenors and appellants, to show that the intervenors paid Marvin Darden $100 for the acre of ground; that the acre was stepped off in Section 26; that the intervenors cleaned up the bushes; and that Marvin Darden owned no land in Section 35 which would fit the description contained in the deed but that he did own lands in Section 26 where the one acre was stepped off. With respect to appellants' contention, they are met with the facts that lack of notice or knowledge on Mrs. Dooley's part was not pleaded; that nothing in the record showed that Mrs. Dooley had actually taken possession of any part of the lands other than that where her house was located; that the description in her deed was void for indefiniteness; and further, that it was shown by Marvin Darden's testimony that he was still exercising some control and possession over the premises within the last two or three years—he having done some fencing.

It is true that Marvin Darden testified definitely that he intended to convey one acre in a square in the northeast corner of Section 35, but in reading all of his testimony it is observed that he could not remember how old he was, whether his father had conveyed the land in Section 35 prior to his death, and that he did not know whether he owned Section 35 at the time the deed was made. In view of the fact situation in which Marvin Darden testified, the chancellor could properly have disregarded his testimony as being untrustworthy. Consequently, we hold that there was sufficient evidence to support the reformation of the deed. *Burchfield* v. *Banks*, 202 Ark. 209, 149 S. W. 2d 551 (1941).

Appellants are concerned because Mrs. Dooley has been ordered to remove the encroachment of her house from the Welches' property. We need not decide here how the trial court should enforce its order, but we do point out that the Welches in their brief indicate that, since the encroachment is within the 15-foot easement awarded Mrs. Dooley, it will not be necessary to relocate the house.

Affirmed.

JERRY L. CARTER ET AL v. CLEVE ZACHARY ET AL.

5-4227 418 S. W. 2d 787

Opinion delivered October 2, 1967

U. A. Gentry, J. Patrick Reilly and *Mike J. Etoch,* for appellants.

George K. Cracraft, John L. Anderson and *David Solomon,* for appellees

CARLETON HARRIS, Chief Justice. This litigation is quite complicated. On February 1, 1960, Cleve Zachary and wife went to the store of Abe J. Davidson in Marvell, Arkansas, and executed a promissory note in the amount of $22,794.04 to Davidson, with interest at the rate of 8% per annum. The purpose of the note was to satisfy an indebtedness due Davidson by Ellis McKissic and wife, the McKissic indebtedness having accumulated over a period of several years.

In March, 1957, McKissic had given a real estate deed of trust to Davidson to secure a $5,000.00 note, this debt being due in November 1957; in October, 1957, a note executed by McKissic in favor of Helena Federal Savings and Loan Association, had been purchased by Davidson for $13,240.15, this note being due in November, 1957. In December, 1957, McKissic executed a note to Davidson in the amount of $18,905.45, with interest at the rate of 10%, due February 28, 1958. This note was endorsed by Zachary. By the end of 1959, only a minimal amount had been paid, and, after the adding of interest, McKissic's balance was $20,722.05. In January, 1960, an additional amount of $2,072.00 was added, making a grand total of $22,794.05.[1] The recitation in this paragraph relates the facts leading to the signing of the note from Zachary to Davidson in February, 1960.

On the same day, in Davidson's office, McKissic and wife executed a quitclaim deed to Zachary for 160 acres of land, being McKissic's farm. Zachary then executed an agreement to reconvey the lands to McKissic upon the repayment by the latter of the indebtedness, plus interest. The agreement also provided for McKissic to pay

[1]The figure ".04" is used at times, while ".05" is also used.

all taxes, and to repay any further amounts loaned by Zachary, together with interest. Also, on this same date, McKissic and wife acknowledged that the $22,794.04 was the correct amount that they owed, and they signed a statement recognizing that they were indebted to Zachary in that amount. In January, 1963, Zachary made the final payment to Davidson on the note (that he had signed in behalf of McKissic), the total amount including interest being $27,505.18. Shortly thereafter, Zachary notified McKissic to quit the premises; however, McKissic ignored the notice and stayed on.

In September, 1963, Zachary executed an "Offer and Acceptance" with appellant, Jerry L. Carter, for sale of the McKissic lands for the sum of $26,000.00, the sale to be closed by December 1, 1963, and, since McKissic remained on the property, Zachary instituted an unlawful detainer action against McKissic in January, 1964. In August, 1964, Carter was granted leave by the court to file an intervention, and he sought to require Zachary and wife to specifically perform the agreement to sell him the McKissic lands, and asked in the alternative, that he be awarded damages against Zachary. Zachary answered the intervention with a general denial. In March, 1965, McKissic amended his complaint, asserting that the deed had been given as a mortgage, and further alleging that Zachary was guilty of usury. In May[2], McKissic instituted a cross-complaint against Davidson, contending that the latter had made usurious charges. Davidson answered with a general denial, and, the cause having been transferred to equity, the case was heard by the Chancery Court in November, 1965. After hearing the evidence, the court found:

1. That McKissic had failed to prove the allegations of usury against Davidson, and dismissed that complaint.

[2]There is no explanation of why these various pleadings were filed so long after the original suit was commenced.

2. The intervention of Carter was dismissed.

3. The quitclaim deed from McKissic to Zachary, together with the agreement to reconvey from Zachary to McKissic, was intended by all parties in interest to be:

"a mortgage with right of redemption given to secure a debt owed by the Defendant to the Plaintiff, Cleve Zachary, in the sum of $22,794.05, which debt bore interest at the rate of 10% per annum until paid; that said lien was also given to secure any and all other advances made by Cleve Zachary to Ellis McKissic during the period of redemption; that said period of redemption had not expired at the commencement of this action.

"5. That up to and including January 14th, 1963, Cleve Zachary advanced additional sums to the Defendant in such an amount that said indebtedness aggregated on that date, the total sum of $27,505.18; that same is now in default; that the Defendant is indebted to the Plaintiff for his principal and interest in the aggregate sum up to this date in the aggregate sum of $37,516.66.

"6. The Court further finds that Cleve Zachary, as Mortgagee in possession of the properties, has paid all taxes and assessments due on said lands for the years 1962, 1963 and 1964, in the total sum of $758.24, and has been compelled to pay premiums of insurance upon the improvements thereon in the sum of $216.58."

The court then made a finding that McKissic was entitled to a credit for the reasonable rental value of the lands, which was found to be $2,040.00 per year, or a total amount of $8,120.00, and was likewise entitled to a further credit of $834.68. Judgment was thereupon entered for Zachary against McKissic in the amount of $29,536.80, and the court directed that if this amount, together with costs, was not paid within 60 days, the property should be sold at public sale. From the decree so entered, Carter appeals from the dismissal of his intervention against Zachary, and McKissic appeals from

that portion of the court's order holding "that there was no usury in any of the transactions involved in said cause and denying to the defendant, Ellis McKissic, any relief either against the plaintiff, Cleve Zachary, or the third-party defendant, Abe J. Davidson."

We proceed to a discussion of each of these contentions.

1. *Was the February,* 1960, *deed from the McKissics to the Zacharys intended as a mortgage?* The Zacharys have not appealed from the court's decision holding that the deed, in effect, was a mortgage, and this question is appealed only by Carter, who, of course, cannot prevail in his prayer for specific performance, unless the Zacharys owned the property.

Carter asserts that the deed given on February 1, 1960, conveyed the lands to Zachary, and that McKissic did not comply with the agreement to reconvey, and thus lost his right to claim the property. Evidence was offered by a witness, James Suitt, that McKissic had recognized Zachary's title, and had so advised Suitt when applying for a production loan. No point would be served in detailing the testimony of the various witnesses, for we are of the opinion that the testimony of Zachary and his wife justified the Chancellor in reaching his conclusion. It is well established that the question of whether a deed to realty (when absolute on its face, and construed together with a separate agreement to repurchase) amounts to a mortgage, or a conditional sale, is to be determined by the intention of the parties. *Ehrlich* v. *Castleberry,* 227 Ark. 426, 299 S. W. 2d 38. In *Newport* v. *Chandler,* 206 Ark. 974, 178 S. W. 2d 240, we said:

"It is unquestionably within the power of two individuals, capable of acting for themselves, to make a contract for the purchase and sale of land, with a reservation to the vendor of a right to repurchase the

property at a fixed price and at a specific time. If such transaction is security for a debt, then it is a mortgage, otherwise, it is a conditional sale. ***"

The examination of Zachary during the trial reflects the following:

"Q. At the time that you all went down there to have the papers fixed, did you go down there with the intention of getting a deed for the property that day?

A. No, sir, I didn't go down there with intentions of getting a deed then."

Zachary stated that the deed was taken for security; Annie Zachary testified likewise. We think it is clear that the deed was intended as a mortgage.

2. *Was Carter entitled to specific performance, or in the alternative, to damages from Zachary?* The testimony reflects that on September 5, 1963, Zachary, acting on advice of counsel, agreed to convey merchantable title to Carter for $26,000.00, subject to good title, and Carter gave Zachary a check in the amount of $500.00 as earnest money.[3] There is evidence that Zachary thought, and with good reason, that McKissic had abandoned his claim to the farm. Although we feel that the record supports the view that Zachary acted in good faith in offering to sell the lands to Carter, there is no point in reviewing the testimony, since we do not decide this point on that premise. Nonetheless, we do not think that Carter is entitled to damages. Appellant's claim in this respect is based on the difference in the contract price and the market value of the land; under the contract, he would have purchased the lands for $26,000.00, the agreemnt reciting that the transaction would be closed by December 1, 1963. The only evidence offered by appellant as to damages was his own testimony, and this was not at all forceful. When asked by his attorney

[3]The check was never cashed, and was returned to this appellant.

as to the fair market value of the land on December 1, 1963, Carter replied, "*I don't really know* [our emphasis]. I was offered $32,000.00 for it prior to that and I didn't take it.'"[4] It will be noted that appellant admitted that he did not know the value of the land on December 1, 1963, and the purported purchasers were not called upon to testify. The testimony about the offer of $32,000.00, if competent otherwise, certainly was hearsay evidence. This was all the evidence relative to damages, and could hardly support such an award. For that matter, the testimony of Carter, since appellant is an interested party, does not stand under the law as uncontradicted, and the court was not required to accept the testimony as correct. *McDonald* v. *The Olla State Bank*, 192 Ark. 603, 93 S. W. 2d 325. Appellant apparently recognizes that his proof is inadequate, for he closes his brief by stating that if specific performance of the contract is now impossible, he "is entitled to damages for breach of the contract, and that the case must be remanded to Chancery Court in order that those damages may be determined." As a rule, Chancery cases are developed completely on trial,[5] and a final determination is made in this court on the record presented. We rarely remand a case simply to develop proof on one phase, where that proof could have been offered at the original trial.

3. *Is McKissic entitled to relief from Zachary because of usury?* McKissic contends that usurious interest was charged by Davidson, and that Zachary, as a volunteer, in settling this indebtedness, paid these usurious charges without first ascertaining the accuracy of McKissic's account with Davidson. It is admitted that Zachary did not know of any usurious or improper charge, but it is contended that he made no inquiry of

[4]The court originally sustained objection to the testimony concerning an offer, but subsequently permitted it. Later, Carter testified that the property had increased in value by March of 1964 to $35,000.00.

[5]Carter's pleading sought $10,000.00 damages.

McKissic as to the correct amount, and therefore, Zachary is not entitled to reimbursement.

In the first place, we think the evidence is heavily against this appellant's contention. One clearly gains the impression from reading this record that Zachary assumed this indebtedness purely as an act of friendship to McKissic, and the evidence reflects that Zachary was entirely willing, before the suit was filed, for McKissic to pay the indebtedness assumed without interest being paid to the former. It is difficult to visualize any person assuming a debt of another of nearly $23,000.00 (aside from the interest that would have to be paid) without first being requested to do so, and further, without ascertaining from that person the proper amount of the debt. Such a transaction, though possible, is contrary to human experience. We think logic supports the testimony offered that these parties met at the office of Davidson, and entered into the transaction. Certainly, the record discloses a written acknowledgment by McKissic that he owed $22,794.04, the amount for which Zachary executed the note to Davidson. In *Lowe* v. *Walker,* 77 Ark. 103, 91 S. W. 22, Walker made a loan to Lowe to enable the latter to pay off a debt due to a Mrs. Rice. Thereafter, Lowe raised the issue of usury. Walker testified that he had no notice of the usury though Lowe testified to the contrary. The Chancellor found for Walker, and Lowe appealed. In affirming the Chancellor, this court, through Justice McCulloch, said:

"Appellee was not affected by usury in the contract between Lowe and Mrs. Rice. Conceding that the debt was tainted with usury, Lowe elected to pay it, and procured its payment by appellee. He cannot defeat his liability to appellee for the money because the original debt to Mrs. Rice which it extinguished was tainted with usury."

There is yet another complete defense, but it will be discussed under the next heading.

4. *Is McKissic entitled to relief from Davidson because of usury?* Let it be remembered that the burden of proving usury is on the one who alleges it. Let it further be remembered that McKissic never raised any claim of usury until March, 1965, when, in an amendment to his answer, he alleged usury against Zachary, and subsequently in May, the same contention was raised against Davidson in a third party complaint. Without discussing the testimony on this point, some of which was uncertain and confusing, it is sufficient to state that any usurious transactions are barred by the statute of limitations.[6] The last transaction occurred on February 1, 1960, when Zachary settled McKissic's indebtedness by executing the note to Davidson. The last note given by McKissic himself to Davidson occurred on December 10, 1957, when he executed his note in the amount of $18,905.45. McKissic's contention that the statute of limitations does not apply is based on his assertion that fraud was practiced upon him, but there is no proof of this allegation in the record. There is no evidence of concealment, or fraudulent acts. In fact, one item which is alleged to constitute usury is the amount of $2,072.00, which was added to the account in January of 1960, and which clearly appears in writing for anyone to see. McKissic stated that he never did see any of the instruments or papers, and said that he did not know he had signed a quitclaim deed;[7] that Davidson kept these papers for him, but there is no evidence that McKissic even asked to see any instruments or the account, or that he made any inquiry whatsoever. In *Williams* v. *Purdy,* 223 Ark. 275, 265 S. W. 2d 534, we stated that mere ignorance of one's rights does not

[6]Ark .Stat. Ann. § 37-206 (Repl. 1962) lists the actions which must be brought in three years, and Ark. Stat. Ann. § 37-209 (Repl. 1962) sets out those that must be commenced within five years after the cause of action shall accrue. It is immaterial here whether the three year statute or the five year statute is applicable.

[7]McKissic also testified that he did not know that Zachary had executed the note assuming his (McKissic's) indebtedness, and did not know that Zachary had ever endorsed his note.

prevent the operation of the statute of limitations; in the event there are affirmative and fraudulent acts of concealment, the statute commences to run when the fraud is discovered. McKissic had been dealing with Davidson for years, and part of his claim of usury dates back for a long period of time. Yet, no contention along this line was made until May, 1965, more than fifteen months after Zachary had instituted suit to obtain possession of the lands in question.

On the whole case, we are unable to say that the Chancellor's findings were against the preponderance of the evidence.

Affirmed.

NICHOLAS W. RIEGLER JR. *v.* MARY MILIER RIEGLER

5-4259

Opinion delivered October 2, 1967

Howell, Price & Worsham, Dale Price and *Fletcher Jackson,* for appellant.

H. B. Stubblefield and *Tom Eisele,* for appellee.

George Rose Smith, Justice. The parties were married in 1943 and separated in 1964. In January, 1965, Mrs. Riegler obtained a decree awarding her separate maintenance and the custody of the couple's five daughters, the oldest of whom was then 18. In March, 1966, Mrs. Riegler filed suit for an absolute divorce on the ground of personal indignities. Dr. Riegler did not oppose his wife's suit for a divorce, but he did resist her claims to alimony, child support, and a share of his property. This appeal and cross appeal relate only to

those contested matters, presenting primarily questions of fact.

I. The decree awarded Mrs. Riegler alimony of $250 a month, which is to be increased to $350 when the jointly owned family residence is sold and she surrenders possession. The decree also awarded her $550 a month for the maintenance of the minor children, with a similar $100 increase upon sale of the residence. (Dr. Riegler does not now question this award.) The decree recognizes Dr. Riegler's asserted desire to provide his children with a college education and directs that if he fails to do so voluntarily the matter will be submitted to the court for decision.

Ordinarily the amount to be allowed as alimony and child support lies within the sound discretion of the chancellor. *Childers* v. *Childers*, 229 Ark. 11, 313 S. W. 2d 75 (1958). Here Dr. Riegler contends that his former wife's misconduct precludes her from any award of alimony and, alternatively, that the monthly allowance is excessive in view of her independent means and his ability to pay.

We find no abuse of the chancellor's discretion. By tacit consent the parties allowed the case to proceed in two stages. It was first submitted to the court's master in chancery as an uncontested case on the issue of the plaintiff's right to a divorce. With respect to property rights, however, the issues were reserved for an adversary hearing before the chancellor. At that hearing the chancellor refused to consider proof of Mrs. Riegler's supposed misconduct. On that point counsel made their record by offers of proof.

The chancellor rightly rejected the charge of misconduct. We have some doubt about the parties' agreed procedure, for such a two-step approach might be used to achieve a collusive divorce. In any event, however, the testimony heard by the master is not abstracted; so we are unable to compare the spouses' relative fault.

Much of the misconduct attributed to Mrs. Riegler occurred years ago and falls within the doctrine of condonation. Finally, the fact that Dr. Riegler does not question his wife's suitability to have the custody of the children confirms the view that Mrs. Riegler is of good character.

The evidence about Mrs. Riegler's independent means is in such conflict that we are unable to estimate the worth of her property with accuracy. Much of it is involved in litigation. Moreover, even if we take a liberal view of the value of Mrs. Riegler's property, her available income would still be only a small fraction of Dr. Riegler's. According to his 1965 federal income tax return, his net income, before the deduction of alimony, was $59,431.35. His federal and state income taxes totaled $26,088.72, leaving him a net income of more than $33,000. It is quite evident that the alimony and child support allowances fall well below Dr. Riegler's ability to pay. We are unwilling to modify the chancellor's award of alimony, either upward or downward.

The matter of the children's college education was deferred for a later decision. What we have to say in Part V of this opinion may be pertinent if that question comes up in the future.

II. The weight of the evidence supports the chancellor's award of a 1964 Chevrolet to the appellee. Not only is there convincing proof that Dr. Riegler gave this car to his wife, but there is no showing that the court's disposition of the car resulted in the appellee's receiving more than one-third of her husband's personal property, taken as a whole.

III. For a number of years preceding the trial Dr. Riegler practiced general medicine in partnership with his father. In attempting to arrive at the plaintiff's statutory one-third interest in the partnership property, Ark. Stat. Ann. § 34-1214 (Repl. 1962), the chancellor

made specific awards for some items, such as cash on hand and the value of partnership life insurance, and then directed that Mrs. Riegler be given a specified share of accounts receivable as they are collected in the future.

This approach to the problem is wrong. Under the Uniform Partnership Act Dr. Riegler's rights in specific partnership assets are those of a tenant in partnership. Ark. Stat. Ann. § 65-125 (Repl. 1966). A judgment creditor properly reaches that interest by means of a charging order. Section 65-128. What the chancellor should do is to determine the value of Dr. Riegler's interest in the partnership, treating the accounts receivable as assets having a provable fair net present value. That determination will result in a monetary decree in the plaintiff's favor, to be enforced, if necessary, by a charging order. We cannot make the determination ourselves on the record before us, for the proof is far from adequately developed. Further proceedings will be necessary on remand.

IV. There are two disputes about the cash value of insurance policies. One relates to policies owned by the partnership and will therefore be considered on remand, under Part III. The other concerns the value of policies owned by Dr. Riegler individually. The chancellor fixed Mrs. Riegler's interest in those policies at $8,811.38, deriving that figure from a statement of Dr. Riegler's assets prepared by his accountant. Mrs. Riegler insists that the court should have considered instead the doctor's sworn answers to interrogatories propounded to him. Those answers, however, gave the cash values as of November 26, 1965. The accountant stated the values as of May 11, 1966, the date of the divorce decree. The chancellor correctly chose the latter as the controlling date for his determination.

V. The decree for separate maintenance awarded Mrs. Riegler $600 a month "for maintenance of herself and the four children now in her custody." In the in-

terval between that decree and the one now being reviewed Mrs. Riegler spent a total of $3,187.68 for college educational expenses of her oldest daughter, who was of age when the separate maintenance decree was entered, and for similar expenses of her next daughter, who reached 18 before the rendition of the later decree. The chancellor directed Dr. Riegler to repay $2,749.00 of those outlays.

That direction was an error. Ordinarily a mother who spends more for child support than the court has allowed her cannot recover the excess, because an award of child support ought not be increased retroactively. She should apply in advance for a larger allowance. *Gant* v. *Gant,* 209 Ark. 576, 191 S. W. 2d 596 (1946). On the other hand, a father may by contract bind himself to go beyond the decree in supporting a daughter who has reached her majority. *Worthington* v. *Worthington,* 207 Ark. 185, 179 S. W. 2d 648 (1944). Mrs. Riegler insists that the proof establishes such a contract on Dr. Riegler's part.

We do not so find. Dr. Riegler testified, as most fathers would, that he wanted all his children to have a college education. We do not read his testimony, however, as embodying an agreement to pay the expenses now at issue. To the contrary, he said that if he paid for his daughters' higher education he expected them to treat him with the respect due a father and to counsel with him about their college training. He complained, among other things, that his oldest daughter had told him to go to hell and had declared that the only thing he had to do with her education was to give her the money to spend as she chose. On the proof as a whole Mrs. Riegler did not sustain the burden of proving an agreement for support over and above the allowance made by the separate maintenance decree.

VI. In 1960 Dr. and Mrs. Riegler borrowed $7,141.25 from Mrs. Riegler's aunt, Mrs. Wagar. Both spouses signed a note for that amount, payable to Mrs.

Wagar and Mrs. Riegler jointly (apparently because the money was taken from a joint bank account that seems to have been established by Mrs. Wagar in the name of herself and Mrs. Riegler). At the trial Dr. Riegler insisted that his liability on the note was barred by limitations, but the chancellor rejected that defense, holding that Dr. Riegler's obligation on the note is still enforceable.

We disagree with that view of the problem. This issue does not involve a division of property owned by the husband. Instead, Mrs. Riegler is contending that her former husband is contractually bound to repay her for money borrowed from her aunt, who died before the trial, without regard to the fact that Mrs. Riegler is a joint maker of the note. No such cause of action was asserted by the plaintiff in her complaint or other pleadings. The proof was not developed with respect to the source of the money borrowed, the extent of the doctor's obligation, or the circumstances surrounding a part payment by Mrs. Riegler herself which is said to have tolled the statute of limitations. The evidence falls so decidedly short of sustaining Mrs. Riegler's right to recover upon the note that this aspect of the case must be decided in Dr. Riegler's favor.

VII. What we have said disposes of most of the points urged by Mrs. Riegler on cross appeal, such as her demand for more alimony and child support, for reimbursement for additional college expenses paid by her, and for an even greater recovery upon the Riegler-Wagar note. One remaining issue on cross appeal is Mrs. Riegler's request that she recover $654.95 expended by her for medical treatment for the minor children, after the entry of the separate maintenance decree. That decree, however, directed that Dr. Riegler be consulted before medical or dental expenses for his children were incurred. He was not so consulted. He testified without contradiction that he might have obtained the services of his fellow doctors either as a matter of professional

courtesy or at a reduced rate if he had been afforded an opportunity to do so. Upon that proof he cannot fairly be saddled with the charges now being asserted.

VIII. We affirm the chancellor's award of a $3,500 attorney's fee to the appellee's counsel and allow an added $1,000 for their services in this court, to be applied upon their fee.

Affirmed in part, reversed in part, and remanded.

BYRD, J., not participating.

ARNOLD WOOD D/B/A ARNOLD WOOD RADIO AND TV SERVICE *v.* NED DOWNING

5-4271 418 S. W. 2d 800

Opinion delivered October 2, 1967

James E. Evans and *Curtis E. Rickard,* for appellant.

Bass Trumbo, for appellee.

PAUL WARD, Justice. This litigation concerns a "lay-a-way" sale of a color television set.

Arnold Wood d/b/a Arnold Wood Radio and TV Service (appellant) is engaged in retailing and servicing radios and TV sets in Springdale.

On January 5, 1966 Ned Downing (appellee) made an agreement with appellant, at his store, to buy a specific color TV set for the price of $450. He paid $100 down and agreed to pay the balance upon delivery at a later date. The agreed date and term of delivery are in dispute, and this dispute is the issue in question.

Early in May of 1966 appellee went to the store to pay the balance due and pick up the set, and he was informed by appellant that he had sold the set to another person and that he had no other set of the same make. Appellee then demanded the return of the $100; appellant refused, and appellee instituted suit to collect the money.

A trial before the court, sitting as a jury, resulted in a judgment against appellant, and he now prosecutes this appeal.

Appellant's testimony is, in substance, that: At the time the sale was made at his store it was agreed and understood by both parties that appellee was to pay the balance of $350 and pick up the set within thirty days; he put the set in storage and held it until about the last of April when he sold it to another person, and; appellee did not come back to pay for, and pick up, the set until around the first of May.

Appellee and his wife (who was also present) testified in substance: They informed appellant, when the sale was made, that they were building a house in Springdale and did not want to accept delivery until the house was finished which would be sometime about the first of March; appellee went back in April and told appellant the house was not finished, and was informed the set was in storage; they went back later when the house was finished and were told the set had been sold

to another person, and; appellant refused to refund the $100.

The record reveals some corroboration of appellee's version. (a) Appellant's wife (who works in his store and was present when the sale was made) admitted she heard something about the construction of the house. (b) Clarence Payne, who was building the house for appellee, is a cousin to appellant. (c) The original sales slip shows these words written on the bottom—" in cash, no credit", but these words were not on the copy given to appellee.

In view of the above it is our opinion that the decision of the trial court (sitting as a jury) is supported by substantial evidence. Also we point out that appellant, after the lapse of thirty days from January 5th, was still holding the set in storage and that he did not give appellee notice he intended to sell the same to another party. Under the situation here we think appellee was entitled to a reasonable notice under Ark. Stat. Ann. § 85-2-706 (3) (Add. 1961).

Affirmed.

The DOWNTOWNER CORPORATION *v.* COMMONWEALTH SECURITIES CORPORATION

5-4257 419 S. W. 2d 126

Opinion delivered October 2, 1967

Reinberger, Eilbott, Smith & Staten, for appellant.

Coleman, Gantt, Ramsey & Cox, for appellee.

LYLE BROWN, Justice. Appellant, The Downtowner Corporation, based at Memphis, Tennessee, brought this suit to recover on an alleged implied contract existing between Downtowner and appellee, Commonwealth Securities Corporation of Pine Bluff. Whether or not an implied contract in fact was created between the parties is the determining issue before us.

In 1962 Downtowner entered into a licensing agreement with Franklin D. Keith and Robert C. Lowther.

That agreement gave the licensees the right to use the trade name, mark, and design of Downtowner in the operation of a new motel to be constructed by licensees in Pine Bluff. For that privilege, licensees agreed to pay ten cents per day per motel room as a royalty and five cents per day for advertising expenses. There was also a provision for the payment of sign rentals. Licensees also committed themselves to purchase from licensor, or its subsidiaries, practically every item needed in the day-to-day operation of a modern motel. These need not be here itemized but the items of royalty fees, payment for advertising, and for sign rentals are important because recovery is sought for them.

Keith and Lowther proceeded to construct a motor inn of 91 rental units and, as authorized in the licensing agreement, operated under the name of Downtowner Motor Inn. The inn was constructed on land owned by Commonwealth, a long-term lease having been executed between Keith, Lowther, and Commonwealth. The lease payments were subrogated to the construction financing furnished by a savings and loan association. Keith and Lowther became heavily indebted by 1965 to numerous creditors in Pine Bluff and to the parent Downtowner in Memphis. In June of that year, Keith and Lowther quitclaimed all their interest (except the licensing agreement, which was non-assignable) to Commonwealth and ostensibly went to Louisiana.

It was Commonwealth's decision that the interests of all creditors would best be served if the "doors could be kept open" until the property could be leased or sold to some experienced and reliable operator. Commonwealth retained Keith's and Lowther's manager. The president and secretary of Commonwealth, inexperienced in the hotel or motel business, took the responsibility of looking after financial affairs as best they could.

It was thought wise to first contact Downtowner in Memphis. It was desired that Downtowner purchase the

property, or in the alternative, enter into a managerial arrangement. A meeting was set up with R. L. Kirkpatrick, executive vice-president of Downtowner, for July 1, 1965. This was only seven days after Commonwealth had taken over the operation. P. R. Clark, Commonwealth's secretary, and the innkeeper, represented Commonwealth at the meeting in Memphis.

The Memphis meeting started a series of contacts and negotiations which continued until February 1966. By that time it appeared that a satisfactory arrangement could not be consummated between the parties. During the interim, Commonwealth had purchased and paid for various Downtowner operating supplies and in most respects operated as if it were a part of the Downtowner chain. Late in February 1966, Downtowner notified Commonwealth to remove all evidence of the Downtowner trademark which appeared on innumerable items used in the daily operations. Commonwealth set about to comply. The name was changed to Down Town Motel. Complaint was registered because of the similarity of that name to "Downtowner." The name was subsequently changed to "Ambassador Motel."

Suit was filed on or near March 30, 1966, by Downtowner, seeking royalty and advertising fees for the period beginning with June 23, 1965. Additionally, judgment was sought for sign rental accruals. Since there had been no affirmative commitment by Commonwealth to pay any of these charges, this question arises: was a contract *implied in fact* between the parties? That is the thrust of appellant's argument.

No definition by this court of an implied contract has been called to our attention. However, we have cases on the subject and the holdings there are consistent with the law to be shortly cited. For example, see *Worth James* v. *P. B. Price Const. Co.*, 240 Ark. 628, 401 S. W. 2d 206 (1966); *Caldwell* v. *Missouri State Life Insurance Co.*, 148 Ark. 474, 230 S. W. 566 (1921); and *Blake* v. *Scott*, 92 Ark. 46, 121 S. W. 1054 (1909).

Confusion has resulted from the interchangeable use of the terms "implied contract" and "quasi-contract." Quasi-contracts are not based on promises to pay or perform. They are obligations which are creatures of the law designed to afford justice. Generally, an indispensable element of a contract, express or implied in fact, is a promise.

> "This latter class [implied contracts] consists of obligations arising from mutual agreement and intent to promise but where the agreement and promise have not been expressed in words. Such transactions are true contracts and have sometimes been called contracts implied in fact. The elements requisite for an informal contract, however, are identical whether they are expressly stated or implied in fact." *Williston on Contracts,* Third Edition, Section 3 (1957).

Restatement recognizes an exception to the rule that a promise must be oral or written, "or must be inferred wholly or partly from such conduct as justified the promisee in understanding that the promisor intended to make a promise." *Restatement, Contracts,* § 5 (1932). That exception is stated in § 72 (2):

> "Where the offeree exercises dominion over things which are offered to him, such exercise of dominion in the absence of other circumstances showing a contrary intention is an acceptance. If circumstances indicate that the exercise of dominion is tortious the offeror may at his option treat it as an acceptance, though the offeree manifests an intention not to accept."

That exception, however, is not here applicable. It should be noted that the exception is predicated on an *offer.* No offer, written or oral, was ever made by Downtowner of Memphis to Commonwealth which designated a tender of specific services covered by royalties, fees,

and sign rentals. We have previously mentioned the July 1 conference in Memphis. Following that, ten letters were exchanged between the two parties over a period of eight months. An operational vice-president of Downtowner, and possibly another official, went to Pine Bluff and visited the property. At no time were royalties, fees, or sign rentals mentioned to Commonwealth officials. It is true that appellant made some monthly billings addressed "Downtowner of Pine Bluff." They were not addressed to Commonwealth. Surely, had Downtowner of Memphis been honestly looking to Commonwealth for these billings, Downtowner would have mentioned the alleged monthly delinquencies to Commonwealth in at least one of the many letters written Commonwealth. Moreover, as late as January 1966, Downtowner requested of Keith and Lowther that they pay the debts being sought in this suit from Commonwealth.

The circumstances just recited weaken the contention that the billings to Downtowner of Pine Bluff constituted notice to Commonwealth that the latter was expected to pay. Keith's and Lowther's licensing agreement with Downtowner of Memphis was in fact not cancelled until March 2, 1966. Under the terms of that agreement, Keith and Lowther could not transfer the license to a third party. So it cannot be said that Commonwealth succeeded to the privileges and obligations of that contract. Any obligations arising between the parties in this case had to result from some agreement made between them after July 1, 1965.

When Commonwealth took over the enterprise it is undisputed that only a brief operation was anticipated. Is it reasonable that Commonwealth would want to subscribe to the involved services? The business was already burdened with debt and the interim operation was costly to Commonwealth. Had Commonwealth's secretary been told at the Memphis meeting that royalty payments, advertising fees, and sign rentals would be re-

quired if the name "Downtowner" was used, it is more reasonable to believe that the connection with Downtowner at Memphis would then and there have been abandoned.

The endeavor of Commonwealth to keep the business open was expected to benefit all the other creditors, including appellant Downtowner. The Pine Bluff Downtowner was one of its nationwide affiliates. Rehabilitation would mean a retention of that association. It would be profitable to appellant and the supply firms owned by it. The fact that Downtowner, Memphis, had good reason to benefit from continuing its Pine Bluff connection is significant in evaluating the intent of the parties.

From what has already been said, our evident holding is that Commonwealth was not guilty of tortious conduct from June 23, 1965, until February 1966. February marks the date Commonwealth was requested to remove all Downtowner signs, marks, trade-marks, and similar indications that the operation was a Downtowner affiliate.

We now consider the second time period, namely the time during which the name "Down Town Motel" was used. Roughly, that period would be from early March to October 27, 1966. First it should be pointed out that Downtowner uses the words "tortious conduct" and at the same time uses the contract price of $13.65 per day in calculating damages. That is not consistent. Nor is Downtowner's plea for damages consistent with the record. Commonwealth moved to require Downtowner to elect between suing on contract and damages for infringement for use of Downtowner's name. According to the record, Downtowner waived any claim for damages and sought recovery "for the franchise fees for the use of the name."

Irrespective of the facts just recited, Downtowner has not preponderantly shown an infringement during

the second time period. That allegation is based on the similarity of outdoor advertising. In March 1966, Commonwealth directed a painter to change the outdoor signs. Downtowner's registered "crest," topped by a crown, was removed along with the crown. That was changed to a simple rectangle. "Downtowner Motor Inn" was removed and the words "Down Town Motel" were placed in the rectangle. The president of Commonwealth explained that the motel was in downtown Pine Bluff; that he was active in a movement of downtown merchants to bring more business into the heart of the business district; hence he thought the name "Down Town Motel" would not only identify its location but would make a contribution to the efforts of organized downtown merchants.

We hold that Commonwealth's sign was not so deceptively similar to Downtowner's as to be likely to confusion, to the advantage of Commonwealth. See *Dad's Root Beer Co.* v. *Atkin,* 90 F. Supp. 477 (1950).

Finally, Downtowner seeks to enjoin appellee from future appropriation of Downtowner's trade name, mark, and design. Commonwealth is not authorized by contract with Downtowner to utilize those registered marks. We see no necessity in issuing an injunction to cover the subject. That matter has apparently become moot.

Our reasons for denying relief to Downtowner do not coincide with the reasons stated by the trial court. Notwithstanding that difference in reasoning, we affirm the result of the trial court. *Langley* v. *Reames,* 210 Ark. 624, 197 S. W. 2d 291 (1946).

Affirmed.

HARRIS, C. J., not participating.

JOHN P. CORN *v.* ARKANSAS WAREHOUSE CORPORATION ET AL

5-4265

Opinion delivered October 2, 1967

Frank Warden Jr., for appellant.

James R. Howard and *Moses, McClellan, Arnold, Owen & McDermott,* for appellees.

JOHN A. FOGLEMAN, Justice. Appellant brought this action to quiet his title to a tract of land in the SW¼ NW¼ of Section 14, Township 1 North, Range 12 West in Pulaski County described by a metes and bounds description. He claimed title by a quitclaim deed dated February 26, 1962, from the Chicago, Rock Island and Pacific Railroad Company, alleging a claim of title from T. P. Blunt and wife, M. J. (or M. A.) Blunt. Blunt was admittedly a source of title common to the parties. Appellant also claimed title by payment of taxes for seven years under color of title and fifteen years on vacant, wild and unimproved lands. He sought to cancel as clouds on his title any and all documents under which appellees claim to have owned, purchased or redeemed all or any part of the lands.

Appellees filed a general denial of the allegations of appellant's complaint and prayed dismissal thereof. The chancellor held that appellant failed to meet the burden of proof imposed upon him and dismissed his complaint for want of equity. This appeal is from that decree.

The lands involved were part of a tract known as the Blunt Five-Acre Tract, being a square in the Southwest Corner of the NW¼ of Section 14, Township 1 North, Range 12 West. The entire tract was purportedly conveyed to W. P. Brady, as trustee, by T. P. and M. J. Blunt, his wife, by quitclaim deed on July 31, 1906, and in turn by warranty deed executed by Brady and wife to the railroad company on June 6, 1907. The railroad company purported to convey to appellant the lands described in his complaint by quitclaim deed dated February 26, 1962. At that time appellant was admittedly the owner of a one-acre square in the northwest corner of the Blunt tract. The tract described in the deed from the railroad company to appellant contained approximately three-fourths of an acre and lay immediately east of the one-acre tract already owned by appellant. It was bounded on the east by the right-of-way of the

Little Rock expressway and on the south by the right-of-way of the railroad company.

It was shown that a one-acre square lying immediately east of appellant's one acre in the northwest corner of the Blunt tract had been conveyed by Thomas P. Blunt and M. A. Blunt, his wife, to Belle Anderson by warranty deed on June 26, 1884. This deed was recorded in the deed records of Pulaski County on June 29, 1885. On March 6, 1963, one Maria Scott executed a warranty deed conveying a tract which would include all of the tract claimed by appellant under the deed from the railroad.[1] Appellees offered the testimony of one Elisha Jackson, a minister, to establish that Maria Scott was the daughter and sole surviving heir of Belle Anderson. If his testimony be given full credit, the appellees have record title by virtue of the earlier deed from the Blunts for all of the tract claimed by appellant except for a small triangle on the east not included in the one-acre tract conveyed to Belle Anderson.

Appellant attacks the credibility of Jackson and says that no weight should be given to his testimony. He says that the witness's answer showed confusion and that if he is correct as to the date of death of Belle Anderson, she would have been 100 years old, as indicated by a Pulaski County certificate of marriage of an Isabella Spears to Green Anderson.[2] It appeared from other conveyances introduced that Green Anderson was the husband of the grantee in the deed from the Blunts. Although at one point on cross-examination, Jackson said that Belle Anderson died three or four

[1]Another warranty deed executed by Maria Scott on June 1, 1966, subsequent to the filing of this action, was received in evidence. This deed was identical to the first except that it contained a recital that Maria Scott was the sole surviving heir of Belle Anderson.

[2]The marriage certificate shows that Isabella Anderson was 17 years of age when she married Green Anderson in 1878. Jackson said that she died 13 or 14 years ago. This would have made her 92 years of age, at the most.

years before Green Anderson, he positively testified both on direct and cross-examination that she married after Green's death and gave other testimony indicating that she survived him. He did not know Green Anderson as well as he did Belle because the former did not attend church but she did. The witness said he lived within three blocks of them. He did not know whether Maria Scott was Green's daughter or not. Appellant introduced a deed dated December 11, 1918, from a *Bell* Anderson, widow of Green Anderson, conveying other lands in the vicinity to one Lula Bowers, recited in the deed to have been the only known blood relative of Green Anderson. The deed also contained a recitation that it was made in fulfillment of a request made by Green Anderson during his last illness. An affidavit by the grantor recorded as a part of this document states he died April 22, 1918. If Maria Scott was not the daughter of Green Anderson, but was the daughter of his wife, legitimate or not, this deed would not necessarily be contradictory to Jackson's testimony. We cannot say that the trial judge, who saw and heard the witness, should have given this testimony no weight, nor should we entirely discard it here, since the trial court had the opportunity to observe the witness, notice his demeanor in answering questions and his interest or lack of interest in the case. *Little* v. *Holt,* 229 Ark. 627, 318 S. W. 2d 157. Appellant was unsuccessful in showing record title in himself to the tract in dispute because of the earlier deed to Belle Anderson, regardless of the weight to be given to the Jackson testimony.

The major thrust of appellant's argument seems, however, to be based upon the contention that his title should be confirmed because the railroad company had paid taxes on the land for more than fifteen years. He relies on Ark. Stat. Ann. § 37-102 (Repl. 1962) providing that payment of taxes for seven years on unimproved and unenclosed land shall be deemed to be possession if the taxpayer has color of title. He also relies on § 37-103 providing that payment of taxes on such lands for a period of fifteen years creates a presump-

tion that the taxpayer or its predecessor in title held color of title to said land prior to the first payment and that all such payments were under color of title.

In this respect he relies on the testimony of one W. A. Nickerson, an abstractor since 1962 and prior to that time, Land and Tax Agent for the Chicago, Rock Island and Pacific Railroad Company for 34 years. He was in charge of right-of-way, payment of taxes and other matters pertaining to real estate. Through him various plats were introduced to support his testimony that the tract in question was within the boundaries of the property in the right-of-way of the railroad, even though he stated that the only purpose for which this tract was used was for a borrow pit when they needed dirt in 1944 and again in 1953. He stated that during all the years he was with the railroad the taxes on its right-of-way were always paid by paying each county tax collector the amount of taxes due on railroad properties. These payments were based on total assessment of miles of trackage, side tracks, buildings and right-of-way real estate as certified by the Arkansas Tax Commission (now Tax Division of the Public Service Commission). The tax receipt for 1935 was introduced as typical. It shows payment of taxes of Choctaw, Oklahoma and Gulf Railroad Company.[3] No description of any property of any kind appears on this receipt. This witness handled the sale of the property to appellant and saw that the property was taken off the right-of-way description on the tax books. He identified a tax assessor's description change covering this change. This memorandum purported to list certain lands in Section 14, Township 1 North, Range 12 West which had previously been listed on the tax books as right-of-way, together with an additional one-acre square and to show new descriptions resulting from the conveyance from the railroad to Corn, the taking of certain highway right-of-way and a deed for a tract from Corn to the

[3]He stated that this was the main line and Hot Springs branch of the Chicago, Rock Island & Pacific Railroad Company.

railroad company. The descriptions of the tracts noted as being right-of-way were void for indefiniteness. There was also introduced a certificate of the county clerk as to certain real property descriptions appearing on the tax books for the years 1956 and 1960 and assessed in the name of "C. R. I. & P. RR" and for the year 1962 in the name of John P. Corn. These descriptions are also void for indefiniteness, referring to "SW cor of Blount Tract W of QL" and "Pt SW NW of Blounts 5 ac tr". *Rhodes* v. *Covington,* 69 Ark. 357, 63 S. W. 799; *Teer* v. *Plant,* 238 Ark. 92, 378 S. W. 2d 663. No other evidence as to the payment of taxes by the railroad on the lands included in the right-of-way assessed by the Tax Division of the Public Service Commission or its predecessors was offered. No explanation of the failure to offer the official records showing the land descriptions constituting the railroad right-of-way was given.[4] Under Ark. Stat. Ann. § 84-601 (Supp. 1965) and § 84-603 (Repl. 1960) these properties of a railroad company are to be reported by the railroad to this assessing authority annually.

In addition to the deed from Maria Scott, appellees claim title by virtue of a tax deed from the Commissioner of State Lands dated September 10, 1946. This deed was based upon a forfeiture of a tract described as "T. P. Blunt 5 acre tract W of Quapaw Line SW¼ NW¼ Sec. 14, T. W of 1 N, Range 12 W, 1.10 acres", admittedly a description void for indefiniteness. An effort to correct the description was made in the deed. Even if the purportedly corrected description could be said to be sufficiently definite, the state's title is based upon the description under which the tax sale and forfeiture were had and no title was thereby conveyed. In view of the disposition we make of the case, this deficiency is of little significance.

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[4]Appellant's attorney sought to make an explanation in oral argument but this was not in evidence before the chancellor nor is it in the record here.

In a suit to quiet title the petitioner must rely on the strength of his own title, not the weakness of his adversary's. *Lawrence* v. *Zempleman,* 37 Ark. 643; *Chapman & Dewey Land Co.* v. *Bigelow,* 77 Ark. 338, 92 S. W. 534 (error dism. 206 U. S. 41, 27 S. Ct. 679, 51 L. Ed. 953); *Gibbs* v. *Pace,* 207 Ark. 199, 179 S. W. 2d 690; *City of Fort Smith* v. *Mikel,* 232 Ark. 143, 335 S. W. 2d 307; *Brown* v. *Masterson,* 240 Ark. 880, 402 S. W. 2d 666. The burden of proof to establish title was upon appellant. *Morris* v. *Breedlove,* 89 Ark. 296, 116 S. W. 223; *Rushing* v. *Thompson,* 208 Ark. 248, 185 S. W. 2d 941; *City of Fort Smith* v. *Mikel, supra.*

Appellant first contends that the decree appealed from is erroneous "as not deciding the issues between the parties". This is actually an argument that the case should be tried de novo—an assertion that can hardly be the subject of any dispute. Appellant then contends that his title should be quieted on trial de novo. But, except as to the small triangular tract, we agree with the trial court that appellant failed to meet his burden to show his own title. The record title to the remaining lands is either in appellee Arkansas Warehouse Corporation, or the heirs of Belle Anderson. The testimony of Nickerson is not sufficiently clear to justify quieting appellant's title by reason of the payment of taxes required by either § 37-102 or § 37-103. The official record of the property included in the assessment of the railroad right-of-way should have shown without question whether these lands were included. The failure of appellant to produce these records or satisfactorily explain this failure may be taken to indicate to the trier of the facts that their production would have revealed evidence adverse to appellant's position. Failure of a party to produce a written instrument upon which he relies or which would tend to establish an issue of fact, when within his power to do so, creates a presumption that its production would disprove his contention. *Ramey* v. *Fletcher,* 176 Ark. 196, 2 S. W. 2d 84; *Miss. R. Fuel Corp.* v. *Young,* 188 Ark. 575, 67 S. W. 2d 581; *Sparkman Hard-*

wood Lbr. Co. v. *Bush,* 189 Ark. 391, 72 S. W. 2d 527; *Security State Fire Ins. Co.* v. *Harris,* 220 Ark. 900, 251 S. W. 2d 115.

Appellant also asserts that it was incumbent upon defendants to plead and prove whatever grounds for relief they might have. We need not determine what effect, if any, the failure of appellees to assert their title and ask that it be quieted may have upon any future action, but certainly this failure to do so does not entitle appellant to the relief sought by him in spite of his failure to meet his burden of proof.

We find that appellant was entitled to have his title quieted as to the triangular tract of land included in the deed from the railroad company to appellant lying east of the tract conveyed by the Blunts to Belle Anderson. As to this tract, the decree is reversed and the cause remanded for the entry of a decree quieting title in appellant as against appellees. As to the remainder of the tract, the decree is affirmed.

BYRD, J., disqualified and not participating.

LEO D. ANDERSON *v.* CITY OF EL DORADO

5282 418 S. W. 2d 801

Opinion delivered October 2, 1967

Brown, Compton & Prewett, for appellant.

James Spencer and *Don Gillaspie,* for appellee.

J. Fred Jones, Justice. This is an appeal from the Union County Circuit Court. The appellant was charged with a violation of Ark. Stat. Ann. § 41-1124 (Repl. 1964), which provides as follows:

> "Every person who annoys or molests any child is a vagrant and is punishable upon first conviction by a fine of not exceeding Five Hundred Dollars ($500.00) or by imprisonment in the county jail for not exceeding six [6] months or by both such fine and imprisonment and is punishable upon the second and each subsequent conviction by imprisonment in the State Prison not exceeding five [5] years."

Appellant was first tried and convicted in the El Dorado Municipal Court. He appealed to the Union County Circuit Court and upon a verdict of guilty at a jury trial, the court fixed punishment of a fine in the amount of $250.00 and six months in the Union County jail. In his appeal to this court, the appellant relies on two points for reversal:

"1. The evidence viewed from its highest probative value, is not sufficient to justify a verdict of guilty of the offense charged, as rendered by the jury of six men.

"2. The Court erred in admitting the testimony of O'Neal Griffin of the El Dorado Police Force, wherein he was permitttd to repeat a statement alleged to have been made by the defendant before the Municipal Court affirming a statement he was purported to have made to the police officers immediately following his arrest, and at a time when he had not been apprised of his constitutional rights."

We are of the opinion that there was ample evidence to sustain the conviction under the first point relied on by the appellant, but that the judgment must be reversed and the cause remanded for a new trial under the second point.

The precise question presented here, and the one on which we base our decision, is whether or not a confession made to police officers during their investigation and which is barred as admissible evidence under amendment VI of the United States Constitution can, nevertheless, be proven by rebuttal to a denial on cross-examination when offered in the form of a judicial admission at a previous court hearing that such confession had previously been made to the police officers.

The facts in this case briefly are as follows: On the evening of October 28, 1966, two young brothers, 14 and 12 years of age, had finished with their separate paper routes in El Dorado and had started home traveling separately on their bicycles. The older child had stopped at a newsstand, and as he came out of the newsstand, a man, whom he later identified as the appellant, stopped him and asked if he was making much money on the paper route. The child talked with the man a few minutes and started on home. When the boy reached a rail-

road crossing on his way home, the same man was sitting in his automobile stopped at the crossing waiting for a train to cross. The man again spoke to him and offered him Two Dollars to get into the automobile. When the boy refused, the man offered Five Dollars and advised the child of perverted sexual desires. The child refused to get into the automobile but went on home and related the incident to his mother. The mother called the city police and gave them a description of the man and the automobile, including its make, color, and the first two digits of the license number, as related to her by the child. In the meantime, the younger child arrived home, and apparently not aware of his brother's experience, related a similar offer of Two Dollars, then Five Dollars, to go riding with a man in an automobile of the same description as related by the older boy.

When the appellant was first arrested, he was charged with driving without a driver's license and was taken to the police station. The boys reiterated to the police officers, in appellant's presence, what had been said to them and identified the appellant as the one who had said it.

According to Police Officer Brewster, he advised appellant of his constitutional rights against self-incrimination and to the benefits of counsel, after which the appellant admitted he had talked to the boys and had said the things they accused him of saying.

At his trial in the El Dorado Municipal Court, appellant testified in his own defense. He denied in Municipal Court, as well as in circuit court on trial de novo, that he had talked with the boys at all. The primary question at the trial on the merits, concerned the identification of the appellant as the man involved. The boys testified at the trial in circuit court as to what was said to them, and they identified the appellant as the one who had said the things he was accused of saying. We are of the opinion that the testimony of the boys alone, if believed by the jury, was sufficient evidence to sus-

tain the conviction. *Cook* v. *State,* 196 Ark. 1133, 121 S. W. 2d 87; *Martin* v. *State,* 151 Ark. 365, 236 S. W. 274.

At the trial in circuit court on appeal, and in anticipation of the prosecution offering proof as to a confession made by the appellant to the arresting officers, a hearing to determine the voluntary nature of the confession was properly conducted by the trial court in chambers, out of hearing of the jury. Officer Brewster testified in chambers that the appellant denied at his trial in Municipal Court that he talked with the boys, but did admit in Municipal Court that he had told the police officers that he had talked with the boys. The appellant denied making a confession or any admission of guilt to the police officers and denied being advised at all as to any of his constitutional rights.

At the conclusion of the proceedings in chambers, the trial judge announced his decision as follows:

> "... It is going to be the ruling of the Court that the admission or confession of this defendant was made voluntary, that it was made without coercion, duress, threat, abuse, enticement, or promise. However, it is not clear to my satisfaction that it was made after he was apprised of his Constitutional rights of an Attorney. That is a burden on the City to prove, therefore, it is going to be the ruling of the Court that such statement was made in response to interrogation without first advising the defendant of his right to counsel and, therefore, inadmissible."

In anticipation that the prosecution might attempt to prove that the appellant had testified in Municipal Court that he had confessed his guilt to the arresting officers, the appellant's attorney sought a ruling of the court on admissibility, and the court ruled as follows:

> "I don't see why such statement is inadmissible. I think that any statement made in open court is a judicial statement and if he now denies such state-

ment, the City may prove same, after laying a foundation and further, such statement is not collateral."

Upon returning from chambers and resumption of the trial before the jury, the appellant testified in his own behalf as to his activities and whereabouts during the day and night before and after his arrest, and on cross-examination, over the objections of the appellant, he was asked questions and gave answers as follows:

"Q. Did you testify in Municipal Court at the time you were tried before Judge Ragsdale?

A. Yes, sir.

Q. Did you say that time you admitted doing what you are accused of doing here?

A. No, sir.

Q. You did not?

A. No, sir.

Q. You are sure of that?

A. I told him I was not guilty of that charge his officers placed on me.

Q. I asked you if you made a statement then. But you have previously made a statement that you had done what you are here accused of; have you stated that you made no such statement in Municipal Court?

A. I did not say I was guilty in Municipal Court.

Q. That's not exactly what I asked and I think you are smart enough to know the difference. What I asked you is did you make a statement in Municipal Court what you said you

had previously admitted the charges that are here brought against you in Municipal Court?

A. No, sir."

At the close of the defendant's evidence, the prosecuting attorney then called Officer O'Neal Griffin as a witness in rebuttal and, over the objections of the appellant, he was questioned and gave answers as follows:

"Q. Did you [sic] make any statement in Municipal Court?

A. He said that he had told us that he did talk to the boys.

Q. Did he say anything about whether he had talked to them along the line that they had accused him of talking to them?

A. He said he had."

Amendment VI to the Constitution of the United States is as follows:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, *and to have the assistance of counsel for his defense.*" (Emphasis supplied.)

Article 2, § 10 of the Arkansas State Constitution is as follows:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by impartial jury of the county in which the crime shall

> have been committed; provided that the venue may be changed to any other county of the judicial district in which the indictment is found, upon the application of the accused, in such manner as now is, or may be, prescribed by law; and to be informed of the nature and cause of the accusation against him, and to have a copy thereof; and to be confronted with the witnesses against him; to have compulsory process for obtaining witness in his favor, and to be heard by himself and his counsel."

At the close of the hearing in chambers, the learned trial judge correctly stated the law pertaining to the admission of confessions in the prosecution of criminal cases. We agree with the trial court's opinion announced in chambers that the confession accredited to the appellant by Officer Brewster was made before appellant had been apprised of his right to counsel, and that the statement was, therefore, inadmissible under the United States Supreme Court decision of *Miranda* v. *Arizona,* 384 U. S. 436, 16 L. Ed. 2d 694.

Even before Miranda, in the case of *Dement* v. *State,* 236 Ark. 851, 370 S. W. 2d 191 (1963), this court said:

> "It is well settled that under the Fourteenth Amendment of the United States Constitution and Article 2, § 10 of the Constitution of Arkansas acceptance of a plea of guilty without first giving or offering the accused benefit of counsel constitutes a denial of due process of law."

In that case we cited *Carnley* v. *Cochran,* 369 U. S. 506, 82 S. Ct. 884, where it was stated:

> "... the record must show, or there must be an allegation and evidence which show, that an accused was offered counsel, but intelligently and understandingly rejected the offer. Anything less is not a waiver."

Thus it is seen that under amendment VI, *supra,* the right to the assistance of counsel for defense in a criminal prosecution, is a right to *have* the assistance of counsel, and since *Miranda* v. *Arizona, supra,* there is no question this right to *have* the assistance of counsel is of the same dignity as the other rights the accused shall enjoy under amendment VI.

As a general rule the trial court was correct in holding that a statement made in open court is a judicial statement and admissible as evidence against the accused at a subsequent trial, *Barnhardt* v. *State,* 169 Ark. 567, 275 S. W. 909, but this is not true when the statement was inadmissible as in violation of constitutional rights in the first place.

The case of *Bayless* v. *United States,* 150 F. 2d 236, is a case in point. In that case, Bayless signed a confession to bank robbery when he was arrested. He pled guilty in court and was sentenced. At a hearing on a petition for habeas corpus, the court found that the defendant had not intelligently waived his right to counsel and had not been advised of his constitutional right to counsel. His plea of guilty was held void and he was granted a new trial. At the subsequent trial, Bayless was asked on cross-examination if he had previously confessed and if he had not previously entered a plea of guilty. In again reversing the conviction, the Eighth Circuit Court of Appeals said:

> "The fact that this tainted evidence was offered as part of the cross-examination of defendant, is, we think, quite immaterial. The coerced confession and plea were used to convict the defendant, and as said in *Malinski* v. *People of the State of New York, supra,* 'Constitutional rights may suffer as much from subtle intrusions as from direct disregard.'
>
> "We again point out that here the confession and plea of guilty have been adjudged to be coerced, and

hence, there seems to be no escape from the conclusion that the conviction based, we must assume, in part at least upon this tainted evidence can not stand. The judgment appealed from is therefore reversed and the cause remanded with directions to grant defendant a new trial."

We are of the opinion that the trial court was correct in holding that the statement made by the accused "was made in response to interrogation without first advising the defendant of his right to counsel and, therefore, inadmissible."

We are of the further opinion that when the front door was thus barred by constitutional amendment, and properly closed to the admission of the proposed evidence by the trial court in this case; that same evidence could not be entered through the back door disguised in the robes of a judicial admission.

For the error indicated, the judgment of the trial court is reversed and this cause remanded to the Union County Circuit Court for a new trial.

Reversed and remanded.

HARRIS, C. J. and FOGLEMAN, J., concur.

JOHN A. FOGLEMAN, Justice, concurring. I concur in the result, but am not willing to accept all the inferences that might be drawn from the majority opinion. Appellant was arrested on Thursday, October 27th, and while at the police station he made several telephone calls. He was released on bond at 5 a.m. on Friday and went home. He returned to El Dorado Municipal Court that afternoon and announced ready for trial.

This evidence offered was not that of a statement made during in-custody interrogation. As a voluntary statement made while testifying in open court or a comment during the course of arraignment and trial when

there was available to him all the safeguards which a court can afford, I do not think this would have been prohibited by the *Miranda* decision. Appellant had been released from custody, had the opportunity to avail himself of the services of counsel and doubtless would have been allowed additional time to do so had he needed it. Yet, I agree that the testimony should have been excluded, after objection, because there is no showing of the circumstances under which this statement was alleged to have been made in the Municipal Court. If made on cross-examination after objection, it would have been inadmissible in my opinion. But if made under circumstances showing it to be voluntary, I would hold otherwise. Under the *Miranda* decision the burden is on the prosecution to establish a knowing and intelligent waiver of constitutional rights, and I think this rule should be applied here.

I want to make it clear that I deem it unnecessary to appoint counsel for indigent defendants on misdemeanor charges. I fear that some of the language in the majority opinion might be taken as an expression of such a necessity, although I do not think it is so intended.

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

THORP THOMAS ET AL *v.* STATE OF ARKANSAS

5266 through 5273 418 S. W. 2d 792

Opinion delivered October 2, 1967

[redacted]

Alston Jennings, for appellants.

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

CONLEY BYRD, Justice. The appellants, Thorp Thomas, Chester Boyer, Leon Brents, Charles F. Wells, Everett Hamm Jr., and Gene Wirges, bring their separate appeals, consolidated here, challenging the authority of the trial court to assess court costs against them upon dismissal of criminal charges against them.

Except for the insertion of the individual names of appellants, the orders entered by the trial court read, ". . . it is by the Court . . . ordered . . .that the indictment against the said Thorp Thomas be dismissed and that Thorp Thomas be discharged, upon payment of costs."

The order assessing court costs against the defendant upon dismissal of the indictment is void and of no effect, *Melton* v. *State,* (Ala. Ct. of App.) 1 So. 2d 920 (1941), and is a violation of due process of law, *Giaccio* v. *Pennsylvania,* 382 U. S. 399 (1966). Nor was any objection necessary since the court exceeded its authority, *Sibley* v. *Leek,* 45 Ark. 346 (1885).

Reversed and dismissed.

CARL WIDMER *v.* J. I. CASE CREDIT CORPORATION

4266

Opinion delivered October 2, 1967
[Rehearing denied November 13, 1967.]

Carl Widmer, pro se.

Charles R. Garner, for appellee.

CONLEY BYRD, Justice. This action by appellee, J. I. Case Credit Corporation, against appellant, Carl Widmer, was previously before this court in *Widmer* v. *J. I. Case Credit Corp.,* 239 Ark. 12, 386 S. W. 2d 702 (1965). After remand a trial on the merits was had, resulting in a judgment for appellee as assignee of a note executed by appellant to Fort Smith Tractor Company, Inc., for farm equipment. This appeal is on a partial record

containing only the mandate of this court from the previous appeal; appellant's answer; numerous requests for admissions of fact; the answers given thereto; the interlocutory orders of the trial court; motions for summary judgment and notwithstanding the verdict; and the final judgment. For reversal, appellant contends that the note was usurious and that appellee is unable to enforce the contract because it is an unlicensed foreign corporation doing business in Arkansas contrary to Ark. Stat. Ann. § 64-1202 (Repl. 1966).

The note sued on is not usurious on its face. Appellant's contention of usury is based on two propositions: (1) that one of the pieces of farm equipment was not delivered to him because it was not received by the seller, or its successor, until after appellant was in default, and (2) that less of each payment should have been applied to interest and more to principal. We find both contentions to be without merit. On the first point, we have held that institution of a suit for more than a party is entitled to does not constitute usury. *Mid-State Homes, Inc.* v. *Knight,* 237 Ark. 802, 376 S. W. 2d 556 (1964). The record shows that the trial court's judgment gave appellant credit for the undelivered machinery. On the second point, appellant errs in the method by which he applies his installment payments to principal and interest, for the lender is entitled to apply the payment first to the interest due on the total indebtedness, and the balance, if any, to the principal. *Hare* v. *General Contract Purchase Corp.,* 220 Ark. 601, 605, 249 S. W. 2d 973 (1952).

With respect to the other issue, the requests for admissions of fact readily show that appellee is an unlicensed foreign corporation doing business in Arkansas contrary to the provisions of § 64-1202, *supra.* However, the negotiable paper here sued upon was not executed directly to appellee but was given to the Fort Smith Tractor Company, Inc., of Fort Smith, Arkansas. There are no facts in the record to show that the as-

signment from Fort Smith Tractor Company, Inc., to appellee was made in the state of Arkansas.

The penalty provision of Ark. Stat. Ann. § 64-1202 (Repl. 1966) provides:

> ". . . any foreign corporation which shall fail or refuse to file its articles of incorporation or certificate as aforesaid, cannot make any contract in the State which can be enforced by it either in law or in equity, . ."

Thus it is seen that the penalty provision applies only to contracts made in this state, and that, being penal in nature, it must be strictly construed in favor of those against whom the penalty is sought, *Alexander Film Co.* v. *State ex rel. Phillips County,* 201 Ark. 1052, 147 S. W. 2d 1011 (1941).

Therefore, since appellant failed to show that the assignment between Fort Smith Tractor Company, Inc., and appellee was entered into in the state of Arkansas, the trial court properly overruled his motion for summary judgment on this issue.

In this respect, we point out that upon this partial record, appellant complains only of the trial court's failure to grant his motion for summary judgment, and of course upon a motion for summary judgment the burden is upon the movant to show that no justiciable issues exist, Ark. Stat. Ann. § 29-211 (Repl. 1962). If the designation of the points to be relied upon on appeal had been sufficient to reach the trial court's finding on this issue, the burden of showing its right to maintain its action would have been upon appellee, *Miellmier* v. *Toledo Scale Co.,* 128 Ark. 211, 193 S. W. 497 (1917).

Affirmed.

OLD AMERICAN LIFE INS. CO. *v.* UNION NATIONAL BANK EXEC.

5-4294 419 S. W. 2d 122

Opinion delivered October 9, 1967

Jack Young, for appellant.

Billy L. Satterfield, for appellee.

CARLETON HARRIS, Chief Justice. William V. Browning purchased a hospitalization policy from the Southern Union Life Insurance Company, making application for same on January 21, 1965. The policy obligations of Southern Union were assumed by Old American Life Insurance Company prior to the filing of this action. The application was taken by K. L. McGuire, described by appellant in its statement of the case as "a special agent of Southern Union with authority to solicit applications for insurance." At the time of making application, Browning paid an enrollment fee of $10.00, and an amount equal to a month's premium ($9.95). On January 27, 1965, the policy was issued, and was delivered to Browning by McGuire the next day. On this date McGuire also collected from Browning the sum of $109.45, representing eleven months' premium under the policy.

There is a clause in the policy which provides that certain diseases, and surgery resulting from sickness,

are covered after six months if the policy is issued on a monthly basis; covered after three months if same is issued on a quarterly basis, after forty-five days if issued on a semi-annual basis, and coverage is provided after only fifteen days if the policy is issued on an annual basis. On April 28, 1965, more than fifteen days after the issuance of the policy, but less than six months from January 27, 1965, Browning was hospitalized for surgery for a bleeding ulcer, and the question at issue in this litigation is whether coverage existed. The parties have stipulated that, if coverage was in effect, the company was obligated in the sum of $1,467.02, exclusive of penalties, attorneys fees, and costs. The company denied liability, and suit was instituted by Browning. On trial, the Pulaski Circuit Court (Second Division), sitting as a jury, found as follows:

"That the Plaintiff and the Defendant entered into a contract or policy of insurance and at the time the policy in question was delivered to the Plaintiff, the Plaintiff was given a receipt dated January 28, 1965, which stated:

> 'RECEIVED OF Mr. William Browning $119.40 plus $10.00 for the first 12 month's cost beginning with the date of the policy.'

The policy itself states that the insured will be 'covered after 15 days if issued on an annual basis.' The policy provided for a 6 months' waiting period if issued on a monthly basis.

The Court finds that by paying the 12 months' costs, or annual premium, the insured was covered by the 15 day waiting period instead of the 6 months' waiting period. The Court further finds that the insurance company was estopped by the action of its agent to deny that the 15 day waiting period was in effect.

The parties stipulated that:

'K. L. McGuire was, on January 28, 1965, an agent for Southern Union Life Insurance Company, acting for them in binding the company on the aforementioned contract.' "

Judgment was rendered against Old American Life Insurance Company in favor of Browning[1] in the amount of $1,467.02, plus 12% penalty, attorney's fee in the amount of $485.00, and costs in the sum of $11.80. From the judgment so entered, appellant brings this appeal. For reversal, it is urged that the court erred in admitting testimony of oral statements and representations tending to change or modify the written documents, and further, that the court erred in concluding that the agent had authority to contract outside the written terms of the policy of insurance.

Over objections, the court permitted Browning to testify that Mr. McGuire, and another representative of Southern Union Life Insurance Company, talked with him about purchasing a policy. Browning stated that they did not have a sample of the policy with them; he desired to see one before making the purchase, and they agreed that he would pay his enrollment fee and a month's premium, which would enable the policy to be issued. Browning testified that he was told that if he bought the policy for only a month, there would be a six months' waiting period, while if he paid a year's premium, there would only be a fifteen day waiting period. Browning stated that he did not want any policy for just one month, but wanted to pay his premium for twelve months. In line with this conversation, he gave McGuire a check for $19.95, representing the enrollment fee and a month's premium, it being understood that the balance of the year's premium would be paid when the policy was delivered. One week after the application was submitted, McGuire took the policy to Browning, and the latter then gave the agent a check in the amount

[1]Browning has since died, and Union National Bank, executor of his estate, has been substituted as party plaintiff.

of $109.45, payable to the Southern Union Life Insurance Company, representing the full premium for one year. McGuire then gave to Browning a company receipt (the name of the company appearing in print at the top, together with its address), which shows that he received of the policyholder "$119.40, plus $10.00 for the first 12 months' cost, beginning with date of the policy." The record reflects that both checks given by Browning were presented to the Union National Bank, and were stamped by the bank, "paid." This was all the proof offered in the case, Browning's testimony being undisputed.

Appellant argues that the court erred in permitting this oral testimony; that there are no ambiguities in either the application, or the policy, and the written contract between the parties cannot be varied by oral evidence. The application itself does not state at any place that Browning was applying for a policy that would be paid monthly. A box at the top of the lefthand corner of the page reflects monthly payments to be $9.95, quarterly payments, $29.85, semi-annual payments, $59.70, and annual payments, $119.40. This certainly shows that one can obtain a policy for any of these periods. At the bottom of the page, there is a notation by McGuire showing that one month's premium had been paid. On the face of the policy, there is a schedule showing (as in the application) the amount of one month's premium, three months', six months', and twelve months'. The effective date is shown to be January 27, and the initial term is shown as expiring on February 27. It is appellant's contention that the payment of the premium for eleven months was simply, under the policy, the payment of eleven renewals in advance.

Let it here be pointed out that, though appellant, in its statement of the case, says that McGuire was "a *special* [our emphasis] agent," the italicized word does not appear in the stipulation entered into between the parties. The stipulation simply reads, as set out in the court judgment, "K. L. McGuire was, on January 28, 1965, an agent for Southern Union Life Insurance Com-

pany, acting for them and binding the company on the aforementioned contract." The company argues that McGuire was only authorized to sell insurance and deliver policies. It will be noted however, that there is nothing in this stipulation which sets out that McGuire's authority was limited in any manner. While the stipulation recites that McGuire was acting for the company in binding it on the contract, there is no language which indicates that this represented his full authority. We think that, to say the least, under all the circumstances, there is an ambiguity here which creates a question of fact, *i. e.,* what was the authority of McGuire in the instant case? Of course, juries (or the Circuit Court sitting as a jury) determine fact questions.

Under the stipulation relative to agency, the company receipt given to Browning by McGuire on January 28 (one day after the policy became effective) showing payment of a year's premium, and the other facts herein mentioned,[2] we think a question of fact was presented to the court relating to the authority possesssed by the agent. The court decided this question adversely to appellant company, and we are unable to say that there was no substantial evidence to support the findings.

Affirmed.

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[2]While the record definitely shows that the checks made out to the company were paid, there is no evidence as to whether the company tendered a refund of any part of the last amount paid.

CALVIN DAVIS *v.* STATE OF ARKANSAS

5289 419 S. W. 2d 125

Opinion delivered October 9, 1967

Kenneth Coffelt, for appellant.

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

GEORGE ROSE SMITH, Justice. The trial court, sitting without a jury, found the appellant guilty of robbery and sentenced him to three years imprisonment. For reversal it is contended that the court erred in admitting proof of an oral confession made by the accused while he was being questioned by four police officers.

At about nine o'clock on the night of February 14, 1966, a man armed with a pistol held up the clerk in a Little Rock liquor store and took about $100 in cash and a bottle of whiskey. At about midnight the North Little Rock police arrested the appellant, Calvin Davis, and his companion, George Overton, who was wanted for several robberies. Davis was then nineteen years old and

had no prior criminal record. The two were riding in a pick-up truck that belonged to Davis's employer and was being driven by permission.

Overton eventually pleaded guilty to the offense now in question and to four other robberies. In the court below, however, Overton exonerated Davis of any complicity in the offense with which Davis was charged. Overton testified that he alone committed the robbery while Davis waited in the truck and that Davis knew nothing about it. Davis's testimony was to the same effect. The principal evidence connecting Davis with the crime was his asserted in-custody confession, in which he admitted that he knew that Overton entered the liquor store with the intention of committing robbery.

As we have said, Overton and Davis were picked up in North Little Rock at about midnight. An hour or so later they were turned over to the Little Rock police, who questioned them separately at about two o'clock in the morning. According to the State's proof the officers warned Davis of his right to remain silent and of his right to an attorney. After having been so warned Davis at first said that he did not want to tell what had happened. The officers nevertheless continued the interrogation. Davis then said that he was willing to discuss the case but that he would rather not sign anything. The officers soon elicited the oral confession that constituted the principal evidence against Davis at the trial.

Under the ruling in *Miranda* v. *Arizona,* 384 U. S. 436 (1966), the alleged confession was plainly inadmissible. There the court, after detailing the officers' duty to warn a suspected person of his constitutional rights, went on to say: "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any state-

ment taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise.'' Here the State's own proof shows that the rule just quoted was violated by the officers who interrogated Davis. His asserted confession was therefore inadmissible.

Reversed and remanded.

PIGGOTT STATE BANK *v.* POLLARD GIN CO.

5-4275 419 S. W. 2d 120

Opinion delivered October 9, 1967

Gus R. Camp, for appellant.

Kirsch, Cathey & Brown, for appellee.

GEORGE ROSE SMITH, Justice. The one question in this case is whether the plaintiff-appellant bank, in

lending $1,200 to Denzil Karnes upon the security of crops to be grown by him during the ensuing year, inserted in its combined Financing Statement and Security Agreement a description of the crops sufficient to put third persons on notice under the Uniform Commercial Code. The chancellor held the description to be fatally defective and accordingly dismissed the bank's suit for conversion against the appellee gin company, which had bought the cotton crop from Karnes.

This is the description used in the Financing Statement and Security Agreement: "CROPS. All of the following crops to be planted or growing within one year from the date hereof on the lands hereinafter described: 7 acres of cotton and 53 acres of soybeans to be produced on the lands of S. E. Karnes; 11.6 acres of cotton and 50 acres of soybeans to be produced on the lands of Mary Gilbee; 4½ acres of cotton and 11 acres of soybeans to be produced on the lands of George Nixon; all of the above crops to be produced in Clay County, Arkansas during the year 1965."

We agree with the chancellor's conclusion. With respect to crops the Code requires, both as to the financing statement and as to the security agreement, that there be a description of the land that is involved. Ark. Stat. Ann. §§ 85-9-203 and 85-9-402 (Add. 1961). The description "is sufficient whether or not it is specific if it reasonably identifies what is described." Section 85-9-110. The Commissioners' Comment to the latter section states: "The test of sufficiency of a description laid down by this Section is that the description do the job assigned to it—that it make possible the identification of the thing described."

Here the description referred merely to seven acres of cotton to be produced on the lands of S. E. Karnes (together with two other similar references). Neither the security instrument nor the proof adduced at the trial sheds any light whatever upon the questions (*a*) whether Denzil grew exactly seven acres of cotton on

the S. E. Karnes land in 1965 and (*b*) whether anyone else was also growing cotton upon the S. E. Karnes land. We need not speculate upon what might have been the posture of the case if both these possibilities had been explained, for that is not the situation before us.

Of course we do not cite as controlling authority decisions of this court that were handed down many years before the enactment of the Commercial Code. Yet we have no hesitancy in relying upon such decisions when they help us to decide whether, in the language of the Code, a description "reasonably identifies what is described." We have said more than once that "a mortgage of a specified number of articles out of a larger number will not be allowed to prevail, unless it furnishes the data for separating the property intended to be mortgaged from the mass." *Krone & Co.* v. *Phelps,* 43 Ark. 350 (1884): *Dodds* v. *Neel,* 41 Ark. 70 (1883). That principle is so reasonable and so plainly applicable to the case at hand that we see nothing to be accomplished by a more extended discussion of the matter.

Affirmed.

THE CITY OF SPRINGDALE, ARKANSAS *v.* HOMER KEICHER AND EUNICE KEICHER

5-4277 419 S. W. 2d 800

Opinion delivered October 9, 1967
[Rehearing denied November 13, 1967.]

Crouch, Blair & Cypert, for appellant.

Lewis D. Jones, for appellee.

PAUL WARD, Justice. This is a condemnation suit brought by the City of Springdale to secure easements for the construction of a sewer line.

On February 2, 1964 the City (appellant) filed a complaint in circuit court against Homer and Eunice Keicher (appellees) to procure a *temporary* easement (over appellees' land) fifty feet wide and approximately 1,000 feet long to be used while constructing the sewer line. Appellant also sought a *permanent* easement (over said land) fifteen feet wide and approximately 1,600 feet long where the line was to be placed. Appellant deposited $150 in the registry of the court to cover any damages to appellee for the taking and asked for the right of immediate entry for construction purposes.

On the same day the court entered an Order giving appellant the right of immediate entry. Thereupon appellant began construction operations.

On November 9, 1966 appellees filed an Answer and Counter-Claim. In the Answer appellees stated they owned the land, and that they should recover the sum of $20,000 "for the taking of said lands and the damages caused to the remainder of their lands". In their cross-complaint appellees sought $10,000 damages caused by odors from a sewage disposal system which appellant had erected and maintained adjacent to their lands during the past three years.

In reply, appellant said any alleged damages asked for in the Counter-Claim was barred by the statute of limitations, and denied all allegations in the answer.

A jury trial on November 28, 1966 resulted in a verdict in favor of appellees in the amount of $7,000 for which judgment was entered.

On appeal appellant designates only one point, but argues two general grounds for a reversal; *One*, there is no "substantial evidence upon which to base the award of damages", and; *Two,* incompetent testimony was admitted in evidence.

One. By-passing for the moment the matter of alleged incompetent testimony, we have concluded there is substantial evidence to support the $7,000 judgment.

Homer Keicher, appellee, testified: I am the owner of the land, consisting of 192 acres, am seventy three years old, was born on the land and have lived there ever since; I used the land for farming—such as melons and truck crops and raising cattle; I know what property has sold for in that neighborhood; In my opinion the value of the land before the sewer line was put in was $70,000 and after that it was worth $50,000. He stated that due to the taking he had to repair a lot of

fences to keep cattle "and I can't even do that", and the odor from the sewer is awful bad.

Mrs. Keicher, the wife of Homer, has lived on the land for twenty-two years, testified: My family owns the property in the neighborhood, and I have an opinion as to the value of our farm. [Her opinion was the same as her husband.] She further stated that before the sewer line was put in we had no trouble with odors, but now when the wind is from the north "it is just unbearable", and she could easily tell the difference between the sewer line and the City dump.

Dale Killian testified: I have been a real estate broker in Washington County for fourteen years; have handled property "well over the entire county and am familiar with the value of real estate, the rural type, and of the urban type"; I know the land here in question and have inspected it; in my opinion "the value of the subject farm prior to its taking was $55,000 . . . the value of the remainder of the farm after the taking by City is $45,000".

King Wheeler, who has been a real estate broker in Washington County for twenty-four years and says he has been acquainted with the land in question all that time, testified, in effect, that the land was worth $54,000 before the taking and $41,000 after the taking.

The above testimony was presented to the jury under instructions of the court to which appellant made no objection, and it was, of course, up to the jury to believe or disbelieve any part thereof. We are therefore unable to say there was no substantial evidence to support the jury's verdict for $7,000. In support of this conclusion we call attention to certain pertinent decisions of this Court.

In *Housing Authority of Little Rock, Arkansas* v. *Winston,* 226 Ark. 1037, 295 S. W. 2d 621, we said that

a non-expert witness who is acquainted with the land in question and says he knows the market value is competent to express an opinion as to its market value. In *Ark. State Hwy. Comm.* v. *Drennen,* 241 Ark. 94, 406 S. W. 2d 327, we held that a land owner could give his opinion as to the before and after value of his land. See also: *Ark. State Highway Comm.* v. *Johns,* 236 Ark. 585, 367 S. W. 2d 436.

Two. We now examine appellant's contention that the case should be reversed because inadmissible testimony was erroneously introduced.

(a) Appellant moved to strike "the entire testimony" of Dave Killian because it "involves a lot of elements that are not properly considered in this suit". The motion was overruled, and, we think, properly so. It is true that references were made by Killian (and other witnesses) to odors from sewer installations other than the pipe line—this pursuant to appellees' cross-complaint. However, the cross-complaint was dismissed by the trial court. Also, in overruling appellant's motion the court sustained it in part by striking testimony relating to the City dump and the land fill. Appellant did not object to this ruling.

(b) Appellant moved to strike the "entire testimony" of Wheeler. The trial court then made this statement: "He can testify as to the value of this farm but if you are going to bring in an element of damage from odor, I will sustain it as to that part" because "he didn't know there was any there before or not". No other objection was made by appellant. At any rate we think appellant failed to show the witness had no reasonable basis for his opinion as he had formerly stated and as modified. In the *Johns* case, *supra,* we said:

> "An expert witness, after having established his qualifications and his familiarity with the subject of the inquiry, is ordinarily in a position to state his opinion."

* * * *

> "It was incumbent upon counsel for the appellant to support their motion to strike by showing that the land owners' expert witnesses had no reasonable basis for their opinions."

In view of the fact that appellant did not object to any of the instructions given by the court, we hold a fact question was presented to the jury as to the amount of damages.

We also find no merit in appellant's contention, backed by testimony of its witnesses, that the sewer line was a benefit, and not a detriment, to appellees' property. There was, however, no showing by appellant that such benefit (if any) was peculiar to appellees and did not likewise benefit other property as well. *McMahan* v. *Carroll County,* 238 Ark. 812, 384 S. W. 2d 488, and *Martin* v. *Raulston, County Judge,* 239 Ark. 769, 394 S. W. 2d 133.

Affirmed.

Brown, Fogleman and Jones, JJ, dissent.

JOHN A. FOGLEMAN, Justice, dissenting. I cannot agree that the judgment should be affirmed in this case. If indeed it can be said that there is any evidence to support the verdict, I do not see how it can be said that there was no prejudicial error in the admission of testimony in the case.

Appellees, the landowners, offered the testimony of Dale Killian, H. G. Brady, King Wheeler and Charles Schumake, in addition to their own testimony, to show the damages they were entitled to recover. Little, if any, of this testimony was competent and most of it should have been stricken. When the incompetent testimony is eliminated, it cannot be said that the jury verdict can be sustained on what remains.

Dale Killian, a Fayetteville real estate man, testified of adequate background to qualify him as an expert to testify as to property values in Washington County. However, he did not understand that this suit was not concerned with a sanitary landfill and city dump on the north edge of appellees' property and he took these rather detracting factors into consideration in determining the reduced value of the Keicher property after the taking. The difference in "before" and "after" values fixed by him amounted to $10,000.00. He said it would be hard for him to take just one consideration in determining how much of the $10,000.00 is caused by the city dump. He said that on the landfill he would place about 1/5 the damage value, about 3/5 on the sewer, and 1/5 on the "other damage." This meant that only about $2,000.00 of the total damage was caused by the easement for the sewer line, the remainder apparently being due to the adjacent sewer plant and the city dump. It is not clear as to how the remainder would be distributed. He testified that if it were not for the city dump and the treatment plant, the sewer line would have raised the value of the property probably $200.00 to $300.00 per acre. At the conclusion of his cross-examination, he repeated that the property was hurt by the dump right square against it and this was one of the things he had been taking into consideration in estimating the damages. I do not see how it can be said that his testimony should not have been stricken.

At no time did the court instruct the jury that they were not to consider that portion of this testimony regarding the noncompensable and unrelated element of damages claimed by appellees, nor did the instructions specifically advise the jury that they should not consider any damages due to the sanitary landfill and city dump. While all the testimony of a witness should not be stricken when part of it is competent, it must be stricken when cross-examination reveals that the witness used an invalid basis in fixing values. *Ark. Highway Comm.* v. *Wilmans,* 236 Ark. 945, 370 S. W. 2d 802. In the cited case the court reversed and remanded

the case because of the failure of the court to strike the value testimony of one witness who used an improper basis, even though it was held that there was no error in failure to strike the value testimony of another. Basing the difference in valuation on an improper element of damage is erroneous and prejudicial. *Ark. State Highway Comm.* v. *Ptak*, 236 Ark. 105, 364 S. W. 2d 794.

Homer Keicher, the landowner, testified that the dump smells like rotten eggs and dead animals. Mr. Keicher did not know of recent real estate transactions immediately adjacent and near to appellees' property, or what the sellers received or purchasers gave, saying that he did not know the price given for land around him for the past five years, never tried to find out, and considered it nothing to him. In saying that the value of his property after the taking was worth only $50,000.00, as against $70,000.00 before, he said that he was taking into consideration that the dump was right next to him, since he joined it for one-half mile. He said that this was one reason why he thought his 192-acre farm was reduced in value to the extent of $20,000.00. He gave no clue as to how he arrived at his values. I feel that his testimony should also have been stricken. Appellant moved to strike the testimony of Keicher on the grounds that he was not qualified to testify as to before and after value and that he took into consideration improper elements of damages. The court did not instruct the jury that they were not to consider the portion of the testimony of the owner relating to the improper basis of damages and there would have been no way for the jury to separate the elements if he had.

As to the first ground, even a landowner witness may not be permitted to give an arbitrary valuation figure having no relation to the facts in the record where he makes no effort to say how he arrived at his valuation. *Ark. State Highway Comm.* v. *Stanley,* 234 Ark. 428, 353 S. W. 2d 173; 4 ALR 3d 749.

Mrs. Keicher frankly said that she did not know what the property in the neighborhood bought and sold for. When asked what the property value was before the taking, she said that her opinion was what her husband said—$70,000.00. Objection to this testimony was overruled. She also thought the value after the taking was $50,000.00. She said there was an odor from the landfill and city dump, but would not be if they kept it properly covered. Unlike her husband, she didn't figure much of the damage was done from the dump and landfill, but she said nobody would want that odor. Her testimony cannot be regarded as substantial. *Arkansas State Highway Comm.* v. *Ptak,* 236 Ark. 105, 364 S. W. 2d 794.

H. G. Brady lived on a neighboring farm and was also litigating with appellant about the sewer line and sewer plant as they affected his farm. He could smell the city dump as he want through the Keicher property. He described it as a very offensive odor. He gave no testimony as to values.

King Wheeler, also a Fayetteville realtor, was possessed of adequate professional qualifications. He also appraised the property upon the assumption that the city dump was a damaging factor, saying that the property was damaged to the extent of $13,000.00. He never stated his opinion as to the value of the lands after the taking. Upon being advised by appellees' attorney, during cross-examination, that the dump was not to be considered, he promptly advised that he would then take off 20% of the figure he gave. He had never heard of neighboring properties recently sold. He admitted that he based his appraisal on comparable sales in Fayetteville and Farmington, not Springdale, because he did not definitely know of any property being sold in Springdale in the preceding few months. He also said that he did not check any Springdale sales because he did not know of any and did not have time, having been employed to make his appraisal only two days before trial. The sale he relied on as being most nearly like the subject tract was of a parcel near Farmington and three and one-

half miles from Fayetteville. But the greatest vulnerability of his testimony is that he did not value the property as of the date of taking, but valued it as of the day he saw it, two days before the trial and nearly three years later.[1] As an additional reason for doing so, he said he didn't know the property too well before that date. Appropriate motions to strike were made and overruled.

It is well settled that the compensation to the landowner can be fixed only on the basis of values at the time of the taking. *Ark. State Highway Comm.* v. *Brewer,* 240 Ark. 390, 400 S. W. 2d 276; *Arkansas State Highway Comm.* v. *Griffin,* 241 Ark. 1033, 411 S. W. 2d 495; *Kansas City Southern Ry. Co.* v. *Boles,* 88 Ark. 533, 115 S. W. 375.

While the court sustained an objection by appellant when the witness improperly assumed that there were no sewage disposal facilities north of the Keicher tract just prior to the taking of the sewer easement, appellees' counsel attempted to rehabilitate him with the result that his testimony was finally admitted over appellant's objections. Wheeler recalled that he had handled the sale of an adjoining farm and knew what the city had north of that tract prior to 1964, but told the court that he did not know that any sewer facilities were there prior to 1964. After appellant's objection, the court ruled that this witness's testimony as to the city dump was excluded and his testimony as to the offensive odor was excluded, but his testimony with reference to damage because the sewer line zigzagged through the property was admitted. The witness had testified about offensive odors from both the sewer plant and the city dump and indicated that 60% of the total damage was due to the location of the sewer plant. I doubt if the jury was able to understand what they were to consider and what they were not to consider. Because of the various factors

[1]The date of taking was February 3, 1964. The date of trial was November 17, 1966.

showing that there was no fair and reasonable basis for the testimony of this witness, it should have been stricken.

I submit that the testimony of these witnesses lacked a proper basis as a matter of law for the giving of their opinions or for the jury's verdict. Appellant made proper objections, motions to strike, and motion for a directed verdict. Where error is committed in the admission of improper value testimony and proper objection is made, the error will be treated as prejudicial unless it be shown that appellant was not prejudiced thereby. *Ark. State Highway Comm.* v. *Ptak,* 236 Ark. 105, 364 S. W. 2d 794. I see no way that it could be said that error in the admission of the testimony in this case was not prejudicial. It leaves no substantial testimony of any nature to support the verdict. The testimony of neither the experts nor the landowners is substantial when cross-examination reveals that it is not based on a fair and reasonable basis. *Malvern & Ouachita River R. Co.* v. *Smith,* 181 Ark. 626, 26 S. W. 2d 1107; *City of Harrison* v. *Moss,* 213 Ark. 721, 212 S. W. 2d 334; *State Highway Comm.* v. *Byars,* 221 Ark. 845, 256 S. W. 2d 738; *Hot Spring County* v. *Prickett,* 229 Ark. 941, 319 S. W. 2d 213; *Arkansas State Highway Comm.* v. *Johns,* 236 Ark. 585, 367 S. W. 2d 436.

The testimony of Charles Schumake had no bearing on values but related to offensive odors from the sewage plant only. Thus, it added nothing to this picture.

I would reverse and remand for a new trial.

I am authorized to state that Brown and Jones, JJ, join in this dissent.

JOSEPH A. GENTRY ET AL *v.* E. J. HOLLAND ET UX

5-4278 419 S. W. 2d 130

Opinion delivered October 9, 1967
[Rehearing denied October 30, 1967]

John W. Cloer, Walter Niblock and *R. L. Womack,* for appellants.

Charles W. Atkinson, for appellee.

LYLE BROWN, Justice. This suit was originated by E. J. Holland, appellee here, to quiet title in 111 acres of land in Madison County. The principal cloud on his title arose as a result of a prior executed lease covering forty acres. That lease has been in the hands of several parties, a number of whom here claim rights still subsist in them. Their claims were adverse to Holland and also as between themselves. The trial court declared the lease had been cancelled for default in monthly rental payments. Various counterclaims and cross-claims growing out of the operations under the lease were litigated and appeals have been taken from those findings. Ap-

pellants are John E. Yarbro, War Eagle Lime Co., Inc., and Joseph A. Gentry.

The forty-acre tract which was leased contained substantial limestone deposits. In 1952 Harwood and Will obtained a nineteen-year lease for the purpose of removing limestone and processing it at a quarry to be located on the lands. The fee owner was to receive five cents per ton for the products processed at the quarry, with this additional provision:

> "And if . . . the royalty payable to lessor be less than an average of $25.00 per month for a period of 3 consecutive calendar months, then lessee must nevertheless begin paying lessor $25.00 per month minimum, and if this stipulation is not fulfilled then lessor may on 30 days written notice to lessee cancel this lease agreement and lessee be required to remove his property from the premises."

In 1959 appellant Joseph A. Gentry came into possession of the lease by assignment. He was also assigned "the good will and name of the War Eagle Lime Company." Within a few weeks Gentry assigned the lease to appellant John E. Yarbro. Gentry and Yarbro simultaneously executed a sale and purchase agreement. By that instrument Yarbro became the owner of the business operated under the name of War Eagle Lime Company. Gentry retained a lien on the lease and all the operating equipment to secure the installment payments.

Yarbro apparently incorporated the lime company under the name of War Eagle Lime Company, Inc. This was done within three months after the Gentry to Yarbro transaction. Yarbro transferred his interest to the corporation "subject to the contract of sale and purchase" between Gentry and Yarbro.

Yarbro operated the company from 1959 until late in 1963, paying the mining royalties to the fee owner, Berry Denney, until December 1963. At that time Yarbro

entered into an agreement with Denney to buy the forty leased acres on which War Eagle's operation was located. An escrow agreement was executed. Yarbro agreed to make a cash payment of $10,000, half of the purchase price, and agreed to pay the balance on or before June 2, 1964. Appellee E. J. Holland actually advanced the down payment for Yarbro. The payment was delivered to Denney. The escrow agreement, contract of sale, and warranty deed, Denney to Yarbro, were held by the escrow agent, First National Bank of Huntsville.

Shortly after the escrow deposit, Yarbro advised his benefactor and employee, Holland, that Yarbro would not be able to raise the purchase price. Appellee Holland testified that in order to protect his advancement, he agreed with Yarbro to buy the acreage. On December 23, 1963, which was ten days after the Denney-Yarbro transaction, Yarbro executed a warranty deed to Holland. The latter was aware of the outstanding mining lease and the escrow transaction. Holland either held his deed or left it with the Bank. On May 22, 1964, Holland and Denney went to the Bank. There Holland paid the balance of the purchase price, borrowing the money from the Bank. Forthwith three instruments were simultaneously recorded under the Bank's direction. These were the Denney-to-Yarbro deed, the Yarbro-to-Holland deed, and Holland's mortgage to the Bank.

Yarbro operated the business from 1959 to late in 1963. By that time War Eagle was heavily indebted. There was no production during the first few months of 1964. During that interim Holland was trying to raise capital to purchase new machinery which would be used in making new products. That endeavor was not successful. At this point Yarbro, acting in the name of the corporation, conveyed all rock and other merchandise on hand to Holland. Appellants claim Holland was to retain $2,910 owed him by War Eagle and to return the balance to the Company. Holland claimed $6,554.15 was due him for wages, commissions, and expenses.

We have summarized the salient facts touching on the status of the lease. For purposes of clarity we shall here digress from the many other contentions and discuss our holding with respect to the lease.

If the lease was extinguished it was because no royalty or rental payments were made during the escrow period, that being from December 2, 1963, until May 22, 1964. On May 10, 1964, Yarbro tendered the April payment (the twenty-five dollar minimum) to Holland. It was refused. Yarbro testified that for several months thereafter he made continuous tenders. There is little dispute about those tenders. All were refused. Gentry sued Yarbro and on June 9, 1965, a judgment was entered in that case in the Madison Chancery Court. All rights of Yarbro in and to the lease were cancelled. The personal property was ordered sold to apply on Gentry's judgment. Then on June 10, 1965, by money order to Holland, Gentry tried to make the rental payment due on that day.

If the lease was still in effect when Holland took the deeds out of escrow, the recited tenders were sufficient to keep the lease in effect. Continuous and unbroken tenders are unnecessary when it is evident they will not be accepted. *Holloway* v. *Buck*, 174 Ark. 497, 296 S. W. 74 (1927); *Taylor* v. *Mutual Ben. Health & Accident Ass'n.*, 133 F. 2d 279 (1943).

Holland's title did not vest until May 22, 1964. He made the down payment with full knowledge that the Denney-to-Yarbro deed would not be released until the balance of the purchase price was paid. And Holland agreed to, and did, timely pay the balance. Unquestionably, Holland knew he had no title until Denney was paid. The chancellor took the view that Holland's rights vested when the Yarbro-to-Holland deed was executed. The trial court also held that the tender of royalty payments was ineffective, theorizing that those payments could not be forced upon Holland. In these two respects the trial eourt erred.

During the escrow period title remained in the grantor, Denney. No waiver of rental payments was recited in the sales contract. Denney's conveyance was on a condition, namely, payment of the full purchase price. *Mansfield Lumber Co.* v. *Gravette,* 177 Ark. 315, S. W. 2d 726 (1928). Therefore Holland's right to rents did not vest until his title vested. The right to rents was in Denney, but in this case he makes no demand. In fact he testified he did not expect any rents after he conveyed to Yarbro. This was perhaps due to Denney not knowing he had a legal right to them. Further, it would not be reasonable to presume that Denney intended to give Holland an absolute right to rental payments when Denney had only a contingent possibility of consummating the sale.

It is our conclusion that the bare lease is in force and the leasehold interest is vested in Gentry. We now consider the remaining contentions.

Yarbro and War Eagle Lime Co., Inc. raise these points in their combined brief:

Point 1. *The court should have vested title to the lease in these appellants.* Yarbro conveyed the lease to War Eagle subject to the lien in favor of Gentry. The Madison Chancery Court, in an action separate from the one before us, determined that Gentry was entitled to be reinvested with that which he conveyed to Yarbro. This point is therefore without merit.

Point 2. *The court erred in dismissing these appellants' prayer for an accounting and judgment against Holland.* In that connection, these appellants argue the property was placed in trust with Holland. They contend Holland sold large quantities of raw materials and should account to them. On conflicting testimony the court held that no such trust had been created and that Holland was not so indebted. We affirm those findings.

Point 3. *The court should not have cancelled the lease as to War Eagle Lime Co., Inc. because the notice to vacate which was purportedly served on War Eagle was ineffective.* This is without merit. According to the sheriff's certificate, a notice was served "on War Eagle Lime Company and John E. Yarbro by delivering a copy of the same to him individually and as President of said Corporation and stating the substance thereof this 27 day of June, 1964." Below the signature of the sheriff appears handwriting indicating that a copy may have been delivered to Yarbro's wife. The sheriff was not called to testify. The handwriting is unsigned. If a copy was delivered to Mrs. Yarbro, we can but assume that was a copy in addition to the copy delivered to John E. Yarbro.

Aside from the lease, Gentry made two other contentions. He sought an accounting from Yarbro and that was denied. The simple answer is that Gentry proceeded against Yarbro in a separate action and was awarded judgment against Yarbro. In that action he foreclosed his lien on the lease and fixtures for the purchase price. If he did not there include a claim for other items involved in the same transaction, he is too late.

Finally, Gentry classifies himself as a creditor of War Eagle Lime Co., Inc. He seeks judgment against Holland because Gentry had no notice of the execution of the bill of sale from Yarbro to Holland. That instrument, dated March 3, 1964, transferred the stockpile of filter rock, concrete aggregate, chips, and lime to Holland. Those items were the property of War Eagle Lime Co., Inc. Gentry was not a creditor of that corporation; he was a creditor of Yarbro.

We affirm the trial court's findings in all respects except as to the lease in question, title to that instrument being vested in Gentry.

LEO WILLIAMS *v.* STATE OF ARKANSAS

5300 419 S. W. 2d 615

Opinion delivered October 9, 1967
[Rehearing denied November 13, 1967.]

Paul B. Gean, for appellant.

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

LYLE BROWN, Justice. Appellant Leo Williams was convicted of possessing marijuana and on two counts of dispensing the drug. Williams filed a petition under our post-conviction procedure, Rule I. He alleged eight constitutional rights to have been violated in the process of arrest, arraignment, and trial. Additionally, he alleged denial of due process in that he was denied the right of appeal. The trial court found no merit in the allegations.

Only one point is argued on appeal: "The failure of the trial judge to appoint an attorney for appeal in

effect denied Mr. Williams of his constitutional guarantee of due process."

The right of an indigent defendant to appointment of appellate counsel was pronounced in the recent case of *Swenson, Warden* v. *Bosler,* 386 U. S. 258 (1967):

> "When a defendant whose indigency and desire to appeal are manifest does not have the services of his trial counsel on appeal, it simply cannot be inferred from the defendant's failure specifically to request appointment of appellate counsel that he has knowingly and intelligently waived his right to the appointment of appellate counsel."

At the post-conviction hearing, which is the basis of this appeal, Williams testified that he informed court-appointed trial counsel of his desire to appeal. He further asserted that trial counsel assured him the appeal would be taken. Trial counsel disputed those assertions and his testimony may be summarized as follows:

He had known Williams for a number of years and they were friends; he talked to Williams after the arrest but before he was appointed; when the verdict was returned "I told him at that time that if he wanted to take an appeal to let me hear from him." On the day of sentencing "he asked me about appealing the case." Williams did not indicate he wanted to appeal. The procedure for filing a motion for a new trial was explained to Williams and he was instructed to let the attorney know of his decision. In order to protect Williams' right of appeal, counsel, on his own initiative, filed a motion for new trial. (Sixteen days intervened between the trial and the order denying a new trial.) Neither Williams nor his wife ever contacted the attorney.

Williams conceded that, although he was permitted to write seven letters each week, he did not write the

attorney from the penitentiary. His explanation for that was that he was not permitted, according to trusties and inmates, to contact a lawyer. He instructed his wife to contact trial counsel. Williams' wife did not testify and her absence is not explained.

The trial court believed the testimony of the attorney. The credibility of Williams' testimony is discounted when we examine his account of the original trial procedure. For example, he testified at the post-conviction hearing that the judge and prosecuting attorney selected the jurors who tried him. The painstaking procedure by which the jury was selected is in the transcript of that trial and is filed here with the post-conviction transcript. The same record refutation of most of Williams' eight points also appears in the trial transcript.

It is not contended that the trial judge had any reason to believe Williams desired an appeal. On sentencing day the trial judge inquired of Williams whether he had anything to say. Williams replied negatively.

The effect of the trial court's adverse finding against Williams was to hold that Williams did not bring himself within the "rule of manifestation" in *Swenson.* We agree. Further, since Williams was advised of his right to appeal and instructed to contact the attorney, his failure to do so within sixteen days constituted a knowing and an intelligent waiver.

Although they are not argued here, the other eight points are listed in the abstract. The trial court properly made a specific finding in respect to each one. As to those findings, we hold there was no error.

Affirmed.

JEANNINE STARBIRD ADM'X, ESTATE OF BRYAN J. HILTON *v.* WADE W. CHEATHAM

5-4272 419 S. W. 2d 114

Opinion delivered October 9, 1967

Murphy & *Burch,* for appellant.

James R. Hale, for appellee.

JOHN A. FOGLEMAN, Justice. Appellant seeks to reverse the judgment of the probate court in favor of a claimant for an indebtedness for construction work done by appellee for appellant's decedent, Bryan J. Hilton, because of the failure of the probate judge to exclude certain testimony because of the "dead man's statute." The key issue was whether the claim had been barred by the statute of limitations. This depended on a deter-

mination whether the statute was tolled by payments made by the decedent in his lifetime. Appellee offered in support of his position his statement of account, admittedly prepared after the death of decedent, which was attached to his proof of claim. He also offered as his business record a small notebook with one page showing payments made by the decedent. He also testified about these alleged payments over the objection of appellant. Appellee contends that even if the "dead man's statute" is applicable, appellant waived its application.

When claimant's attorney was examining him with reference to payments made by Hilton, as shown by the statement attached to the claim, appellant based his objection on the statute of limitations only. Appellee had answered, after the objection was overruled, that the payments made on the account by Hilton were shown on this sheet.

When the question was reworded to ask if those payments were made during Hilton's lifetime, appellant objected to any statement by the witness in regard to payments made by decedent. The objection was overruled. Appellee then identified and offered the small notebook which he said he kept in his own handwriting as a permanent record. Appellant's objection that the alleged business record was "self-serving, irrelevant and immaterial" was overruled. In addition to the items of the account, this showed the following:

"Payments on Bryan Hilton

	Accts.
$100.00	54
$200.00	56
$200.00	58

$200.00	61
$ 75.00	62''

Thereafter appellant's attorney cross-examined appellee as follows:

"Q. You prepared this after Mr. Hilton's death? (Cl. No. 1)*

A. Yes.

Q. I also ask you to examine this sheet here that is alleged to be a copy of an account reflecting certain credits?

A. Yes.

Q. When was that prepared?

A. Well, at each year.

Q. You prepared this each year?

A. I put it in my book what I had received from him during that year on these contracts.

Q. You prepared this each year?

A. Each year, yes.

Q. I'm talking about this sheet of paper itself, this particular one?

A. That was prepared when I filed the claim.

Q. When you filed the claim?

A. Yes.

Q. I see.

A. Or shortly before.

*This was the statement and supporting document attached to his claim.

Q. And Mr. Cheatham, you allege here that Mr. Hilton paid you certain payments, did he pay you any payments by check, or how were these payments made?

A. All of them except one was by check.

Q. Was by check?

A. By check.

Q. Do you know what those checks, where they were drawn and on what bank?

A. No, I don't know exactly. Some bank in Fayetteville, but I don't—

Q. Did he pay them to you directly?

A. How?

Q. Did he pay them to you directly?

A. I'm a little hard of hearing.

Q. Did he pay those payments to you directly?

A. Sometimes—some by mail and some directly. I don't know which is which.

Q. He sent some of those in the mail?

A. Yes.

Q. Now, do you recall which ones he sent by mail?

A. All of them except the last one he paid me cash, I believe it was all by mail, I'm not sure that they were all by mail, but part of them were.

Q. The last one was made by cash?

A. Yes.

Q. Do you remember, Mr. Cheatham, where this alleged cash payment was made?

A. Where it was made?

Q. Yes.

A. It was made in Lincoln.

Q. There in Lincoln, Arkansas."

Thereafter appellant renewed his objection to the sheet attached to the proof of claim only on the basis that it was prepared after Hilton's death.

There can no longer be any question that the effect of this statute can be waived by the action of a party in whose favor it might be invoked. *Lisko* v. *Hicks,* 195 Ark. 705, 114 S. W. 2d 9; *Harris* v. *Whitworth,* 213 Ark. 480, 211 S. W. 2d 101. The incompetency of the witness is waived where timely objection is not made. *Lisko* v. *Hicks, supra; Brickey* v. *Sullivan,* 208 Ark. 590, 187 S. W. 2d 1; *Carlson* v. *Carlson,* 224 Ark. 284, 273 S. W. 2d 542. Appellee argues that appellant's objection was untimely. We find that, even if it can be said that appellant made sufficient objection to the testimony to raise this question, his subsequent actions constituted a waiver of the statute. The incompetency is also waived, even though timely objection was interposed, when the same testimony, in effect, to which objection was made is brought out on cross-examination. *Harris* v. *Harris,* 225 Ark. 958, 286 S. W. 2d 849. His failure to object to the notebook on the ground now asserted and his cross-examination on the same subject bringing out virtually the same information as elicited on direct examination, particularly as to the last payment alleged to have been made by the decedent, certainly constituted a waiver.

We are not unaware of such cases as *Johnson* v. *Murphy,* 204 Ark. 980, 166 S. W. 2d 9; *Campbell* v. *Hammond,* 203 Ark. 130, 156 S. W. 2d 75; *Brittian* v. *McKim,*

204 Ark. 647, 164 S. W. 2d 435; *Smart* v. *Owen,* 208 Ark. 662, 187 S. W. 2d 312. All of these cases were based on the then existing rule that no objection was necessary, in chancery practice, to preserve an objection on this ground since this court tried such cases de novo and would consider only competent testimony. This rule was abandoned in *Umberger* v. *Westmoreland,* 218 Ark. 632, 238 S. W. 2d 495. Although the rule had been applied in probate cases after the adoption of Amendment 24, it was held to be no longer applicable after the *Umberger* decision. *Carlson* v. *Carlson,* 224 Ark. 284, 273 S. W. 2d 542.

The judgment is affirmed.

BYRD, J., dissents.

R. J. O'BRIEN AND DOWELL, DIVISION OF DOW CHEMICAL *v.* LESTER PRIMM AND EDITH PRIMM

5-4261 419 S. W. 2d 323

Opinion delivered October 9, 1967
[Rehearing denied November 6, 1967.]

D. J. Honeycutt and *Gaughan & Laney,* for appellant.

Melvin Chambers, for appellee.

J. Fred Jones, Justice. This is an appeal by R. J. O'Brien and Dowell, Division of Dow Chemical, from a judgment for damages in the amount of $4,000.00 rendered by the Ouachita County Circuit Court on a jury verdict in favor of the appellees, Lester and Edith Primm, who were plaintiffs in the trial court.

Appellants contend that verdicts should have been directed for them and designate four points relied on as follows:

> "1. The Court erred in not directing verdicts for the defendants at the close of plaintiffs' case and again after plaintiffs were permitted to produce additional testimony and again closed their case.
>
> "2. The Court erred in not directing verdicts for the defendants at the close of all of the testimony and before instructing the jury, and in refusing to enter a verdict for the defendants notwithstanding the verdict of the jury.
>
> "3. The Court erred in not directing verdicts for the defendants inasmuch as there was no substantial evidence of negligence on the part of appellants.
>
> "4. The Court erred in not directing verdicts for the defendants inasmuch as there was no substantial evidence that appellants' acts were the proximate cause of the injuries complained of."

The record reveals the following facts:

In April 1964 appellees owned a forty-acre tract of land in Ouachita County with their home and a tenant house located thereon. Both houses had been supplied, for about eighteen years, with water from a well about thirty feet deep and containing twelve or fourteen feet of good soft water. The appellant, R. J. O'Brien, owned an oil well 550 feet from appellees' water well. The oil well was 2,326 feet deep, and in April 1964, was providing 1.4 barrels of oil per day. Seven hundred feet and four hundred and eighty-five feet, respectively, from appellees' water well, there were two salt water disposal pits which had been in use for a number of years. The evidence is in conflict as to whether the pits were higher or lower in elevation than appellees' water well.

In April 1964, appellants did what is known as a sand fract job on the oil well, and within a week or so following this operation, a change was noted in the quality of the water in appellees' water well, and the quality of the water rapidly deteriorated until it soon became unfit for human consumption.

There was ample evidence presented by appellees that during the eighteen years prior to the sand fract operation, the water in their well had been palatable and wholesome and that within a month following the sand fract operation, the water became unfit for household use, even for bathing and laundry. Aside from the testimony of the appellees and their witnesses as to the change in the appearance and taste of the water, there was evidence that the water killed flowers watered with it; that new galvanized pipe fittings on hot water tanks had been eaten through with rust and acidic-like corrosion in a period of eighteen months. Undated reports of chemical analyses made after the sand fracting job, showed a variation in total dissolved salts from 60,800 ppm with a pH factor of 6.1 to 851 ppm dissolved salts with a pH factor of 4.9.

Chemical analyses presented by appellants from samples taken from the Primm well on December 7, 1964, and December 7, 1965, show changes as follows: chloride from 160 in 1964 to 340 in 1965; sodium 80 to 190; total solids 305 to 613 and pH factors from 6.2 to 6.7.

Although the terms "dissolved salts," "chloride" "sodium," and "total solids" are indefinite terms in relation to the problem here, appellees' undated reports of chemical analyses show a tremendous variation in the chemical contents and acidity of the water, and appellants' reports show that the named chemicals and solids more than doubled within the one year period from December 1964 to December 1965, and during the same period, the relative acidity of the water changed slightly toward alkalin (pH 7 being neutral) from 6.2 to 6.7. The analyses reports introduced by appellees bear no date so we are unable to tell when the water attained its highest relative acidity, but appellants' own expert witness testified that pH 4.9 is a strong acid for human consumption or use.

As a matter of fact, appellants offered expert testimony to the effect that the chemical content of the water in appellees' well was consistent with the chemical content of the salt water disposal pits near his land, so certainly there was ample evidence of damage to appellees' water well to go to the jury at the close of appellees' proof, and there was ample evidence to support the jury verdict on this point.

Appellees' witness, Mr. Hogg, testified that appellees' land had a true market value of $20,000.00 with good usable water, and $8,000.00 or $10,000.00 without usable water. Mr. Honeycutt, a witness for appellants, placed the before and after value at $12,500.00 and $11,000.00, or a difference of $1,500.00 based on the value of the two houses and one acre of ground with each house and $1,000.00 for drilling a new well.

From this testimony and the testimony of appellees as to their inconvenience in having to haul water for domestic use, together with the testimony of Mr. Hamlin as to the two water strata in the area; one 25 to 30 feet deep and the next 360 feet deep; we are of the opinion that appellees submitted ample competent evidence to go to the jury on the over-all damages, and that there was sufficient evidence to support a jury verdict of $4,000.00.

We now come to the most important issue; the negligence of appellants and the proximate cause of the damages to appellees.

The appellants produced considerable testimony while using charts or diagrams drawn to scale, apparently showing detailed diagrams of the oil well, including the location of oil bearing sands, perforations, and the location or locations of cement in or around the casing.

As we understand the testimony, the appellees were trying to prove, by circumstantial evidence, that because of the pressure forced into the oil well in the sand fracting operation, a channeling occurred from the oil well into the water strata of appellees' well thus bringing impurities from the oil well to appellees' water well, and that appellants were negligent in applying the pressure they did apply in bringing this about.

Appellants were attempting to disprove appellees' theory by showing that even with a pressure of 3,500 pounds per square inch, a channeling did not occur as evidenced by no sudden drop in pressure on a pressure gauge at the well-head. And that as a matter of fact a channeling *could not* occur, because of the protective cement around the casing as indicated on the charts.

Apparently the charts were not offered in evidence since they do not appear in the record before us, but

in their use before the jury Mr. Zwahlen, a petroleum engineer for appellant, testified as follows:

"Q. Mr. Zwahlen, I have some diagrams. Are you familiar with that diagram?

A. Yes, I am.

Q. Would you explain it, please?

A. Yes, I will. May I move over here, so possibly the Judge can see?

Q. Mr. Zwahlen, was this drawn under your supervision?

A. This was drawn under my supervision, since I had all the records of what went on. This illustrates the well that we actually fracted up there, the Wesson No. 1, and according to our records the well, of course, was completed according to the State regulations. We had our surface casing set at *this depth* and cemented.

Q. What is that?

A. *This blue line is cement.* We explain *down here.* You may not be able to see it, but *cement is solid through here,* the surface casing. Of course, *this is the outside of the hole* and then we drilled on down to our projected depth, which this one was 2,326 was the total depth of our well. Then we ran our production casing, which is 5½ inch casing, to below our producing sand. Then we—Some of you people, I know, being in the oil field know these terms, but I'd like to go on through this. We pumped cement on down *around this casing* and it comes out around the outside and the top of the *cement is shown here.* It calculates out that it should be at 925 feet, *from the surface* to here, and we are *perforated down here* in the range of 2,150 feet and below, which gives

us more than 1,000 foot of cemented casing which will protect anything up above us.
* * *

Q. Here's another chart. Do you recognize this chart, Mr. Zwahlen?

A. Yes, I do. We were trying to draw to scale *something that we could bring into the Court Room and show to everyone here exactly, as we could, the situation we had out there* on the job when we were fracting and, of course, *over here, what we have labeled here,* we've taken this information from what we call our electric log. *It shows here,* starting at the surface down to around 900 feet, we have clays, sand and shales interbedded and this is the upper part. *Up in here* is where you have, of course, your fresh water. *This is our surface casing* that *we have in here* and it's cemented.

Q. Is this the same blue that was on the other?

A. *This is the same blue that was on the other.* Of course, *there's another blue down here.* Like I said before, we calculate the cement should come to about 950 feet, so we have all of the cement above this formation that is producing oil and that we did *fract down here,* where we're getting our oil from." (Emphasis supplied.)

One of the links in the chain of circumstances appellees were attempting to forge in support of their theory, was that even though casing and cement were designed to protect against channeling in the oil well under ordinary pumping conditions, vibrations were negligently set in motion by the appellants in their sand fracting operation, and that the vibrations were of sufficient intensity to loosen the casing and cement in the oil well; thus permitting a channeling to occur under

the pressure necessarily applied in the sand fracting of oil wells in general, and that *was applied* to appellants' well in particular.

As to the vibrations, Mrs. Primm testified:

> "We did feel the vibrations. It seemed like they were just going to blow the ground out from under us."

Mrs. Primm testified that the noise and vibrations from appellants' operation were much worse than from other sand fracting operations previously done near, and even closer to her house, than appellants' operation.

Appellants were using an old airplane engine without a muffler in their fracting operation and they admitted it made a lot of noise. Appellants did not deny vibrations in the air during their operation, but attempted to disprove vibrations in the ground by introducing pressure charts or graphs taken at the well-head during the operations and by then demonstrating the sensitivity of the machine mechanism to vibrations artificially induced in the court room. No objection was made to this bit of demonstrative evidence, but the jury had a right to recognize that the sensitive mechanism of the machine was not under 3,500 pounds of pressure per square inch when the demonstration was conducted in the court room.

As to directed verdicts, this court is fully committed to the rule restated as recently as June 5, 1967, when in the case of *St. Louis Southwestern Railway Co.* v. *Frances W. Farrell, Adm'x,* 242 Ark. 757, 416 S. W. 2d 334, 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 inferences 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."

The evidence in the record before us does not measure up to the requirements for a directed verdict.

Here the appellees' water well had been producing an abundance of excellent soft and palatable water from a thirty foot depth for a period of eighteen years prior to April 1964. During April 1964, appellants sand fracted their oil well at a depth of 2,150 feet and in doing so they first introduced acid into the well, in an amount and of a kind not shown in the record, but for the purpose of cleaning out the perforations leading from the casing into the oil bearing sand. Appellants then forced an unknown quantity of oil, blended with sand, through the well out into the oil bearing sand under a pressure of 3,500 pounds per square inch. In carrying out this operation, the appellants created a noise with vibrations transmitted either through the air, through the ground, or through both the air and the ground, but in any event of such intensity to vibrate appellees' house which was a distance of 550 feet from appellants' operation.

The record reveals that pH 7 in water analysis is the dividing line, or neutral area, between acidity and alkalin and that pH 4.9 is a strong acid for human use or consumption. The record further reveals that soon after appellants had finished their operation, the water in appellees' well became unfit for consumption and use and showed an acidity content of pH 4.9, subsiding to almost neutral, 6.7 by December 1965, and that as the acidity of appellees' well water diminished, the calcium and cholride contents more than doubled. There is am-

ple evidence that appellees had good well water before the sand fract operation, and that it has been unfit for use since the sand fract operation.

Appellants' oil well, only 550 feet from appellees' water well, contained an undetermined amount of acid. It was the only known source of acid anywhere near appellees' well. This acid was forced out into the earth under tremendous pressure along with, or ahead of, an undetermined amount or volume of fracting material. There is evidence of tremendous vibrations in connection with this operation and some evidence that the ground under appellees' house vibrated. So giving to the appellees' evidence its highest probative value, and taking into account all reasonable inferences that may be deduced from it, the jury could have reasonably concluded that the high acid content of the water in appellees' well, which had suddenly gone bad following the sand fract operation, was forced into appellees' well along with other impurities, from the only known and nearest source, appellants' oil well.

If the jury accepted appellants' theory that the impurities in appellees' water well came from the salt water disposal pits, the jury could have reasonably concluded that the vibrations from appellants' fracting operations disturbed the surface of the ground to a depth sufficient to release seepage from the disposal pits into the pure water strata of appellees' well.

We conclude that the trial court did not err in not directing verdicts for the appellants at the close of appellees' case, (*Hawkins* v. *Missouri Pac.*, 217 Ark. 42, 228 S. W. 2d 642) and we conclude that there was no error in the trial court's failure to direct verdicts for the appellants on the other points relied on in their brief. (*Arkansas State Highway Comm.* v. *Webster*, 236 Ark. 491, 367 S. W. 2d 233; *Arkansas Louisiana Gas Co.* v. *Robert C. Wood*, 240 Ark. 948, 403 S. W. 2d 54.)

The judgment of the trial court is affirmed.

BROWN and FOGLEMAN, JJ., dissent.

JOHN A. FOGLEMAN, Justice, dissenting. I respectfully dissent. The case was submitted to the jury on the basis of negligence and the majority opinion indicates that they believe that negligence is the appropriate basis for liability rather than liability without negligence. With this I can agree, as it is not shown that the use being made of appellants' property or the method of operation was such as to invoke the doctrine of strict liability. I agree that the doctrine of *res ipsa loquitar* cannot be applied in a case such as this when injury might have been brought about by either of two speculative theories, for one of which the defendant is not responsible, and neither of which is included or excluded by affirmative evidence. *Oklahoma Gas & Electric Co.* v. *Frisbie,* 195 Ark. 210, 111 S. W. 2d 550; *Martin* v. *Arkansas Power & Light Co.,* 204 Ark. 41, 161 S. W. 2d 383; *Williams* v. *Lauderdale,* 209 Ark. 418, 191 S. W. 2d 455. The evidence must have a substantial probative tendency to show that plaintiff's injury was caused by defendant's negligence to the exclusion of anything else. *Saunders* v. *Lambert,* 208 Ark. 990, 188 S. W. 2d 633.

As indicated in the majority opinion, the evidence on behalf of appellees was all circumstantial both as to negligence and proximate cause. This is a proper basis for a jury verdict. *Parker* v. *Marsh,* 221 Ark. 229, 252 S. W. 2d 624; *Superior Forwarding Co.* v. *Garner,* 236 Ark. 340, 366 S. W. 2d 290. Conjecture cannot be permitted to supply the place of proof, however, and create a conclusive presumption, as this would exclude every other reasonable means which might have caused the injury. *Missouri Pacific R. Co.* v. *Ross,* 194 Ark. 877, 109 S. W. 2d 1246. The burden was on appellee to show an act of negligence on the part of appellant by substantial testimony and he cannot rely on inferences based on conjecture and speculation. *Glidewell, Administrator* v. *Arkhola Sand & Gravel Co.,* 212 Ark. 838, 208 S. W. 2d 4.

It seems to me that, as between the salt water pits and the "sand fracting" operation, the jury could only

speculate as to the cause of damage to appellees. The circumstantial evidence certainly does not exclude the salt water pits as a possible cause, nor do I think it shows negligence on the part of appellants. In *Turner v. Hot Springs Street Railway Co.,* 189 Ark. 894, 75 S. W. 2d 675, a case involving a similar question, this court said:

> "***And where the testimony leaves the matter uncertain, and shows that any one of a half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion."

The acts of negligence upon which appellees rely were (1) use of excessive pressure, (2) failure to place enough protective material above the pressure area, and (3) causing excessive vibrations of the oil well casing.

Evidence of excessive pressure is based almost entirely upon the testimony of appellee Edith Primm that there was more pressure than had been used in sand fracting other wells near their house. It appeared from cross-examination that she judged pressure by the noise made in the operation. There was no evidence that the amount of pressure used was excessive, nor was there any evidence at all on behalf of appellees as to the second act of negligence. Mrs. Primm also testified that they felt vibrations at the house and it seemed as if they were going to have the ground blown right out from under them. There was expert testimony to show that the vibrations were only in the air.

Jack Robinson, a witness for appellees who has worked in the oil industry, stated that vibrations would loosen casing in an oil well. He also said that when you

have a loose casing, it was possible that fluids would pass up through the channeling and that channeling jobs have been known around pipe in an oil well. John Langley, another witness for appellees, said that vibrations would loosen casing and that channeling, or the movement of material from one formation to another, resulted from pressure. He also said that when the cement was not adequate to protect against such a possibility, the situation could be detected by salt water in the oil formation. Conrad Hamlin, offered as a water well expert by appellees, said that there was a chance that a slush pit 100 feet by 100 feet, 15 feet deep, within 500 feet of Primm's shallow well which has salt water continually discharged into it would pollute the Primm well. There is nothing in the record to show that appellants had anything to do with these pits.

Tom Jordan, a petroleum engineer employed by R. J. O'Brien, stated that the oil well was in all respects in accord with industry standards before the sand fracting was done. He said the oil producing formation was at 2,150 to 2,200 feet.

Lee Zwahlen, O'Brien's petroleum engineer who designed the sand fracting job on the well, said that they tested the lines and pump used under pressure and found no cracks or leaks. He also said that the work was done 2,150 feet down in the well. The pressure used was 2,500 pounds per square inch. He added that if the fracting material had not gone into the oil producing formation it would have come out the top valve. While he said the pump made a lot of noise, he said there was no vibration of the ground. Acid was spotted around the perforations[1] to clean them up. He said that salt water increased from 7% or 8% to 10% after the fracting. Mr. Zwahlen had heard of channeling jobs and knew what they were, but testified that there was no channeling on this job. He said this would have been impossible with-

[1]The perforations are at the level of the oil producing strata.

out producing a lot of salt water and that this did not occur.

M. J. Olive, a chemical engineer, supervised the taking and analyzing of samples from the Primm well and the pits near the house. The chemical analysis in each sample was very nearly identical, but the chloride content was naturally much higher in the pits. It was his opinion, based on an on-site inspection and analysis of the water samples, that the concentration of chloride in the Primm water came from the pits by seeping subsurface to the well.

In my opinion this testimony does not meet the requirement for circumstantial evidence to show that the well was affected by the sand fracting job or that appellant was guilty of any negligence. There was no evidence that there was channeling, no evidence of excessive salt water as a result thereof, and nothing to indicate that any of the material used came from a depth of 2,150 feet through various formations to the level of appellees' well which was 29 feet deep. The chloride content was shown by a letter from a chemist named Faulkner to Primm to be low enough on September 10, 1964, to indicate that no acid got into the well during the fracting job.

I think that the evidence, given the strongest probative force favoring appellees, only leads to speculation and conjecture as to both negligence and proximate cause which are improper bases for submission of the question to the jury. *Superior Forwarding Co.* v. *Garner*, 236 Ark. 340, 366 S. W. 2d 290. The burden was on appellees to show by substantial evidence, rather than inferences, speculation and conjecture, a basis upon which a jury might have found some act of negligence on the part of appellants. *Glidewell, Administrator* v. *Arkhola Sand & Gravel Co.*, 212 Ark. 838, 208 S. W. 2d 4. Nor may a jury capriciously disregard reasonable testimony of witnesses in order to give substance to a fanciful theory. *Missouri Pac. R. Co.* v. *Ross*, 194 Ark.

877, 109 S. W. 2d 1246. In the latter case the evidence showed that the battered body of appellee's decedent was found on a straight railroad track on which it was customary for pedestrians to walk. There was blood at the scene. There were no footprints and no indication that the body had been dragged. It was shown that deceased had started walking to a destination along the railroad tracks five miles away on the night before his body was found. The railroad company's testimony showed that a lookout was maintained on all trains at all times the deceased could have been on the tracks and that the headlights on the trains gave proper illumination. The language of the court is particularly applicable here:

> "* * * If, with the lookout being maintained, physical surroundings and attending conditions were such as to negative any explanation of the tragedy other than the supposition that Ross was walking on or near the track, then we might say the jury was justified in disregarding testimony of appellant's agents as to the measure of care, and such action would not be arbitrary. But no such case has been made out. To admit this would be to say that there is a conclusive presumption that Ross was walking on or near the track, in the glare of a brilliant headlight, and that negligence alone was responsible for the fact that his presence in such place of peril was not discovered. There is no such conclusive presumption. *Such a rule would exclude every other reasonable means which might have caused the tragedy.*" [Emphasis ours]

There are other means which might well have caused this damage in the case before us and the testimony does not exclude them.

I do not find the suggestion that ground vibrations may have caused seepage from the salt water disposal pits convincing. There was no evidence either that this

happened or might have happened. Such a conclusion by the jury could only be speculation.

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

FRED HOLLIS AND HOLLIS MOBILE HOMES, INC. *v.* DON F. CHAMBERLIN D/B/A DON'S DISCOUNT HOUSE

5-4274 419 S. W. 2d 116

Opinion delivered October 9, 1967

Gus R. Camp, for appellant.

Randall W. Ishmael, for appellee.

J. Fred Jones, Justice. This appeal is from a judgment in replevin rendered in favor of the appellee (plaintiff in the trial court) by the Craighead Circuit Court, Jonesboro Division, with the judge sitting as a jury.

The appellee, Don F. Chamberlin, is an individual dealer in mobile homes in Poplar Bluff, Missouri. In the course of his business he sells new camper units designed for installation on pick-up trucks. The appellant, Fred Hollis, is a dealer in used mobile homes in Jonesboro, Arkansas, and also buys and sells camper units. He operates his business under its corporate name, "Mobile Homes, Inc."

About 7:30 p.m. on July 12, 1966, appellee sold to one Joe Crowder a new camper unit for the retail price of $1,757.74. The appellee had purchased the unit from the factory for the wholesale price of $1,538.25. Crowder gave appellee a check on Citizens Bank in Springfield, Missouri, in full payment for the unit. Crowder loaded the unit onto a pick-up truck, which was too small to properly accommodate the camper unit, and he left appellee's place of business without obtaining a bill of sale, but with announced purpose and intention of returning later to pick up the tail gate of the truck which had been removed from the truck in loading the camper unit and which was left at appellee's place of business. Crowder did not return for the tail gate, but instead, drove the truck with the camper thereon to Jonesboro, Arkansas, and on the following day, July 13, sold the camper unit to the appellants for $500.00. Crowder's check to appellee was dishonored for insufficient funds and appellee instituted suit in replevin against appellants for possession of the camper unit and for damages.

The appellee filed his original complaint and affidavit to obtain delivery August 19, 1966. The complaint and affidavit alleged ownership and right of possession. Appellant filed a motion to dismiss the complaint because appellee was not the owner of the property in-

volved; that Crowder purchased the camper with a check which was dishonored by the bank and that appellant was an "innocent purchaser" of the property for $500.00. Appellee then filed an amended complaint also setting out the transaction between appellee and Crowder in some detail, and stating that appellant "was not an innocent or in good faith purchaser for value."

Appellant filed a motion to strike the amended complaint as untimely after delivery of possession under bond, and this motion to strike contained an alternative plea of general denial and counterclaim for damages.

The trial court made findings and entered judgment as follows:

> "(1) The defendant's Answer, being Section 2 of the Motion to Strike Amended Complaint, was only a general denial and there were no pleadings as to an affirmative defense of the defendant being an innocent purchaser for value.
>
> "(2) (a) No title passed from plaintiff to Joe Crowder as title was conditional upon payment of the check tendered for the purchase price.
>
> "(3) (b) Defendant was not an innocent purchaser for value.
>
> "The plaintiff should have judgment for possession of the pickup camper which is the basis for this replevin suit, * * *
>
> "IT IS THEREFORE BY THE COURT considered, ordered and adjudged that the plaintiff have possession of the above described pickup camper which is the basis of this replevin suit; that the plaintiff and the surety on his replevin bond be discharged from any and all further liability in connection with the said bond; and that the plaintiff recover from the defendant all his costs herein

paid, laid out and expended, for which execution may issue."

At first glance it would appear that the judgment of the trial court is inconsistent with the court's findings. The record is not clear what action, if any, was finally taken on the appellants' motions to dismiss and to strike, but the motion to dismiss does set up the affirmative defense of "innocent purchaser for value"; appellee's amended complaint recognizes this defense as "good faith purchaser for value," the case was apparently tried and decided on that point, and we conclude that the trial court was correct in the judgment rendered.

The parties seem to agree that this transaction is controlled by the Uniform Commercial Code in Missouri, as between appellee and Crowder, and in Arkansas, as between Crowder and appellant, and that Crowder obtained a voidable title by the delivery of the camper in exchange for the worthless check.

The appellant has cited the correct section of the Uniform Commercial Code applicable to this case. Ark. Stat. Ann. § 85-2-403 (Add. 1961), is as follows:

> "A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though
>
> * * * (b) The delivery was in exchange for a check which is later dishonored."

Under the above statute, this case presented a fact question to the trial court as to whether or not appellant was "a good faith purchaser for value," and in this

court on review, the question is whether or not there was any substantial evidence to support the trial court in finding that the appellant "was not an innocent purchaser for value." We accept the terms "good faith purchaser for value" and "innocent purchaser or value," as being synonymous as used in this case, and we conclude that there was substantial evidence to support the trial court's finding on this point. *Arkmo Lumber Co.* v. *Luckett,* 201 Ark. 140, 143 S. W. 2d 1107.

Crowder advised appellants that he wanted to sell the camper because it did not properly fit on his truck and interfered with the safe and proper driving of the truck. "They said: 'Our truck will not haul the camper'." Appellant did not know Crowder nor any of the other three people with him when he purchased the camper unit from Crowder, but he did know that the camper unit looked new and was worth at least $1,000.00. Appellant knew that the unit was "purportedly" transported from Springfield, Missouri, when he purchased it, yet the camper unit did not fit the truck it was on, it was not tied down on the pickup and no explanation was made, and apparently no questions were asked, as to why it was not tied down. Crowder had no bill of sale, or other evidence of title from appellee, and apparently appellant asked no questions concerning Crowder's title. He did, however, require and receive a bill of sale *from* Crowder.

The case of *Gentry* v. *Alley,* 228 Ark. 236, 306 S. W. 2d 695, involved the rightful use of microfilm and the defense of "innocent purchaser for value," was interposed. In holding that the defendants were not innocent purchasers for value, this court said:

> "The record discloses many facts and circumstances which were calculated to have aroused Gentry and Linton's curiosity as to the history and ownership of the questioned film, and very little inquiry would have disclosed the true facts."

In the *Gentry* case we quoted with approval from 77 C. J. S. at page 1092 under the title of Sales, Adequacy of Price, as follows:

> "Inadequacy of price, when very great, is of itself evidence to a purchaser of infirmity in his seller's title, and consideration is to be given it, in connection with other circumstances, in determining whether a buyer is a purchaser without notice."

We also quoted from C. J. S., page 1099, same volume, as follows:

> "The consideration, in order to be effective to bring a transfer within the doctrine of bona fide purchase, should be an adequate valuable consideration, or a fair consideration, but it need not be up to the full price of the goods."

The trial court was sitting as a jury in this case and there was substantial evidence to support the finding that appellant was not a good faith purchaser of the camper unit for value.

The judgment of the trial court is affirmed.

BYRD, J., dissents.

CONLEY BYRD, Justice, dissenting. I would reverse and remand this case to the trial court because it does not appear from the trial court's order that a finding was made on the facts involved here. The trial court's order is as follows:

> ". . . Now, upon this 29th day of October, 1966, upon reviewing the record herein, and a careful consideration of the briefs filed by the parties in the above matter, the Court is of the following opinion:
>
> (1) The defendant's Answer, being Section 2 of the Motion to Strike Amended Complaint, was only

a general denial and there were no pleadings as to an affirmative defense of the defendant being as innocent purchaser for value.

(2) (a) No title passed from plaintiff to Joe Crowder as title was conditional upon payment of the check tendered for the purchase price.

(2) (b) Defendant was not an innocent purchaser for value. . ."

The Uniform Commercial Code in effect in both Arkansas and Missouri with respect to the acquisition of goods here involved provides as follows:

Ark. Stat. Ann. § 85-2-403 (Add. 1961)—

"(1) A purchaser of goods acquires all title which his transferor had or had power to transfer . . . A person with voidable title has power to transfer a good title to a *good faith purchaser for value.* When goods have been delivered under a transaction of purchase the purchaser has such power even though" (Emphasis supplied.)

* * *

"(b) the delivery was in exchange for a check which is later dishonored, or"

Ark. Stat. Ann. § 85-1-201 (Add. 1961)—

"General definitions.—"

* * *

"(19) 'Good faith' means honesty in fact in the conduct or transaction concerned."

* * *

"(44) 'Value'. Except as otherwise provided with respect to negotiable instruments and bank collections . . . a person gives 'value' for rights if he acquires them"

* * *

"(d) generally, in return for any consideration sufficient to support a simple contract."

In referring to the order above set out, I agree with the majority opinion that appellant raised the issue of good faith purchaser for value. Item 2(a) is an incorrect statement of the law, for the reason that under the Uniform Commercial Code the court has to determine only whether the transferor, Joe Crowder, received voidable title from appellee, Don F. Chamberlin d/b/a Don's Discount House. It appears to me that in Item 2(b) the court, as a matter of law, concluded that appellant was not an innocent purchaser for value because of its erroneous interpretation of the law with respect to Items 1 and 2(a).

I am persuaded that this is so because in the trial of the case appellee objected to any evidence showing that appellant was a bona fide purchaser of the trailer, and at that time the trial court indicated that appellant had not pleaded such, but permitted the testimony to be admitted, reserving his ruling thereon with the statement that "it may be this is strictly a matter of law." Under these circumstances, I think appellant was entitled to have the fact issue of his good faith, as defined by the Uniform Commercial Code, determined by the trial court.

Therefore I respectfully dissent.

OTTENHEIMER BROTHERS MANUFACTURING Co. *v.* VIVA CASEY

5-4273 419 S. W. 2d 784

Opinion delivered October 16, 1967
[Rehearing denied November 20, 1967.]

C. Richard Crockett, for appellant.

George Pike, Jr., for appellee.

CARLETON HARRIS, Chief Justice. This is a Workmen's Compensation case. Appellee, Viva Casey, was employed by Ottenheimer Brothers Manufacturing Company, appellant herein, in its plant located in Little Rock. Mrs. Casey's job was to hand pleat skirts, set collars, run a pinking machine, and put tape on dresses manufactured by the company. Appellee's wages averaged about $57.90 per week, and her working hours were 7:30 A.M. to 4:00 P.M., five days per week, with morning and afternoon breaks of ten minutes each, and thirty minutes for lunch. On the night of May 6, 1965, Mrs. Casey became ill with what she described as "gas pains," a hurting in the upper part of her stomach and chest. She stated upon awakening next morning, she did not feel good, but had no pains. She went on to work, but began to feel worse, and about 8:30 or

8:45, after lifting a heavy bundle, she felt a pain in her chest. She endeavored to continue work until about 9:30, when she was forced to stop. Mrs. Casey stated that the pain "left my chest, and went up into my arm and shoulder and it seeemd like it would run down my arm and it was just as if you had cut it off." She went to the first aid room and rested for a while. When the lunch hour arrived, appellee was unable to eat, and a fellow employee took her home. That afternoon, she went to the office of Dr. E. J. Ritchie, and subsequently (on October 8, 1965) was examined by Dr. Alfred Kahn, Jr.; also, Drs. Ben Price and James Wilson, cardiologists, made an examination on July 12, 1965. In the meantime, on Monday, May 10, Mrs. Casey returned to work, and worked through Thursday, May 13; while at home that night, she suffered another attack, and has not worked since that time. Another attack was also suffered in June. Appellee filed a claim for compensation benefits, and the matter was heard by a referee. At the conclusion of the hearing, an award was made, but on appeal to the full commission, same was denied. This action of the commission was appealed to the circuit court, which reversed the commission. From the judgment so entered, appellant brings this appeal.

Here, of course, under our well established rule in compensation cases, we are only concerned with whether there was substantial evidence to support the findings of the commission. Mrs. Casey, in testifying, described her duties, part of which consisted of holding a dress up while she guided it through the sewing machine. She stated that holding her hand up, during a day's time, became very tiresome; that she lifted bundles during the day ranging from something less than 20 pounds up to 25 pounds; she had started work for Ottenheimer's in February, 1963, and had lost weight from 189 pounds to 157 during the period of her employment. Mrs. Casey insisted that the pains that she experienced on the night of May 6 were not similar to the one she experienced at work on May 7, and she also stated that she was not in pain when she went to work on the latter date.

Eldon Casey, husband of appellant, said that his wife would complain of being completely exhausted when she returned from work, and would mention a "heaviness in her chest." He stated that she mentioned hurting in her chest on the night of May 6, but that she went to work the next day, though complaining.

Dr. Ritchie testified by deposition on January 11, 1966, that he had been treating Mrs. Casey since May 7, 1965, and last saw her on December 10 of that year. He stated that on May 7, he found she had an attack of angina pectoris, and he gave her an injection of opiate (Demerol) for relief; subsequently, an electrocardiogram was done, which revealed coronary insufficiency. The doctor testified that Mrs. Casey's difficulty was due to arteriosclerotic heart disease, which results in coronary insufficiency; that this condition, from time to time, causes angina pectoris; however, he stated that there was no evidence of a thrombosis or infarction. The witness said that arteriosclerosis is a progressive disease, and it was his opinion that the work claimant was doing on May 7, though having nothing to do with the coronary insufficiency, did contribute to the angina attack which occurred on that date, *i.e.,* the work did contribute to the pain that was suffered by appellee on that particular occasion.[1] He stated that she also, on May 21, came into his office complaining of pain, and upon inquiry, Mrs. Casey said that she had been hurting most of the day, though she had been doing her normal house work on that occasion. The doctor testified that she continued to have anginal pain nearly every day after the 21st. He stated that only the attack of pain which occurred on May 7 could be attributed to the work itself, but that her other attacks of pain were also due to her coronary insufficiency, the pain being occasioned by whatever she happened to be doing at the time. The

[1]It might be here stated that the medical evidence in this case points out that angina pectoris is not, in itself, a disease, or condition, but only a symptom of coronary insufficiency. Angina pectoris is sometimes a forerunner of coronary thrombosis.

cardiograph done by the doctor revealed no damage to the heart, and Dr. Ritchie sent Mrs. Casey to Drs. Wilson and Price, who examined her for heart trouble. They made a second cardiogram, and this was compared with the one done by Dr. Ritchie. Both were negative, *i. e.,* there was no evidence of heart damage. It was the view of Ritchie that the work contributed to the attack on May 7, but he could not say that the work at the Ottenheimer Brothers plant caused the condition from which he found her suffering on December 10, 1965; he did state that he thought it might have contributed some to the attacks that she had. The testimony of Dr. Ritchie is the only evidence in the record which supports, in any measure, the view taken by claimant.

Dr. Kahn likewise testified that Mrs. Casey's condition was due to coronary insufficiency, and he explained that this disease is an aging of the arteries. He stated that the aging process does not have any relation to the work the patient might be doing; in fact, the doctor said that physical activity (if controlled) is one of the few things that tend to retard the onset of coronary artery disease. As to the attack on May 7, the witness testified:

"* * * I think the most that one could say is that it's conceivable that something that she did at work might precipitate the pain, which is just a symptom of the underlying disease, but I don't think I could prove, if I tried to, that any important damage had been done to her, or in fact any detectable objective damage."

He said that the pain was only a manifestation of coronary insufficiency and did not represent any physical damage to the heart:

"Well, we ran an electrocardiogram on this patient when she was completely at rest. Then she was given a specified amount of exercise, which was in relationship to her age and build. Then portions of the electrocardio-

graph were repeated. These tracings did not show evidence of—we call it anoxia, in the electrocardiograph. In other words, they were normal after exercise and before.

Q. Did you find any evidence of heart disease from the electrocardiograph?

A. No.

Q. All right. Did you find any evidence of a blood clot or infarction of the heart muscles?

A. No, sir, I did not."[2]

In answer to the question as to whether it was at all possible that the exercise which she performed on May 7 had contributed to her present condition, Dr. Kahn replied that there are no "absolutes" in medicine, but that he certainly didn't think that the 25 pound lifting was related to her present condition; he was rather emphatic in stating that it was his opinion that her activities did not speed up the degenerative disorder in her coronary arteries, and accordingly he did not think that the angina attacks, which Mrs. Casey had after she quit work, had any causal relation with the exertion of May 7. He also said that excessive fatigue is not good for a person, but that it could not relate to a progression of her disease.

Respondent's Exhibit "A" to the testimony of Dr. Ritchie was a letter from Dr. Wilson to Ritchie. In the letter, Dr. Wilson states that he is "not absolutely convinced she has arteriosclerotic heart disease with coronary insufficiency, but there are enough predisposing

[2]Dr. Ritchie commented on a Master's test as one "where they put these people through the mill, hops, jumps, up and down stairs, just a terrific amount of severe exercise, * * * then they do a cardiogram." He was then asked: "Now, if the patient has heart disease, coronary insufficiency or something like that or an infarct or a thrombosis, it will show up on that cardiogram, would it not?" A. "That's right and they might show up dead too."

factors and her symptoms suggest angina strongly enough that I think the safest thing is to assume she has coronary disease until we can prove differently." One item in the letter is of particular interest. After stating that Mrs. Casey came to the office for evaluation of her recent illness, Dr. Wilson wrote:

"As you know she thought she was in pretty good health until May 6, 1965, when she had a retroeternal chest pain accompanied by aching in her left arm. This occurred about 9:30 at night after she had retired and following a supper which included some fried foods. The pain never did really subside, and after she went to work the next day it became much worse."

Mrs. Casey denied that she told Dr. Wilson that the pain never did subside. She said she could not understand why Wilson placed that in his report. Of course, since the doctor was not acquainted with appellee until she went to his office, it is difficult to understand how he obtained that information unless she told him, and it would appear that Mrs. Casey has overlooked, or forgotten, that she gave this information. It will be remembered that her husband also stated that she was still complaining on the morning of May 7 when she was getting ready to go to work.

Appellee relies somewhat upon our recent case of *Dougan* v. *Booker,* 241 Ark. 224, 407 S. W. 2d 369, but there are some distinctions in that case.[3] There, a worker with a bad heart put forth unusual exertion in his work, collapsed on the job, and died. The family physician, who had known Dougan for a long period of time, testified in the case in support of the widow's claim, and this doctor was the only doctor who personally had seen and examined Dougan. The other two doctors who testified only reviewed the transcript of the testimony, and from a reading of that testimony, answered a detailed hypothetical question, one of the doctors express-

[3]Other cases cited are not applicable to the facts herein.

ing the opinion that Dougan's work did not contribute to his death. The claim for compensation benefits was not allowed, and we reversed on appeal.

In the case before us, no family physician testified, and no doctor who testified saw Mrs. Casey before the day of the attack complained of. However, all of the doctors mentioned in this opinion personally observed Mrs. Casey; no one testified simply on the basis of having read the transcript. Of course, in the case cited, Dougan suffered his attack, and died before reaching the hospital; here, the weight of the evidence is to the effect that no heart damage was occasioned by the attack suffered on May 7.

As stated at the outset, we are only concerned with whether there was substantial evidence to support the finding of the commission. It is not within our province, irrespective of any sympathy that we might have for Mrs. Casey, to decide questions of fact. That is the function of the commission, and we are unable to say that the finding by the commission was not supported by substantial evidence.

Accordingly, the judgment of the Circuit Court is reversed, with directions to reinstate the order entered by the Workmen's Compensation Commission.

It is so ordered.

WARD, J., dissents.

PAUL WARD, Justice, dissenting. In dissenting to the majority opinion I shall try to make clear my views on two features of this case. *One* relates only to this particular case. *Two* relates to all cases of this nature.

One. While it is my opinion, after careful consideration, that there is no substantial evidence to support the findings of the Commission, I will endeavor to show

only that there is definitely a *doubt* about there being such evidence.

Set out below are my reasons for the *doubt.*

(a) Before this case reached us five duly qualified judicial persons expressed their opinions on this matter. Two persons (two commissioners) thought there was no such evidence. Three persons (the referee, one commissioner, and the trial judge) thought there was such evidence.

(b) It is undisputed: that appellee was a healthy woman before she began working on the assembly line, which entailed constant, tedious application and lifting heavy bundles; that, while working, she began suffering pains and finally completely collapsed; that shortly thereafter she tried the same work again and was unable to continue, and; that she is still unable to work although she needs to do so because of a sick husband and financial demands.

(c) Dr. Ritchie testified, in essence, it was his opinion: that appellee was suffering from *angina pectoris;* that her condition was aggravated by her work, and; that she would never be able to return to the same type of work.

(d) Ottenheimer's own doctor admitted: "the most reasonable assumption was that the attack was precipitated by the work she was doing". Again he said: "Well, I certainly would think that it would be aggravated by the type of lifting and the type of work she did".

To refute the above the majority rely on the testimony of one doctor whose opinion was that there was no relation between appellee's work and her attack or her present condition. Personally, I wonder if there was not some doubt in his mind since he used thirty three

pages in appellants' brief to express and substantiate is admitted that appellee's claim was not based on a "heart" condition or injury, the doctor referred to the "heart" at least twelve times. In his testimony the doctor said: "The angina pectoris is simply a *manifestation* of a disease", but Webster defines it as a "disease" —not a *manifestation.*

Two. If a *doubt* has been raised [and I cannot see how a reasonable person could say otherwise] then the *doubt* should have been resolved in favor of appellee.

In the case of *Cummings* v. *United Motor Exchange,* 236 Ark. 735, 368 S. W. 2d 82, where the Commission was reversed, we find this statement:

> ". . . it is the intent and purpose of our Workmen's Compensation laws that they should be liberally construed and, that *doubtful* cases are to be resolved in favor of the claimant". (emphasis supplied.)

In the case of *Dougan* v. *Booker,* 241 Ark. 224, 407 S. W. 2d 369, we find the following language:

> "The Workmen's Compensation Law was adopted to give compensation to workers, not to allow insurance carriers to make *fine distinctions* to avoid liability. In this case the Commission did not give the liberal interpretation to the law which our cases require." (emphasis supplied.)

In *Clemons* v. *Bearden Lumber Company,* 236 Ark. 636, 370 S. W. 2d 47, there is language which calls for serious and careful consideration in a case of this kind. It reads:

> "The law imposes on us the *duty* to interpret the Workmen's Compensation Law liberally to the end

that the injured employees shall be remunerated for loss of earning power". (emphasis supplied.)

In the spirit of the above holdings I would resolve the *doubt* in favor of appellee.

EVELYN McLENDON *v.* DICK JOHNSTON JR. ET UX

5-4295 419 S. W. 2d 309

Opinion delivered October 16, 1967

W. H. Daggett, for appellant.

Harold Sharpe, for appellees.

GEORGE ROSE SMITH, Justice. The appellant, Mrs. McLendon, and the appellees, Johnston and his wife, own adjoining lands in Marianna. In 1965 Mrs. Mc-

Lendon began the construction of a house that eventually proved to encroach by about 3.4 feet upon the lot-and-a-half to which the Johnstons have record title. At about the time the house was completed the Johnstons brought this suit to compel Mrs. McLendon to remove the encroachment. This appeal is from a mandatory injunction granting the relief prayed. For reversal Mrs. McLendon relies upon adverse possession and estoppel.

There is hardly any dispute about the facts. Mrs. McLendon formerly owned all three of the contiguous lots now in question. In 1952, when all the lots were unimproved, she sold the north lot-and-a-half to a Mr. Bronson, whose title later passed to Ronald May. In 1954 May built the house that is now owned and occupied by the appellees.

The present controversy really stems from May's having built a picket fence that lacked several feet of being on the true boundary line between his property and that of Mrs. McLendon. May's fencing ran south along part of his back boundary line and then turned east and continued for about two thirds of the distance to the street in front of the house. The illusion that the fence marked the true boundary was doubtless compounded by the fact that the sidewalk in front of May's house was paved only to the point at which it would have intersected the fence if the fence had been extended to the east line of May's land.

When the Johnstons bought their house in 1962 they were told that the east-west fence was not on the line—that they were getting a strip on the other side. By then the east-west part of the fence had deteriorated, and Johnston removed it long before Mrs. McLendon began to build a house on her land. Mrs. McLendon testified that she "understood" that the fence had been on the boundary. Her contractor accordingly ran a string from the end of the Johnstons' sidewalk to the end of the Johnstons' back fence and positioned the new

house with reference to that line. There is no dispute about the fact that the McLendon house does encroach upon the Johnstons' property to a distance of 3.4 feet.

We may dispose quickly of the appellant's claim of adverse possession. Until she began to improve her lots in 1965 they were vacant and unenclosed. Hence her assertion of title by adverse possession rests solely upon the fact that her neighbor placed his fence decidedly short of the common boundary. It is firmly settled, however, that "a landowner who puts his fence inside his boundary line does not thereby lose title to the strip on the other side. That loss would occur only if his neighbor should take possession of the strip and hold it for the required number of years." *Brown Paper Mill Co.* v. *Warnix,* 222 Ark. 417, 259 S. W. 2d 495 (1953). Here there is no semblance of actual hostile possession on the part of the appellant.

Upon the remaining issue the evidence falls short of establishing an estoppel. There is no explicit or convincing proof that either the Johnstons or their predecessors in title ever represented to Mrs. McLendon that the lateral picket fence was actually on the boundary line. Johnston testified that when he first noticed that the McLendon house was being built he told the contractor about his own understanding of the boundary line. Johnston states that he got no satisfaction from the contractor, who said that the Cline & Frazier Company had surveyed the lot. Neither the contractor nor the surveyor was called to contradict Johnston's testimony. Later on Johnston employed his own surveyor to determine the true line and promptly filed suit when it turned out that an encroachment existed. There was no want of diligence on his part.

On the other hand, Mrs. McLendon was not free from fault in the matter. She is an experienced builder, having erected and sold about ten houses in the neighborhood. Yet in this instance she made no apparent effort to determine the boundary line with accuracy. She

admits that she paid $45 for a survey that was made by Cline & Frazier at the behest of her contractor, but the record contains neither the survey nor any testimony about what it disclosed. We must assume that the missing evidence would be unfavorable to Mrs. McLendon's position. *Mutual Relief Assn.* v. *Weatherly,* 172 Ark. 991, 291 S. W. 74 (1927). Her contractor, according to Johnston's uncontradicted testimony, was told about the possibility of an encroachment, but he apparently failed to pass the information on to Mrs. McLendon. Upon the record as a whole we find no sound basis for holding that the Johnstons should be estopped from complaining of a mistake that was primarily the result of Mrs. McLendon's own oversight. In similar circumstances we have directed that a mandatory injunction issue for the removal of the purpresture. *Jernigan* v. *Baker,* 221 Ark. 54, 251 S. W. 2d 999 (1952); *Leffingwell* v. *Glendenning,* 218 Ark. 767, 238 S. W. 2d 942 (1951). Such cases control this one.

Affirmed.

LARRY JAMES WRIGHT *v.* STATE OF ARKANSAS

5299 419 S. W. 2d 320

Opinion delivered October 16, 1967
[Rehearing denied November 6, 1967.]

J. Sam Wood and *Martin Green,* for appellant.

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

PAUL WARD, Justice. Larry Wright, appellant was charged with the crime of committing rape on the night of January 24, 1967. He was tried and convicted on May 9, 1967, and sentenced to life imprisonment.

The victim identified appellant as the person who entered her bedroom about midnight and forced her to have intercourse with him. Appellant's defense consisted mainly of an alibi. He took the witness stand, and testified, in substance: He was at the home of his parents from about 10 p.m. on the night in question and remained there constantly until 7 or 8 o'clock the next morning. He was corroborated by his parents, and, to some degree, by other witnesses.

On appeal, and for a reversal, appellant does not contend there was any lack of sufficient evidence to support the jury verdict of guilty. He does, however, contend the case should be reversed because of two alleged errors committed by the trial court, which alleged errors we presently examine.

One. The first contention by appellant is:

> "The trial court erred in failing to grant a mistrial after allowing the prosecution to improperly cross-examine the defendant by accusing defendant of specific acts of bad conduct and criminal conduct and attempting to impeach defendant's credibility."

Another point raised by appellant is closely related to the above and will not be discussed separately. It merely

concludes that "the verdict of the jury was rendered out of bias and prejudice against the defendant as a result of the improper cross-examination . . ." mentioned above.

On cross-examination appellant was asked nine questions by the prosecuting attorney relative to his alleged past conduct or behavior. The first question was:

> Q. "I will ask you if Mr. Roger Tucker on several occasions has requested that you quit hanging around his place of business because you make indecent proposals to women."

Appellant objected on the ground that "it has nothing to do with the proof of innocence in this case at all." Then the trial court stated:

> ". . . you know this defendant has taken the stand. He is subject to the same rule and cross-examination as any other witness. These questions may be asked on the credibility of the witness."

To the above appellant again objected, and saved exceptions.

Six or seven other questions of the same or similar import were propounded to appellant, all of which were denied by him. To one other question of this nature appellant answered that "I used to hang around the Palace Laundry and they told me, the lady did, to stay away and I ain't been back there since".

There were several discussions between the court and the attorneys relative to the propriety of the question during which time appellant made proper objections. Then the court made this statement to the jury:

> "Gentlemen, you understand these questions and answers with respect to this line of questioning which has just been pursued, to which the defense

> has objected, is not to be considered by you as substantive proof of the offense for which he is being tried. It goes only to his credibility."

A review of our decisions pertinent to matter here in question leads us to conclude the trial court's ruling was correct.

In support of his contention of error appellant cites cases of *Ware* v. *State,* 91 Ark. 555, 121 S. W. 927; *Younger* v. *State,* 100 Ark. 321, 140 S. W. 139, and; *Henson* v. *State,* 239 Ark. 727, 393 S. W. 2d 856. We think, however, these cases are not applicable to the situation here. In the *Ware* case the State offered testimony by witness as to other crimes committed by appellant after he had tried to prove his good character. In rejecting the State's testimony this Court also said:

> "As a witness in the cause, he could have been cross-examined; and upon his cross-examination, like any other witness, he could have been asked as to specific acts for the purpose of discrediting his testimony as a witness."

In the *Younger* case (which was a rape case) the State again offered to prove appellant's bad character by its own witnesses, even though he had not attempted to prove his good character. In holding this was improper, we said:

> "Appellant, however, having taken the witness stand in his own behalf, was subject to all the rules of examination and impeachment as any other witness. Therefore to test his credibility the State had the right on cross-examination to ask the witness if he had not been convicted of petit larceny, and if he had not been confined in the penitentiary."

The issue in the *Henson* case was very similar to that in the *Ware* case, and we held that after appellant had offered to prove his good character the State could not

introduce witnesses to prove "specific instances of bad behavior as a matter of contradicting appellant's testimony".

There are numerous decisions by this Court holding, in effect, that when a defendant takes the witness stand (as he did here) he is subject to the same rules of evidence and impeachment as other witnesses on cross-examination to test his credibility. *Jordan* v. *State,* 141 Ark. 504, 217 S. W. 788; *Kyles* v. *State,* 143 Ark. 419, 220 S. W. 458; *Hays* v. *State,* 219 Ark. 301, 241 S. W. 2d 266, and; *Edens* v. *State,* 235 Ark. 178, 359 S. W. 2d 432.

Two. It is here contended that the trial court committed reversible error in refusing to discharge the jury and empanel a new jury. The issue arose in the manner described below.

While the jurors were being questioned for qualification the trial court asked them if anyone knew anything about the facts of the case or if they had heard anything about it. Thereupon John Candler (a member of the panel) stated: "This incident occurred in rent property owned by myself and my wife." Appellant moved for a mistrial, and it was denied by the court. An objection was made by appellant, and exceptions saved.

A review of the record convinces us the court committed no reversible error. In response to further questioning by the court Candler made it clear that he had talked with no one who purported to know the facts; that, if accepted, he would not be influenced either way as to guilt or innocence of the defendant; that he didn't know appellant or the prosecuting witness, and had never seen either before the morning of the trial; that he only heard that an "alleged incident did happen"

Appellant also made a motion to strike Candler for cause, and this motion was granted.

We think the trial court, under the state of the record here, did not abuse his discretion in refusing to declare a mistrial. In the case of *Briley* v. *White,* 209 Ark. 941, 193 S. W. 2d 326, this Court refused to grant a mistrial. In sustaining the trial court we used this language:

> "Much latitude must be given to the trial court in handling matters of this kind, and, in the absence of a showing of abuse of discretion or a manifest prejudice to the rights of the complaining party, this court will not reverse a judgment on account of the action of the trial court". (Citing numerous cases in support.)

Affirmed.

J. E. BROOKS *v.* RENNER AND COMPANY INC. ET AL

5-4267 419 S. W. 2d 305

Opinion delivered October 16, 1967

Murphy & Burch, for appellant.

Putnam, Davis & Bassett, for appellees.

LYLE BROWN, Justice. Suit was filed by J. E. Brooks, plaintiff-appellant, against Renner and Company Inc., a Fayetteville insurance agency, and Commercial Standard Insurance Co., with whom Renner placed a substantial part of its business. The sole issue below was whether a Commercial Standard auto liability policy issued by Renner to J. E. Brooks on June 3, 1964, was in effect on November 2, 1964. On motion for summary judgment the trial court ruled against Brooks.

Brooks resided in Fayetteville continuously for many years. For some ten years he had insured one or more automobiles through the Renner agency. A policy was written annually; however, it carried a four months expiration date. Prior to the stated expiration date, Renner would mail a four months renewal statement and a premium bill. It is Brooks' contention that because of the described business practices, there existed an implied agreement between the parties which bound Renner, in the absence of notification to the contrary, to renew the contract.

In 1963, Brooks moved to Little Rock but maintained his auto liability coverage with Renner. The expiration date on the involved policy was October 3, 1964.

Under date of September 21, 1964, Renner addressed this letter to Brooks at his office in Little Rock:

> "Your coverage on your cars under the above policy will expire October 3, 1964.
>
> "In your present situation, it would be best that you secure coverage in Little Rock. You will be able to get better service from an agent there closer to you.
>
> "When you get your other coverage effective 10-3-64, be sure the agent furnishes evidence of the insurance to GMAC on the 4 Dr. Hardtop and the Bank of Arkansas on the Convertible.
>
> "We greatly appreciate having written this coverage for so many years."

The letter to Brooks was received in due course. He is not sure just when he read the letter; it was his general recollection that it was approximately one week after receipt of it. Brooks did not reply to Renner's letter.

Did Renner's letter to Brooks, dated September 21, 1964, constitute notice that the policy would not be renewed? Any doubts and inferences about the content of the letter in this respect must be resolved in Brooks' favor. *Russell* v. *City of Rogers,* 236 Ark. 713, 368 S. W. 2d 89 (1963).

On a motion for summary judgment this court is authorized to ascertain the plain and ordinary meaning of a written instrument. This is permitted only after any doubts are resolved in favor of the party moved against. If doubt exists and makes the meaning ambiguous, there then arises an issue of fact to be litigated. *Elbow Lake Coop. Grain Co.* v. *Commodity Credit Corp.,* 251 F. 2d 633 (1958).

Tested by the stated principles we think there is but one logical conclusion to be reached. It plainly and simply gave notice to Brooks that his policy was not being renewed. It is devoid of any alternative. For example, the letter did not point up the inconvenience of his insurance being written in a city 200 miles distant from his city of residence, and, alternatively, offer to continue writing it if Brooks insisted. Renner gave him the date of expiration. Brooks was told it would be best to secure the coverage in Little Rock. He was advised to notify GMAC and the Bank of Arkansas of the change. Appreciation was expressed for having had Brooks as a customer. This was unequivocally a letter of finale.

Appellant attaches significance to the absence of such a bold statement as "I am not going to continue coverage." That argument is not convincing. *American National Insurance Co.* v. *Hamilton,* 192 Ark. 765, 94 S. W. 2d 710 (1936). There the court held an instructed verdict for the Company should have been granted. Our court said that a notice which reasonably appraises the insured that the insurer is exercising its right not to renew is sufficient. We think Renner's notice meets the reasonableness test.

Finally, appellant argues that if the non-renewal letter of September 21 is interpreted in light of extraneous circumstances, it would be obvious to a jury that the letter was ambiguous; here it is pointed up that Mr. Renner and Brooks were friends and Brooks was a long-standing customer. For those reasons, appellant Brooks concludes, rather inarticulately, that Renner was impliedly obligated to take care of Brooks' insurance needs. We recognize that service agencies are expected to, and usually do, take an interest in the welfare of their regular customers. Ofttimes they render courtesies over and above the obligations created by contracts. That is simply good business.

Concerning appellant Brooks' final argument, we have reviewed the record and conclude it is without mer-

it. To the contrary, the record refutes it. The only variance in the contractual relationship was that Renner accommodated Brooks by not requiring payment of premium in advance. He carried Brooks on open account and the last premium due in June 1964, was not paid until the following November. In all other respects their transactions were handled in accordance with sound business practices. The same procedure for renewal was followed for some ten years. That was Brooks' testimony. Every four months Renner would mail a renewal certificate and render a statement. That was done each time in advance of the expiration date. Ten days in advance of the October renewal date the usual renewal notice and billing were not mailed. In lieu of those, Renner wrote a letter reminding Brooks of the expiration date, advising him to obtain his insurance in Little Rock, cautioning him to notify the automobile lienholders of the change, and thanking him for having "written this coverage for so many years."

If, as now contended by appellant, neither of the parties treated this letter as a non-renewal notice, why did Brooks wait until November 5 to reply? That was three days after one of his automobiles had been involved in an accident in Little Rock.

Affirmed.

G. L. ARMSTRONG *v.* E. L. COOK

5-4309 419 S. W. 2d 308

Opinion delivered October 16, 1967

J. H. Spears, for appellant.

Giles Dearing, for appellee.

LYLE BROWN, Justice. This action originated when appellant Armstrong filed petition in the Cross County Court under the provisions of Ark. Stat. Ann. § 76-110 (Repl. 1957); there he sought to establish a private road which would lead from the county road across appellee Cook's lands and to the Armstrong property. The county court granted the petition. On appeal to circuit court by Cook, the findings of the county court were vacated. Those findings were based on omissions which we shall later describe. It is appellant Armstrong's contention that the county court's order which awarded him an outlet to the county road was justified.

Appellant Armstrong and appellee Cook own adjoining farm lands. A public road runs through the Cook lands. Armstrong has no immediate access to a public road. For a number of years he has gained access to his acreage by crossing, with permission, the woodlands of his neighbor. The woodlands were cleared and planted in an orchard and Cook no longer desired to make passageway available.

The county court failed to follow the statutory requirements in a number of respects, all of which will not be enumerated. We do point out that the written report of the appraisers does not sufficiently describe the land through which the road would pass; nor does it

calculate the value of the strip of land which would be appropriated for the road. No survey was incorporated in the commissioners' report.

Here is the only instrument of the commissioners:

"We, the undersigned Commissioners, appointed to view the lands in Section 31, Township 7 North, Range 4 East, in Cross County, Arkansas, to determine the feasibility of laying off a private road to reach the lands belonging to G. L. Armstrong, do make this report.

"We find that G. L. Armstrong needs a road to his property. We also find that there is no other feasible route except an old road now in existence.

"We recommend that a 20 foot road be built at the same location where the old road is now. There will be no damage to the Cook Farm in the construction of this road."

The order entered by the county court adopted the same description as is contained in the commissioners' report. If that report, along with the order of the county court, were recorded, it is apparent that the description is so vague that the road could not be located from an examination of the records. It is also noted that the county court order makes no finding with respect to damages. Section 76-110 requires a finding as to whether damages are sustained, "which damages shall include the value of the land of each owner sought to be appropriated."

The recited omissions were sufficient to invalidate the county court proceedings. However, the circuit court erred in granting Cook's prayer for dismissal. That court should have retained jurisdiction and tried the case de novo. Ark. Stat. Ann. § 27-2006—7 (Repl. 1962). See *Garland County Board of Election Commissioners* v. *Ennis,* 227 Ark. 880, 302 S. W. 2d 76 (1957).

Reversed and remanded.

JAKE CARDEN *v.* BERTHA J. EVANS, MOTHER AND NEXT FRIEND OF MARTHA JANE EVANS, A MINOR

5-4279 419 S. W. 2d 295

Opinion delivered October 16, 1967

Wright, Lindsey & Jennings; By: *Alston Jennings,* for appellant.

Felver A. Rowell Jr., for appellee.

JOHN A. FOGLEMAN, Justice. This appeal invokes the application of the automobile "guest statutes" [Ark. Stat. Ann. §§ 75-913 and 75-915 (Repl. 1957).]

Appeal was taken from a judgment based upon a jury verdict after the trial judge denied a motion for a directed verdict at the conclusion of the evidence offered on behalf of appellee. Appellant then rested without presenting any testimony and renewed the motion which was again denied.

The suit was brought by appellee Bertha J. Evans, as mother and next friend of Martha Jane Evans, a minor, against appellant Jake Carden, also a minor. Viewing the evidence in the light most favorable to appellee, the facts are:

Martha Jane Evans, aged 14 at the time, was riding as a passenger in an automobile being driven by Jake Carden, then 17 years of age, on Sunday evening, December 19, 1965. The two had been going together since the late part of the summer, having had dates on Fridays, Saturdays and Sundays. They frequently went in his automobile. He normally drove fast—usually not under 60 miles per hour, most of the time around 70. She had, on occasion, told him to slow down. On most of these occasions he ignored the request. On some of them he slowed down some, but not a lot. On the night of December 19, he wasn't driving any differently from the way that she knew he always drove, except that he didn't ordinarily take his eyes off the road or drive with one hand. On this particular evening Carden came to her house around 6:30 and they left for town around 7 or 7:30. They went to Bill's Tastee Queen and got something to eat. After about a thirty-minute stay at Bill's, they went to Bigelow where Carden lived. On the way to Bill's, Martha Jane had occasion to ask Carden to slow down but he did not do so. On the return trip from Bigelow, while traveling on Highway No. 113 at about 11 p.m. at a point half way between Houston and Oppello, out in the open country, the car ran off the road shortly after the vehicle had come out of a long curve. As a result, Miss Evans was thrown out of the car and suffered severe, painful and disfiguring injuries

about the mouth and face. Just before the car ran off the road, Jake was helping her, at her request, to adjust or unfasten her seat belt. In order to do so, he looked off the road and had only one hand on the steering wheel. They were in a curve at the time. When she asked him to help he was driving around 70 miles per hour and she asked him to slow down but he did not do so. He ignored her objections to his not slowing down. His eyes were off the road for at least one minute. He negotiated at least one curve safely without ever looking at the road. While she could not say definitely that Carden was driving faster than 60 miles per hour, she testified that the speed limit was not 60 but she could not remember what it was at the point. Appellant admitted to the investigating police officer that he was driving too fast and that he had looked over at Miss Evans momentarily and left the highway.

We find that there was error in failure to direct a verdict for appellant. There can be no liability on the part of young Carden unless there is evidence to show that his vehicle was willfully and wantonly operated in disregard of the rights of others—particularly Martha Jane Evans. While the evidence undoubtedly shows negligence, perhaps even gross negligence, on his part, it is not sufficient to show the required willfulness and wantonness. *Splawn, Admr.* v. *Wright,* 198 Ark. 197, 128 S. W. 2d 248; *Edwards* v. *Jeffers,* 204 Ark. 400, 162 S. W. 2d 472; *Cooper* v. *Calico,* 214 Ark. 853, 218 S. W. 2d 723; *Steward* v. *Thomas,* 222 Ark. 849, 262 S. W. 2d 901; *Scott* v. *Shairrick,* 225 Ark. 59, 279 S. W. 2d 39.

In order to constitute the willful misconduct required, there must be a conscious failure to perform a manifest duty in reckless disregard of natural or probable consequences to the life or property of another, as distinguished from gross negligence which does not involve such reckless disregard of consequences. *Splawn* v. *Wright, supra.* There must be a willfulness, a wantonness and indifferent abandonment in respect of conse-

quences, applicable alike to self and guest. *Cooper* v. *Calico,* 214 Ark. 853, 218 S. W. 2d 723. The burden of proof to show the required conduct was upon appellee. *Poole* v. *James,* 231 Ark. 810, 332 S. W. 2d 833; *Splawn* v. *Wright, supra.* Before a driver will be found guilty of this conduct, the evidence should be unusually strong and convincing. *Splawn* v. *Wright, supra.*

This case is uniquely similar to the *Splawn* case. There the driver of the vehicle was driving at a speed of 40 to 45 miles per hour on a slick, muddy road in bad visibility conditions due to rain and fog when his vehicle went off the road after having negotiated a curve. He lost control of the car after he reached down to turn on or adjust the heater. He had paid no attention to the objections of the injured party that he was driving too fast. There was testimony that most any speed would have been hazardous. This court reversed and dismissed the case because of failure of the trial judge to direct a verdict for the administrator of the estate of the driver who was killed. Even the elements of bad visibility and bad road surface conditions are absent here.

In another case reversed and dismissed for refusal to direct a verdict for a driver and against his guest, it was said that wantonness, in the sense of the statute, is a mental attitude shown when a person, notwithstanding his conscious and timely knowledge of an approach to an unusual danger and of common probability of injury to others, proceeds into the presence of danger, with indifference to consequences and with absence of all care. *Ellis* v. *Ferguson,* 238 Ark. 776, 385 S. W. 2d 154.

In *Edwards* v. *Jeffers,* 204 Ark. 400, 162 S. W. 2d 472, there was evidence that the injured passenger, as well as the husband of the host driver, had called the latter down two or three times about her excessive speed on a road with curves on which the gravel was loose, before she lost control of her vehicle as she negotiated a "square" turn at a speed of 60 or 70 miles per hour

or faster and left the road some quarter of a mile beyond the curve. This case was also reversed and dismissed.

Appellee relies on the holding in *Spence* v. *Vaught,* 236 Ark. 509, 367 S. W. 2d 238, as authority for affirmance of this judgment. There is a great distinction between this case and that, so it does not support appellee's position. There testimony was introduced tending to show that appellant, after her car began to make first a singing, then a grinding noise, and finally a swerve lasting over some period of time, ignored warnings from her guest to slow down from a speed of 50 to 60 miles per hour and see what was the matter. The court found that the failure of appellant to slow down after the grinding noise started and the car swerved more violently, although twice warned to do so, would constitute willful or wanton negligence. We have no such evidence here. As was said in *Steward* v. *Thomas*, 222 Ark. 849, 262 S. W. 2d 901, acting negligently on the spur of the moment is quite a different thing from *persistent* pursuit of a course of driving in a reckless and dangerous manner over the protest of the occupants of his vehicle. In view of our own holdings we do not find cases from other jurisdictions cited by appellee to be persuasive, even if applicable.

In view of the disposition we make of the case, we find it unnecessary to determine whether the action of the trial judge in forcing appellant to file an answer and go to trial on the same day the court appointed his mother as guardian ad litem to defend for him constituted an abuse of discretion.

Reversed and dismissed.

ZILPHA NOWAK *v.* GLADYS MARTIN ET AL

5-4280 419 S. W. 2d 300

Opinion delivered October 16, 1967

Gardiner & Steinsiek, for appellant.

Marcus Evard, Oscar Fendler, Graham Sudbury and *H. G. Partlow Jr.,* for appellee.

J. Fred Jones, Justice. This is the second appeal growing out of litigation over the last will and testament of Ida B. Crockett. The first appeal, *Nowak* v. *Etchieson,* 241 Ark. 328, 408 S. W. 2d 476, concerned the validity of the codicil to the will and the disposition of a lapsed legacy. The present appeal concerns the disposition of rents from farm lands held by the trustee under a testamentary trust created by paragraph nine of Mrs. Crockett's will. The exact question presented is whether or not rents from the real property collected between the death of the testatrix and the sale of the real property under power of the trust, are to be distributed to the *cestui que* trust, along with the proceeds from the sale of the real property under item nine of the will, or whether these rents are to be distributed to the residuary legatees under item ten of the will.

After providing for the payment of funeral expenses, debts and other specific legacies, items nine and ten of the will, insofar as they relate to the question here involved, are as follows:

> "9. I give and devise to J. F. Etchieson, of the City of Blytheville, Arkansas, as trustee for the uses and purposes hereinafter mentioned and set forth, all of the rest and residue of my real estate, wherever the same may be situated, of which I shall die seized and possessed, to be held and disposed of by him as such trustee in the manner hereinafter provided.
>
> "It is my will and command that the said trustee shall, as promptly after my death as he shall feel a reasonable price may be obtained therefor, sell all of my said real estate at private sale for the best obtainable price, and that, after deducting from the proceeds of such sale reasonable compensation for

his time, effort and business judgment together with any expense incident to the sale, divide the proceeds of such sale equally among the within named ELLA CUNNINGHAM, BERTHA MILLER AND GLADYS MARTIN. If any notes or instruments of security shall be received in connection with any such sale said trustee shall personally endorse and assign the same without recourse on himself to the above three persons as tenants in common owning equal interest with each other. For these purposes, my trustee is hereby given absolute power and authority to negotiate and enter into any and all things, contracts and agreements for the sale of said property and to execute, acknowledge and deliver all contracts and instruments of conveyance that he shall deem to be expedient or desirable in connection with the disposition of such real estate. My trustee shall not be required to seek any authority from any other or other [sic] tribunal or to make any report to any other, tribunal or person other than the three beneficiaries of the trust who have been named herein.

* * *

"10. I give and bequeath to my nieces, ZILPHA NOWAK and ELLA LUTZ, as tenants in common owning equal interests with each other, all of the rest and residue of my property, if there be any such residue, that shall remain after the foregoing provisions of my will shall have been fully complied with."

Ella Cunningham and Ella Lutz were one and the same person and predeceased the testatrix. Her share of the proceeds from the sale of the real property under item nine of the will, went to the heirs of the testatrix as a lapsed legacy under our holding on the previous appeal. In the case at bar, the trial court made the same division of the rents and held that Bertha Miller and Gladys Martin were each entitled to one-third of the

rents, with the remaining one-third to be distributed to the heirs at law of Ida B. Crockett. Zilpha Nowak, as the sole surviving residuary legatee under paragraph ten of the will, brings this appeal and relies on three points for reversal, as follows:

> "1. The farm rents from the lands of Ida B. Crockett are considered as personalty and belong to the Executor of the Estate.
>
> "2. Said farm rents pass under the provisions of Paragraph 10 of the Last Will and Testament of Ida B. Crockett.
>
> "3. In the Probate action, if said rents do not pass under Paragraph 10 of the Last Will and Testament said rents are intestate property and belong to all heirs at law of the decedent, Ida B. Crockett."

The points relied on are so closely related to the same rule of construction we shall not attempt to treat them separately.

Appellant contends that there was an equitable conversion of the real estate devised to J. F. Etchieson in trust, and that this real property should be treated as personalty from the date of the death of Mrs. Crockett until the date of sale. Appellant earnestly contends that the rents collected from this real estate while in trust, and prior to the exercise of the power of sale under the trust, constituted separate personal assets of the estate of the decedent to be administered as such; that since the rents were not needed for the payment of funeral expenses, debts and other legacies, and since they were not specifically mentioned in other legacies, they should be charged to the account of the executor and distributed as residue under item ten of the will. The thrust of appellant's contention is that since the real property was converted to personalty, item nine of the will devised personal property consisting only of the proceeds from

the *sale* of the real estate and that the rest and residue of the estate, consisting of rents from the real property should go to appellant under paragraph ten of the will.

We agree that a conversion of the real estate was effected here and agree, that for the purpose of the will, the conversion related back to the death of the testatrix. We do not agree that an equitable conversion of real property under the power of a testamentary trust, automatically, and by operation of law, separates the proceeds of the sale under the power from the income derived from rents on the real property prior to the exercise of the power of conversion. Certainly we do not agree that an equitable conversion under the power of a testamentary trust can defeat the object of the trust or the intentions of the testator in creating it.

The taking of rents and profits is a necessary incident of possession and where there is no express direction as to the disposition of rents and profits, the reasonable implication is that they are to go to the persons beneficially interested in the estate. *Hubbard* v. *Housley et al,* 59 N. Y. Supp. 392, 43 App. Div. 129.

The estate of Mrs. Crockett was entirely solvent and it was not necessary to sell her real estate to pay debts. But, even in a case where it is necessary to sell real estate to pay debts and where a sale is ordered because a decedent's estate is insufficient to pay his debts, it has been held that the rents accruing after the decedent's death and before the exercise of a power of sale go with the title to the land to the heirs or devisees, and not to the executor or to the purchaser under the power. *Bittle* v. *Clement, et al,* 54 Atl. 138 (N. J. 1903).

The question here is not whether there was or was not an equitable conversion. It is obvious that there was. The question is not whether the real property of the decedent was to be considered personal property from the date of decedent's death for purposes of the will

—we conclude that such is the incidental effect of an equitable conversion. The real question here is whether the rents constitute a portion of the personal estate of the testatrix to be administered as such outside the power of the trust.

The cases cited by appellant do not reach the precise point on this question, but this precise point was before the Supreme Court of Rhode Island in the early case of *Hendrick* v. *Probate Court of East Greenwich,* 55 Atl. 881, 25 R. I. 361, and the question there involved being so near in point with the question here, we quote rather extensively from the decision in that case.

In the *Hendrick* case, a Mrs. Jones died testate. The named executor renounced the trust conferred upon him and the decedent's husband, Mr. Jones, was appointed and qualified as administrator with will annexed. Mr. and Mrs. Jones owned real property as tenants in common. As to her undivided one-half interest in a part of the real property, Mrs. Jones' will provided:

> " 'I direct my executor hereinafter named, as soon after my decease as he can conveniently do so, to sell, at public or private sale, as he may deem best, my interest in the estate known as the Tillinghast estate, ... and to pay over and divide the fund arising from said sale to and among the following named persons, in the proportions specified, to wit.' "

Then follows a list of the persons amongst whom said fund is to be divided.

After the death of Mrs. Jones, her husband administrator collected rents from the real estate in the amount of $280.00. A Mr. Hendrick, as an interested party, contended that one-half of this rent money should be charged to the administrator in his account and in this connection, the court said:

"The only question presented for our decision in this case is whether the administrator, as such, is properly chargeable with one-half of the rents collected from said estate as aforesaid. If the rents constitute a portion of the personal estate of the testatrix, of course they are properly chargeable to him in his account; but, if they do not, then they are not so chargeable. At the trial of the case the court directed the jury to find that the amount of $140—this being one-half of the amount of rent collected—should be charged against Mr. Jones, and be accounted for by him; and they accordingly so found. We think this instruction was error. Under the will of Mrs. Jones, as we construe it, the entire beneficial ownership of the real estate devised by virtue of said twenty-fifth clause thereof passed immediately to the persons named as beneficiaries, and hence whatever rents were collected belonged to them. The direction to sell contained in said clause amounted, in effect, to an equitable conversion of said real estate into personalty, and impressed it with a trust in favor of said beneficiaries. And the mere fact that the real estate was not immediately converted into personalty did not have the effect to deprive the beneficiaries of any part of said property. The duty of the administrator c. t. a. under said clause was to convert said real estate into personalty as soon as he could conveniently do so after the death of the testatrix, and distribute the proceeds of such sale as directed. This direction impressed a trust upon the land, and specified who should execute said trust. The power of sale given in said clause was not a naked power, but was coupled with a trust, which required the execution of the power as soon as might be. And in powers which are in the nature of trusts, as said by the court in *Greenough* v. *Welles,* 10 Cush. 576, 'the rights and interests of third parties who are beneficially interested in the trusts which arise and grow out of the execution of the power come in and can be enforced as against the party to whom the power is given.

* * * When a trust is to be effected by the execution of a power, then the trust and power become blended, and binding upon the donee of the power. The most familiar instance given in the books of such a union is the case where a power is given by a will to sell an estate, with direction to apply the proceeds upon a trust.' See *Gibbs* v. *Marsh,* 2 Metc. (Mass.) 243. In *Leeds, Ex'r.* v. *Wakefield,* 10 Gray, 517, Shaw, C. J. says: 'As a general rule, one clothed with a mere naked power may execute the power or not, at his own will; but one invested with a power to which a trust is annexed is bound in equity, as in other cases of trust, to execute the power, in order that the equitable rights of those who are stated as the objects of the testator's bounty under such trusts may have the enjoyment of the benefits intended for them.' The doctrine that in equity the beneficial interest in property is the controlling and real interest, and also that where, under a devise, an estate is to be sold, and the proceeds divided among designated parties, such direction amounts to an equitable conversion of the estate into personalty, was fully elaborated by Stiness, J., in delivering the opinion of this court in *Van Zandt* v. *Garretson,* 21 R. I. 418, 44 Atl. 221. See, also *Newport Water Works* v. *Sisson,* 18 R. I. 411, 28 Atl. 336. And while it is true that the proceeding before us is not technically an equitable one, yet, for the purpose of determining as to the rights of the parties relating to said rents, we see no reason why said doctrine should not be applied. Moreover, it is well settled law in this state that a probate court has nothing to do with the real estate, or the rents of real estate, of a deceased person, until the proper legal steps have been taken to place such property in the hands of the executor or administrator for the necessary purpose of settling the estate. That is to say, until the personal property of a decedent is exhausted in the payment of debts and legacies, neither the executor, the administrator,

nor the probate court has anything to do with the real estate or the income thereof, except as may be directed by the will, if there be a will. As said by Matteson, C. J., in *Grinnell* v. *Baker,* 17 R. I. 49, 23 Atl. 913: 'The ordinary powers and duties of an executor are to take possession of the goods and chattels of the testator; to collect the debts due to him; to sell the goods and chattels, so far as may be necessary for the payment of the testator's debts and the pecuniary legacies and expenses of administration; and to distribute the residue of the assets among the persons entitled to them under the provisions of the will. If to these ordinary powers and duties there is superadded the power and duty to invest portions of the testator's estate and to pay over the income, such power and duty, being appropriate to the office of a trustee, rather than of an executor, are held to constitute a trust, and the executor, in executing them, is regarded as a trustee, and not as executor.' Applying this rule to the case now under consideration, it clearly appears that said Charles B. Jones, administrator c. t. a., held the rents in question as trustee for said beneficiaries, and not as administrator c. t. a.; and hence it follows that he is not chargeable therefor in his account as such administrator. The exception taken to the ruling of the presiding justice relating to said item of rent must, therefore, be sustained."

Although Mr. Etchieson was the executor, as well as trustee with power of sale under the will of the testatrix, the estate was entirely solvent in personal property and there was no need for the executor to invade the real property. There was no need for the executor to invade the appellees' beneficial interests in the real estate or the rents therefrom for any purpose. The testatrix was specific in separating the duties of Mr. Etchieson as executor and as trustee. The testatrix did not merely execute a will coupled with a naked power of sale. The power was coupled with a trust, the testa-

trix was specific in separating the duties under the power in the *trustee* from the duties of the *executor*. She not only placed the trustee in possession of the trust property with a power to sell her real estate, her directions to the trustee impressed a trust upon the land, and the trustee was to account to no one except the named beneficiaries of the trust. It clearly appears in this case, as in the *Hendrick* case, supra, that Mr. Etchieson held the rents in question as trustee for the beneficiaries and not as executor, and that the chancellor was correct in ordering the distribution of the rents to the beneficiaries of the trust and not to appellant as residuary legatee under item ten of the will or to the heirs of the decedent.

We are of the further opinion that it was the testatrix's intention that the appellees have all the beneficial interest in the real property converted, including the rents therefrom, as well as the proceeds from the sale. We conclude that the chancellor's findings are not against the preponderance of the evidence in this case, and that the decree should be affirmed.

Affirmed.

TOM SADLER, GUY CLEMONS AND IMOGENE CLEMONS *v.* SHIRLEY HILL

5-4300 419 S. W. 2d 298

Opinion delivered October 16, 1967

[Rehearing denied November 6, 1967.]

Arnold, Hamilton & Streetman, for appellant.

Drew & Holloway, for appellee.

CONLEY BYRD, Justice. This appeal challenges the validity of the published notice of foreclosure proceeding by the Eudora Western Drainage District. The trial court found that the foreclosure proceeding was valid and that the drainage district's deed vested title in appellee Shirley Hill. Appellants Guy Clemons et ux, record title holders to the 40 acres of land involved, and appellant Tom Sadler, the tenant holding under Clemons, appeal, and for reversal rely on the following points:

I. That the trial court was in error in holding that the notice of foreclosure by Eudora Western Drainage District was legally sufficient to vest the court with valid foreclosure and sale jurisdiction as to property of appellant.

II. That the trial court was in error in holding that the foreclosure sale by Eudora Western Drainage District was a valid sale in view of noncompliance with provisions of Ark. Stat. § 21-548.

The facts show that in 1945-46 one P. H. Williams began paying taxes on the property in the name of "W. T. Williams," that he continued to do so through the tax year 1959, and that having acquired title to the 40 acres by adverse possession he sold them in February, 1961, to Guy Clemons and Imogene Clemons, his wife, for $3,000. Guy Clemons et ux, through Tom Sadler, im-

mediately took possession of the premises and remained in possession through the trial of this lawsuit. Clemons, upon acquisition of his deed, promptly recorded it, but neglected to assess his property with the tax assessor, as required by Ark. Stat. Ann. § 84-414 (Supp. 1965). He also neglected to pay the taxes for the tax year 1960, which were due and payable on and after the third Monday in February, 1961. For the tax years 1961, 1962 and 1963 the lands were assessed in the name of Clemons; however, the taxes were not paid and were returned delinquent.

The lands are also in the Southeast Arkansas Levee District, and the taxes due that district on and after the third Monday in February, 1961, for the tax year 1960, were returned delinquent. At the delinquent land sale in November, 1961, the 40 acres was sold to the Southeast Arkansas Levee District for the general taxes and levee taxes due thereon. However, no confirmation was had as required by § 9 of Act 83 of 1917, the act creating the Southeast Arkansas Levee District. The chancellor found that the sale did not vest title in the Levee District because the redemption period had not expired.

With respect to the Eudora Western Drainage District, the record shows that foreclosure proceeding was instituted in April, 1962, for the delinquent 1960 taxes. Throughout the proceeding the supposed owner of the lands was listed as "W. T. Williams." The District made no inquiry as to record ownership or possession. The only notice to appellants of any of the proceedings was by publication, listing the supposed owner as "W. T. Williams." No notice of the proceeding was given the Levee District, and the Notice of sale and the sale in no manner recognized the interest of the Levee District. The court confirmed the foreclosure sale to the Drainage District in June, 1962, and a deed was issued to the Drainage District in June, 1964. In October, 1964, the Drainage District conveyed the land to Hill for $100.

Hill then, on October 24, 1964, acquired a conveyance from the Southeast Arkansas Levee District, conveying "all rights, title and interest of said Levee District acquired by it pursuant to its purchase at county collector's sale for taxes due year 1960, payable in 1961."

The lands had increased in value from the $75 per acre paid by Clemons in 1961 to $150 per acre at the time Hill acquired his deed in 1964.

I

Appellant says that the question to be determined on this appeal is whether the publication of the notice during the foreclosure proceeding in the name of "W. T. Williams" as the supposed owner was constitutionally sufficient to give appellants notice of the proceeding. In alleging insufficiency of notice, appellants rely on *Simpson* v. *Reinman,* 146 Ark. 417, 227 S. W. 15 (1920).

We find appellants' contention on this point to be without merit. This matter was held contrary to appellants' contention in *Leonard* v. *Thompson,* 228 Ark. 136, 306 S. W. 2d 869 (1957). Therefore we hold that the notice of the foreclosure proceeding published in the name of "W. T. Williams" as the supposed owner was a sufficient compliance with the law, Ark. Stat. Ann. § 20-1124-26 (Repl. 1956).

II

Nor do we find merit in appellants' contention that the sale to the Drainage District was invalid because of its noncompliance with Ark. Stat. Ann. § 21-548 (Repl. 1956). The record fails to show any capacity on appellants' part which would give them any right to challenge the sale to the Drainage District under § 21-548. Furthermore, the record clearly shows that the sale to the District was had in June, 1962 and that the present suit was not instituted until October, 1965. In that event any

right of action on the part of anyone to set aside the sale to the District is clearly barred by § 21-548, which provides:

> "... If the board of commissioners or directors of any drainage district having a lien on the lands or the trustee of any bondholders having such lien is not notified of the application for such sale, they may on motion at any time within three [3] years have the sale set aside and the lands resold."

Affirmed.

MARJORIE MILLER *v.* MARY JANE RIEGLER ET AL

5-4283 419 S. W. 2d 599

Opinion delivered October 23, 1967

Leonard L. Scott, for appellant.

George E. Lusk Jr. and *Robert C. Downie,* for appellees.

CARLETON HARRIS, Chief Justice. Marjorie Miller, appellant herein, and Mary Jane Riegler, appellee, are sisters, and reside in Little Rock. Minnie Wagar, who died in Little Rock, testate, on August 8, 1963, was an aunt of these two sisters. In March, 1957, Mrs. Wagar lived in Long Beach, California. She had been ill, and Mrs. Riegler and her mother went to California and brought Mrs. Wagar back to this city. The latter lived with appellee, paying $100.00 per month for room and board, until January, 1958, when she went to a nursing home, staying there until her death. A joint checking account was opened with Mrs. Wagar's funds in the names of Minnie M. Wagar and Mary Jane Riegler, and a joint safe deposit box was taken in their names, and Mrs. Wagar's property was placed there. On July 23, 1957, Mrs. Wagar, then 81 years of age, executed her last will and testament, and on July 25, she caused several hundred shares of stocks of the approximate value of $45,000.00 (representing about one-half of stocks owned by Mrs. Wagar) to be transferred to the joint names of Mrs. Riegler and herself. The new stock certificates reflected the owners of the stock to be "Mrs. Minnie W. Wagar and Mrs. Mary Jane Riegler, as joint tenants with right of survivorship and not as tenants in common." It was agreed that the aunt would receive the dividends for the balance of her life. Subsequently, the dividends from these stocks were placed in the joint checking account, and these dividends were reported on the Federal Income Tax returns of Mrs. Wagar. As previously stated, Mrs. Wagar departed this life in August, 1963, and her will was duly admitted to probate in Pulaski County. Mrs. Riegler, the executrix of the estate, recognized that the money in the joint checking account was a part of the estate, but she claimed absolute ownership of the stock as the survivor of the

joint tenancy. Thereupon, Mrs. Miller instituted suit, asserting that the stocks that were still held in the joint names at date of Mrs. Wagar's death actually belonged solely to the deceased (and accordingly were a part of her estate), and should be administered as such.[1] Appellant asked for judgment for one-half of the stocks and one-half of the value of any that had been converted.[2] Mrs. Riegler answered, denying that the transfer of the stock was for the convenience of Mrs. Wagar, asserted that it was a gift to Mrs. Riegler, and that Mrs. Miller accordingly had no interest. On trial, the Pulaski Chancery Court (1st Division) held:

"That all of the stock certificates involved in this suit (including all stock certificates sold by Mary Jane Riegler prior to the institution of this suit and all stock certificates held by Mary Jane Riegler at the commencement of this suit which had been reissued in her name individually) were originally issued in the name of the testatrix and Mary Jane Riegler as joint tenants with right of survivorship and not as tenants in common, and all of said stocks are the sole property in fee simple absolute of Mary Jane Riegler, individually, and all dividends received from this stock are the sole property in fee simple absolute of Mary Jane Riegler, individually."

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[1]Under Mrs. Wagar's will, after making some specific bequests, the residue and remainder of the estate was devised to Mrs. Riegler in trust, the income of the principal of the trust estate to be distributed in convenient installments to her brother, George Henry Miller, the father of appellant and appellee, during his lifetime. The trustee was also authorized to use any part of the principal as might be required to properly take care of the brother. The will further provided that, upon the death of George Henry Miller, or upon the death of Mrs. Wagar (if the brother died before the testatrix), the trust estate was to be divided equally between Mrs. Riegler and Marjorie Nicolini (Miller), or in event of the death of either niece, that share to the child or children of the deceased relative.

[2]There was also a prayer in the complaint for certain items of personal property to which Mrs. Miller made claim, but the Chancellor's adverse decision on this point has not been appealed.

From the decree so entered, appellant brings this appeal. For reversal, it is asserted that the stocks involved in this case, which were held in the joint names of Minnie M. Wagar and Mary Jane Riegler at the time of the death of Mrs. Wagar, were the property of Minnie M. Wagar, and the 1957 transfer of the stocks into the joint names of Minnie M. Wagar and Mary Jane Riegler did not constitute or create a true joint tenancy, or gift, or otherwise vest any ownership rights in Mrs. Riegler.

It is first argued that the circumstances surrounding the transfer of the stocks clearly show that there was no intention by the aunt of making a gift to her niece. It is pointed out that, though reissued in the joint names of the two women, the stocks were returned to a joint safe deposit box (which had been acquired in their names on May 27, 1957), and that all other property in the box belonged to Mrs. Wagar. It is likewise pointed out that all of the dividends from all stocks including those held jointly, and those simply in Mrs. Wagar's name, were placed in the joint bank account at the Worthen Bank. Further, it is mentioned that the dividends from the joint stocks were reported solely on the federal income tax return of the aunt. Mrs. Wagar also received a $65.00 per month pension, which was placed in the joint bank account. No separate monies or funds of Mrs. Riegler were deposited in this account, and all checks written on it were solely for the debts or expenditures of Mrs. Wagar. The checks were all written by appellee, with the exception of five or six of $100.00 each, which were given to Mrs. Riegler, and signed by Mrs. Wagar in payment of room and board. These facts are all argued by appellant as evidence that Mrs. Wagar had no intention, in creating the joint tenancy, of giving an interest in the transferred stock to Mrs. Riegler, but only made the transfer for the purpose of convenience, *i. e.,* to enable Mrs. Riegler to handle financial transactions for the aunt with handiness. Appellant also calls attention to the fact that Mrs. Riegler recognized that

funds in the joint bank account (with her aunt) were properly a part of the estate, and such funds were listed as assets. It is also argued that it simply isn't reasonable that Mrs. Wagar would give this amount of stock to a person (Mrs. Riegler) that she had only seen three or four times in her life before moving to Little Rock.[3] Mention is made of the fact that the deceased was apparently very devoted to her brother, and that it was her principal intent, as evidenced by her will, that he be taken care of the rest of his life; that the will provided that, upon his death, the two daughters should take the residue of the estate. We see little, if any, significance to the fact that Mrs. Wagar held a high regard for her brother, as expressed in her will. The proof reflects that Mr. Miller had an income of over $200.00 per month, was older than Mrs. Wagar, and certainly the income, or even the principal, if needed, of the remaining $45,000.00 worth of stock (still held by Mrs. Wagar) would have been considered adequate to take care of his needs. For that matter, however affectionately Mrs. Wagar might have felt toward her brother, she had made no provision for him until the will of July, 1957, was executed. At any rate, appellant's arguments, heretofore quoted, are all based on surmise and speculation. It is sometimes difficult to ascertain people's motives, but it is generally true, even with relatives, that a decedent feels closer to, or likes, one relative more than another. Here, one fact instantly stands out, *viz.,* That Mrs. Wagar lived with Mrs. Riegler for nearly a year, and at the time of making the stock transfer, evidently planned to live with appellee for the balance of her life, this plan being altered because of illness suffered by the aunt following a fall in November of 1957. Not only that, but the very fact that the aunt would pick Mrs. Riegler to handle her business for her (which is not disputed) indicates that she had more confidence in, or closer ties with, appellee than with appellant. Still again, Mrs. Riegler was named Executrix of the Wagar estate,

[3]The record indicates that this was about the same number of times that Mrs. Miller had seen her aunt.

as well as Trustee. Of course, if the transfer was only made for convenience, one immediately wonders why all stocks were not transferred, instead of only half.

Be that as it may, litigation cannot be decided on surmise, or what someone else might have done under similar circumstances. It can only be decided on the evidence presented in court. The testimony heavily preponderates to the effect that the transfer was made at a time when Mrs. Wagar was fully possessed of all her faculties, and understood exactly what was being done. Only three people testified, Mrs. Riegler, Mrs. Miller, and Warren Bass, a certified public accountant of Little Rock, who handled tax matters for Mrs. Wagar.

Mrs. Miller testified that it was her "understanding" from a conversation with her sister that the latter was going to take care of the aunt's affairs, and the transfer of stock had been made for convenience only; she also stated that her sister said that, though part of the estate was in her (appellee's) name, everything would be divided "50-50." Mrs. Riegler denied making these statements, and said that she had informed Mrs. Miller that everything *in the estate* would be divided "50-50."

The strongest evidence introduced was that of Mr. Bass, who testified as follows:

Mrs. Wagar was a small lady, quite bright, alert, knowledgeable, and very interesting to talk to. She knew the property she owned, and planned a transfer of stock along with executing the will. She stated that she intended to make her home with Mrs. Riegler the rest of her life; she also said that there were two people she cared for, one being Mrs. Riegler, and the other being the brother.

The witness made a list of the stocks which were to be transferred, such list being offered as an exhibit at

the trial. He discussed the matter with Mrs. Wagar several times. Bass was very emphatic in stating that Mrs. Wagar knew exactly what she was doing, and that it was her intention to transfer the $45,000.00 worth of stock to Mrs. Riegler as a joint tenant. We think it was clearly established that the aunt, of her own free will and accord, made the transfer with full knowledge that the stocks transferred would not be a part of her estate, and the survivor of the joint tenancy created would take the full amount.

It is next contended that the requisites of a joint tenancy were not met, and accordingly, the gift must fail. It is first pointed out that there is no statutory provision here involved, such as those which cover savings and loan associations and banks; that accordingly, when a joint tenancy is created, the four "unities" must exist. These are set out in the case of *Stewart* v. *Tucker,* 208 Ark. 612, 188 S. W. 2d 125, and are listed, in a quote from 33 C. J. 907, as follows:

"(1) unity of interest (2) unity of title (3) unity of time (4) unity of possession. That is, each of the owners must have one and the same interest, conveyed by the same act or instrument, to vest at one and the same time . . . and each must have the entire possession of every parcel of the property held in joint tenancy as well as of the whole."

Let it first be said that we have already, to some degree, departed from the rule of the four unities. In *Ebrite* v. *Brookhyser,* 219 Ark. 676, 244 S. W. 2d 625, George Brookhyser conveyed real property, which he owned, from himself to his wife and himself as tenants by the entirety. The trial court held that an estate by the entirety had been created, and Ebrite appealed to this court. There too, *Stewart* v. *Tucker, supra,* was principally relied upon, and it was contended that essential requirements to create the estate had not been complied with, the wife's undivided half interest not

having been acquired at the same time as the interest retained by her husband; that the husband could not convey to himself, and therefore could have acquired no new title by virtue of his own deed. In upholding the trial court, we stated that there was no reason why parties should not be able to do directly that which they could undoubtedly do indirectly through the device of a strawman. The late Justice J. S. Holt, writing for this court, stated:

"We cannot agree with this reasoning. A complete answer is given in what is now the leading case of In re *Klatlz's Estate,* 216 N. Y. 83, 110 N. E. 181. There a majority of the judges, Bartlett, Collin, Hiscock, and Cardozo, agreed that under modern married women's property acts a husband may create a tenancy by the entirety by a conveyance to himself and his wife. The same argument as to the unity of time was presented there as here, but Judge Collin answered: 'The husband did not convey to himself, but to a legal unity or entity which was the consolidation of himself and another.' "

This decision certainly has not been viewed as unsound for there can be no logic in preventing a spouse from directly giving to his or her marriage partner equal rights in property that is owned, when the same result was permitted by creating the estate through a third party who really held no interest in the property at all.

Likewise, it also appears that the same view is being widely followed with reference to joint tenancy. The landmark case is probably that of *Colson* v. *Baker et al,* 87 N. Y. Supp. 238. The issue was stated in the opening line of the opinion, as follows:

"The question to be determined on this motion is whether a person seized in fee of an estate can, by a direct grant, deed the property to another and himself in joint tenancy, instead of tenancy in common, without the intervention of a third party."

A part of the logic used by the court is interesting. It is pointed out that the unity of time refers to joint parties becoming joint tenants at the same time. As stated:

"* * * When, therefore, he attempts to create for himself and his grantee an estate in joint tenancy out of his fee by a direct deed to the grantee, why does not the joint tenancy arise at the same time and by the same act? I think it does. Of course, each joint tenant has the same interest by such a deed, and each is in possession of the whole like tenants in common.

"In all references to the 'four unities' requisite to create a joint tenancy, I find nothing that prevents their existence or creation by the act of the grantor for himself and another as well as by his act for two other persons."

In the case of *Kleemann* v. *Sheridan* (Ariz.), 256 P. 2d 553, there is a succinct discussion of the issue with which we are here concerned. There, the question was whether a joint tenancy in personal property had been created by two sisters who, in leasing a safe deposit box, recited in writing that all property theretofore or thereafter placed in the box was the joint property of both and would pass to the survivor. The Arizona Supreme Court discussed the history of joint tenancy, saying:

"Before entering upon a discussion of the points raised by appellant it will perhaps be pertinent to briefly recount the common-law essentials to create a joint tenancy. They are unity of time, unity of title, unity of interest, unity of possession. Such tenancy could not arise by descent or other operation of the law but may arise by grant, devise or contract. Of course the right of survivorship is inherent in the joint tenancy estate and without which joint tenancy does not exist. At first joint tenancy under the common law involved only in-

terest in land but at an early date it was recognized as applying to personal property as well. At common law a person could not make a conveyance to himself. An attempt to convey land to himself and to another resulted in a conveyance of only one-half of the property to the other and the grantor still held his moiety under his original title, thus destroying two essentials of joint tenancy, unity of time and of title. The result of such attempt was to create a tenancy in common.

"The same rule would seem to logically apply to personal property and is the rule of law relating to both real and personal property in many of the states of the Union including Maine, Illinois, Wisconsin and Nebraska, but the majority of the state courts have held that the common-law concept of the four unity essentials should give way to the intention of the parties and that a joint tenancy may be created by a conveyance from one to himself and another as joint tenants. California has passed a law making the rule applicable to husband and wife.

"We have apparently aligned ourselves with the majority rule insofar as personal property, the title to which passes by delivery, is concerned.* * *

"Another characteristic of joint tenancy is that it is not testamentary but 'is a present estate in which both joint tenants are seized in the case of real estate, and possession in case of personal property, per my et per tout,' that is, such joint tenant is seized by the half as well as by the whole. The right of survivorship in a joint tenancy therefore does not pass anything from the deceased to the surviving joint tenant. Inasmuch as both cotenants in a joint tenancy are possessors and owners per tout, *i. e.,* of the whole, the title of the first joint tenant who dies merely terminates and the survivor continues to possess and own the whole of the estate as before."

The court, mentioning that it was holding in line with the majority rule, and that it was the intention of the sisters to create a joint tenancy, held that that estate had been created. Numerous other cases also hold that the intention of the parties is controlling, rather than the common law concept of the four unities.

Here, we think the intention of Mrs. Wagar is established, *i. e.*, to create a joint tenancy, and we can see no more reason to hold to the old premise that the four unities must exist, than the jurisdictions (and numerous others) just quoted, particularly when we have already, as earlier pointed out, to some extent discarded that concept of the law.

However, appellant also relies upon the fact that Mrs. Wagar and Mrs. Riegler agreed that Mrs. Wagar was to retain—and did retain—the dividends[5] from the stocks jointly transferred. This, says appellant, is fatal to the creation of a joint tenancy for the reason that the two parties did not have equal rights to share in the enjoyment of the property during their lifetime. In connection with this argument, it is also urged that the retaining of the dividends from the transferred stock prevents the transfer from acquiring the status of a gift. We do not agree with these arguments. Joint ten-

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[4]See, *inter alia, Greenwood* v. *Commissioner of Internal Revenue*, 9 Cir., 134 F. 2d 915; *Switzer* v. *Pratt*, 237 Iowa 788, 23 N. W. 2d 837; *Conlee* v. *Conlee*, 222 Iowa 561, 269 N. W. 259; *Creek* v. *Union National Bank in Kansas City (Mo.)*, 266 S. W. 2d 737. These cases cite numerous others to the same effect.

[5]It is also argued, though not forcefully, that Mrs. Wagar likewise retained an interest in the principal. This contention is based upon some answers given on cross-examination by Mrs. Riegler and Mr. Bass, but we think the evidence falls far short of establishing any retention by Mrs. Wagar of an interest in the principal. Actually, the testimony is confusing as to whether the dividends were to be, in all events, retained by Mrs. Wagar, or would only be retained if they were needed for her support. The legal question would be the same, but we treat the matter as though the withholding of the dividends was definite.

ants may agree between (or among) themselves as to the use made of the property. In 48 C. J. S. under "Joint Tenancy," Section 10, Page 933, we find:

"Joint tenants may contract with each other concerning the use of the common property, as for the exclusive use of the property by one of them, or the division of the income from the property."

In *Tindall et al* v. *Yeats et al* (Ill.), 64 N. E. 2d 903, the question was whether a Mrs. Adams and Mrs. Yeats were joint tenants or tenants in common. The trial court held that they were joint tenants, and this holding was appealed to the Supreme Court. One of the points argued by appellant was that Mrs. Yeats had agreed that Mrs. Adams should have all rents from the land, as well as the possession thereof during the life of Mrs. Adams, and this, said appellant, prevented the estate from being one of joint tenancy. The Illinois Supreme Court disagreed, holding that it was clear that it was the intention of the parties that Mrs. Adams should enjoy the possession of the entire estate; that this was done with the permission and consent of Mrs. Yeats, and that the parties had the right to make this agreement.[6] And why should this not be permissible?

[6]Incidentally, Illinois is one of the states that still holds that the four unities must be observed in creating a joint tenancy. Mrs. Adams was the original owner of the property, and a conveyance from a third party was used in effecting the joint tenancy. At the time of the creation of the joint tenancy, Mrs. Adams and Mrs. Yeats entered into the following agreement:

"Whereas the First Party has this day and date vested title in the parties hereto as joint tenants in the Marshall County, Illinois, farm owned by the First Party, all evidenced by certain deeds executed by the First Party and Martin A. Adams, her husband, and Walter C. Overbeck, all of the within date;

"Now Therefore, in consideration of having vested title of said real estate as aforesaid, The Second Party herein, in consideration thereof, agrees with the First Party that said First Party shall have all the rentals from said real estate and the possession thereof during the term of her natural life, with power and authority to insure the buildings thereon, make repairs and do such other things

Why should owners of property, real or personal, be prohibited from doing as they desire with that property, so long as the disposition is not for an immoral purpose, or against public policy?

Nor do we agree with appellant's argument with reference to the invalidity of the gift. Appellant states in her reply brief:

"We submit it cannot be that there is any difference in the presumptions applicable to or the basic rules essential to the creation of a gift, whether in the form of outright ownership, joint tenancy, or otherwise, except such as might be inherent in the nature of the particular estate created. * * * If there is a retention of a right to income or principal, or both, inconsistent with the estate ostensibly donated, so that it is not made 'beyond recall,' then we submit it is incomplete and ineffectual as between the parties. * * * And, as pointed out in our brief in main, to permit a joint tenancy with retention of all income is nothing more than a void testamentary arrangement."

This stock was given to Mrs. Riegler, and placed in the lock box. We have shown, in the citations mentioned, that the joint tenancy was not affected, even though Mrs. Riegler was not to share in the dividends. We here point out that, in the creation of the joint tenancy, Mrs. Riegler did not first become possessed of her interest or rights in the property when Mrs. Wagar died; rather, she acquired a *present* interest when the estate was created, i. e., her rights as a joint tenant had already vested before her aunt's death. This fact, of

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thereon as she could or would do were she the sole and exclusive owner thereof. This Agreement shall not, however, in any manner affect the joint tenancy of said real estate nor the legal incidents accompanying same.

"Dated this 31st day of May, A. D. 1939.

"Grace M. Adams, (Seal)
"Margaret Isabelle Yeats, (Seal)"

course, silences the argument that a joint tenancy with retention of income is nothing but a void testamentary arrangement.

Affirmed.

ARLENE DICKERSON *v.* COE DICKERSON

5-4305 419 S. W. 2d 608

Opinion delivered October 23, 1967

Edgar E. Bethell, for appellant.

Jack Rose, for appellee.

GEORGE ROSE SMITH, Justice. This is a suit for divorce brought by the appellant, Arlene Dickerson, on the ground of personal indignities rendering her condition in life intolerable. The chancellor dismissed the complaint, finding that even though it is probably impossible for the parties to continue to live together the plaintiff failed to prove her asserted ground for divorce.

The only issue here is whether that conclusion is against the weight of the evidence.

The couple was married in Ozark in 1948, when he was 21 and she was 17. They were living in Fort Smith when they separated nineteen years later. Pretty much by common consent the husband moved to an apartment, allowing his wife to occupy the family home with their two children, a boy of 18 and a girl of 15. Since the separation Dickerson has voluntarily contributed $150 a month to the support of his family.

Mrs. Dickerson disclaims any suggestion of violence, physical abuse, or infidelity on the part of her husband. Her grievances are twofold: First, she blames him for the couple's difficulty in really communicating with each other for some time before their estrangement. Secondly, she considers her husband's handling of the family finances to have been so niggardly and tyrannical as to amount to an intolerable affront to her dignity and peace of mind. Mrs. Dickerson testified that for a year or more before the separation she was under such nervous tension that she broke out with hives and was compelled to take tranquilizers for relief. Her condition improved materially after her husband moved out of the house.

Upon the first point Mrs. Dickerson testified that when she tried to discuss their problems Dickerson would refuse to talk about their difficulties and would instead read the paper or leave the house. Dickerson denied that testimony, saying that during their entire married life there were only one or two occasions when he refused to talk with his wife. On the other hand, he accuses her of having declined to discuss financial matters (which were evidently of abnormal importance to him).

It is fair to say that by far the greater part of this couple's unhappiness stemmed from money mat-

ters. Both have been employed for a number of years. At the time of the trial Dickerson's take-home pay was about $555 a month and Mrs. Dickerson's was about $65 a week. Dickerson has long taken the position that he and his wife should each bear a definite part of the family expenses. His responsibility has included the purchase of food, payments on the house, insurance, utility bills, his own personal expenses, and part of the children's clothing and school expenses. His wife's part in the family financial scheme has embraced the purchase of her clothes, the acquisition of some furniture, payments upon her car, and lesser matters that we need not detail.

It is quite apparent that for the past two or three years what Mrs. Dickerson calls her husband's obsession about money has been a constantly growing source of irritation to her. For a while the couple maintained a joint bank account, but if Mrs. Dickerson wanted to write a check for an outlay that Dickerson regarded as her personal responsibility he required her to pay him the amount of the check in cash. She finally opened her own account. Again, Dickerson customarily picked up and paid for only his own dry cleaning, leaving his wife to make extra trips to get the rest of the family cleaning. Dickerson has undoubtedly been somewhat secretive about his own income and bank accounts—all part and parcel of the undue emphasis he appears to place upon financial security.

We are not convinced that Dickerson's peculiarities in the management of the family's pecuniary problems should be declared to constitute habitual and intolerable personal indignities to his wife. This case is typical of those in which the chancellor's opportunity for reaching the right decision is immeasurably superior to ours. Even though he concluded that the parties' clash of personalities is so great that they are not likely to be able to continue to live together, "such a situation does not warrant the granting of a divorce in the absence

of proof that a statutory ground therefor exists." *Lipscomb* v. *Lipscomb,* 226 Ark. 956, 295 S. W. 2d 335 (1956). Dickerson testified positively that he loves his wife and always will. His attitude may well have been regarded by the chancellor as decidedly more conciliatory than that of his wife. With the testimony in conflict upon many pivotal points, we are not able to say that the trial court's decision is against the weight of the evidence.

The appellee is directed to pay the appellant's court costs and briefing expense, together with an additional attorney's fee of $250.

Affirmed.

HARRIS, C. J., and BROWN, J., dissent.

CARROLL COUNTY BOARD OF EDUCATION *v.* COUNTY SCHOOL DISTRICT NO. 1 ET AL

5-4306 419 S. W. 2d 592

Opinion delivered October 23, 1967

H. G. Leathers, for appellant.

H. Paul Jackson, for appellee.

PAUL WARD, Justice. This litigation concerns the dissolution [including annexation to two other districts] of County School District No. 1 of Carroll County (an appellee here). Appellee was created under Initiated Act No. 1 of 1948 which includes Ark. Stat. Ann. §§ 80-426 to 429 (Repl. 1960) and is found in the Acts of 1949 at pages 1414 to 1416.

On July 1, 1966 the Carroll County Board of Education (appellant here) dissolved the appellee district and annexed approximately the west one-half of the land to the Berryville School District and the east portion to the Green Forest School District.

Appellee (along with residents of District No. 1) prosecuted an appeal to the circuit court, where testimony was introduced by both sides.

At the conclusion of the hearing the trial court set aside the Order made by the Board of Education, dissolved District No. 1, and gave approximately 15% of its territory to the Green Forest School District (described by metes and bounds) and the rest of its territory to the Berryville District. From the above decision and Order appellant prosecutes this appeal, seeking a reversal on two grounds, stated as follows:

(One) "The Board of Education of Carroll County has the authority to annex some or all portions of Carroll County School District No. 1 to another district or districts.

(Two) "The order of the Board of Education was made to more effectively and more efficiently serve the residents of the district; such Order cannot be altered unless it is shown by clear and convincing

evidence that the Board acted in an arbitrary and discriminatory manner."

One. Appellant, under this point, argues that the trial court was in error in holding the Board had no authority to annex portions of District No. 1. What the trial court held was that the Board had no authority of Ark. Stat. Ann. § 80-426 et seq. However, the Board is given this authority under Ark. Stat. Ann. § 80-213 (b) (Repl. 1960), and any error (a point which we do here decide) the trial court may have made is harmless, and does not affect any issue raised on appeal.

Two. A careful reading of the record convinces us that the trial court was justified in setting aside the Order of the Board which divided District No. 1 in two equal parts. Such division strongly indicates the Board failed to make a careful study of the matter of convenience to the school children and their parents, and that it disregarded their expressed wishes, which were shown by petitions filed with the Board. Such petitions showed that 85% of the people in District No. 1 chose to join the Berryville District. Furthermore, it is significant, we think, that no one makes any objection to the division made by the trial court.

It is our conclusion, therefore, that the Order of the trial court should be, and it is hereby, affirmed.

Affirmed.

FOGLEMAN, J., dissents.

JOHN A. FOGLEMAN, Justice, dissenting. County School District No. 1 of Carroll County came into being by operation of Section 1 of Initiated Act No. 1 of 1948 [Ark. Stat. Ann. § 80-426 (Repl. 1960)]. It is clear to me that the trial court was in error in holding that the County Board of Education had no power to annex territory from the district to other districts under the

provisions of this act (Ark. Stat. Ann. § § 80-426 to 80-429). This authority could be exercised at any time after June 1, 1949. Appellees' contention that this could not be done after this election of directors in the district is contrary to the act itself. Section 3 (Ark. Stat. Ann. § 80-428) clearly indicates that a county board of education may annex all or a portion of the territory of such a district to other districts in order to provide each child access to accredited schools as close to his home as possible. The act distinctly made the provision of such access the duty of the board of the district *and* the county board. Consequently, there is nothing in the act to limit the action of a county board to the period prior to election of a district board. This question was reserved in *Stroud* v. *Fryar,* 216 Ark. 250, 225 S. W. 2d 23. I do not find where it has arisen subsequently.

It then becomes important to determine the scope of appellate review by the circuit court. Appeal within thirty days is provided for by Ark. Stat. Ann. § 80-428. This section does not provide any procedure for appeal or limitation on the scope of review. I take it that § 80-236 governs appeals by any person feeling aggrieved by any final order or decision of a county board of education. It has been specifically held that the circuit court should conduct a trial de novo on an appeal so taken. I think that the circuit court properly tried the case de novo. *School District No.* 26 v. *School District No.* 32, 177 Ark. 497, 6 S. W. 2d 826. Cases cited by appellant holding that the circuit court can only disturb orders of a county board of education when it is clear that a board has acted arbitrarily, unreasonably, or discriminatorily, relate either to proceedings under other statutes specifically limiting the scope of review or to mandamus, certiorari or equitable proceedings. I am not unaware of cases holding that in matters of formation or consolidation of school districts the action of a county board will not be disturbed unless testimony shows it to be arbitrary and unreasonable.

See *Bledsoe* v. *McKeowen,* 181 Ark. 584, 26 S. W. 2d 900; *Priest* v. *Moore,* 183 Ark. 999, 39 S. W. 2d 710; *Milsap* v. *Holland,* 184 Ark. 996, 44 S. W. 2d 662; *Perry* v. *Gill,* 184 Ark. 1099, 44 S. W. 2d 1084; *School District No.* 26 v. *Baxter County Board of Education,* 183 Ark. 295, 35 S. W. 2d 1013. These decisions are based on a statute providing that such action be taken where, in the *judgment* of the county board of education, it would be for the best interest of all parties affected. It was pointed out in the *Baxter County* case that this meant the board had a discretion in the matter, but the court did not. No such language appears in the statute involved here and the provision for appeal is in the same section as the provision for board action. I feel that trial de novo under the authority above cited was proper here. However, I find nothing to indicate that either the Green Forest District or the Berryville District, to which the territory of School District No. 1 was annexed, has consented to the annexations. This is necessary to the annexation (§ 80-428). I would reverse and remand for a new trial in the circuit court.

LILLIE MAE SPOTTS, ADM'X.* ET AL *v.* ELLA LEWIS

5-4302 419 S. W. 2d 622

Opinion delivered October 23, 1967

John F. Gibson, for appellants.

Robert M. Smith, for appellee.

*Willie Mae Lewis was substituted as Administratrix on the day of trial; however, the trial court and attorneys made no change in subsequent records. So for clarity we leave the case as originally styled. Our opinion, however, binds the present administratrix.

LYLE BROWN, Justice. Bennie Lewis and Ella Lewis, subsequently divorced, owned a tract of land by the entirety. Upon the complaint of Ella Lewis, appellee here, the chancellor ordered the ejectment of appellants, widow and certain children of Bennie Lewis, deceased. Ella Lewis claimed under a right of survivorship. Appellants claimed title by adverse possession on the part of Bennie Lewis claimed under a right of survivorship. Appellants Bennie's death. The chancellor held (1) that under an estate by the entirety, one spouse cannot hold adversely to the other, and (2) that adverse possession was not in fact established. Those are the two issues argued on appeal.

In 1945 Bennie and Ella Lewis, husband and wife since 1929, acquired by the entirety the involved 175.85 acres. They lived on the land prior to purchase. The acreage, mostly unimproved, adjoined some sixty-six acres which Bennie owned in his own right. In 1946 Ella took the youngest of seven children and went to Milwaukee, Wisconsin. (Over the years the other children followed her there.) Bennie obtained a divorce on grounds of desertion in 1947. The land was not mentioned in the decree. In 1948 Bennie remarried and lived on the involved land until his death in 1964. At the time of Bennie's death, his widow and their eight children were living on the land. This suit followed, by which Ella claimed title under the 1945 deed to Bennie and Ella Lewis, then husband and wife. The appellants—the widow and her children by Bennie Lewis—argue Ella lost her title by adverse possession of Bennie Lewis. They also plead estoppel; however, *the single point argued on appeal is that of adverse possession.*

Assuming, without deciding, that adverse possession can defeat the record title of Ella Lewis, we examine the record to resolve the correctness of the chancellor's finding that adverse possession was not established.

From the time Ella Lewis left for Milwaukee in 1946 until Bennie's death in 1964, Bennie lived on the land; he cleared, cultivated, sold timber, and paid the taxes; he borrowed money and received allotment payments; he built another house and raised a new family. In none of his financing did he execute a mortgage or give written assurance that he was the sole owner; however, those who financed Bennie Lewis considered the land to belong to Bennie and they testified that Bennie was generally reputed to be the owner. Ella Lewis testified that she made several requests of Bennie Lewis that he share some of the proceeds of the farm with her. In no instance did he respond favorably; at the same time, he did not assert that his refusal to divide was based on a claim of exclusive ownership.

On the other side of the coin, the chancellor found these elements which, as stated in his written findings, weighed against the claim of adverse possession:

(1) Ella Lewis produced a letter from Attorney Will Irvin, dated August 18, 1947. Attorney Irvin wrote her on behalf of Bennie Lewis, seeking her signature on a waiver of service and entry of appearance in Bennie's divorce case. In that letter she was assured that the divorce "will not interfere with your property rights. He can get a divorce and you will retain the same interest in the property that you now have."

(2) Ella Lewis testified that on one occasion after the divorce Bennie told her the land ought to be sold and she replied in the negative; that on another occasion she asked "for her part" and he responded that her part was needed for taxes; that at no time during her many visits (the first one in 1951 and regularly after 1955) did Bennie Lewis assert that he was claiming the land exclusive of her; that on those visits to her mother she and Bennie would talk "about the kids and about the land, but he never would offer me what I would like."

(3) At no time between the separation of the husband and wife and the death of Bennie Lewis did he place any incumbrance on the land.

(4) Ella Lewis produced two letters written by Bennie in May and July 1962. In the first letter he offered Ella fifty dollars "to sand your name off the deed." He explained he had no desire to sell the land; "I want to fix it so the children can't sell it. When I am dead you will have a home as long as you live. The children will need a home. I want to fix it so nobody can't sell it. . . I want the children to have a home as long as they live and their children." He told Ella that Willie (then his wife) was agreeable to the plan.

Ella did not reply to that letter so in July a note was sent by Bennie to a daughter in Milwaukee. He requested her to deliver the message to Ella. It was of the same tenor as the first letter. Ella testified she did not respond to those propositions; that in March 1964 she was in Dermott and met Bennie on the street; that they talked about the land and she suggested it be sold and the proceeds divided equally. Bennie died the following June. Ella attended the funeral.

Again, assuming that adverse possession could in law overturn the record title of Ella Lewis, we must look for the evidentiary requirements to be met. Precedent is found in *Anderson* v. *Walker*, 228 Ark. 113, 306 S. W. 2d 318 (1957). Mr. and Mrs. Walker owned an estate by the entirety. The husband left the wife and she continued to occupy the property. She obtained a divorce on constructive service in 1947. In 1955 the husband brought suit against the heirs of the deceased wife, the heirs having continued in possession of the property after the death of Mrs. Walker. In that situation our court invoked this rule:

> "We have frequently and consistently held that, 'where entry upon land is permissive, the statute

will not begin to run against the legal owner until an adverse holding is declared and notice of such change is brought to the knowledge of the owner.' "

The chancellor discussed *Anderson* and found that the record title of Ella Lewis had not been overturned by the heirs' claim of adverse possession. We are unable to say his findings are against the preponderance of the evidence.

The principal weakness in the heirs' claim of adverse possession is the lack of proof that Bennie Lewis ever openly declared that he was holding adversely to Ella's title. That declaration need not be affirmatively made; it can be established by acts "so notorious and unequivocal that notice must be presumed." *McGuire* v. *Wallis*, 231 Ark. 506, 330 S. W. 2d 714 (1960). In *McGuire*, a tenant in common was "in charge of the farm, managing it for his own benefit, paying taxes, and paying the installments upon the mortgage debt; but these facts are insufficient to support a claim of adverse possession against his co-tenants." Bennie Lewis' activities may be similarly described, with the added statement that he did treat the land as his own when borrowing money on open account.

The chancellor gave considerable weight to the letters written by Bennie Lewis in 1962. Appellants contend those letters were written *after* Bennie's title had ripened by adverse possession and have no probative value. We do not agree. A nominal offer of purchase is often made "to buy peace and avoid litigation." However, an offer may be considered by the trier of facts if it sheds light on the nature of the defendant's possession. That is true even if the offer is made after the seven year period has elapsed. *Baughman* v. *Foresee*, 211 Ark. 149, 199 S. W. 2d 596 (1947). Other statements in those letters are far more enlightening on Bennie's state of mind. We refer to his avowed intention to so arrange the title that he, Ella, and all his

children would have a home during their lifetime. That is clearly inconsistent with a state of mind that closets a claim of exclusive and adverse title.

We concede that the ouster of the present family of Bennie Lewis evokes our sympathies; however, it should be remembered that through the years they have enjoyed all the fruits of the land. Ella could have put her rightful share to good use. Bennie's and Ella's children all gradually migrated to the mother in Milwaukee and their rearing became her burden, with no financial help from the father, Bennie. Furthermore, Bennie Lewis owned at the time of his death 66.30 acres adjoining the involved tract. Ella testified that she makes no claim to that land.

As in *Anderson* v. *Walker,* we do not here reach appellants' contention that in an estate by the entirety one spouse can hold adversely to the other. That is on the theory that divorce dissolves the entirety estate. Numerous holdings of this court have answered that question in the negative. Those holdings seem to be contrary to the great weight of authority. Our Legislature, declaring "that numerous injustices have been done" because entireties could not be dissolved in a divorce proceeding, enacted Act 340 of 1947. That Act permits chancery courts to dissolve entireties in divorce proceedings and to treat the parties as tenants in common. Act 340 is not here applicable because the estate was created prior to the passage of the act. *Jenkins* v. *Jenkins,* 219 Ark. 219, 242 S. W. 2d 124 (1951). We recognize the many instances in which this court, absent Act 340, has held that divorce cannot dissolve an entirety estate. We are reluctant to disturb those holdings because, as evidenced in *Jenkins,* they are looked upon as establishing a rule of property. Yet we can conceive, as did the Legislature, of situations where blind adherence to the rule could make a mockery of justice. So we say the plea of adverse possession to an entirety estate could conceivably succeed in a situation where

there is clear evidence of unequivocal notice to the former spouse of intention to hold adversely.

Affirmed.

B. BRYAN LAREY, COMMISSIONER OF REVENUES *v.* CONTINENTAL SOUTHERN LINES, INC. ET AL

5-4325 419 S. W. 2d 610

Opinion delivered October 23, 1967

Tom Tanner, for appellant.

Smith, Williams, Friday & Bowen, and *Harper, Young, Durden & Smith,* for appellee.

JOHN A. FOGLEMAN, Justice. The question to be determined on this appeal is whether Ark. Stat. Ann. § 75-1251 (Supp. 1965) [Section 11, Chapter 2, Act No. 40 of the Acts of the First Extraordinary Session of the General Assembly of 1965] is constitutional. The action was brought against the Commissioner of Revenues of the State of Arkansas[1] by appellees, all of whom are in the business of transporting passengers and goods,

[1]The action was instituted against Doris McCastlain, then Commissioner of Revenues, but B. Bryan Larey, her successor, was substituted as a party to the action, on his motion, on the date the decree was rendered.

for hire, in interstate commerce to and through Arkansas by motor buses which use special distillate fuels. Each of them filed reports, showing the mileage traveled, on forms prescribed by the Commissioner of Revenues of the State of Arkansas. Upon the basis of these reports, but under protest, each of the appellees paid taxes on the special distillate fuel used at the rate of 8½ cents per gallon on the number of gallons indicated by assuming that each of the appellees used one gallon for each five miles traveled pursuant to the section questioned. Appellees' suit was to recover all that portion of the tax paid by each in excess of 8½ cents per gallon used, with interest from date of payment. They allege that each of them maintained an average consumption of less than the amount determined by statute. The case was tried upon a stipulation of facts. In pertinent part, the stipulation was as follows:

> "1. * * * There are intrastate carriers (bus companies) engaged in the identical business and competitive with the Plaintiffs over certain routes.
>
> 2. The plaintiffs and the intrastate bus companies operate motor vehicles which primarily use diesel engines for propulsion.
>
> 3. The intrastate bus companies pay an excise tax of $.085 per gallon on all distillate special fuels purchased by them either at the time delivered to their storage facilities for later use or when purchased from a retailer for delivery directly into the motor vehicle's tank.
>
> 4. The Plaintiffs, as interstate bus companies, submit a monthly report to the Defendant itemizing the quantity of fuel purchased and mileage traveled in Arkansas during the preceding month. With respect to the distillate special fuel imported into Arkansas and used for operation of a motor vehicle, the Plaintiffs pay $.085 per gallon based on the presumption that their motor vehicles consume one gal-

lon of fuel for each five miles traveled. The greater part of the fuel used is imported into Arkansas in the tanks of the vehicles.

5. All of the Plaintiffs obtain more than five miles of travel for each gallon of special distillate fuel consumed. The Plaintiff, Continental Southern Lines, Inc., maintains an average of 6.3 miles per gallon and this is representative of the fuel consumption of the Plaintiffs as a group. The intrastate carriers have comparable consumption standards.

6. An intrastate bus company which obtains 6.3 miles per gallon pays a tax of $.0135 per mile of travel. A Plaintiff maintaining the same consumption pays a tax of $.017 per miles of travel."

The chancellor rendered judgment for appellees with interest at the rate of 6% from date of payment of the tax until they are paid. He also enjoined appellant from attempting to enforce § 75-1251 in such a manner as to result in the collection of the distillate fuel tax in an amount exceeding 8½ cents per gallon.

The third paragraph of § 75-1251 reads as follows:

"For the purpose of determining whether a distillate special fuels user is entitled to a refund or a refund credit, or owes the State of Arkansas tax on distillate special fuels used in this State, as provided hereinabove, the number of gallons of distillate special fuels used in this State shall be determined by the Commissioner of Revenues on the basis of five (5) miles per gallon of distillate special fuels. The Commissioner may make appropriate rules and regulations to assure accuracy in the reporting of such mileage and to prevent violations thereof."

Appellees contended and the trial court found that the section was unconstitutional in that it is arbitrary,

unreasonable, a burden on interstate commerce and discriminatory against interstate carriers in violation of Article 2, § 3 and Article 16, § 5 of the Constitution of Arkansas, and Article 1, Section 8, Cl. 3, Article 4, Section 2, Cl. 1 and Amendment Fourteen, Section 1 of the Constitution of the United States.

Under the facts in this case, we find that the paragraph above quoted from § 75-1251 is unconstitutional as a burden upon interstate commerce, in violation of Article 1, Section 8, Cl. 3 of the United States Constitution.

There is nothing in this record or in Act No. 40 to indicate that the five mile per gallon basis was other than arbitrary. It is stipulated that an average of 6.3 miles of travel per gallon of special distillate fuel is representative of the fuel consumption of appellees and of intrastate carriers. This means that a tax of 8½ cents per gallon is paid by intrastate carriers at the time they purchase gasoline in the state, while interstate carriers who purchase their fuel at a point outside Arkansas pay tax on the fuel used in Arkansas at the rate of 10.71 cents per gallon. Thus, whether the tax be figured upon a gallonage basis or a mileage basis, the interstate carriers pay 1.26 times the tax paid by an intrastate carrier. The only way the interstate user can avoid this inequality is by buying all his fuel in Arkansas. However desirable this might be from the standpoint of the economy of the State of Arkansas, this discrimination in favor of the intrastate operator violates the constitutional standards for interstate commerce. *Halliburton Oil Well Co.* v. *Reily,* 373 U. S. 64, 83 S. Ct. 1201, 10 L. Ed. 2d 202.

Appellant urges that since this tax is an excise tax on a privilege,[2] the legislature may make reasonable classifications for the purpose of taxation which must

[2]See *Sparling* v. *Refunding Board,* 189 Ark. 189, 71 S. W. 2d 182, where it is held that the tax is a privilege tax for the use of the highways.

be upheld by the courts unless the classification is clearly unreasonable and arbitrary and without just distinction as a foundation. While we agree with the general statement, appellant has not cited any case, nor do we know of any, where any court has held that a classification based solely upon a distinction between intrastate and interstate commerce has been upheld as reasonable or appropriate. Cases such as *Vaughan* v. *City of Richmond,* 165 Va. 145, 181 S. E. 372, cited by appellant, upholding the imposition of higher license taxes on businesses of nonresidents than on businesses of residents have no application here. There the higher licenses were said to be justified because it was shown that residents were taxed in ways which the nonresidents wholly escaped. Nonresidents of the City of Richmond who resided in the State of Virginia were charged the higher rate in that situation, so the commerce clause was not involved. To afford equal protection of the laws, required by Amendment Fourteen to the United States Constitution, such classification must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly situated shall be treated alike. *Royster Guano Co.* v. *Commonwealth of Virginia,* 253 U. S. 412, 40 S. Ct. 560, 64 L. Ed. 989. Equality for the purposes of competition and the flow of commerce is measured in dollars and cents and not legal abstractions. *Halliburton Oil Well Co.* v. *Reily,* 373 U. S. 64, 83 S. Ct. 1201, 10 L. Ed. 2d 202.

The commerce clause of the United States Constitution forbids discrimination whether forthright or ingenious. *Best & Co.* v. *Maxwell,* 311 U. S. 454, 61 S. Ct. 334, 85 L. Ed. 275.

The Supreme Court of the United States has held privilege taxes or license fees unconstitutionally discriminatory against interstate commerce in cases where the corresponding taxes or fees paid by those in intrastate commerce only are substantially less. *Best & Com-*

pany v. *Maxwell, supra; Memphis Steam Laundry Cleaner* v. *Stone,* 342 U. S. 389, 72 S. Ct. 424, 96 L. Ed. 436; *West Point Wholesale Grocery Co.* v. *Opelika,* 354 U. S. 390, 77 S. Ct. 1096, 1 L. Ed. 2d 1420. It has also been held that equal treatment for in-state and out-of-state taxpayers is a condition precedent to valid use taxes on imported goods. *Halliburton Oil Well Co.* v. *Reily, supra.*

This court has long recognized that privilege taxes on acts which are part of the processes of interstate commerce must be calculated so that in their practical effect they will not substantially discriminate in favor of comparable activities in intrastate commerce which compete economically with the interstate activities that are taxed. *Nicholson* v. *Forrest City,* 216 Ark. 808, 228 S. W. 2d 53.

Although our fuel tax is a privilege tax, it can be sustained as to those in interstate commerce, not as a tax, but as reasonable compensation for the use of our highways. As such, the measure of compensation exacted from an interstate carrier must have a reasonable relationship to the use which the carrier makes of the highways. *Dixie Greyhound Lines, Inc.* v. *McCarroll,* 101 F. 2d 572 (8th Cir.) affirmed 309 U. S. 176, 60 S. Ct. 504, 84 L. Ed. 683.

In an effort to sustain the classification, appellant urges that the cost of collection of the tax is greater where the interstate user is involved than it is where the intrastate user is involved. Appellant cites us no authority sustaining this position, but it is unnecessary for us to determine whether this difference might constitute a proper basis for classification since we have nothing before us to indicate that this cost bears any relationship whatever to the resulting difference in the tax collected.

We do not mean to say that any act basing the tax to be paid by one in interstate commerce upon a deter-

mination of gallonage consumption based upon a fixed mileage per gallon factor arrived at upon an appropriate factual basis would necessarily be unconstitutionally discriminatory. The determination of that constitutional question is not necessary to our decision, since under the stipulated facts, the result here is obviously an improper burden on interstate commerce.

There are two particulars in which the decree of the trial court is erroneous, and it must be modified. That decree stated that all of § 75-1251 was unconstitutional. We find no basis for this holding as to the first two paragraphs thereof. Obviously, this was inadvertently said as there is no question raised except as to the third paragraph. The court also allowed interest on the amounts to be refunded. As an attribute of sovereignty, the state is not liable for interest in any case, unless it has by statute made itself liable, or authorized a contract providing for the payment of interest. *State* v. *Thompson,* 10 Ark. 61; *Jobe* v. *Urquhart,* 102 Ark. 470, 143 S. W. 121. In the latter case, the court held a contract entered into by the Board of Commissioners of the State Penitentiary providing for the payment of interest was void and reversed and dismissed a judgment for interest. In discussing the possible moral obligation of the state to pay interest, this court there said:

> "In the next place, it does not lie within the province of the courts to speak for the State and determine and enforce her moral obligations. The courts are not the keepers of the conscience of the State. The honor and integrity of the State or sovereignty are lodged in the people—her citizens and the subjects—and in turn the honor and integrity of her people are reflected through the Legislature of the State. The people or sovereignty speak by legislative enactment, and on all questions involving the moral obligation of the State, the Legislature is the sole and exclusive tribunal to determine and adjust such matters. * * * "

While appellant does not raise either of these questions, this is a matter of public interest. Since the trial here is a trial de novo, we may enter such judgment as the chancery court should have entered upon the undisputed facts in the record. *Baxter County Bank* v. *Copeland,* 114 Ark. 316, 169 S. W. 1180; *Pickett* v. *Ferguson,* 45 Ark. 177. When a chancery decree grants relief to which an appellee is clearly not entitled on the record, this court will modify the decree to omit the excessive relief. *Hess* v. *Adler,* 67 Ark. 444, 55 S. W. 843. When it appears that a portion of a chancery decree is inadvertently inserted, this court may modify the decree by striking out that portion. *City of Ft. Smith* v. *Mikel,* 232 Ark. 143, 335 S. W. 2d 307. In view of the lack of power of the courts to recognize a moral obligation of the state, the action of the trial court in rendering a judgment for interest is in excess of its jurisdiction. When a trial court enters an order without jurisdiction over the subject matter, the question cannot be overlooked even if not raised. *Sibley, Receiver* v. *Leek,* 45 Ark. 346.

The decree of the chancery court is modified to declare only the third paragraph of § 11, Chapter 2, Act No. 40 of the First Extraordinary Session of 1965 unconstitutional as being in violation of Article 1, Section 8, Cl. 3 and Amendment Fourteen of the Constitution of the United States and to eliminate the clause adding interest on the recovery of each appellee at the rate of 6% from the date of payment until paid.

The decree is affirmed as modified.

UNITED EQUITABLE INSURANCE COMPANY *v.* MARTHA C. VIVION

5-4317 419 S. W. 2d 597

Opinion delivered October 23, 1967

Pope, Pratt, Shamburger, Buffalo & Ross, for appellant.

Arthur G. Frankel and *Donald G. R. McDermott,* for appellee.

JOHN A. FOGLEMAN, Justice. Appellant seeks reversal of a judgment for $833.25, 12% penalty and attorney's fees on a claim under an insurance policy covering hospitalization resulting from accidental injury.

Appellee, a 79-year-old lady, was residing in the home of her sister after having been in a convalescent home until February 1, 1966. She took out the policy of insurance on May 4, 1965. On February 13, 1966 she suffered an injury as the result of a fall while walking

from her bedroom to the bathroom during the night. She was taken by ambulance to St. Vincent's Infirmary at the direction of Dr. Andrew A. Pringos because of severe pain in her lower back resulting from the fall.

She remained in the hospital under care and treatment by the doctor until March 10, 1966. She was bedridden while in the hospital. Physical therapy during her hospital stay was given to enable her to again employ a walker she had previously used because of an injury unrelated to this fall. Appellee's doctor testified that the precipitating cause of her hospitalization was her fall. In addition to a contusion of the back and loss of equilibrium, appellee suffered from shock and depression during her hospital stay.

The trial judge, sitting without a jury, found that the appellee's injury and hospital residence were the result of an accident under the terms of the policy and gave judgment for compensation for the full period.

The policy provides for payment of benefits "in the event of hospital residence occurring solely as the consequence of direct bodily injury resulting from any accident and independently of all other causes."

Appellant's basic contention is that the trial court erred in allowing recovery for the last five days of appellee's stay in the hospital. It asserts that this portion of her hospital residence was not solely the result of her fall. The testimony of all parties indicates that the primary reason for her being kept in the hospital for this period was the unavailability of a room or bed in a convalescent or nursing home.

Appellant has cited no authority for its contention that the court's findings are contrary to the law and evidence. We have been unable to find any decision covering a similar situation. There can be no doubt, under the undisputed facts, that the incidence of the hospital

residence was the consequence of direct bodily injury resulting from accident and independent of all other causes.

If the pertinent policy clause can be said to be ambiguous, we must construe it to justify a recovery if a reasonable construction will do so: *Travelers' Protective Association of America* v. *Stephens,* 185 Ark. 660, 49 S. W. 2d 364; *Metropolitan Life Ins. Co.* v. *Guinn,* 199 Ark. 994, 136 S. W. 2d 681; *Life & Casualty Ins. Co. of Tennessee* v. *Kinney,* 206 Ark. 804, 177 S. W. 2d 768.

An obvious inference to be drawn from the testimony is that the residual consequences of appellee's injuries required care and treatment unavailable in her home, but available in a nursing home. While appellant is not responsible for the want of nursing home accommodations, continued residence in the hospital appears to have been the only alternative. This is sufficient to support the findings of the trial court that hospitalization for the last five days was accrued solely as a consequence of her accidental bodily injury.

Inasmuch as the allowance of attorney's fee and penalty hinges upon the correctness of the trial court's action on the amount of recovery on the policy, no question remains as to these items.

The judgment is affirmed and appellee is allowed an additional sum of $250.00 for attorney's fee.

ARKANSAS POWER & LIGHT COMPANY *v.* CITY OF LITTLE ROCK ET AL

5-4307 420 S. W. 2d 85

Opinion delivered October 23, 1967
[Rehearing denied November 27, 1967.]

Darrell Dover, for appellant.

Perry Whitmore and *Sam Robinson,* for appellees.

J. FRED JONES, Justice. This is an appeal by the Arkansas Power & Light Company from an adverse judgment rendered by the Pulaski County Circuit Court, Third Division, on appeal to that court by the Power Company from an adverse decision of the Board of Adjustment of the City of Little Rock.

By municipal ordinance, the City of Little Rock is zoned into fourteen use zones or districts, ranging from "A One-family district" to "K Heavy industrial district." By municipal ordinance any property, when newly annexed to the city, automatically falls into the "A

One-family district" classification until a zoning plan of the area is prepared and adopted. Official Code of Ordinances of the City of Little Rock, Arkansas, § 43-28, subsection (d), adopted in 1937, and appearing in the record before us by stipulation, is as follows:

> "Territory which may hereafter be annexed to the City of Little Rock shall be classified in the "A" one-family district immediately upon final acceptance by the city until a zoning plan of the area is prepared and adopted. The planning commission and board of directors shall proceed diligently to zone the newly annexed territory after a public hearing, of which due notice has been given."

In 1961 a large area of land along the south side of the Arkansas River, and west of the former city limits, was annexed by the City of Little Rock and automatically fell into the "A One-family district" classification. No affirmative action was taken by the Planning Commission and Board of Directors in zoning this newly annexed territory as provided in section 43-28 of the ordinance.

The Little Rock zoning ordinances provide for a five member board of zoning adjustment with jurisdictional power to hear and grant requests for variances in the permissible use of property in a given use zone.

Arkansas Power & Light has a franchise to furnish electric power to all of Little Rock including newly developed residential areas of western Little Rock, and including the newly annexed area south of the Arkansas River. Arkansas Power & Light transports its electric energy at high voltage, through above ground wires or cables in the Little Rock area, and it becomes necessary throughout the transportation system, and at intervals along the transmission lines, to construct substations where the electric energy is transformed from the high voltage necessary in transportation to the low voltage

necessary in safe distribution for domestic consumption. The electric energy, thus reduced in voltage, is delivered to the consumer through distribution lines radiating out from the substations, and can only be distributed in useful voltage within a limited radius of the substation. Thus it is necessary to have the substation near the center of the area to be served with electric energy through the substation.

In 1965, Arkansas Power & Light acquired, by purchase, a substation site, consisting of approximately three acres, near the Arkansas River and within the territory annexed in 1961. Arkansas Power & Light applied to the Little Rock Board of Zoning Adjustment for permission to use its property for a substation site, and the application was refused and permission denied by the Board of Review. Arkansas Power & Light appealed to the Pulaski County Circuit Court, and several property owners along a bluff overlooking the Arkansas River, and the site of the proposed substation, intervened in opposition to the proposed use by Arkansas Power & Light. The circuit court also denied the power company's petition and Arkansas Power & Light has appealed to this court relying on the following points for reversal:

> "1. There is no evidence to support the lower court's holding that appellant is not entitled to the requested permit.
>
> "2. The lower court erred in not weighing the evidence presented before it *de novo* and by instead applying an administrative review test and further erred in considering evidence not in the record."

We do not reach the first point relied on by the appellant, as we have concluded that the decision of the trial court must be reversed on the second point.

This case presents a rather unique situation, in that it appears from the overall record, that the case may

have been fully *tried de novo* on appeal to the circuit court, but it is quite clear that it was *heard* and *considered* by the trial court under the erroneous impression that the evidence was to be confined, and its considerations limited, to whether or not there was any substantial evidence to support the ruling of the Board of Adjustment or whether the ruling of the Board was arbitrary or capricious. The following excerpts from the rulings on admissibility of evidence throughout the trial leave no doubt as to the court's impression on this point.

> "If there had been no place other than this place I am sure the commission would have granted it, they didn't, they refused it and that is not in the Commission Order, in other words *all I can under the law consider is whether or not the Commission was arbitrary in refusing it,* not whether or not it would have cost them more or cost some other property owner more. Now they might have had several reasons for refusing it for which they would have been justified and the cost to the Power Company is not one of them.
>
> "Reasonableness of the Power Company is not in question, *it is whether the ruling of the Board is arbitrary, capricious or whatever.*
>
> "Those are the things the Court will have to take into consideration when he gets down to *arriving at whether the Commission was capricious in denying this petition.*
>
> "The way I see it the construction or non construction of a highway or express way would have nothing to do with the reason for the Board having refused the petition when it was filed. *The only thing I am interested in was there any substantial evidence to sustain them or did they act arbitrarily,* not whether or not there is going to be an express way.

> "The thing I am trying to say is that the building of the express way that *is not going to enter into the court's decision as to whether or not the Board acted arbitrarily or if they don't build the express way would have nothing to do with why the Board overruled the petition.*" (Emphasis ours.)

There is no evidence in the record that this erroneous conception was pointed out to the court during the trial of the case and there is no affirmative evidence that either party was prejudiced by the error, but after taking the matter under advisement on briefs, the court directed a letter to the attorneys as follows:

> "After a careful consideration of all the records in the above case, the evidence introduced dehors the record and the excellent briefs submitted by both sides, *I have concluded that the action of the Board of Zoning Adjustments was supported by substantial evidence and that the Board should* be affirmed.
>
> "Judge Robinson will prepare precedent for judgment submitting same to Mr. Dover for his approval as to form." (Emphasis ours.)

A precedent for judgment was prepared which contained the following language:

> "After careful consideration of the entire record herein, the evidence introduced dehors the record, testimony and evidence introduced in open court, and briefs submitted by the parties, it is the finding and judgment of this Court that the action of the Board of Zoning Adjustment of the City of Little Rock, Arkansas, was supported by substantial evidence and that Arkansas Power & Light Company's petition requesting a reversal of said Board of Zoning Adjustment's decision should be denied."

This precedent was approved, as to form, by the attorney for the appellant, Power & Light Co. and the attorney for the appellee, Board of Adjustment, but it was not approved by the attorney for the intervening appellees and was not signed by the trial court and entered of record.

The judgment that *was* signed by the trial court was approved as to form by the attorney for the appellee, Board of Review, and the attorney for the intervening appellees, but was not approved by an attorney for the appellant. The judgment signed by the trial court and appealed from simply recites:

> "After considering all the facts as shown by the evidence and the law applying thereto, it is the finding and judgment of this Court that the Petition should be denied.
>
> "It is so ordered."

This being the state of the record, we have no way of knowing whether any party to this litigation would have offered any additional, less, or different evidence than was offered, had they known the evidence was being accepted and would be considered on the merits of the case in a trial *de novo*, rather than in determining whether or not there was any substantial evidence to sustain the decision of the Board of Review, or whether the action of the Board of Review was arbitrary or capricious in denying the petition.

The ordinance setting up the Board of Review and defining its authority provides for appeal to the circuit court in the following language:

> "Any person or persons, jointly or severally aggrieved by any decision of the board, or any officer, department, board or bureau of the City of Little Rock, may present to the circuit court a petition,

duly verified, setting forth that such decision is illegal in whole or in part, specifying the grounds of the illegality."

We do not imply that a municipal ordinance can limit the venue or restrict the scope of inquiry in matters on appeal from municipal departments, but in any event, this case was appealed to the circuit court. Upon appeal from the circuit court, we do not try the case *de novo,* but only review the errors assigned. *Fidelity Deposit Company* v. *Fairfield,* 169 Ark. 997, 278 S. W. 658. The circuit court does, however, try cases *de novo* on appeal from a municipal Board of Adjustment. Ark. Stat. Ann. § 19-2830.1 (Supp. 1965). This point was very recently settled in the case of *City of Little Rock* v. *Leawood Property Owners Association,* 242 Ark. 451, 413 S. W. 2d 877, wherein we said:

"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."

and in that case we held as follows:

"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."

For the reasons stated, we reverse this case and remand it to the trial court for a new trial, to the end that any party hereto may offer such competent evidence as may be desired on a trial *de novo*. We might add, however, that if it were not for the recited error of the trial court, we might well reverse this case on the evidence now before us.

Reversed and remanded.

BYRD, J., disqualified.

HOUSING AUTHORITY OF THE CITY OF LITTLE ROCK, ARKANSAS *v.* LAWRENCE FISHER ET UX

Opinion delivered October 23, 1967

5-4291 419 S. W. 2d 606

Smith, Williams, Friday & Bowen, for appellant.

Spitzberg, Bonner, Mitchell & Hays, for appellees.

CONLEY BYRD, Justice. This is an eminent domain proceeding. Appellant, Housing Authority of the City

of Little Rock, Arkansas, contends that the $161,000 award in favor of appellees Lawrence Fisher and Faye Fisher is excessive, and that the trial court erred in awarding interest on the amount in excess of the $101,-081.26 deposit during the period appellees were entitled to collect rent on the property.

This action was initiated in circuit court on November 9, 1965. Upon deposit in the registry of the court of $101,081.26 as estimated just compensation, the Housing Authority was vested with fee simple title and immediate right of entry. Appellees, together with Black & White Cab Company, immediately filed motions contesting the Housing Authority's right to take the property and requesting that the matter be transferred to equity. After the transfer to equity, the parties compromised the issue concerning the Housing Authority's right to condemn the property by an order entered August 3, 1966, which provided:

"1. The defendants, Lawrence Fisher and Faye Fisher, are entitled to withdraw said total sum of $101,-081.26 without prejudice to their rights to have the amount of compensation to be paid by plaintiff to them for the acquisition of said parcel of real estate to be determined by the Court herein;

"2. The plaintiff has the right to acquire said parcel of real estate for the reasons and purposes set out in the plaintiff's Complaint herein;

"3. By reason of the fact that the defendants contested the right of the plaintiff to take the above described parcel, the plaintiff did not become entitled to collect any rents becoming due from said parcel until June 1, 1966, and defendants, Lawrence Fisher and Faye Fisher, are entitled to receive all rents which accrued prior to June 1, 1966;

"4. The defendant, Black & White Cab Company, shall pay the plaintiff rent at the rate of $500.00 per

month begining June 1, 1966, and ending when said defendant vacates said parcel, and said defendant shall vacate said parcel on or before November 1, 1967, unless plaintiff shall, in writing, extend the time within which said defendant shall occupy said parcel."

The property in question is located at 114 East Markham in Block 1 of the original City of Little Rock. It is 55½ feet wide from east to west and 140 feet deep from north to south. It fronts on both Bridge and Markham Streets. The Black & White Cab Company advertising on the two-story building on the property is visible from a number of downtown businesss such as hotels, bus stations and professional office buildings.

With respect to the value of the property, appellee Lawrence Fisher testified that in his opinion the highest and best use of the property was for the taxicab business, and that it was worth $200,000. Mr. Louis Cohen and Mr. Byron Morse were called as expert witnesses for appellees. Mr. Cohen testified that in his opinion the fair market value of the property was $166,000, based on both a comparable sales approach and an income approach. Mr. Byron Morse testified that he had considered both the comparable sales and the income approaches, but that he did not give particular weight to the comparable sales approach because of the difficulty in finding sales of comparable properties. Mr. Morse stated that the main thing he dwelt upon was the income approach, and that in his opinion the property would probably sell for $161,000.

The Housing Authority called as its expert witnesses Mr. William A. Payne, who testified that the market value, based on the comparable sales approach, was $83,000; and Mr. James H. Larrison, who testified that the market value, based on the comparable sales approach, was $84,000.

All the expert witnesses are admittedly competent real estate operators. The testimony of every witness

was to some extent discredited by expert testimony for the other side. The Housing Authority here intimates that a sale of property in Block 2 made by Ed I. McKinley and wife to appellees on April 1, 1965, for $55,000, is indicative of the market value of property in the area for comparable sales purposes. Of course, we can not accept this, because the record shows that the witnesses considered many sales and that some of them did not believe this sale a true arm's length transaction. Even if it were an arm's length transaction, it is still permissible for witnesses to consider it a bargain instead of representing the market price.

Little cross-examination was made of appellees' witness, Mr. Byron Morse. To attack the credibility of Mr. Morse's testimony here, the Housing Authority contends that the $1,000-a-month lease arrangement between Black & White Cab Company and the Fishers was not a bona fide transaction and that it was not representative of the rental value of the property. To substantiate its position, it points out that its witnesses estimate the rental value to be from $600 to $700 per month and that it was renting the property to the Black & White Cab Company at the time of trial for $500 per month. We find nothing in the record to show that the rental agreement between appellees and Black & White Cab Company was not an arm's length transaction. Nor can we assume that the $500-a-month arrangement between Black & White Cab Company and the Housing Authority is any more an indication of its fair rental value than the $1,000 paid to the Fishers.

Consequently, we are unable to say that the trial court's finding of a fair market value of $161,000 is contrary to a preponderance of the evidence.

We agree with the Housing Authority that under the record appellees are not entitled to interest on the excess judgment over the deposit during the time that they were entitled to collect rent from the property. See

Arkansas State Highway Comm'n v. *Muswick Cigar & Beverage Co.*, 231 Ark. 265, 329 S. W. 2d 173 (1959). Consequently, the judgment is modified to allow interest at the rate of 6% on the excess judgment from June 1, 1966.

The judgment is affirmed as modified.

Brown and Jones, JJ., dissent.

SYBIL L. SHERMAN, ADMINISTRATRIX OF THE ESTATE OF URIEL LAMBERT BEARDEN, JR. *v.* MOUNTAIRE POULTRY COMPANY, INC. ET AL

5-4282 419 S. W. 2d 619

Opinion delivered October 23, 1967
[Rehearing denied November 13, 1967.]

F. C. Crow, for appellant.

H. H. McKenzie, for appellee.

CONLEY BYRD, Justice. Appellant, Sybil L. Sherman, administratrix of the estate of Uriel Lambert Bearden, Jr., deceased, appeals from a jury verdict on interrogatories, finding that appellees, Mountaire Poultry Company, Inc., and William D. Purifoy, its employee, were not negligent in the death of Uriel Lambert Bearden, Jr., a five-year-old child.

The facts show that on January 14, 1966, Purifoy delivered a load of chicken feed to two poultry houses, the first one being south of and across the county road running by the Bearden home, and the other being to the north and somewhat behind the Bearden home. The decedent was in the Bearden home yard near a tree when Purifoy passed the home on his way to the second poultry house. As he passed, the boy waved to him. After backing the truck up to the poultry house, Purifoy found that the snorkel on his truck did not quiet reach the feed bin. Purifoy then crawled down from the top of the truck, drove the truck forward a short distance, cut the wheels to the left and backed the truck up so that its left side would be closer to the feed bin. While Purifoy was standing on the fender of his truck to turn on the bottom auger, he observed the decedent lying where a wheel of the truck had run over him. He ran to the house to notify the child's parents and to use the telephone. Later, at the home of Mrs. Denton McKamie, in front of Mrs. McKamie and Purifoy's boss, Robert Moeller, the child's mother told Mr. Purifoy, "I don't blame you, son, I know it was an accident." "It was just an unavoidable accident, a terrible thing, but an unavoidable accident."

This was Purifoy's first trip to the poultry house where the accident occurred. There was testimony on behalf of appellant that it was the boy's custom to get

the feed tickets from the truck drivers. The boy's father testified that on this occasion, after the truck was first backed up to the poultry house, the boy rode his tricycle down a path toward the truck; that after the truck started up the second time he saw his son ride his tricycle in front of the truck in an attempt to return to the house; and that a pile of dirt obscured his view thereafter. Purifoy testified that he did not observe the boy at any time after he waved to him at the house, some 196 feet from the place where the boy was subsequently found. The record reflects that a three-foot high object within ten feet of the truck would not be visible to the driver.

After review of the record, we are unwilling to say that there is no substantial evidence to support the jury's verdict.

Appellant contends that it was error to permit Mrs. McKamie and Mr. Moeller to testify that Mrs. Bearden told Purifoy it was an unavoidable accident. We have consistently held that statements in the nature of an admission by a party are admissible as original evidence. *Bullington* v. *Farmers' Tractor & Implement Co., Inc.,* 230 Ark. 783, 324 S. W. 2d 517 (1959). The authorities have extended this to admissions or declarations against interest made by a person who is not a party of record but who is a real party in interest, such as Mrs. Bearden in the instant case. *Isley* v. *McClandish,* 299 Ill. App. 564, 20 N. E. 2d 890 (1939), 31A C. J. S. Evidence § 320. Appellant relies on *Coca-Cola Bottling Co. of Southwest Ark.* v. *Carter,* 202 Ark. 1026, 154 S. W. 2d 824 (1941), as holding that such testimony is not admissible, but we point out that in that case the truck driver whose admission was put in evidence was not a party of record, nor did he hold a pecuniary interest such as that of Mrs. Bearden in this case.

Error is also assigned by appellant to the trial court's failure to give appellant's instruction on res ipsa

loquitur. As we pointed out in *Chiles* v. *Fort Smith Commission Co.*, 139 Ark. 489, 216 S. W. 11 (1919), the presumption—*i. e.* res ipsa loquitur—arises from the inherent nature and character of the act causing the injury. Presumptions arise from the doctrine of probabilities. The future is measured and weighed by the past and presumptions are created from the experiences of the past. Thus when a thing that causes injury is shown to be under the management of the defendant and the accident is one which in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendant that the accident arose from a want of care.

While a claim for injuries to a small child arising from the use of a vehicle is always complicated by the rule that a child of tender years can not be guilty of negligence, we can not say that every accident such as that involved here is one which experience teaches us will arise from a want of care on the part of the driver. This is a much different situation from that involving a vehicle leaving a roadway generally traveled by vehicles and injuring a pedestrian, or that in which a vehicle runs through a board fence and injures an unsuspecting pedestrian on the other side of the fence. Consequently, we hold that the trial court properly refused appellant's res ipsa loquitur instruction.

Appellant argues a number of other points on appeal, but from the record we find that either she did not object at the time the matter transpired in the trial court, as required by Ark. Stat. Ann. § 27-1762 (Repl. 1962), or they were matters dealing with damages, making such errors harmless in view of the jury's finding of no negligence.

One such point has to do with the courtroom behavior of a beautiful, mature young woman, apparently Purifoy's wife; but the record is absolutely silent as to

any such conduct and we have only appellant's statement in the brief.

We readily admit that this case presents one of those close factual situations in which we are permitted only to ascertain whether there is substantial evidence to support the jury verdict, and are not at liberty to determine where the preponderance of the evidence might lie. Consequently, upon the whole case and after a thorough search of the record, we find that the judgment must be affirmed.

BROWN, J., disqualified.

SOLOMON JEROME SMITH JR. *v.*
BILLY A. PUTERBAUGH

5-4322 419 S. W. 2d 594

Opinion delivered October 23, 1967

G. E. Smuggs, for appellant.

L. Weems Trussell, for appellee.

CONLEY BYRD, Justice. Appellant Solomon Jerome Smith Jr.'s appeal from an order of the trial court overruling his demurer to a counterclaim filed against him by appellee Billy A. Puterbaugh, in the nature of an action for malicious abuse of process, is dismissed for lack of an appealable order. *Coffelt* v. *Gordon,* 238 Ark. 974, 385 S. W. 2d 939 (1965).

C. H. SCOTT *v.* LOMA BEATRICE RUTHERFORD

5-4333 419 S. W. 2d 595

Opinion delivered October 23, 1967

Guy H. Jones and *Phil Stratton,* for appellant.

A. F. House, for appellee.

CONLEY BYRD, Justice. Appellant, C. H. Scott, appeals from an order of the trial court sustaining the demurrer of appellee, Loma Beatrice Rutherford, to a complaint in ejectment.

The complaint as amended, together with the attached documents, alleges that appellant, through J. H. Mize, holds an undivided 1/5 interest in the lands involved. The allegation regarding the deed from appellee to J. H. Mize is as follows:

> "That defendant has admitted execution of said deed to plaintiff's predecessor in title; defendant has admitted acknowledgment of said deed conveying the lands described in the original complaint herein to plaintiff's predecessor in title; for an amendment to his orginal complaint herein plain-

tiff alleges that defendant delivered said deed to her agent and brother, Keith Rutherford, with instructions to him to deliver said deed to the Union National Bank and there to be held by said bank and delivered during regular banking hours on or before February 5, 1960, to Oresta Wilkins, agent for plaintiff's predecessor in title, upon payment of $5,000.00 therefor; that a letter addressed to Oresta Wilkins and signed by Keith Rutherford is attached hereto as Exhibit 'A' as evidence of the circumstances giving rise to the deposit of said deed in escrow with said bank; that a facsimile of the receipt of said deed by said bank is attached hereto as Exhibit 'B.'

"That subsequent thereto and before the close of regular banking hours on February 5, 1960, said deed was surreptitiously recovered from said bank by one of defendant's attorneys; that said deed was then mutilated by removal of the signatures thereon; that defendant has admitted that said deed is at this time in possession of her attorneys; that said attorneys have promised the court that the original deed would be produced in lieu of the facsimile heretofore produced by defendant which deed has been made a part of the record and is adopted by way of amendment to the original complaint herein."

Exhibit A, a letter from Keith Rutherford, a brother of appellee, to Oresta Wilkins, reads as follows:

"This will confirm our recent conversations pertaining to the receipt that you and I secured from Mrs. White, an employee of the Union National Bank, Little Rock, Arkansas, in acknowledging the deposit of a Warranty Deed executed by Miss Loma Rutherford, my sister, to J. H. Mize, Grantee for her one-fifth interest in the J. H. Rutherford's estate. Deed deposited on February 3, 1960.

"This Agreement was consummated at the home of my sister, Miss Loma Rutherford, and her signature was witnessed by me, Keith Rutherford, her brother C. H. Rutherford, and yourself, and notarized by you. C. H. Rutherford and I, after a thorough discussion of this proposal with our sister told her that we thought it a fair and equitable proposal but that she should make up her own decision in accepting it. She did sign the instrument in good faith. I might add that you, as the purchaser, in behalf of J. H. Mize, Grantee, that you did not use any pressure of any character.

"You and I deposited the Warranty Deed on February 3, in the Union National Bank, and of course, I was acting as my sister's agent, and followed her instructions by accompanying you to the bank. I specifically told Mrs. White to deliver this Warranty Deed to you, upon payment of $5,000.00, as first payment on purchase of her interest during regular banking hours by February 5th, 1960.

"When you telephoned me on February 5, 1960, and told me that you had tendered the $5,000 payment, per agreement, but was told that the Union National Bank had delivered the Deed to Mr. Harry Meek, Attorney, I was surprised and embarrassed, as this agreement of sale was entered into in good faith and should have been completed.

"I do hope that this statement will assist you in clarifying any unfavorable feeling that Mr. Mize might have had against you, because of the manner in which this agreement was violated.

"I want to emphasize the fair and equitable manner which you have always carried out your promises to me."

Exhibit B, attached to the amended complaint, is a receipt used by Union National Bank when accepting

items for collection. The receipt shows the total amount to be $10,000, payable $5,000 cash in hand and $1,000 annually. On its face is this notation: "This Receipt is NOT NEGOTIABLE and is accepted subject to the rules of the Union National Bank governing Collection Items."

In ruling on appellee's demurrer and alternative motion to transfer to equity, the trial court properly offered to transfer same to equity before ruling on the demurrer. However, on appellant's objection to the transfer to equity, the trial court ruled that the complaint failed to state a cause of action in ejectment.

Under Ark. Stat. Ann. § 34-1401 et seq (Repl. 1962), the exhibits attached to the complaint, as required by § 34-1408 to show plaintiff's title in an ejectment action, are part of the pleadings, *Jones* v. *Harris,* 221 Ark. 716, 255 S. W. 2d 691 (1953).

Although it is true that appellant alleged as a conclusion that the bank was an escrow agent from whom the deed was surreptitiously recovered, we agree with the trial court that the facts pleaded do not show legal title in appellant on which he can recover in ejectment. We have consistently held that in ejectment a plaintiff must recover on the strength of his own title and not on the weakness of his adversary's title, *McCrory School Dist.* v. *Brogden,* 231 Ark. 664, 333 S. W. 2d 246 (1960), and that the owner of an equitable title can not maintain an action in ejectment, *Percifull* v. *Platt,* 36 Ark. 456 (1880). In such case the owner of an equitable title is required to go into a court of chancery to secure the recognition and assertion of his title. *Maupin* v. *Gaines,* 125 Ark. 181, 188 S. W. 552 (1916).

Appellant, to sustain his argument that the complaint was sufficient against the demurrer filed, relies on *Shreve* v. *Carter,* 177 Ark. 815, 8 S. W. 2d 443 (1928). However, in *Shreve* v. *Carter* it was pointed out that the complaint in equity was very loosely drawn and

that a motion to make more definite and certain, if it had been filed, should have been sustained. Here appellee's motion asking that appellant comply with Ark. Stat. Ann. § 34-1408 (Repl. 1962) by attaching the muniments of title upon which he relied took the place of a motion to make more definite and certain, and the result thereof clearly shows that Union National Bank received the deed from appellee for collection purposes. The receipt certainly refutes appellant's position that the bank was acting as agent for appellant's grantor, J. H. Mize.

Affirmed.

GLEN D. CHENOWITH D/B/A RUSSELLVILLE LIVESTOCK SALE *v.* BANK OF DARDANELLE

5-4304 419 S. W. 2d 792

Opinion delivered October 30, 1967

Laws & Shulze, for appellant.

Mobley & Bullock, for appellee.

CARLETON HARRIS, Chief Justice. Four checks in the amounts of $3,800.00, $3,000.00 (these checks being dated January 13, 1966), $1,242.55 and $155.00 (these checks being dated January 14, 1966) were drawn on the Citizens Bank of Pottsville by Glen D. Chenowith, appellant herein, made payable to Homer Parham. These checks were all deposited in the Bank of Dardanelle by Parham, where he had an account, and were forwarded on to the correspondent bank in Little Rock. When they reached the Pottsville Bank, this bank refused payment, noting insufficient funds on the two larger checks, and "Bank closed for examination" on the two smaller ones. The correspondent bank notified the Bank of Dardanelle by wire or telephone call that the checks were being returned. Thereupon, the Bank of Dardanelle, appellee herein, examined Parham's balance, and found that he had on deposit in excess of $6,800.00; a hold order of $6,800.00 was placed on Parham's account so that when the unpaid checks were returned to Dardanelle, they would be covered.[1] In the meantime, Parham wrote a check to Chenowith, drawn on the Bank of Dardanelle, for $6,800.00,[2] and this check was presented for payment in the Dardanelle Bank *after* the bank had been notified that the $3,800.00 and $3,000.00 checks had been turned down, but before those checks were actually forwarded to the Dardanelle bank. When this $6,800.00 check was presented, the bookkeeper at the Bank of Dardanelle mistakenly believed that the purpose of

[1]The two smaller checks are not affected by the controlling statute in this litigation, and will be treated separately in this opinion.

[2]Both Chenowith and Parham were engaged in the business of the purchase and sale of livestock, and they frequently sold and bought cattle from each other.

the hold order was to cover this $6,800.00 check, and, under this belief, the hold order was removed and the $6,800.00 check was paid. When the two checks (already turned down by the Pottsville bank) arrived at the Dardanelle bank, there were no funds in Parham's account to charge back. A bank employee, not knowing that the hold order had been removed, and that Parham no longer had sufficient funds on deposit to cover a chargeback, mailed both checks to Parham with a notice advising the latter that the two unpaid checks would be charged back against his account. The bank was unable to collect the $6,800.00, and accordingly instituted suit in the Pope County Circuit Court against Parham and Chenowith for the amount of the four checks. At the conclusion of appellee's evidence, appellants moved for a directed verdict, and this motion was denied. At the conclusion of all the evidence, the court again denied a motion for directed verdict, and the case was submitted to the jury. The jury returned a verdict of $4,098.70 against Chenowith, and a like amount against Parham. From the judgment entered in accordance with this verdict, Chenowith brings this appeal. Parham does not appeal from the judgment rendered against him. Three points are alleged for reversal, but since Point 2 controls the litigation, there is no need to discuss the other contentions. Appellant's Point 2 alleges that the court erred in refusing to give a directed verdict for the appellant, at least insofar as the $3,000.00 and $3,800.00 checks are concerned.

This case is governed by the provisions of the Uniform Commercial Code. Ark. Stat. Ann. § 85-3-603 (Add. 1961), *inter alia,* provides as follows:

"(1) The liability of any party is discharged to the extent of his payment or satisfaction to the holder even though it is made with knowledge of a claim of another person to the instrument unless prior to such payment or satisfaction the person making the claim either supplies indemnity deemed adequate by the party

seeking the discharge or enjoins payment or satisfaction by order of a court of competent jurisdiction in an action in which the adverse claimant and the holder are parties. This subsection does not, however, result in the discharge of the liability.

(a) of a party who in bad faith pays or satisfies a holder who acquired the instrument by theft or who (unless having the rights of a holder in due course) holds through one who so acquired it;"

Parham testified that he was notified by John Hamilton, Vice-President of the Dardanelle bank, by phone call that the Chenowith checks were not good, and that something would have to be done about them. Parham stated that he would have to get in touch with Chenowith. Hamilton advised that he (Parham) had around $18,000.00 in the bank, and the banker requested that he be allowed to deduct these bad checks from that amount. Parham approved this procedure, and subsequently received the two checks in the mail. A few days later, Hamilton called back, and told him to come over to the bank. Parham complied with the request. He found Hamilton somewhat upset, the latter stating that the bank examiners would be in, wanting Parham to sign a "paper"; Parham signed a note for something over $11,000.00[3] Parham and Chenowith went back the next day, and according to the former, Hamilton informed him that the amount wasn't as much as originally thought, and had him sign a new note. This note was in the amount of $8,847.55, and included the four checks here involved upon which payment had been refused. Parham insisted that the notes were signed at Hamilton's request. The banker, however, testified to the contrary, *i. e.,* he said that the suggestion had been made by Parham. Hamilton stated that Parham said, "I sure don't want the bank to be in any jam on my account, and I don't want the bank to lose on this. Just let me sign something to take care of it. Just let me sign a

[3]There were other checks upon which payment had been refused, besides the four involved in this litigation.

note." Whereupon, Hamilton prepared a demand note, which Parham signed. According to the banker, the note was not even filed; he simply "pitched" it into a box. When asked what the note was for, Hamilton replied, "Nothing whatever. It was never recorded in our books at all. The note was not carried through the bank in any way." The purpose of obtaining the note is never made clear, though it certainly would appear that it could only have been for the purpose of placing the bank in a position to, at some time in the future, collect its money for the checks that had not been paid. The testimony does not reflect that Hamilton even asked Parham for the checks. Chenowith was present when Parham signed the note.

The note was signed on January 25, and Chenowith testified that, on January 28, he settled the checks with Parham; at that time, Parham returned the checks to appellant. The settlement was reached largely on the basis of the fact that each man owed the other different sums of money for various transactions, and Chenowith stated that, after all credits had been allowed by each, Parham owed him $272.00. Parham's testimony is not at all clear. He first said that they had not settled; he subsequently said that their accounts were settled within a few hundred dollars, not more than $300.00, and if Chenowith said $272.00, that amount was probably correct.

Appellant contended that his liability was discharged under the provisions of § 85-3-603, heretofore quoted, since he fully satisfied the amount of these checks with the holder (Parham). The Circuit Judge, however, denied the motion for directed verdict, because Chenowith was with Parham at the bank when Hamilton advised that the checks were unpaid. This ruling was erroneous. It will be noted that the statute says that the liability of the party is discharged "even though it is made with knowledge of a claim of another person to the instrument," unless the claimant (the bank) supplies indemnity deemed adequate by the party seeking

the discharge (Chenowith) or enjoins payment or satisfaction by court order in an action in which the adverse claimant (Chenowith) and the holder (Parham) are parties. No indemnity was supplied, nor did the bank, in filing its suit, seek an injunction, as provided by the statute. It is also asserted by appellee that Chenowith and Parham were acting in bad faith, *i. e.*, they knew the checks had not been paid at the time they made this settlement. Appellee, in its brief, asserts that Parham was nothing more than a bailee, and his conduct amounted to a conversion of the checks "to his own use or a larceny by bailee, and accepting them with knowledge of the circumstances, Chenowith participated in the conversion or larceny and was nothing more than an accessory thereto."

Under the statute, Chenowith would not have been discharged from liability if he paid or satisfied a holder "who acquired the instrument by theft or who holds through one who so acquired it," but the commissioners' comment with reference to Subsection (1) makes clear that the question of good or bad faith has nothing to do with liability. That comment is as follows:

"Subsection (1) changes the law by eliminating the requirement of the original Section 88 that the payment be made in good faith and without notice that the title of the holder is defective."

Of course, Parham did not steal the check, and it might also be mentioned that the complaint does not charge that Chenowith and Parham entered into a conspiracy to defraud the bank.

Appellee also argues, as a matter of supporting its judgment, that Chenowith and Parham had not completely settled their financial transactions with each other (this contention being made on the basis of Parham's testimony), and since they had not fully settled, Chenowith's liability had not been discharged. We disagree. Whether the entire indebtedness between the men had

been settled is immaterial here, for it is admitted that the checks had been turned over to Chenowith by Parham, who had become the holder,[4] having been sent the checks by the bank. Thus, Chenowith had settled *this* indebtedness with Parham.

Of course, the checks were sent back to Parham by the bank through error, but, under the quoted section of the Commercial Code, this is of no aid.

As to the two smaller checks, we think without going into detail, that the appellant is liable. Succinctly, this conclusion is reached because these checks, though not paid, were not returned by the bank to Parham, and appellee accordingly remained the holder of those checks. Being the holder, it had a right to proceed against Chenowith.

In accordance with the reasoning herein set out, we hold that the court erred in not directing a verdict for appellant on the $3,800.00 and $3,000.00 checks, and the judgment is reversed to that extent. There was no error in that part of the judgment covering the $1,242.55 and $155.00 checks. The cause is therefore remanded to the Circuit Court, with instructions to enter a judgment not inconsistent with this opinion.

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[4]Under the Uniform Commercial Code, "Part 2—General Definitions and Principles of Interpretation, [85-1-201] (20) 'Holder' means a person who is in possession of a document of title or an instrument or an investment security drawn, issued or indorsed to him or to his order or to bearer or in blank."

PULASKI FEDERAL SAVINGS & LOAN ASSOCIATION ET AL *v.* CONWAY LEE CARRIGAN ET AL

5-4312 419 S. W. 2d 813

Opinion delivered October 30, 1967

Wright, Lindsey & Jennings, for appellants.

Owens, McHaney & McHaney, for appellees.

GEORGE ROSE SMITH, Justice. This is a suit by the appellees, Carrigan, his wife, and their mortgagee, to enjoin the appellants from levying execution upon Lot 23 of Chicot Terrace Addition to Little Rock, which is owned by the Carrigans. The chancellor granted the injunction, holding that the deficiency judgment under which the appellants were about to proceed did not constitute a lien against Lot 23. That is the issue here.

All the facts are stipulated. Lot 23 was formerly owned by Roy Stillman. On December 9, 1965, Stillman and Mr. and Mrs. T. A. Hale executed a written offer-and-acceptance agreement by which Stillman agreed to sell the property to the Hales. On March 23, 1966, Pulaski Federal obtained a personal judgment against Stillman and his wife in a foreclosure suit involving other property. That property was sold pursuant to the decree on May 5, 1966, leaving a deficiency judgment for $2,644.07, which was later assigned to the other appellant, Southern Mortgage Insurance Corporation.

On April 20, in the interval between the entry of the foreclosure decree and the entry of the deficiency judgment, Stillman performed his contract with the Hales by conveying Lot 23 to them by warranty deed. Later on the Hales sold the land to the Carrigans. This suit for injunctive relief was brought by the Carrigans when the appellants levied execution on Lot 23 under their deficiency judgment and served notice that the property would be sold by the sheriff.

The chancellor was right. A judgment lien attaches only to the judgment debtor's interest in the land, "and, if that interest be subject to any infirmity or condition by reason of which it is eliminated or ceases to exist, the lien attached thereto ceases with it. . . . A judgment lien is subject to existing equities of third parties in the land." *Snow Bros. Hdw. Co.* v. *Ellis,* 180 Ark. 238, 21 S. W. 2d 162 (1929).

More than three months before Pulaski Federal obtained its foreclosure decree Stillman had bound himself to sell Lot 23 to the Hales. There is no contention that the Stillman-Hale contract was anything other than a good-faith transaction. Hence Pulaski Federal's judgment lien was subject to that contract and was defeated when Stillman conveyed the lot to the Hales.

The entire thrust of the appellants' argument is that the Stillman-Hale contract was not a present sale

of the land, because the agreement contemplated that various steps were to be taken in the future, such as the furnishing of an abstract of title, the obtaining of FHA financing, the execution of a deed by Stillman, the giving of a note by the Hales, and so forth. No matter. Contracts for the sale of land nearly always leave one or more steps, such as the examination of title, to be taken in the future, but the seller is nevertheless bound to perform his agreement. See *McClain* v. *Alexander*, 235 Ark. 64, 357 S. W. 2d 1 (1962); *Bushmeyer* v. *McGarry*, 112 Ark. 373, 166 S. W. 168 (1914); *Meyer* v. *Jenkins*, 80 Ark. 209, 96 S. W. 991 (1906). If Stillman had attempted to evade his obligation the Hales could have obtained specific performance. It follows that the Hales' equitable rights were superior to Pulaski Federal's subsequent judgment lien, because, as we have said, that lien was "subject to existing equities of third parties in the land."

Affirmed.

FOGLEMAN, J., dissents.

JOHN A. FOGLEMAN, Justice, dissenting. I am unable to agree with the result reached by the majority in this case. I agree that a judgment lien attaches only to the judgment debtor's interest in land. I am not in agreement as to what that interest was under the facts in this case. I do not believe that this court has extended the rule that a vendor of real estate retains a legal title only to secure the payment of the purchase money, while the equitable title is in the purchaser, making the vendor's property immune from execution on a judgment rendered after a sale of the property under the contract in this case. It seems to me that the Arkansas decisions have gone quite a long way in this field—further than in most other states.[1] I feel that this case is an undesirable extension of that rule, permitting an owner of

[1]See 43 Iowa Law Review 366—374; 2 Freeman on Judgments, 5th Ed. § 964; Annot., 57 L. R. A. 643, at 646; *Reid* v. *Gorman*, 37 S. D. 314, 158 N.W. 780.

real property to facilitate putting assets in the form of real estate beyond the reach of creditors. Our rule is a rule of property, as far as it has gone. I would not disturb the rule, but where the extension of such a rule to an entirely new set of facts is concerned, we are not bound by the rule of property and should endeavor to make our statutes mean what they say. The mere fact that ours is a minority rule should not require us to limit the application of a rule of property, but it should cause us to carefully examine any extension that we are asked to make. I find no difficulty in distinguishing this case from those in which we have applied the rule, and think that there is no sound reason why we should not hold this property subject to the judgment lien in this case.

I do not believe there is any Arkansas case wherein an executory contract with a forfeiture clause, in which the vendor does not *sell*, but only *agrees to sell* and the purchaser does not *purchase*, but only *agrees to purchase*, and in which the purchaser is not put in possession, has been held to create such an estate in the purchaser as to deprive the vendor of such title as to make the property subject to a judgment lien.[2] The holding of the majority enables an embarrassed debtor to put real estate beyond the reach of creditors and, thus, make the collection of just debts difficult. It unnecessarily enables such a debtor to convert real estate into cash so that it is at least difficult for the creditor to reach. I see no valid reason why the interest of Stillman in this property should not be subjected to the lien of the judgment, subject, perhaps, to the right of the contracting purchaser to have paid the purchase price to an execution purchaser and demanded a deed, or to have paid the judgment debtor and withheld the amount paid from the balance of the purchase price. The abstract of title would have revealed the judgment to the purchaser.

[2]The textwriter in 55 Am. Jur., Vendor & Purchaser, § 357, says: "An executory forfeitable contract for the purchase of land vests no element of title, either legal or equitable." P. 784.

Our statute makes all real estate whereof the defendant was "*seized in law or equity*" on the day of rendition of the judgment subject to execution. Ark. Stat. Ann. § 30-201 (Repl. 1962). "Seize" means: "To put in possession, invest with fee simple, be seized of or in, be legal possessor of, or be holder in fee simple." Black's Law Dictionary, 4th Ed. Possession is the prime factor of seisin. See Black's Law Dictionary, 4th Ed., page 1524. Although I think that Stillman was seized both in law and in equity of the real estate in question, I do not think that it can be said that he was not seized in law. His possession of the property, without any actual sale or conveyance, should make this property subject to execution.

I submit that the rule applied by the majority grew out of decisions in which a bond for title, not an executory contract with a forfeiture clause, was involved.

The entire concept of the fictional relationship of mortgagee and mortgagor ascribed to vendor and purchaser, on which the rule is based, arose out of bonds for title, something entirely different from the executory contract of sale with a forfeiture clause, such as we have here. See *Smith* v. *Robinson*, 13 Ark. 533. The legal fiction has been applied to executory contracts of sale where possession was given under the contract. *Williams* v. *Baker*, 207 Ark. 731, 182 S. W. 2d 753.

The bond for title, once in common use in conveyancing when lands were sold upon credit, (See *Kelly* v. *Dooling*, 23 Ark. 582; *Schearff* v. *Dodge*, 33 Ark. 340) has fallen into disuse.

The common form of the bond for title recited that the vendor had *bargained and sold* the real estate to the purchaser and would deliver a proper deed upon payment of the balance of the purchase price. See Arkansas Form Book, Stayton; *Smith* v. *Robinson*, 13 Ark. 533. On the other hand, the vendor in an ordinary contract for sale of real estate *agrees to sell* and the pur-

chaser *agrees to buy.* It is implicit in the bond for title that the entire transaction shall be as complete as if there had been a conveyance by deed. *Smith* v. *Robinson, supra.* Generally, possession of the land involved was delivered to the purchaser under a bond for title, and it was held that an action for ejectment against a defaulting purchaser would lie in favor of a vendor, at least until the adoption of our statute permitting equitable defenses to be interposed at law. *Smith* v. *Robinson,* 13 Ark. 533; *Refeld* v. *Ferrell,* 27 Ark. 534; *McGehee* v. *Blackwell,* 28 Ark. 27; *Cleveland* v. *Aldridge,* 94 Ark. 51, 125 S. W. 1016; *Higgs* v. *Smith,* 100 Ark. 543, 140 S. W. 990; *Williams* v. *Baker,* 207 Ark. 731, 182 S. W. 2d 753; *Weaver* v. *Gilbert,* 214 Ark. 800, 218 S. W. 2d 353. A bond for title may be distinguished from an executory contract of sale with forfeiture clause in other ways.

The bond for title was something more than an executory contract to sell. It imported a present sale, which passed the ownership and beneficial interest in the land to the purchaser, usually accompanied with possession or the right of possession as against the vendor. *Moore & Cail* v. *Anders,* 14 Ark. 628; *Harris* v. *King,* 16 Ark. 122; *Maxwell* v. *Moore,* 18 Ark. 469.

Upon default of vendee, vendor must proceed to foreclose the purchaser's equity of redemption under a bond for title, but not under an executory contract for sale with forfeiture clause. *Smith* v. *Robinson, supra; Newsome* v. *Williams,* 27 Ark. 632; *White* v. *Page,* 216 Ark. 632, 226 S. W. 2d 973.

A default under a bond for title does not effect a forfeiture. *Fairbairn* v. *Pofahl,* 144 Ark. 313, 222 S. W. 16. An executory contract to sell with a forfeiture clause does. *Harrison* v. *Mobley,* 211 Ark. 772, 202 S. W. 2d 756; *White* v. *Page, supra.*

A vendee under a bond for title may encumber or alienate the land, subject to the lien for the balance of

the purchase money. *Smith* v. *Robinson,* 13 Ark. 533.

The vendee under a bond for title is liable for taxes assessed on the lands after the sale *Hall* v. *Denckla,* 28 Ark. 506.

The purchaser under an executory contract where purchaser "agrees to purchase" is not liable for such taxes, but vendor is until the date the sale is consummated by payment and execution of deed. *Tate* v. *Ellis,* 201 Ark. 1185, 147 S. W. 2d 34.

A vendee holding a title bond from the owner may support an action to quiet title and recover possession from an adverse claimant. *Norman* v. *Pugh,* 75 Ark. 52, 86 S. W. 833. He may also devise it by will. *Stubbs* v. *Pitts,* 84 Ark. 160, 104 S. W. 1110.

It appears that it was first held by this court that the interest of the vendor who had given *a bond for title* was not subject to execution in *Strauss* v. *White,* 66 Ark. 167, 51 S. W. 64. In that case, the vendee had been placed in possession of the land before the judgment was rendered in favor of the execution purchaser. This court took this possession into consideration in arriving at the result, holding that the vendee's *possession* was notice to the judgment plaintiff and execution purchaser of the title or claim under which the vendee held.

Virtually all of the cases in which the bond for title is credited with creation of a mortgagor-mortgagee relationship with the resulting legal fiction as to title show clearly that the purchaser was put in possession or had the right to possession. See *e. g., Moore & Cail* v. *Anders,* 14 Ark. 628; *Maxwell* v. *Moore,* 18 Ark. 469; *Lewis* v. *Boskins,* 27 Ark. 61; *Hall* v. *Denckla,* 28 Ark. 506; *Garrett* v. *Williams,* 31 Ark. 240; *Roach* v. *Richardson,* 84 Ark. 37, 104 S. W. 538; *Hill* v. *Heard,* 104 Ark. 23, 148 S. W. 254, 42 L.R.A. (n.s.) 446; *Davie* v. *Davie,* 154 Ark. 633, 18 S. W. 935; *Alexander* v. *Mason,* 216 Ark. 367, 225 S. W. 2d 680.

As a matter of fact, some of them hinge the legal fiction that the purchaser becomes the equitable owner of the land and the vendor holds the legal title only as security for the payment of the balance of the purchase money, at least in part, upon the purchaser's being put in possession. See *Stubbs* v. *Pitts,* 84 Ark. 160, 104 S. W. 1110; *Warren* v. *Henson,* 171 Ark. 162, 283 S. W. 19; *Fine* v. *Dyke Bros.,* 175 Ark. 672, 300 S. W. 375. Where the fiction or doctrine is applied to executory contracts for sale of real estate, the purchaser almost always has been put in possession of the premises. See *Judd* v. *Rieff,* 174 Ark. 362, 295 S. W. 370, and other cases cited in this opinion.

In all of the cases cited by appellee either the purchaser was put in possession of the land or the vendor had put his conveyance beyond his control. All may be distinguished from this case.

In *State Bank of Decatur* v. *Sanders,* 114 Ark. 440, 170 S. W. 86, the purchaser under the oral contract took the actual control, possession and management of the farm and made improvements. While the vendor had not executed a deed to make the sale fully consummated, he had an election to either take a mortgage on other land as security for the balance of the purchase money or reserve a vendor's lien on the property sold. He did not make the election until after a judgment was rendered against him and the judgment creditor unsuccessfully asserted the lien of the judgment against the purchaser's grantee.

In *Howes* v. *King,* 127 Ark. 511, 192 S. W. 883, the vendor gave a deed in which a vendor's lien was retained. This lien was not subject to execution. The purchaser was in possession of the land at all times. After the death of vendor, the purchaser arranged for a loan to pay part of the purchase money notes and gave a mortgage as security. He then conveyed the land to the vendor's legatee, who released the vendor's lien and immediately reconveyed the land to the original purchaser,

but retained a lien for the balance of the purchase money. The court said the various steps were parts of the same transaction and constituted but one act, and that there was no moment when the legatee-grantor owned the land free from the conditions of the transaction or could have conveyed them, except subject to these conditions. The court has later referred to the legatee-grantor as only a conduit in the title. See *United Loan & Investment Co.* v. *Nunez,* 225 Ark. 362, 282 S. W. 2d 595, where a "straw man" in a transaction between husband and wife was held not to have title subject to judgment lien. In *Snow Bros. Hardware Co.* v. *Ellis,* 180 Ark. 238, 21 S. W. 2d 162, the vendor had placed a deed in escrow under which he had no power of recall. Thus, he placed the delivery of the conveyance beyond his own control, unless he paid a certain note due one year after the date of the escrow agreement. The "purchaser" had only to deposit a fixed amount of money with the escrow agent to receive the deed, in case of default by the vendee. The court compared this transaction to a bond for title and said that the vendor *had conveyed* his interest in the land on condition.

The purchaser in this case offered to buy. Earnest money was paid. It was to be forfeited if the buyer failed to fulfill his obligation, without prejudice to the assertion of any other *legal* rights by seller because of the *breach.* Possession was to be given after the closing date, which seems to have been upon approval of an FHA loan to purchaser. Seller was to pay taxes due on or before the closing date. There is nothing in the contract to remotely suggest a contemporaneous sale of the property. Certainly this purchaser had nothing—no title which could be alienated or encumbered by him.

I would dissolve the injunction and dismiss the cause of action.

CHARLES D. HILL ET AL *v.* LEE COUNTY BOARD OF EDUCATION ET AL

5-4430 419 S. W. 2d 807

Opinion delivered October 30, 1967

Forrest E. Long and *Giles Dearing,* for appellants.

Daggett & Daggett, for appellees.

GEORGE ROSE SMITH, Justice. This is a suit filed in the chancery court by the appellants, patrons of Moro School District B, to enjoin the Lee County Board of Education from putting into effect an order by which that Board consolidated the Moro District with Marianna School District A. The chancellors sustained the Board's motion to dismiss the complaint for want of jurisdiction, holding that the plaintiffs should have appealed from the Board's order of consolidation to the circuit court.

Petitions for consolidation of the two districts were

filed with the Board. That body, purportedly acting under Ark. Stat. Ann. § 80-408 (Repl. 1960), gave notice that the petitions would be heard on May 15, 1967. On that date the appellants appeared to protest the consolidation, but the Board voted unanimously to merge the two districts.

No appeal was taken from the Board's order. Instead, the appellants filed this suit in chancery, alleging in substance that the petitions for consolidation were not signed by a majority of the patrons of the Moro District. It is the appellants' theory that Section 80-408, providing for an appeal to the circuit court, was repealed by Act 21 of the Second Extraordinary Session of 1965. (Act 21 is not included in the Arkansas Statutes Annotated, for the reason that the compiler considered it to be temporary legislation. See Volume 8, Tables, p. 487.)

At the outset there can be no doubt that if Section 80-408 is still in force, the appellants have mistaken their remedy. That statute declares in explicit language: "Appeals may be taken to the Circuit Court from the findings of the board on the ground that the requisite number of electors have not signed the petition, or because the notices herein required were not given." The appeal must be taken within thirty days. Section 80-236; *McLeod* v. *Richardson*, 204 Ark. 5[illegible], 163 S. W. 2d 166 (1942); *Gibson* v. *Davis*, 199 Ark. 456, 134 S. W. 2d 15 (1939). The remedy by appeal is adequate and exclusive. *Vaught* v. *Frey*, 219 Ark. 525, 243 S. W. 2d 384 (1951); *Portland Sch. Dist. No. 4* v. *Drew County Bd. of Education*, 217 Ark. 725, 233 S. W. 2d 66 (1950).

We are firmly of the opinion that Act 21 did not repeal Section 80-408. Act 21 provided for a comprehensive review of the public school system throughout every county having two or more school districts. Section 3 of Act 21 created a County School Study Commission composed of three members from each local school board and three members from the county board

of education. By Section 4 of the act the Study Commission was directed, not later than August 1, 1966, to prepare a preliminary plan for the reorganization of school districts within the county. A public hearing was to be held not later than October 1, 1966. Thereafter, not later than March 1, 1967, the Study Commission was required to approve a reorganization plan and submit it to the State Board of Education. By Section 7 of Act 21 ten percent of the voters in the districts affected by the plan could petition for a special election at which the electors in the affected districts could approve or reject the plan. Section 13 of Act 21 had this repealing clause: "This Act is intended to be cumulative and not to have the effect of repealing any laws or parts of laws not in irreconcilable conflict herewith. All laws and parts of laws in irreconcilable conflict herewith are hereby repealed."

There is no irreconcilable conflict between Act 21 and the pre-existing school laws. In fact, there is no conflict at all. The two statutory schemes are intended to accomplish two different purposes and may co-exist side by side. Act 21 provided for a county-wide study and plan of reorganization that might well affect every school district in the county. It could be put into effect only on petition of ten percent of the voters in the affected districts and by a majority vote of the electors in those districts.

By contrast, Section 80-408 deals with day-to-day matters that often involve only one or two districts. Under that statute the county board of education may form a new district, dissolve an old one, consolidate two or more districts, or detach territory from one district and add it to another. It is clear that if Act 21 were the sole method of reorganizing school districts, as the appellants contend, there would be a serious, even tragic, omission in the school laws as a whole. That is, there would be no way for a county board to make adjustments, such as the transfer of territory from one district to its neighbor, however badly such adjustments

might be needed. Quite obviously such purely local matters ought not to depend for accomplishment upon county-wide action. We conclude that there is no irreconcilable conflict between the earlier statutes and Act 21, whether it be regarded as temporary or permanent legislation.

Affirmed. For good cause shown an immediate mandate will issue.

WILLIE LEE PASCHAL *v.* STATE OF ARKANSAS

5306 420 S. W. 2d 73

Opinion delivered October 30, 1967
[Rehearing denied November 27, 1967.]

McKay, Anderson & Crumpler, for appellant.

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

GEORGE ROSE SMITH, Justice. Charged with having had possession of goods which he knew to have been stolen, the appellant was found guilty and sentenced to three years imprisonment. Ark. Stat. Ann. § 41-3938 (Repl. 1964). For reversal he contends, first, that his admission of guilt was inadmissible and, second, that it was not sufficiently corroborated.

On January 3, 1967, police officers were investigating the burglary of a liquor store in Ouachita county. Acting upon information that the stolen whiskey was being sold in Columbia county the officers obtained a search warrant and searched Paschal's home near Magnolia. They found two cases of whiskey, which were later identified as having been taken in the burglary. The officers arrested Paschal and took him to Camden, in Ouachita county, for questioning. There is no contention that Paschal was not duly warned of his constitutional rights before the interrogation began. According to the State's testimony, Paschal readily admitted that he knew that the liquor had been stolen.

Counsel for the appellant, citing *McNabb* v. *United States,* 318 U. S. 332 (1943), insist that the confession was inadmissible because Paschal had not been taken before a magistrate for commitment, as the statute requires. Ark. Stat. Ann. § 43-601. The *McNabb* case, however, involved the interpretation of federal statutes that do not apply to the states. *State* v. *Browning,* 206 Ark. 791, 178 S. W. 2d 77 (1944). Under our statute the failure to take an arrested person before a magistrate does not vitiate a confession, because the statute is construed to be directory only. *State* v. *Browning, supra; Moore* v. *State,* 229 Ark. 335, 315 S. W. 2d 907 (1958).

Nor is there merit in the suggestion that the confession should have been excluded because Paschal was held in confinement for several days before he was charged with an offense. Such an illegal detention does not retroactively affect an admissible confession that

was made soon after the initial arrest. *United States* v. *Mitchell,* 322 U. S. 65 (1944). This is true because the necessary causal connection between the detention and the confession is lacking.

Secondly, it is argued that the confession was inadmissible for the reason that it "embraced an element vital to the State's case which was not corroborated." The statute does not require that a confession be corroborated in every detail. It is enough that the confession be accompanied by other proof that the offense was committed. Ark. Stat. Ann. § 43-2115; *Mouser* v. *State,* 215 Ark. 131, 219 S. W. 2d 611 (1949). Not only did the State's evidence show that the two cases of liquor were stolen property; the jury could have inferred from Paschal's own testimony that he knew this to be true. He testified that he bought the two cases at less than the retail price, in a dry county from two men who were transporting the whiskey in an automobile. Thus there was ample proof to show that the offense was actually committed.

Affirmed.

CAROLYN E. CHUDY *v.* DR. AMAIL CHUDY

5-4315 420 S. W. 2d 401

Opinion delivered October 30, 1967

[Rehearing denied November 27, 1967.]

Frances D. Holtzendorff, for appellant.

Smith, Williams, Friday & Bowen, for appellee.

PAUL WARD, Justice. This litigation relates to the immunity of a doctor from liability for certain acts or conduct. To better understand the issue, how it arose, and how it reaches this Court, we set out below a brief summary of the background facts.

On August 19, 1965 Mrs. Carolyn E. Chudy (appellant here) filed suit for a divorce from her husband, Brunan S. Chudy. On August 30, 1965 Dr. Amail Chudy (appellee here, and a brother of Brunan S. Chudy) allegedly signed a false certificate stating appellee was in need of psychiatric treatment. On the same day a hearing was held before the Probate Court relative to the condition of appellee, and the presiding judge or-

dered her to be taken to the Arkansas State Hospital for Nervous Diseases. Appellee was held in said hospital for one day when she was released, on a petition for a writ of habeas corpus, by the Probate Judge.

On November 17, 1965 appellant filed a Complaint, and later an Amended Complaint, in circuit court against appellee wherein she made, in substance, the following allegations:

(a) The defendant wilfully and intentionally made and signed a false statement or certificate, stating that she was psychotic and in need of psychiatric care, at the time appellee knew said statement was false.

(b) Appellee's purpose in making this statement was to have it submitted to the Probate Court in order to have her committed for psychiatric treatment in said hospital, knowing at the time she was not psychotic.

(c) At all times she was "sane and competent and free from psychosis and was not in need of mental or psychiatric care."

(d) Appellee was engaged in a conspiracy with his brother, Brunan S. Chudy, for the purpose of assisting the said Brunan S. Chudy in deterring her in the aforementioned divorce proceedings, and to falsely and unlawfully deprive her of her liberty, and to humiliate, intimidate and embarrass her.

(e) She is the mother of three children who live with her, and she has suffered anxiety, humiliation and embarrassment over said detention and deprivation of her liberty, as well as from public notoriety, and that she will continue to so suffer.

(f) She has suffered compensatory damages in the sum of $100,000 and punitive damages in the sum of $50,000 for which she prays judgment.

To the above complaint appellee filed a Motion for Summary Judgment which was sustained by the trial court, hence this appeal.

It is our conclusion that the complaint states a cause of action, and that the trial court erred in granting the Motion for Summary Judgment. It is well settled by decisions of this Court that the Motion does not lie when material facts are in issue. *Griffin* v. *Monsanto Co.*, 240 Ark. 420, 400 S. W. 2d 492.

If, as alleged, appellee wilfully, knowingly and maliciously executed the false certificate and conspired with appellant's husband to deprive (and did deprive) appellant of her liberty and freedom, causing her to suffer as pleaded, she has a right to recover damages in a court of law.

In the case of *Comfort* v. *Young,* 69 N. W. 1032, Young filed "with the board of insane commissioners . . . charging that plaintiff [Comfort] was and is insane, and a fit subject for custody and treatment in the insane hospital of the state." There it was held the trial court properly instructed the jury as follows:

> " 'The real question for you to determine first in this case is: Was the information made by the defendant and filed by him honestly and in good faith, upon probable cause . . ."

The case of *Brandt* v. *Brandt,* 3 N. E. 2d, 96, 286 Ill. App. 151, is in point with the above holding that such allegations are matters for the jury to consider. There, plaintiff (appellant) sued her former husband (and others) alleging the defendants "conspired to commit plaintiff to a hospital for the insane unlawfully and improperly." The case was tried by a jury which found appellant had not proved the allegations. On appeal, the Court cited cases which held "that one who maliciously and falsely sues out an inquisition of lunacy may be liable to the party injured." The Court then said:

"There is no question of the law in that respect, . . . but that is wholly beside the question" because there "is no proof here from which a conspiracy can be inferred." Of course, in the case before us, appellant was not even allowed to offer *proof* of her allegations. In accord with the rule above announced are other cases cited in 145 A.L.R. at page 705 et seq.

In reply to the above, and in urging an affirmance of the trial court, appellee makes this statement: "The sole question before the Court in this case is the application of the defense of absolute privilege." In support of that position appellee cites cases which we will examine and which, we think, can be distinguished and are not applicable under the pleadings in the case here under consideration.

(a) *Hurley* v. *Towne et al,* 155 Me. 433, 156 A. 2d 377, is a case where the doctor was *called,* as an expert *witness,* before the committing proceedings, and there the doctor was immune from liability for that reason. In the case before us appellee was not *called* and he was not *a witness.* The court pointed out that "every person shall have a remedy at law for every wrong," but that public policy requires that witnesses shall not be restrained by fear.

(b) *MeZullo* v. *Maletz,* 331 Mass. 233, 118 N. E. 2d 356, was an action based on Tort, where the doctor "was *called upon* to perform an important duty," *i. e.* to sign a certificate of commitment. There the Supreme Court also pointed out that "Plaintiff does not contend that a case at Common Law is made."

(c) *Dyer* v. *Dyer,* 178 Tenn. 234, 156 S. W. 2d 445, is where appellant sued her former husband and two doctors for damages for false imprisonment in the state hospital. The trial court had sustained a demurrer to the complaint. On appeal the Supreme Court affirmed. In doing so, however, the Court said that the statements of appellees "were made in a *judicial proceeding* under

oath, in response to a *call* for their professional opinion and were, therefore, absolutely privileged." (our emphasis) The Court again said that the statements were "responsive to *questions propounded* to the defendant by counsel while being *examined* . . . in a *judicial proceeding* . . ." (our emphasis.)

In the case here under consideration this is the situation: Appellee was not a *witness* in a judicial proceeding and he was not *called* by anyone to make a statement or certificate. He is charged with conspiring with the husband of appellant to have her taken from her home and children and placed in the State Hospital for Nervous Diseases, and is charged with doing so wilfully, falsely, and maliciously to hinder the divorce proceeding and to cause her embarrassment and humiliation. It is our conclusion that appellant has a right to try to prove the allegations in her complaint.

Reversed.

HARRIS, C. J. and BYRD, J., dissent.

JONES, J., not participating.

CONLEY BYRD, Justice, dissenting. I dissent from the majority opinion because I consider the statement made by appellee, Dr. Amail Chudy, in connection with the lunacy proceedings of appellant, Carolyn E. Chudy, to be an absolute privilege given by the courts, not only of this state but of other states. In setting forth my reasons it must be kept in mind that this matter went off in the trial court on a motion for summary judgment after the parties had interchanged interrogations and requests for admissions of fact, and had made certain stipulations regarding the record in the lunacy proceedings.

The amended complaint filed May 6, 1966, concerning the conduct of Dr. Chudy, alleges:

"That at the time herein mentioned, plaintiff was married to defendant's brother, Brunan S. Chudy. That at the time of the acts herein complained of, an action for divorce was pending between the plaintiff and the said Brunan S. Chudy in the Chancery Court of Pulaski County, Arkansas.

"That over a period of time, the plaintiff had been a patient of the defendant for ailments and illnesses which were not of a serious nature, but had not consulted with the defendant in a professional capacity since the forepart of July, 1965, at which time she visited at defendant's office for the purpose of having her leg x-rayed for a physical ailment from which plaintiff in the past had suffered.

"That on August 30, 1965, the defendant wilfully and intentionally made and signed a false statement or certificate, stating that plaintiff was psychotic and in need of psychiatric care, and at the time of making such statement, the defendant had knowledge that such statement or certificate was wilfully false.

"That defendant's purpose in making the statement referred to above was to submit or have the statement submitted to the Probate Court of Pulaski County, Arkansas, in order to have plaintiff committed for psychiatric treatment in the Arkansas State Hospital for Nervous Diseases, knowing that plaintiff was not insane or psychotic at the time of making such statement.

"That as a result of defendant's wilful and false diagnosis of her condition, on August 31, 1965, she was picked up at her home by two deputy sheriffs of Pulaski County, Arkansas, and without her consent and over her protest and against her will, she was taken by said deputies into custody and incarcerated in the Arkansas State Hospital for Nervous Diseases, where she was detained further against her will all the remaining portion of that day, over night and until the afternoon of

the next day, namely, September 1, 1965, at which time she was released by virtue of a hearing and court order of the Pulaski Chancery Court.

"That at all times, the said Carolyn E. Chudy was sane and competent and free from psychosis and was not in need of mental or psychiatric care.

"That the defendant wilfully, falsely caused plaintiff to be deprived of her liberty and detained without just cause.

"That the defendant was engaged in a conspiracy with his brother, Brunan S. Chudy, for the purpose of assisting the said Brunan S. Chudy in deterring plaintiff in the divorce proceedings between them and to falsely and unlawfully deprive plaintiff of her liberty and to humiliate, intimidate and embarrass her.

"That the wilful, intentional and false conduct upon the part of the defendant was the proximate cause of plaintiff's injuries and damages hereinafter described."

The false statement mentioned in the amended complaint was on file in the lunacy proceedings and was made part of the record here by stipulation of counsel. It provides:

"TO WHOM CONCERNED:

Re: Mrs. Brunan S. (Carolyn) Chudy
Our File: Chart No. 1267

After conversation by telephone on August 30, 1965 and considering the many factors regarding the mental status of the above named patient, it is our feeling that she should be under psychiatrist care. Sincerely,

/s/ **Amail Chudy, M.D.**"

Our statute on application for commitment of dangerous patients to the State Hospital is Ark. Stat. Ann. § 59-234 (Supp. 1965). It provides:

"If at any time the Superintendent shall determine that any patient admitted to the State Hospital under any provision of this Act [§§ 59-299—59-242] is dangerous to himself or to society, the Superintendent shall request a writ of commitment from the Probate Court of the County in which the patient lives. This request for commitment shall be accompanied by a certificate from the medical staff of the State Hospital setting forth the facts as to the patient's mental condition and that he or she is dangerous to himself or to herself, or to society. The Superintendent may also request a writ of commitment for any patient for whom he deems it to the best interest of the patient that such a writ be issued, for the purpose of detaining the patient in the hospital for such time as the Superintendent deems necessary for proper care and treatment. In such cases the presence of the patient before the Court need not be required. If any Health Officer, or any practicing physician, regularly licensed by the state of Arkansas, believes that any person residing in the county, who is not a patient in the State Hospital, is so suffering from mental disease as to be dangerous to himself or to soci y and such person cannot be taken peaceably to the State Hospital as provided in other Sections of this Act, then such Health Officer or physician shall certify this fact to the Judge of the Probate Court of such county for a hearing, copies of such certification to be delivered to the person affected thereby, or to his guardian, or to his nearest relative, if any, whereupon said court shall hold a hearing either in regular term or in vacation in chambers, receiving such evidence as may be offered by all parties interested, after which he shall, if the evidence justifies, issue an order of commitment to the State Hospital. In such cases the presence of such person before the Court need not be required.

"Any patient in any public or private hospital in this State which maintains facilities especially designed for the care and treatment of the mentally ill, and which is approved and licensed by the State Board of Health, may be detained in said hospital for diagnosis, care and treatment of any mental disorder, including acute psychosis induced by alcoholism or drug addiction, or, at the discretion of the government (governing) head or board of any such hospital, may be admitted for such service, provided a regularly practicing psychiatrist duly licensed by the State of Arkansas shall certify in writing to such hospital that such patient is suffering from psychosis and that the patient is likely to be harmful to himself, herself or society. A patient so detained by or admitted to any hospital described in this section may be confined to the premises of such hospital until such time as a regularly practicing psychiatrist licensed by the State of Arkansas shall certify in writing to such hospital that the patient is no longer harmful to himself, herself or society.

"No action shall be brought against any hospital described in this Section, nor against its governing body or the members thereof, nor against its superintendent, administrator, agents, representatives, servants and employees, nor against any nurse or physician who confines and detains, or who aids in the confinement and detention, of any patient in the manner prescribed by this section, to recover damages therefor or incident thereto; provided that the immunity herein granted shall not be held to extend to any person who shall wilfully make and sign a false certificate to a hospital that a person is suffering from psychosis nor to any one who confines or detains a person in a hospital with knowledge that any such certificate is wilfully false.

"Probate Courts in this State shall have, and are hereby granted, the same jurisdiction and authority to commit persons to any private hospital in this State equipped to care for persons suffering from psychosis,

as in this Section above set forth, as they may now or hereafter be empowered by law to commit to the State Hospital; provided any such private hospital be willing to accept and care for patients so committed to it. A patient so committed to a private hospital by the Probate Court may be discharged therefrom upon a written certificate by a regularly practicing psychiatrist duly licensed by this State, that he is no longer harmful to himself, herself or to society, or when transferred, by order of the Probate Court which committed the patient, to another hospital or institution, or when discharge of said patient shall be ordered by said Probate Court or other Court having jurisdiction.

"Nothing in this Section shall be construed to prevent voluntary entry by patients in and their admissions to public and private hospitals by applications of the patients or others in their behalf. [Acts 1943, No. 241, § 6, p. 498; 1957, No. 413, § 2, p. 1151; 1961, No. 77, § 1, p. 175.]" (Emphasis supplied.)

The history of the foregoing statute shows that it was enacted in parts, the first paragraph having been a portion of Act 241 of 1943 and the subsequent paragraphs enacted as amendments thereto. The italicized paragraph, which recognizes the liability of doctors who make wilfully false statements, refers to situations where a patient is in a public or private hospital and is retained there on a doctor's letter or certificate without benefit of a lunacy inquest.

The first paragraph of the statute makes it clear that Dr. Chudy's statement did not provide a sufficient basis on which the probate court could legally have issued an order of commitment, because the letter certainly does not state that Mrs. Chudy was dangerous to herself or to society. Not only is it obvious that the doctor's statement was made for use of the probate court in connection with Mrs. Chudy's lunacy inquest, but Mrs. Chudy in her complaint alleges that defend-

ant's purpose in making the statement was to submit or have the statement submitted to the probate court. Therefore, as will be seen by our decisions hereinafter discussed, Dr. Chudy's statement comes under the absolute privilege given to relevant or material statements made in testimony, pleadings, or other papers in judicial proceedings.

In *Johnson* v. *Dover,* 201 Ark. 175, 143 S. W. 2d 1112 (1940), we had before us a suit for slander based on a statement a witness had made in court. In upholding the witness's statement as a privileged communication for which an action did not lie, we pointed out that the general rule of American cases is that statements made by a witness in the regular course of a judicial proceeding are absolutely privileged where they are relevant and pertinent to the subject of inquiry, even though false or malicious.

Recovery for defamation against physicians for similar statements made in lunacy inquests has been denied in *Gilpin* v. *Tack,* 256 F. Supp. 562 (W. D. Ark. 1966); *Fisher* v. *Payne,* 93 Fla. 1085, 113 So. 378 (1927); *Dunbar* v. *Greenlaw,* 152 Me. 270, 128 A. 2d 218 (1956); *Mezullo* v. *Maletz,* 331 Mass. 233, 118 N. E. 2d 356 (1954); and *Jarman* v. *Offutt,* 239 N. C. 468, 80 S. W. 2d 248 (1954). See Annot., 73 A.L.R. 2d 333 § 7 (1960).

Thus it is seen that appellant's only complaint against Dr. Chudy concerns the statement he made for use in the lunacy inquest. The doctor's statement is certainly relevant and pertinent to the issue that was before the trial court and, under the adjudicated cases of this and other courts as set out above, was a privileged communication upon which no action for defamation can lie.

The majority makes much of appellant's allegation that Dr. Chudy conspired with appellant's husband to deprive her of her liberty and freedom, which is a charge in the nature of malicious prosecution. The ma-

jority opinion in this connection fails to consider the effect of the discovery proceedings. When the discovery proceedings had by the parties are considered, it is obvious that the only fact upon which appellant relies for recovery against Dr. Chudy is his making of the written certificate for use in the lunacy inquest as required by the statute.

Under Ark. Stat. Ann. § 59-234, *supra,* a person can not be committed to the State Hospital except on the certification of a regularly licensed physician that the person "is so suffering from mental disease as to be dangerous to himself or to society and such person cannot be taken peaceably to the State Hospital." As a practical matter, doctors do not make such certifications except on the request of some member of the person's family. A physician who makes such certification is always susceptible to the allegation that he conspired with some member of the family to deprive the person of his liberty without just cause. Consequently, every doctor making such certification, after today's majority opinion, will place himself in the position of having to defend his action in court against the accusation of conspiracy.

Therefore I would sustain the motion for summary judgment on the basis as alleged in the amended complaint that it was a statement submitted to the probate court of Pulaski County, Arkansas, in accordance with our lunacy statute, Ark. Stat. Ann. § 59-234, and is therefore privileged.

SHELBY ELECTRIC CO. and Maryland Casualty Co. *v.* BILLY DURAN

5-4311 419 S. W. 2d 798

Opinion delivered October 30, 1967

John M. Shackleford, Jr., for appellants.

Clint Huey, for appellee.

PAUL WARD, Justice. This is a Workmen's Compensation case, and the essential facts are not in dispute.

On May 9, 1961 Billy Duran (appellee here), while working for Shelby Electric Company (appellant here), suffered an injury to his right foot. A claim was filed for compensation. At a hearing before the referee appellee was adjudged to have suffered a permanent partial disability of fifty percent to his right leg below the knee. The referee allowed money compensation and also held that appellee was entitled to receive as compensation one pair of orthopedic shoes. An Order in accord with the above findings was entered by the referee on October 12, 1962 and no appeal was taken. The shoes were furnished, and the last payment to appellee was made on December 7, 1964.

On January 20, 1966 [one year and forty-four days after the last payment and more than four years after the injury] appellee filed a claim with the Commission for another pair of orthopedic shoes, and a hearing was had before the referee. Appellant controverted the claim, claiming it was barred under Ark. Stat. Ann. § 81-1318 (b) (Repl. 1960) which reads:

> "In cases where compensation for disability has been paid on account of injury, a claim for additional compensation shall be barred unless filed with the Commission within one year from the date of the last payment of compensation or two years from the date of accident, whichever is greater."

The referee held the claim was not barred. On appeal to the Commission, it held the claim was barred and, on appeal, the circuit court reversed the Commission, holding the claim was not barred by the above quoted statute —hence the appeal by appellant to this Court.

The only question before this Court is whether appellee's claim is barred under the statute previously quoted.

It is the contention of appellee here that this claim was not barred, and that his claim was timely filed under the provisions of Ark. Stat. Ann. § 81-1311 (Repl. 1960) which, in pertinent part, reads:

> "The employer shall promptly provide for an injured employee such medical, surgical or other attendance or treatment, nurse, and hospital service, medicine, *crutches and apparatus* as may be necessary during the period of six months after injury, or for such time, in excess thereof as the Commission, in its discretion, may require."

The contention of appellee is refuted, and must be denied, under our holding in the case of *Key* v. *Ark. P. & L. Co.*, 228 Ark. 585, 309 S. W. 2d 190, where we

had under consideration both of the statutes set out above. As stated in the opinion, the only issue before the court was whether the limitations provided by § 18 apply to a claim for *medical treatments*. We rejected the contention by *Key* that his claim was not barred by the statute of limitations as set out in § 18 which includes the above quoted § 81-1318 (b) but that it was timely filed under the above quoted § 81-1311. In rejecting *Key's* contention we said:

> "We readily agree with appellant that the above statute empowers the Commission to require medical and hospital expenses indefinitely provided a claim therefor is filed within one year after the date of the last payment."

It cannot be reasonably argued that although § 81-1311 applies to *medical and hospital treatment* it does not apply to *crutches and apparatus,* since both kinds of relief are included in the same statute and in the same sentence.

It follows therefore that the judgment of the trial court must be, and it is hereby, reversed.

Reversed.

SMITH and FOGLEMAN, JJ., concur.

JONES, J., dissents.

GEORGE ROSE SMITH, Justice, concurring. Under the *Key* case, cited by the majority, we are compelled to hold that this claim is barred by limitations. But it ought not to be. Statutes of limitation are intended to put stale demands at rest, when pertinent proof may no longer be available and when other accidents or illnesses may have contributed to the claimant's condition.

Those considerations do not apply in this instance. The destruction of the appellee's heel is a permanent

thing that is not going to change with the passage of time. The issue of causation has been set at rest once and for all. In the circumstances the controlling statute might well be amended. This concurring opinion is intended merely to call the matter to the attention of the General Assembly.

FOGLEMAN, J., joins in this concurring opinion.

J. FRED JONES, Justice, dissenting. I do not agree with the majority opinion in this case and I would affirm the decision of the trial court. As a practical matter, there is a lot of difference between *medical and hospital treatment* and *crutches and apparatus*, as set out in Ark. Stat. Ann. § 81-1311 (Repl. 1960), and I can think of no better case pointing up the difference than the one before us.

Here we have an injured workman, fully and completely recovered from his injury insofar as medical and hospital treatment is concerned. His healing period has ended and he has been paid all the monetary compensation he is entitled to under the Workmen's Compensation Law, for his temporary as well as his permanent partial disability. The only thing wrong with appellee now, as a result of his accident, is that he simply has no heel on one of his feet. There is no question now, and never will be, that he lost his heel as a result of this accident; consequently, there is no possibility of him ever claiming an *apparatus*, in the form of an orthopedic shoe, for some related condition not attributable to his accidental injury.

Certainly the furnishing of such apparatus by the employer should not toll the statute of limitations on a claim for additional compensation or for medical or hospital treatment, but certainly the appellee's failure to demand a new pair of orthopedic shoes at least once a year, regardless of the condition of the ones already furnished to him, should not divest the Workmen's Compensation Commission of its statutory discretion in re-

quiring the employer to furnish crutches and apparatus for such time, as may be necessary, in excess of the period of six months after injury.

I would affirm the circuit court in remanding this case to the Workmen's Compensation Commission for the exercise of its statutory discretion.

JACK FRANKLIN ADAMS *v.* CHARLES T. WOODFIN, ADM'R, ET AL

5-4316 419 S. W. 2d 796

Opinion delivered October 30, 1967

E. J. Butler, Phil Hicky, for appellant.

Barrett, Wheatley, Smith & Deacon, for appellees.

LYLE BROWN, Justice. Appellant Adams by this appeal seeks to establish his right to prosecute a suit for personal injuries against the administrator and the personal representative of the estate of William Floyd

Turnage, deceased. The trial court dismissed Adams' complaint on the ground that prior litigation had adjudicated the same issues of negligence. In that litigation the appellees here were the plaintiffs and the only defendant was Adams' employer. Adams was a witness and that trial resulted in a finding that Adams' negligent operation of his employer's truck caused the collision. Is Adams estopped by the final judgment in the prior suit from pursuing his personal injury case?

In February 1963, Jack Franklin Adams, an employee of East Texas Motor Freight Lines, Inc., was involved in a collision with a passenger car driven by Robert Martin Turnage. Adams claims to have received serious injuries. Turnage was fatally injured. The Turnage Estate filed suit against ETMF in a federal district court in Tennessee. The suit was grounded solely on the alleged negligence of Adams, the driver for ETMF. Adams was not a party to that action. He testified as a witness on behalf of his employer. Judgment was awarded the Turnage Estate.

Jack Franklin Adams subsequently filed his own suit for personal injuries against the Turnage Estate. The suit was filed in St. Francis County, Arkansas, the situs of the collision. The trial court sustained a motion to dismiss Adams' suit on the ground that Adams' negligence had been adjudicated in the federal court proceedings in Tennessee. Adams appeals from that order of dismissal.

Adams contends that his cause of action is his own, that it is in no manner derived from his employer, and that he is entitled to his day in court. The Turnage Estate does not rely on res judicata in its strict sense because the parties are not the same in the two cases. However, appellees contend ETMF and Adams were so connected in interest in the Tennessee litigation that the Turnage Estate may avail itself of the Tennessee judgment as res judicata in the St. Francis County suit. The Estate points to the employer-employee relationship

and to the fact that ETMF's liability was predicated solely on a finding of negligence against Adams. This defense is often referred to as "estoppel by judgment."

We have not been cited an Arkansas case in which the precise facts have been before this court. However, there have been so many cases in other jurisdictions that the law is well settled. A case precisely in point comes from Massachusetts and has been cited with approval by other forums. *Pesce* v. *Brecher,* 19 N. E. 2d 36 (1939). Pesce sued Brecher for personal injuries. In a former action, Pesce's employer had sued Brecher for property damage caused by the same accident. Pesce, the driver, testified in that case. Judgment was rendered against Pesce's employer. In the second action, *Pesce* v. *Brecher,* the defendant pleaded the first judgment in estoppel. In rejecting the motion to dismiss, the court said:

> "The former adjudication was not a defense to this action. It is elementary and fundamental that every individual is entitled to his own day in court in which to assert his own rights or to defend against their infringement. The present plaintiff was not a party to the former action. He is not in privity with any party in the sense that his rights are derived from one who was a party. His cause of action is, and always has been, his own. It is in no way derived from his employer, who was a party. The relation of employer and employee, in and of itself, does not confer upon the employer any power to represent or to bind the employee in litigation. That the plaintiff testified as a witness in the former action is immaterial. He had no control over the conduct of the trial. He could not cross-examine opposing witnesses. The essential elements of an estoppel by judgment are lacking."

Of the same accord are such cases and authorities as *Makariw* v. *Rinard,* 336 F. 2d 333 (1964); *Dave Rice* v. *Ringsby Truck Lines et al,* 302 F. 2d 550 (1962);

Brown v. *Wheeling & L. E. R. Co.*, 65 N. E. 2d 912 (1945); Restatement, Judgments, § 96 (1) (2); 1 Freeman on Judgments (5th Ed. 1925) § 469 at p. 1029.

We hold that the Tennessee adjudication does not preclude Adams from maintaining his St. Francis County action.

Reversed and remanded.

ROBERT CABLETON *v.* STATE OF ARKANSAS

5302 420 S. W. 2d 534

Opinion Delivered October 30, 1967
[Rehearing denied December 4, 1967].

John W. Walker, for appellant.

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

JOHN A. FOGLEMAN, Justice. This appeal is taken from the action of the trial court affirming judgments of the Mayor's Court of the City of Gould in two cases and the Justice of the Peace Court of Gould Township in Lincoln County in three cases. All charges were misdemeanors. The first conviction was had in the Mayor's Court on December 18, 1965 upon a charge of disturb-

ing the peace and obstructing justice. In that case a fine of $100.00 and costs of $10.50 were assessed against appellant. All of the remaining convictions were on October 4, 1966, with total fines imposed amounting to $421.50. The costs assessed totaled $43.00. Jail sentences were for a total of nine months. The charges were public drunkenness, resisting arrest, assaulting an officer and disturbing the peace. Timely appeals were taken. Judgments affirming were entered in the Lincoln Circuit Court on the 13th day of February 1967. Each recites that affirmance of the original judgment was entered when appellant failed to appear after having been called three times at the bar of the court by the sheriff. Motions to vacate these judgments and for new trial were timely filed, heard and denied.

Appellant seeks reversal on the basis that in the Mayor's and Justice of the Peace Courts he was not advised of his right to counsel and that no offer was made to appoint counsel if he were unable to afford his own lawyer. The gist of appellant's argument appears to be that the failure to appoint counsel for an indigent charged with a misdemeanor on which a jail sentence may be imposed is a violation of his rights under the Sixth and Fourteenth Amendments to the Constitution of the United States. The records in the original trial courts are silent on the subjects of indigency, advice as to right to counsel and request for representation by an attorney. The cases heard there in October were continued from September 15, 1966, however, at the request of appellant. On the margin of the docket sheet in the case heard December 18, 1965, the names of John Walker and Deactor [Delector] Tiller are listed at attorneys for appellant. No statement as to their appearance or nonappearance is recited in the judgment.

Appellant's contention is based largely on the holding in *Gideon* v. *Wainwright,* 372 U. S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799. This court has held that failure to appoint counsel under similar circumstances did not vio-

late the constitutional rights of one charged with a misdemeanor. *Winters* v. *Beck,* 239 Ark. 1151, 397 S. W. 2d 364 (cert. denied 385 U. S. 907, 87 S. Ct. 207, 17 L. Ed 2d 137). It was pointed out in that opinion that the *Wainwright* case dealt with a felony charge where the defendant had been sentenced to five years in the penitentiary. Appellant urges, however, that the felony-misdemeanor distinction is illogical and should be abandoned, relying on cases from other jurisdictions, at least two of which, *McDonald* v. *Moore,* 353 F. 2d 106 (5th Cir.) and *Harvey* v. *Mississippi,* 340 F. 2d 263 (5th Cir.), were decided before the Supreme Court denied certiorari in *Winters* v. *Beck* and were obviously considered by that court as they are cited in the dissenting opinion of Mr. Justice Stewart. Not only was the Supreme Court fully aware of the decision of the Fifth Circuit in the *McDonald* case, but the Circuit Court, even while rejecting the "felony-misdemeanor" rule, the "serious offense" rule[1] and the "peculiar, particular or special circumstance"[2] rule and refusing to adopt a "petty offense" rule, recognized that the *Wainwright* case did not require the appointment of counsel in all cases, for it said:

> "* * * It seems unlikely that a person in a municipal court charged with being drunk and disorderly, would be entitled to the services of an attorney at the expense of the state or the municipality. Still less likely is it that a person given a ticket for a traffic violation would have the right to counsel at the expense of the state. If the Constitution requires that counsel be provided in such cases it would seem that in many urban areas there would be a requirement for more lawyers than could be made available. Even with the assistance of law students, whose services may be requested under some of the

[1]Announced in cases such as *State* v. *Anderson,* 96 Ariz. 123, 392 P. 2d 784.

[2]This was the rule announced in *Betts* v. *Brady,* 316 U. S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595.

> Criminal Justice plans, the demand might come near exceeding the supply."

It should be noted that the *Harvey* case is relied on as precedent in the *McDonald* case.

In considering *Gideon* v. *Wainwright,* there are factors to be weighed other than the fact pointed out in the *Winters* case that it involved a felony conviction. That decision did not declare that the Fourteenth Amendment made the guarantees of the Sixth obligatory, as such, upon the states. Its rationale was that those pledges and guarantees contained in the Bill of Rights of the Federal Constitution, which are implicit in the concept of ordered liberty, are fundmental principles of liberty and justice which are the bases of our political and civil institutions and are fundamental and essential to a fair trial, are made obligatory upon the states by the Fourteenth Amendment. In arriving at its conclusion, the court relied upon *Powell* v. *Alabama,* 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A.L.R. 527, as well as *Betts* v. *Brady,* 316 U. S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595 (the result of which it overruled) and *Palko* v. *Connecticut,* 302 U. S. 319, 58 S. Ct. 149, 82 L. Ed. 288, (in which the double jeopardy provision of the Fifth Amendment was held not to be obligatory upon the states). Thus, the statement with reference to right to counsel "[i]n all criminal prosecutions" is not obligatory upon the states, having never been considered fundamental to a fair trial or basic concepts of liberty and justice in any cases other than felonies. The United States Supreme Court has long recognized that a valid distinction can be made between serious and petty offenses in application of Sixth Amendment guarantees. *District of Columbia* v. *Clawans,* 300 U. S. 617, 57 S. Ct. 660, 81 L. Ed. 843.

Appellant also relies on cases such as *People* v. *Witenski,* 15 N. Y. 2d 392, 259 N. Y. S. 2d 413, 207 N. E. 2d 358. This decision was by a court divided four to

three. It can be distinguished. In New York there was a statute (Code of Criminal Procedure § 699) requiring a magistrate to immediately inform a defendant of his right to aid of counsel at every stage of the proceedings and before any further proceeding is had. The court said that it had previously decided there was so little real difference in that statute and Code of Criminal Procedure § 308, requiring that when a defendant appears upon arraignment on indictment, he must be asked if he desires the aid of counsel and that the court must assign counsel if he does. Of course, our statutes only require the appointment of counsel in felony cases. Ark. Stat. Ann. § 43-1203 (Repl. 1964). Subsequently, the New York Court of Appeals recognized that the *Wainwright* case did not extend the right to assigned counsel to all crimes, in an opinion holding that these constitutional requirements were not applicable where a defendant was charged with a traffic law violation. *People* v. *Letterio,* 16 N. Y. 2d 307, 266 N. Y. S. 2d 368, 213 N. E. 2d 670.

Another case cited by appellant is *People* v. *Mallory,* 378 Mich. 538, 147 N. W. 2d 66. An examination of that decision leads to the conclusion that it is based upon peculiar language of the Michigan Constitution, the rule making power of that court, and statutes of that state. The opinion recognizes that the decisions of the United States Supreme Court may not be controlling of the question of right to counsel in misdemeanor cases.

We choose not to anticipate that the Supreme Court of the United States will extend the rule of the *Wainwright* case to misdemeanor cases. We rather choose to hold that the public policy of this state on the right to appointed counsel is expressed in our statutory law. While the statute requiring appointment of counsel in felony cases was adopted long before the decision in *Gideon* v. *Wainwright, supra,* we take judicial notice that the General Assembly of our state has met in regular session twice subsequently. We cannot assume that, in failing to extend our law to require appointment of

counsel in cases other than felonies, they were ignorant of that decision. Any change in the law of Arkansas, after certiorari was denied in the *Winters* case, should either come through legislative enactment or by an express decision of the United States Supreme Court.

Our decision in the *Winters* case does not stand alone. It has been followed or cited with approval in other jurisdictions. See, *e. g.*, *City of Toledo* v. *Frazier*, 10 Ohio App. 2d 51, 226 N. E. 2d 777; *State* v. *Sherron*, 268 N. C. 694, 151 S. E. 2d 599; *City of New Orleans* v. *Cook*, 249 La. 820, 191 So. 2d 634.

In Florida, the arena in which at least five of the "constitutional right to counsel" cases have been originally contested, the Supreme Court has also held that the *Wainwright* case did not apply to misdemeanors. They based their holding that an indigent defendant accused of a misdemeanor was not entitled to appointed counsel on the action of their legislature providing for a public defender for indigents in non-capital felony cases. This, they said, constituted a declaration of the state's public policy. *Fish* v. *State*, 159 So. 2d 866 (Fla.); *Watkins* v. *Morris*, 179 So. 2d 348 (Fla.). The Ohio court has also found a declaration of public policy in its statutes. *City of Toledo* v. *Frazier*, *supra*. It is suggested by the Supreme Court of North Carolina that the United States Supreme Court has not put a responsibility upon a state in this field any greater than that imposed by its own statutes. *State* v. *Sherron*, 268 N. C. 694, 151 S. E. 2d 599.

Practical considerations must enter into these policy determinations. As stated by the District Court of the Eastern District of North Carolina, it must be recognized that the right to counsel is not an end in itself, but a means for achieving the most perfect justice possible in a given situation, which requires the striking of a balance between an ideal situation and what is humanly possible to achieve. *Creighton* v. *State of North Carolina*, 257 F. Supp. 806. Practical consideration of the

impact of application of abstract constitutional principles on the administration of justice is not without precedent. *Johnson* v. *State of New Jersey,* 384 U. S. 719, 86 S. Ct. 1772, 16 L. Ed. 2d 882; *Linkletter* v. *Walker*, 381 U. S. 618, 85 S. Ct. 1731, 14 L. Ed. 2d 601; *Tehan* v. *United States, ex rel Shott,* 382 U. S. 406, 86 S. Ct. 459, 15 L. Ed. 2d 453; *State* v. *Zucconi,* 93 N. J. Super. 380, 226 A. 2d 16. Most misdemeanor cases are tried in Arkansas in municipal courts, justice of the peace courts, police courts and mayor's courts. According to the Second Annual Report of the Judicial Department of Arkansas, the 61 municipal courts had 108,040 criminal charges and 201,867 traffic charges[3] filed in the year 1966. According to the same report, there were 2,267 justices of the peace in Arkansas in 1967, and there is no reason to believe that the number was any less in 1966. We have no record of the number of police and mayor's courts in Arkansas of which we can take judicial notice, nor of the number of cases brought before them. We recognize that some of the criminal charges before the municipal courts are felony cases in which the judges sit only as committing magistrates.

The practical impossibility of implementing a system such as appellant urges is obvious when we consider that there are more justices of the peace[4] in Arkansas than there are resident practicing lawyers and that there are counties in which there are no practicing lawyers.[5] The impact of such a rule would seriously impair the administration of justice in Arkansas and impose an intolerable burden upon the legal profession.

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[3]This did not include 108,094 non-moving traffic charges in the City of Little Rock. In some of the courts, traffic offenses are included in the criminal cases rather than being listed separately.

[4]All have jurisdiction of misdemeanors except those in townships where municipal courts sit. Ark. Stat. Ann. § 22-709 (Repl. 1962) and §§ 43-1405, 43-1408 (Repl. 1964); *Logan* v. *Harris*, 213 Ark. 37, 210 S. W. 2d 301 (1948).

[5]This is indicated by records in the office of the clerk of this court of current licenses to practice.

It has also been held that constitutional rights are not invaded in misdemeanor cases in which counsel is not appointed for indigent defendants, even though otherwise required, where the defendant has a right to trial de novo on appeal where he is represented by counsel. *Doss* v. *State of North Carolina,* 252 F. Supp. 298. In the case at bar, appellant was provided that right. Ark. Stat. Ann. § 26-1308 (Repl. 1962); § 19-1204 (Repl. 1956); § 44-509 (Repl. 1964). Appellant took appropriate steps to avail himself of this right and was represented by counsel. By his failure to make timely appearance in the circuit court, however, he forfeited this right. The cases stood for trial at any time after the transcripts were filed in the circuit court. Ark. Stat. Ann. § 44-506 (Repl. 1964). Upon his failure to appear when the case was set for trial, the circuit court was authorized to affirm in the absence of good cause shown. Ark. Stat. Ann. § 44-507 (Repl. 1964). Appellant does not really question this, but contends that his constitutional rights under the Sixth and Fourteenth Amendments were also violated because he was not granted a continuance. At any rate, if appellant did appear in court on the date set (as advised to do by his attorney) and was only a few minutes late, as he contends, there is nothing in the record to indicate that he made his presence known to the trial court.

Appellant's request for a continuance was made to the prosecuting attorney, not the court. This being so, appellant has no standing to complain. Be that as it may, the excuse given for the requested continuance is not ground for reversal. The granting or refusal of a continuance is within the sound discretion of the trial court and reversal is not authorized unless the trial court abused its discretion. *Jackson* v. *State,* 54 Ark. 243, 15 S. W. 607; *Perez* v. *State,* 236 Ark. 921, 370 S. W. 2d 613. Appellant says the continuance should have been granted because his attorney had what the latter considered a more important case set for trial in Camden on the same day. It has been held that the failure to grant

a continuance on this account is not an abuse of discretion. The following language of *Brickey* v. *State*, 148 Ark. 595, 231 S. W. 549, is applicable here:

> "* * * Counsel who are employed to represent clients having cases pending in courts must so arrange their business as to be able to appear to represent their clients when those cases are called for trial. The business of the courts cannot be controlled, interrupted, or made to conform to the business interests of attorneys. The fact that an attorney may have cases for clients pending in different courts whose terms convene at the same time, and which condition may render it impossible for the attorney to be in attendance at one of the courts, is no imperative reason for the continuance of the causes in which he is employed in the court which he does not attend. These are matters addressed to the sound discretion of the presiding judge of the court, who must conduct the public business entrusted to him in a manner most conducive to the interests of the public whom he serves. It is never an abuse of discretion for the court to refuse to grant a continuance in a cause on account of the absence of employed counsel, unless such counsel is absent by reason of sickness or some other unavoidable casualty. The absence of an attorney from a court where causes are pending in which he is employed as counsel because of causes pending in other courts in which he is also employed as counsel is not an unavoidable casualty."

Appellant's remaining point for reversal is that he was denied due process of law in violation of Article II, Section 8 of the Arkansas Constitution and the Fourteenth Amendment to the United States Constitution, contending that the Mayor of Gould, being interested in the maintenance of the city treasury into which fines were paid, could not give him a fair trial. As a further basis he contends that the Mayor had an interest in

avoiding demonstrations which might tend to excite the inhabitants of the city or disrupt the public peace. Nothing in the record shows that any such demonstration was involved, contemplated or feared by anyone. While we find no merit in either contention, this question was first raised on appeal, not having been incorporated into the motion for new trial. This question, then, cannot properly be considered on this appeal. *Randall* v. *State,* 239 Ark. 312, 389 S. W. 2d 229; *Clayton* v. *State,* 191 Ark. 1070, 89 S. W. 2d 732; *Fain* v. *State,* 189 Ark. 474, 74 S. W. 2d 248. Here again, however, the alleged prejudice would have been unimportant if appellant had availed himself of a trial de novo.

The judgments are affirmed.

MRS. FRED PLANQUE ET AL *v.* CITY OF EUREKA SPRINGS, ARKANSAS

5-4299 419 S. W. 2d 788

Opinion delivered October 30, 1967

W. D. Anglin, for appellants.

Oliver L. Adams Jr. and *James E. Coates*, for appellee.

J. Fred Jones, Justice. This appeal is from a judgment of the Carroll County Circuit Court, Western District, upholding the annexation of certain territory consisting of some 715 acres, known as Stadium Addition, by the City of Eureka Springs. The annexation was carried out under the provisions of Ark. Stat. Ann. § 19-307 (Repl. 1956), which is Act Mar. 9, 1875, No. 1 § 84, p. 1. The city council of Eureka Springs submitted the question of annexation to the qualified electors, a majority voted in favor of annexation and a petition was presented to the county court as provided in § 19-307. Eight individuals and three married couples, who owned property within the territory involved, and who are the appellants here, opposed the petition in county court and after hearing thereon, the petition for annexation was granted and an order of annexation was entered by the county judge. The remonstrants appealed to the circuit court where a jury was waived and the case was tried before the circuit judge sitting as a jury. After hearing the evidence offered by the remonstrants, and after finding that a majority of the votes cast at the election was in favor of annexation and that the proposed territory was contiguous to the existing boundary of the City of Eureka Springs, the circuit court found "that the Remonstrants have failed to go forward with the burden of proof to show the invalidity of the order of the Carroll County Court," * * * and the petition of the remonstrants objecting to the an-

nexation order of the Carroll County Court was dismissed and the annexation was approved by the circuit court.

On appeal to this court appellants designate the following point for reversal:

> "The Court erred in directing a verdict for the petitioner and appellee, City of Eureka Springs, Arkansas, upon the grounds that the remonstrants and appellants failed to go forward with the burden of proof to show the invalidity of the order of the Carroll County Court, after the remonstrants and appellants had presented their proof of same."

At the outset we consider appellants' reference to "directing a verdict" to mean "rendering judgment" since a jury was waived in this case, and we consider the trial court's finding that the appellants failed to "*go forward* with the burden of proof" to mean "*sustain* the burden of proof," since appellants apparently did accept their burden of proof and did go forward in producing the testimony of three witnesses in support of their contention that the order of annexation should not have been made following the hearing in county court.

There have been few material legislative changes in our annexation laws since first enacted in 1875, and our case law has not deviated far from the guide lines laid down in the landmark case of *Vestal* v. *Little Rock,* 54 Ark. 321, 15 S. W. 891, decided by this court in 1891. In the Vestal case we said:

> "City limits may reasonably and properly be extended so as to take in contiguous lands, (1) when they are platted and held for sale or use as town lots, (2) whether platted or not, if they are held to be brought on the market and sold as town property when they reach a value corresponding with the views of the owner, (3) when they furnish the

abode for a densely-settled community, or represent the actual growth of the town beyond its legal boundary, (4) when they are needed for any proper town purpose, as for the extension of its streets, or sewer, gas or water system, or to supply places for the abode or business of its residents, or for the extension of needed police regulation, and (5) when they are valuable by reason of their adaptability for prospective town uses; but the mere fact that their value is enhanced by reason of their nearness to the corporation, would not give ground for their annexation, if it did not appear that such value was enhanced on account of their adaptability to town use."

Neither have we had occasion to deviate far from the additional principle announced in the *Vestal* case that:

". . . city limits should not be so extended as to take in contiguous lands, (1) when they are used only for purposes of agriculture or horticulture, and are valuable on account of such use, (2) when they are vacant and do not derive special value from their adaptability for city uses."

Following a favorable vote for annexation in a properly called and conducted election, the county court is bound to grant the petition praying for the annexation unless a complaint is filed against it, and the burden rests on those filing such complaint to show why the petition for annexation should not be granted.

In the early case of *Dodson* v. *Mayor and Town Council, Fort Smith,* 33 Ark. 508, this court said:

"By force of the statute the annexation follows the vote of the city, and the proper formal steps prescribed to be taken in the County Court, unless there be a complaint filed against it and sustained. The vote of the town makes a *prima facie* case as to

> the propriety of the annexation. The onus of showing cause against it sufficient to satisfy the judgment of the County Judge, was upon the remonstrants."

On appeal to the circuit court from an order of the county court in annexation cases, the circuit court tries the case *de novo* but the burden of proof in showing that the territory should not be annexed still rests on those opposing the annexation where a majority of the electors of the municipality have voted for annexation. *Marsh* v. *City of El Dorado,* 217 Ark. 838, 233 S. W. 2d 536.

In the case of *Garner* v. *Benson,* 224 Ark. 215, 272 S. W. 2d 442, this court said:

> "We have consistently held that the findings of the Circuit Court have the same weight and effect as the verdict of a jury and therefore we must affirm the Court's judgment if we find any substantial evidence to support it. We are not called upon to decide where the preponderance of the evidence lies. It is further well established that the vote of the town or city makes a prima facie case as to the propriety of the annexation. The burden of proof of showing cause against annexation rests upon those opposing it."

In the case of *Mann* v. *City of Hot Springs,* 234 Ark. 9, 350 S. W. 2d 317, one of the rules applicable to a case like this was stated as follows:

> "The vote of the electors of the City of Hot Springs made a *prima facie* case for annexation, and the burden was on the appellants, as the objectors, to defeat the *prima facie* case."

The parties stipulated that the plat presented at the trial in circuit court represented the territory involved and that a majority of the votes cast in the elec-

tion on the question was in favor of annexation. The trial court found from the plat before it that the 715 acres, more or less, in Stadium Addition was contiguous to the City of Eureka Springs and that a majority of the votes cast in the election was in favor of annexing this territory to the City of Eureka Springs.

So we now come to the only question actually before us on this appeal. Did the trial court err in holding that the appellants failed to sustain their burden of proof that the proposed territory should not be annexed?

The record does not reveal the number of property owners or people residing in the territory involved, and this is immaterial except possibly to show the density of population, but only three owners of approximately 33 acres of the area involved testified at the trial in circuit court. No professional or expert testimony was offered and none of the thirteen appellants testified except Burt Hull, V. E. Blanchard and George O'Connor.

Mr. Hull testified that he owns 21 acres, more or less, and that his land has small brush on it; that a ridge runs down south of his house where he raises good garden stuff; that it had watermelons on it when he bought it, and had a big potato patch the next year; that he has some pasture on it now where he keeps a horse and sometimes a few cows; that the land is agricultural in nature to a certain extent; that there are seven or eight houses within approximately one mile between his land and the city limits.

Mr. Hull's primary objection is to the building code and the revenue that would be derived from his land and spent by the city as it has been spending its revenues. He thinks the city has grown beyond its present boundary lines.

Mr. O'Connor owns about five acres bordering the present city limits. He has observed livestock in the entire area, but not in great numbers. This witness has

city water to his place, but no streets. He put in the water line and pays double the regular water rate. Mr. O'Connor has some pasture, a junk yard, a filling station and his home on his land. He has not used his pasture in two years. Two highways wind through the area and streets lead off going into town.

Mr. Blanchard owns about seven acres about one-half mile from the present city limits. The gist of his testimony is that he purchased the property for a retirement home and keeps farming equipment on it. He understands that the city wants to annex the property for an industrial site and he doesn't believe there is enough labor available to run an industry. He testified that the city has grown beyond its boundaries but doesn't need his property.

The entire evidence offered by the appellants consisted of the testimony of these three appellants, and the substance of their testimony was directed primarily to the personal inconveniences, lack of benefits and higher taxes they anticipate from annexation.

Mr. O'Connor testified:

> "Another of my objections to being annexed is that the people out there are people who have paid their bills and paid them on time and they don't give rubber checks. Neither is there any of them out there to my knowledge that have been picked up for drunkenness. So, I don't have any particular desire to break into town."

This court has held that the desires of the residents in the territory to be annexed are not a determinative point. *Mann* v. *City of Hot Springs, supra.* In the Mann case attention is also directed to an annotation in 62 C.J.S. 129 "Municipal Corporations" § 44, with cases there holding that "Neither is it a valid excuse for refusing annexation of territory that the taxes in such territory will be increased."

The rule announced in the case of *Dodson* v. *Mayor and Town Council, Fort Smith, supra,* as applicable to the case here. By force of the statute the annexation followed the vote of the City of Eureka Springs. The vote of the City made a *prima facie* case as to the propriety of the annexation, and the burden of producing sufficient competent evidence to overcome the *prima facie* case as to the propriety of the annexation was on the appellants, and we conclude that the trial court did not err in holding that appellants failed in their discharge of that burden. The judgment of the trial court is affirmed.

Affirmed.

J. T. SUMMERS ET AL *v.* DON HOOK ET AL

5-4321 419 S. W. 2d 810

Opinion delivered October 30, 1967

Howell, Price & Worsham, for appellants.

Henry Spitzberg, W. S. Miller **and** ***DeMatt Henderson,*** for appellees.

J. Fred Jones, Justice. This is an appeal from a decree of the Pulaski County Chancery Court, Third Division, dismissing a complaint filed by the appellants to void a resolution adopted by the Arkansas Baptist State Convention. Arkansas Baptist State Convention and Arkansas Baptist Medical Center, formerly Baptist State Hospital, are separate corporate entities. It was the intent of the resolution complained of to release from control of the Convention the trusteeship of the Arkansas Baptist Medical Center, and to sever all connections between the Convention and the Center. The complaint alleges that the resolution violated Article VII of the Constitution of the Convention and was void. The complainants also sought to enjoin the officers of both corporations from acting under the resolution.

The chancellor, in the trial of the case, was called on to interpret Article VII of the Constitution of the Convention, and to determine whether or not the resolution was legally effective under the Constitution. We try chancery cases *de novo* from the record on appeal, but affirm the chancellor's findings if not clearly against the preponderance of the evidence and we find no abuse of the chancellor's discretion.

The plaintiffs in the chancery action and appellants

here, are pastors of Baptist Churches and are members of, or messengers to, the Arkansas Baptist State Convention. Some of the defendants in the chancery action, and appellees here, are officers and directors of the Arkansas Baptist State Convention, and some are officers and directors of the Arkansas Baptist Medical Center.

Article VII of the Convention's Constitution provides as follows:

> "The Convention shall elect trustees to manage and to operate its colleges, hospitals, orphanages and any other institutions it may possess, as follows: Section 1. Ouachita Baptist University, 24; Arkansas Baptist Medical Center, 18; Arkansas Baptist Home for Children, 18; Baptist Memorial Hospital, 9."

On November 7, 1966, the Convention, in regular business session, adopted by *majority vote* the resolution complained of, containing the following provision:

> "I That Baptist State Convention of Arkansas hereby does declare that Arkansas Baptist Medical Center henceforth is, and forever shall be, a body corporate independent of this Convention, solely under the control of its Board of Trustees and membership, fully discharged of responsibility to or control of this Convention."

Appellants contend that the chancellor erred in dismissing their complaint, and on appeal to this court rely on one point as follows:

> "The resolution passed by the Arkansas Baptist State Convention on November 7, 1966, which would terminate the Convention's right to direct the trusteeship of the Arkansas Baptist Medical Center is void in that it conflicts with Article VII of the Constitution of the Arkansas Baptist State Conven-

tion, said Article VII not being amended by the resolution."

Appellants earnestly contended in the trial court, and still contend here, that the resolution complained of was in violation of Article VII of the Convention, and that the resolution could not be legally effective without amending the Constitution; that the resolution, as adopted, did in effect attempt to amend the Constitution; that it was adopted by a mere majority vote and that under Article X of the Constitution it can only be amended by "two-thirds of the members voting concurring in the measure."

On the other hand the appellees contend that Article VII only applies to hospitals and other institutions actually *owned* and operated by the Convention; that Arkansas Baptist Medical Center is a separate corporate entity owning its own property and conducting its own corporate affairs, completely divorced from any *legal right* of control or interference in its affairs by the Convention; that the resolution was not in violation of Article VII, did not require an amendment to the Constitution to be binding, and the vote by which it was adopted only required a majority vote as any other business resolution, and not a two-thirds vote as required to amend the Constitution.

It is true that Section I of Article VII of the Constitution of the Convention lists Arkansas Baptist Medical Center among *its* institutions *possessed* by it. As we see it, the validity of the vote by which the resolution was adopted turns on the fact question of whether or not the Arkansas Baptist Medical Center was the Convention's hospital or institution possessed by the Convention. In arriving at an answer to this question, it is necessary to trace some of the history of the hospital as related to the Convention.

By a resolution adopted in 1919, the Convention resolved to immediately undertake the launching and

putting into operation a modern hospital. This resolution provided for the appointment of a seven member Hospital Commission to carry out the will of the Convention in launching and putting into operation the hospital and provided that the Hospital Commission:

> ". . . be empowered with authority to take out charter, and take all necessary steps incident to establishing this hospital work; and that the State Board be instructed to cooperate with the *Special Hospital Commission* in financing and otherwise carrying out the will of the Convention." (Emphasis ours.)

The following year, in 1920, another resolution was adopted by the Convention under which the membership on the Hospital Commission was raised from seven to nine members, and this resolution provided:

> ". . . all nine of such members shall be elected at this session; that three of such members shall serve for one year, three for two years, and three for three years. 'That five members of said Commission shall be from Little Rock, Arkansas, and at least one shall be appointed from each locality where the Commission may have a hospital.' "

In January 1921, nine individuals executed articles of incorporation for a corporation named "Baptist State Hospital," the fifth, sixth and seventh articles being as follows:

> "FIFTH—The affairs and business of the corporation shall be conducted and controlled by a Commission or Board of Directors consisting of nine members. Said Commission or Board of Directors shall elect one of its members as President, and one of its members as Vice-President, and shall also elect from its members a secretary and treasurer.
>
> "SIXTH—The *corporators* shall be and constitute

the Commission or Board of Directors, and shall serve during their term of office for which they *were* appointed by the Arkansas Baptist State Convention.

"SEVENTH—The Commission or Board of Directors are empowered to ordain and establish all by-laws and regulations necessary to the management and business of said corporation, and alter and repeal the same at pleasure." (Emphasis ours.)

In 1937, under authority of resolutions adopted by the Convention and in consideration of the payment by the hospital of $150,000.00, or so much thereof as necessary to liquidate the indebtedness of the Convention, and especially the bonded indebtedness, the Executive Board of the Convention executed and delivered to the Hospital a warranty deed transferring all of Block 4, Centennial Addition of Little Rock, to Baptist State Hospital and its successors and assigns forever. Following this transaction there is nothing further in the record, except testimony hereinafter referred to, showing any connection at all between the Baptist State Convention and the Hospital or Medical Center.

The record does show, however, that in 1948, and again in 1965, Baptist State Hospital, by resolution of its own Board of Trustees, amended its own charter and articles of association, and by appropriate court orders changed its corporate name, finally becoming "Arkansas Baptist Medical Center."

After the execution and delivery of the deed from the Convention to the Hospital in 1937, the Hospital acquired other real estate by purchase from various individuals, taking title by deed from the various grantors to the Hospital in its own corporate name as a non-profit corporation, and to its successors and assigns forever. There is nothing in the record to indicate that the Convention has ever owned or claimed legal title in any of the properties owned or used by the hospital

since the Convention sold and transferred to the Hospital all of Block 4, Centennial Addition, in 1937. It is rather clear under the seventh article of the Hospital Articles of Incorporation, that it was intended that the Commission or Board of Directors of the Hospital Corporation was to manage and conduct the business of that corporation.

The Convention has been contributing from $75,000.00 to $100,000.00 annually to the operating expenses of the Medical Center and from the testimony at the trial before the chancellor, it would appear that the Convention has continued to name trustees for the Hospital Corporation from its inception, and has from time to time adopted resolutions authorizing the Hospital Corporation to borrow money and purchase land. Apparently this procedure was continued under the Fifth Article of the incorporation in which it was provided that "the *corporators* shall be and constitute the Commission or Board of Directors, and shall serve during their terms of office for which they were appointed by the Arkansas Baptist State Convention."

The appointments of the *corporators* as Commissioners or a Board of Directors under this Fifth Article was made some forty-six years ago and, of course, the terms of office for which they were appointed have long since expired. The Baptist State Hospital Corporation came into existence full grown, with all the incidental rights to sue and be sued, ordain and establish its own by-laws and regulations necessary to the management of its own business, and to alter and repeal the same at pleasure. The Hospital Corporation has twice amended its own articles of incorporation.

If the Convention has continued to name directors to fill vacancies on the Hospital Board of Directors, and has exercised any control over the Hospital Corporation's Board of Directors in the conduct of the affairs of that corporation, we are of the opinion that such control has been exercised by the Convention un-

der a right by sufferance rather than under any legal right reserved or granted in the articles of incorporation, and that the decree of the chancellor is not against the preponderance of the evidence in this case and should be affirmed.

Affirmed.

HARRIS, C. J., not participating.

ANDREW JACKSON ROWE *v.* STATE OF ARKANSAS

5303 419 S. W. 2d 806

Opinion delivered October 30, 1967

Phillip D. Hout, for appellant.

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

CONLEY BYRD, Justice. This is a proceeding under Criminal Procedure Rule No. 1, 239 Ark. 850a. Appellant's conviction, resulting in consecutive sentences of 21 years for robbery and 7 years for burglary, was originally affirmed by this court in 1955. See *Rowe* v. *State,*

224 Ark. 671, 275 S. W. 2d 887 (1955). In this post-conviction procedure appellant offered no additional proof, but relied on the record previously made. For reversal of the trial court's order refusing him any relief, he relies on the following points.

I. The petition for writ of habeas corpus should have been granted because, in the original trial, the court erroneously permitted the state to introduce evidence of appellant's previous convictions in the state's case in chief.

II. The petition for writ of habeas corpus should have been granted because the penitentiary commitment does not specify which of appellant's consecutive sentences is to run first.

I

Appellant contends that we should give retroactive effect to our decision in *Miller* v. *State,* 239 Ark. 836, 394 S. W. 2d 601 (1965). In *Miller,* reversing our former procedure, we held that the prosecuting attorney could not, on a trial of the primary charge, inform the jury of prior convictions for purposes of invoking the additional penalties of the habitual criminal statute, Ark. Stat. Ann. § 43-2328 (Repl. 1964). This holding has been applied retroactively to cases then in the ordinary appellate process. *Russell* v. *State,* 240 Ark. 97, 398 S. W. 2d 213 (1966); *Francis* v. *City of Benton,* 240 Ark. 738, 401 S. W. 2d 729 (1966). However, we do not feel that we should apply it retroactively to cases finally adjudicated and in which the appellate process has been completed. Other courts with the same problem have arrived at similar conclusions. *Linkletter* v. *Walker,* 381 U. S. 618 (1965); *Tehan* v. *Shott,* 382 U. S. 406 (1966).

The procedure under the habitual criminal statute is now controlled by Act 639 of 1967.

II.

We find appellant's second point to be without merit. The commitment originally issued by the trial court directed that appellant be ". . . delivered to the penitentiary authorities . . . and there confined at hard labor for the period of 21 years for robbery and 7 years for burglary, both sentences to run consecutively . . ." On this record we had no trouble on the original appeal in determining that the sentences were consecutive and that the 21-year sentence was to be served before the 7-year sentence. The determination of which sentence shall run first is a matter within the discretion of the trial court and we find no abuse of it in this case. Ark. Stat. Ann. §§ 43-2311-2312 (Repl. 1964).

Affirmed.

H. J. LEWIS ET UX *v.* JOHNNY CROCKETT

5-4276 420 S. W. 2d 89

Opinion delivered November 6, 1967

James R. Howard, for appellants.

Sam Laser, for appellee.

CARLETON HARRIS, Chief Justice. The question in this case is whether the Pulaski County Circuit Court (Third Division) committed error by giving an instruction to the jury on unavoidable accident. On January 25, 1963, in Little Rock, Mrs. Bessie Lewis, appellant herein,[1] was proceeding south on Mississippi Street, between 8:00 and 8:30 P.M., on her way home from a women's club meeting. A freezing rain had begun to fall, and the streets were becoming slick. When, according to her testimony, she reached the crest of a steep hill just north of the intersection of Mississippi and Gable, she stopped to try to determine whether the hill could be safely negotiated, and after watching other cars drive slowly down the hill without incident, proceeded to do likewise. After traveling approximately 100 yards, she was struck from the rear by an automobile driven by Johnny Crockett, appellee herein. Subsequently, appellant instituted suit, alleging personal injuries. On trial, the jury returned a verdict for Mr. Crockett, and from the judgment entered in accordance with the verdict, Mrs. Lewis brings this appeal. For reversal, only one point is relied upon, *viz.,* the lower court erred in giving appellee's requested instruction No. 1 (unavoidable accident) over the general and specific objections of the appellant.

[1]Both Mr. and Mrs. Lewis are appellants, but for convenience, we use the singular.

Mrs. Lewis testified that the Crockett car topped the hill (she could not see a set of headlights), and traveled toward her "very fast;" that she was moving slowly when the automobile struck the rear of her car. She said that appellee, when asked "why he was coming at such a terrific rate of speed," replied, "Well, I was going over 35 miles an hour when I hit you."

Crockett testified that his family had dinner with the family of Stanley Rushing at a restaurant, and then went to Rushing's home. The latter developed a bad headache, and appellee, accompanied by Rushing, went out to obtain aspirin. Appellee stated that as he started down the hill, he noticed a car stopped at the bottom; that he blinked his lights, and honked his horn, thinking that the car would move on. Crockett said that he tried to avoid hitting the Lewis automobile, but was unable to do so. He denied making the statement that he was traveling 35 miles per hour. Rushing testified that Crockett was not driving fast, though appellee admitted that the two of them engaged in a conversation with a man, who lived near the scene, relative to appellee's speed: "The gentleman came out of the house and said he wanted to know why I was traveling fast and I told him I wasn't and Mr. Rushing said we weren't traveling fast."

Over appellant's general and specific objections, the court gave appellee's requested instruction No. 1 (AMI 604) reading as follows:

"If you believe from the evidence that the occurrence was an unavoidable accident, that is, one which was not proximately caused by negligence of any party in this case, then no one is entitled to recover."

The sole question on this appeal is whether the giving of this instruction constituted reversible error. We hold that the answer is, "Yes." The controlling case on this point is *Houston* v. *Adams,* 239 Ark. 346, 389 S. W. 2d 872. This opinion was rendered on April 26, 1965,

and three subsequent cases reiterate the rule announced in *Houston.*[2] First, let it be said that we have held that a collision is the result of an unavoidable accident if it is not attributable to negligence on the part of either party. *Houston* v. *Adams, supra,* and cases cited therein. The discussion in *Houston* is apropos in the present case There we said:

"In the past decade several courts have re-examined the suitability of this instruction in negligence cases. In the leading case, *Butigan* v. *Yellow Cab Co.,* 49 Cal. 2d 652, 320 P. 2d 500, 65 A.L.R. 2d 1, the Supreme Court of California overruled an earlier decision and held that the issue of unavoidable accident should not be submitted to the jury in any case (except when a definition of the term may be required by statute). From the opinion: 'The so-called defense of inevitable accident is nothing more than a denial by the defendant of negligence, or a contention that his negligence, if any, was not the proximate cause of the injury . . . Since the ordinary instructions on negligence and proximate cause sufficiently show that the plaintiff must sustain his burden of proof on these issues in order to recover, the instruction on unavoidable accident serves no useful purpose.

* * *

" 'The instruction is not only unnecessary, but it is also confusing. When the jurors are told that "in law we recognize what is termed an unavoidable or inevitable accident" they may get the impression that unavoidability is an issue to be decided and that, if proved, it constitutes a separate ground of nonliability of the defendant. Thus they may be misled as to the proper manner of determining liability, that is, solely on the basis of negligence and proximate causation.'

* * * *

[2]*Burton* v. *Bingham,* 239 Ark. 436, 389 S. W. 2d 876, *Rhoden, Admr.* v. *Lovelady,* 239 Ark. 1015, 395 S. W. 2d 756, *Oklahoma Tire and Supply* v. *Bass,* 240 Ark. 496, 401 S. W. 2d 35.

"We are of the opinion that in a typical negligence case the position taken by the California court is right. In such a case the plea of unavoidable accident is in fact nothing more than an assertion that the defendant was not guilty of actionable negligence. That defense should be submitted to the jury in terms of negligence and proximate causation. For the court to submit also an issue of unavoidable accident is, as the Butigan opinion pointed out, to suggest that unavoidability is a separate defense, requiring separate consideration by the jury."

Appellee argues that *Houston* is not controlling here, since the facts are entirely dissimilar; that the instant litigation is controlled by *Industrial Farm Home Gas Company* v. *McDonald,* 234 Ark. 744, 355 S. W. 2d 174. The latter case was decided in March, 1962. The only similarity in the case before us and *Industrial Farm* is that the roadway was slick with ice, but other facts are entirely different. In *Industrial Farm,* both operators were admittedly driving slowly, and were only about 25 feet apart when they observed each other. Neither could have observed the other earlier. More than that, the testimony of both drivers was to the effect that the accident was unavoidable. Here, as already indicated by the recital of the facts, this situation does not exist. There is a very definite contention on the part of appellant that appellee was negligent, and the mere fact that a street or road is slick, does not, within itself, raise the issue of unavoidable accident. After all, in holding that this instruction should not have been given, we are not taking away appellee's defense, for it is his contention that he was not negligent, and before he can be determined to be liable, a jury must find that he was negligent, and that such negligence was a proximate cause of the alleged injuries complained of.

Perhaps it should again be emphasized that, since *Houston* v. *Adams, supra,* we have held that an unavoidable accident instruction is only permissible in exceptional situations. In that case, we mentioned, as an ex-

ample of an unavoidable accident, a collision occurring because of a driver, with no previous coronary disease, losing control of his car as a result of a sudden heart attack. Accidents caused by an "Act of God" might well be included—but certainly, no such issue is presented here.

However, appellee contends, even if the instruction constituted error, it was harmless error. Appellee says:

"When all the instructions are considered together, including those set out above, it would seem most unlikely that the jury would believe that unavoidable accident, as innocuously defined in AMI 604, presented a separate issue in addition to negligence and proximate causation."

This could be true, but, as pointed out in *Oklahoma Tire and Supply* v. *Bass, supra,* we do not know how the jury reached its verdict. As in that case, the verdict was general, and the jury might well have taken the unavoidable accident instruction as the basis of its finding.

In line with the cases cited, the judgment is reversed, and the cause remanded to the Pulaski County Circuit Court.

FOGLEMAN, J., dissents.

JONES, J., not participating.

JOHN A. FOGLEMAN, Justice, dissenting. I respectfully dissent. Even if the instruction given were erroneous, I cannot see how it could possibly have been prejudicial. Appellee pleaded unavoidable accident as a defense. Each party alleged that the other was negligent in the operation of his automobile under the highway conditions. It is possible that the jury might have found that neither was guilty of negligence under the circumstances. If the jury could so find, then this was an un-

avoidable accident as defined by the instruction. The instruction is a correct statement of law and under these circumstances was not abstract. Thus, I cannot see where it did any harm.

MAX MEHLBURGER ET UX *v.* CHARLES W. NORWOOD ET AL

5-4244 420 S. W. 2d 81

Opinion delivered November 6, 1967

Boyce R. Love, for appellants.

Christopher Mercer Jr. and *John P. Gill* and *Isaac A. Scott,* for appellees.

GEORGE ROSE SMITH, Justice. This litigation began as a suit brought by the Mehlburgers to enjoin their downstream neighbor, Charles W. Norwood, from cutting timber upon a 100-acre tract of riparian land that was concededly formed by the Arkansas River as an accretion. Norwood, and later on his downstream neighbor, McAninch, contested the Mehlburgers' assertion of exclusive ownership of the disputed tract, their contention being that the tract in controversy came into exist-

ence as an accretion to all three riparian ownerships. The trial court upheld the defendants' position and divided the accretion among the three sets of litigants in accordance with the rules governing the apportionment of such lands. As we view the case, the basic question for the chancellor was a narrow issue of fact. We affirm his decision.

The record is voluminous, but we may avoid a wealth of needless detail and put the fundamental issue in focus by comparing the shoreline as it existed immediately after the disastrous Arkansas River flood of 1927 with the shoreline as it existed when this suit was filed in 1963.

The 1927 deluge swept away a substantial amount of soil and left on the west bank of the Arkansas River as riparian land, the tracts later acquired by the Mehlburgers, the Norwoods, and the McAninches. The Mehlburger tract was upstream, to the north, the Norwood tract was in the middle, and the McAninch tract was downstream, to the south. The boundary between the Mehlburger tract and the Norwood tract was the Maumelle River (or Creek), which emptied into the Arkansas at that point. All three tracts, as we have indicated, were bounded on the east by the Arkansas River.

In 1963 (and for some years earlier) the Mehlburger tract was the only one of the three that still touched the Arkansas River. A long narrow peninsula—the land now in dispute—had formed by accretion and extended downstream from the Mehlburger tract for a distance of a mile or more along the Arkansas River. That peninsula was separated from the Norwood and McAninch lands by the Maumelle River, which now ran southward in front of the Norwood-McAninch tracts and emptied into the Arkansas at a point far downstream from what had been its mouth in 1927.

The pivotal issue below was how that change in the shoreline, and in the channel of the Maumelle, came

about. The Mehlburgers contend that the peninsula gradually formed as an accretion attached only to their tract and extended slowly southward, forcing the channel of the Maumelle to bend to its right so that that stream continuously separated the growing peninsula from the Norwood-McAninch properties.

The appellees contend, and the chancellor found, that the accretion began to form against the appellees' land on the mainland, south of the mouth of the Maumelle as it existed in 1927. After 1940 the Maumelle changed its course, not gradually but abruptly, cutting through the accretion so that accreted lands already attached to the Norwood-McAninch tracts were left on the east side of the Maumelle. If the appellees' version of the facts is correct they are entitled to prevail under our decisions in *Adkisson* v. *Starr,* 222 Ark. 331, 260 S. W. 2d 956 (1953), and *Dowdle* v. *Wheeler,* 76 Ark. 529, 89 S. W. 1002, 113 Am. St. Rep. 106 (1905). (We are not persuaded by the appellants' argument that the *Adkisson* and *Dowdle* cases may be distinguished on the ground that the Maumelle is a navigable stream, as the trial court found it to be. In our opinion the navigability of the Maumelle is immaterial.)

No useful result would be attained if we should try to recount all the testimony bearing upon what is basically an issue of fact. The conflicts in the evidence cannot be reconciled. We may say, however, that in weighing the proof we are especially impressed by the physical facts reflected by aerial photographs taken by the U. S. Corps of Engineers. The earliest picture, made in 1940, shows the Arkansas River flowing against the three rival tracts, much as it did after the 1927 flood. But a later photograph, taken in 1948, reveals unmistakably that a sandbar (which was the embryonic stage of the accretion now in controversy) had built up in front of the appellees' land and that the Maumelle River crossed the middle of that sandbar at right angles to the channel of the Arkansas River and emptied into that stream at a point far north of the mouth of the

Maumelle as it existed in 1963. Convincing proof such as this tips the balance in favor of the chancellor's decree.

Affirmed.

BYRD, J., disqualified.

ARKANSAS STATE HIGHWAY COMMISSION *v.* KATHERYN CHILDRESS DARLING ET AL

5-4303 420 S. W. 2d 94

Opinion delivered November 6, 1967

John R. Thompson, for appellant.

John Eldridge, for appellees.

PAUL WARD, Justice. This is a condemnation suit brought by the Arkansas State Highway Commission to procure three parcels of land to be used in the construction of U. S. Highway No. 64. Each parcel was a part of a larger acreage—each parcel owned by one or more heirs of E. F. Childress and wife, who are deceased.

The parcels of land mentioned in the complaint will, for clarity, be designated as follows:

Parcel (1.) 6.87 acres owned by Katherine Childress Darling and T. R. Childress, for which there was a deposit of $1,700 for compensation.

Parcel (2.) 5.38 acres owned by T. R. Childress et al, with a deposit of $1,500.

Parcel (3.) 0.76 acres owned by T. R. Childress and wife, with a deposit of $5,520.

In answer, appellees alleged the deposits were insufficient compensation for the lands taken and *the damages done to the remainder of the lands*, and accordingly prayed for judgment.

The trial resulted in a judgment against appellant (Commission) as follows: Parcel (1) $2,850; Parcel (2) $3,050, and, Parcel (3) $10,167.

On appeal appellant relies, for a reversal, on three separate points which we now examine.

One.

"The trial court erred in overruling appellant's motion to strike the value testimony of appellee, T. R. Childress, because he failed to state the market value of the whole tract before the taking and the market value of the remainder after the taking."

We are unable to agree with appellant's contention. According to appellant's own abstract of Childress' testimony he stated:

> "My house is 32 x 67, 2,080 square feet of livable area, three bedrooms and two bathrooms. At $12.50 a square foot the house would be worth $26,000.00 and my 480 square feet of carport at $5.00 a square foot would be $2,400.00 and I had to put in a water pump extra. The relocation of the highway has diminished the fair market value at least fifty percent, or $14,350.00."

On cross-examination Childress again testified to the same effect. This Court has many times approved this kind of testimony. For a recent case see *Herman B. Young et al* v. *Ark. State Highway Commission,* 242 Ark. 812, 415 S. W. 2d 575.

We have also many times held that the owner of property has the right to give his opinion as to the value of same.

Two.

> "The trial court erred in overruling appellant's motion to strike the value testimony of C. J. Peacock because he failed to state the market value of the whole tract before the taking and the market value of the remainder after the taking."

In our opinion the trial court was correct in refusing to strike the testimony of this witness. In essence, he testified: I have been actively engaged in farming for about ten years; I have bought and sold land in the vicinity of the lands here considered, and I am familiar with the fair market value of land of a similar type and character; I consider the fair market value of the house as about $12,000 and the shed at about $3,500, and I would value the house and ground after the highway was built as about $4,000 less.

It is apparent from the above abstract of Peacock's testimony that it does not conform strictly with the *before and after* formula, but we think it reaches the same result. In effect it says that the property was valued at not less than $15,500 *before the taking* and $11,500 after the highway was built, *i. e., after the taking*. The witness was cross-examined by appellant and if he didn't mean what we say he meant, then this fact could have been, but was not, revealed. We agree that some of Peacock's testimony was not entirely clear, but no objection was made on that ground. If *part* of his testimony was competent, and we so find, then a motion to strike *all* his testimony was properly denied. *Ark. State Highway Comm.* v. *Carpenter*, 237 Ark. 46, 371 S. W. 2d 535 and *Ark. State Highway Comm.* v. *Bowman*, 237 Ark. 51, 371 S. W. 2d 138.

Three.

> "The trial court erred in overruling appellant's motion to strike damages to the property assessed by C. V. Barnes for valuation based on trees and drainage impairment and attributed as severance damage, inasmuch as no special damages were set out in the pleadings of the appellee."

Again we are unable to agree with appellant's contention. The testimony given by Barnes was comprehensive and in detail—covering ten pages in appellant's abstract—and we deem it sufficient to make only brief references to it. He is a real estate expert, having engaged in making real estate appraisals for twenty years. He not only gave his opinion as to the before and after value of the property but explained the reasons therefor. He pointed out, as a result of the taking, certain damages, such as, drainage, damage to fences, houses, yard, cost of removing houses, removal of trees, etc.

Appellant moved to strike this kind of testimony on the ground that no such damages were pleaded. The trial court overruled the motion over objections. We agree with the trial court.

In appellant's abstract of appellees' answer it is stated that the court deposits were "insufficient for the property taken and the damages done to the *remainder of the lands. . .*" In appellees' Answer and Cross-Complaint (Tr. p. 16) it is alleged they ". . . should recover the sum of $2,500 for the value of the land and $3,000 for damages to the remainder of the tract" (referring to one parcel). The same allegations were made with reference to another tract.

Affirmed.

BROWN and FOGLEMAN, JJ., concur.

JOHN A. FOGLEMAN, Justice, concurring. I concur in the majority's result, but I reach it by approaches which would not result, even unintentionally, in erosive action on our "before and after" rule for testimony directed to the measure of compensation. I agree, however, that when a witness has shown sufficient knowledge to convince the trial judge that his opinion may be of value, he may state his opinion of the damages in a case such as this, when it is obvious that the opinion is based on the proper measure—*i. e.,* the difference between the value of the land before the taking and after. *St. L. I. M. & S. Ry. Co.* v. *Brooksher,* 86 Ark. 91, 109 S. W. 1169. This is not exactly what is involved in this case, in my opinion.

In addition to the testimony set out in the majority opinion, the landowner-witness did testify on cross-examination, after the motion to strike, that he valued his house at $28,700.00 before the taking and $14,350.00 after the taking. Even if it be urged that all his testimony as to values should have been stricken before this examination, certainly this testimony supplied any alleged deficiency so that his entire testimony as to values could not be stricken. Witness Childress not only testified as to the diminution of the value of his residence by reason of the taking, but he also testified as to "per acre" values of certain of the lands actually taken.

There is ample precedent in partial taking cases to permit a witness to testify about the value of things situated on the land taken and about other factors relating to the relative desirability of the remaining lands. This testimony is admissible, not as the measure of damages, but in order to show damage and to explain the elements that a seller or purchaser, either before or after the taking, would consider in arriving at the market value. *Arkansas State Highway Comm.* v. *Hood,* 237 Ark. 202, 372 S. W. 2d 387; *Kirk* v. *Pulaski Road Improvement District No.* 10, 172 Ark. 1031, 291 S. W. 793.

Generally speaking, a landowner, as an aid to the jury in arriving at just compensation, may show anything that a buyer of ordinary prudence would consider before he would purchase or that a seller would weigh either before or after the taking. *Little Rock Junction Railway Co.* v. *Woodruff,* 49 Ark. 381, 5 S. W. 792; *Yonts* v. *Public Service Co.,* 179 Ark. 695, 17 S. W. 2d 886; *Pulaski County* v. *Horton,* 224 Ark. 864, 276 S. W. 2d 706; *Arkansas State Highway Commission* v. *Carpenter,* 237 Ark. 46, 371 S. W. 2d 535. For example, rental income or value may be shown. *Desha* v. *Independence County Bridge Dist. No.* 1, 176 Ark. 253, 3 S. W. 2d 969; *Housing Authority* v. *Winston,* 226 Ark. 1037, 295 S. W. 2d 621; *Springfield* v. *Housing Authority,* 227 Ark. 1023, 304 S. W. 2d 938. Other examples are: Cost of restoration of a retaining wall or relocation, reconstruction or reproduction of a building (*Kirk* v. *Pulaski Road Improvement District No.* 10, 172 Ark. 1031, 291 S. W. 793; *City of Little Rock* v. *Sawyer,* 228 Ark. 516, 309 S. W. 2d 30; *Arkansas State Highway Commission* v. *Bryant,* 233 Ark. 841, 349 S. W. 2d 349); Cost of construction of a road connecting the remaining parts of the land taken (*Arkansas State Highway Commission* v. *Speck,* 230 Ark. 712, 324 S. W. 2d 796); moving costs (*Arkansas State Highway Commission* v. *Jackson County Gin Co.,* 237 Ark. 761, 376 S. W. 2d 553); cost of replacing fence, replacement of shrubs and flowers, moving a house back from a right-of-way line, replumbing, rewiring and loss of trees (*Arkansas State*

Highway Commission v. *Carpenter,* 237 Ark. 46, 371 S. W. 2d 535); value of buildings which enhance the market value of the property (*Arkansas State Highway Commission* v. *Griffin,* 241 Ark. 862, 411 S. W. 2d 495).

Furthermore, it has been said that evidence should be directed first to the value of the land taken, and then to damages resulting to the remainder. *Springfield & Memphis Railway Co.* v. *Rhea,* 44 Ark. 258. This procedure is particularly applicable where there is no contention that the remaining property is benefited by the improvement.

The motion was to strike all the values testified to by the witness. His testimony as to the depreciation in value of the house, and as to the values of certain of the lands taken and as to some of the remaining lands affected by the taking, was admissible as hereinabove noted. It was not error to refuse to strike *all* his testimony.

Under the rules above set out, about the same comments can be made on the testimony of Peacock. He definitely stated that the Darling land was worth in excess of $500.00 per acre and the Childress land $500.00 per acre before the highway was built; that the two acres on which the Childress house was situated were worth $2,000.00, the house $12,000.00, a shed $3,500.00; and that the value of the Childress house and grounds was off $4,000.00 after the highway was built. These are certainly elements to show that the property was damaged.

I think there was no error in the court's refusal to strike the testimony of C. V. Barnes because of testimony as to damages resulting from drainage impairment and loss of trees. Lack of trees and poor drainage are certainly items which any purchaser who sought to buy the remainder would consider. The loss of the trees and the impairment of drainage would certainly be kept in mind by a seller.

It was said in *Springfield & Memphis Railway Co.* v. *Rhea,* 44 Ark. 258, that, where the construction has been completed, the court and jury may properly consider evidence of permanent injury to the land by a substituted drainage system that was insufficient. The contention there made was that this element should have been the subject of a separate action. The court's holding was to the effect that, after construction, the jury may consider the state of facts then existing in determining what damage had been done, embracing all past, present and future damage which the improvement may reasonably produce. It has further been held that under these circumstances impoundment of water as a result of the completed construction, properly or improperly done, may be shown to the jury as an element of damages, as against an objection that such constitutes an element of special damages. *Arkansas Cent. R. Co.* v. *Smith,* 71 Ark. 189, 71 S. W. 947. Loss of trees has been held to be a proper factor to consider in arriving at the before and after value. *Arkansas State Highway Commission* v. *Carpenter,* 237 Ark. 46, 371 S. W. 2d 535. Appellant contends that this latter item should be excluded since it was not specifically pleaded. The statement in *Bradley* v. *Keith,* 229 Ark. 326, 315 S. W. 2d 13, with reference to pleading damages as to lands remaining (probably dictum) is not applicable. Here, Barnes identified the trees as being in the area *taken,* on both direct and cross-examination. Certainly it was proper that appellant's counsel ask, as he did, the basis for the witness's testimony and the elements of damage he considered. The answers could not be calculated to have misled the jury as to the measure of damages. He had already given his valuation of the property before and after the taking.

BROWN, J., joins in this concurrence.

DEAN E. BDOWNING ET UX *v.* SYLVESTER HICKS ET AL

5-4327 420 S. W. 2d 545

Opinion delivered November 6, 1967
[Rehearing denied December 4, 1967.]

F. C. Crow, for appellants.

Graves & Graves, for appellees.

PAUL WARD, Justice. This is a suit in ejectment to obtain possession of a part of Lot 1, Block 1, London's Addition No. 1, to the City of Hope. The litigation arose in the manner presently summarized.

One J. J. Moore acquired title to the said Lot in 1941, and immediately took possession. In 1947 he conveyed the south seventy feet of the Lot to one Mabel Washington. Moore failed to pay taxes on his part of the Lot in 1960, and it was conveyed to the State in November, 1961. On February 11, 1964 the state deeded the forfeited parcel to the Southwest Land and Development Company. (Note that the description in this deed reads: "Part of Lot 1 of Block. . ."). On May 12, 1966 the land company (by accurate description) conveyed the land to Dean E. Browning and wife, who are the appellants here. Appellants never took actual possession of the property on which there was a house.

Appellants filed a complaint in circuit court containing, in substance, the following material allegations: (a) The facts set out above; (b) The property is occupied by Sylvester Hicks and his wife, and his parents, who are appellees herein; (c) Appellees are trespassers, and they have refused to surrender possession; (d) A search of the records fails to show appellees have any interest in said property, and they have not paid taxes thereon.

The prayer was; for possession of Lot 1, less the south seventy feet; for eviction of appellees, and; to have title quieted in the plaintiffs (appellants).

To the above complaint appellees filed a Demurrer and a Motion for Summary Judgment. The trial court sustained the Demurrer and also granted the Motion, stating:

> "Plaintiffs are basing their claim on a tax forfeiture and deed from the State of Arkansas to Southwestern Land and Development Company, which are both void because the lands described by a 'part' description . . . . it is undisputed that the plaintiff's alleged title is based on this void tax forfeiture and sale and that is the only real issue in the case. . ."

It is our conclusion that the trial court was correct in his analysis of the case, and must be affirmed.

Appellants do not contend that the trial court misstated any material fact or that there are any disputed material facts in this case. Therefore the Motion for a Summary Judgment was proper, there being only a question of law for the trial court to decide. See Ark. Stat. § 29-211 (c) (Repl. 1962) and *Trinity Universal Ins. Co.* v. *Robinson,* 227 Ark. 482, 299 S. W. 2d 833.

There are numerous decisions of this Court holding a "part" description or an indefinite description con-

veys no title. See: *Price* v. *Price,* 207 Ark. 804, 182 S. W. 2d 879: *Clem* v. *Missouri Pacific Rd. Co.,* 223 Ark. 887 (p. 888), 269 S. W. 2d 306; *Teer* v. *Plant,* 238 Ark. 92, 378 S. W. 2d 663, and; *Thomason* v. *Abbott,* 217 Ark. 281, 229 S. W. 2d 660. In the last cited case we said that an indefinite description would not support an action in ejectment or quiet title.

It is of no avail to appellants to show that the deed they received from the Land Company contained a definite description, since the deed to the Land Company was void by reason of the indefinite description. *American Portland Cement Company* v. *Certain Lands,* 179 Ark. 553, 17 S. W. 2d 281.

Affirmed.

BROWN, J., not participating.

CLARENCE E. ROUSE *v.* JAMES N. WESTON ET AL

5-4320 420 S. W. 2d 83

Opinion delivered November 6, 1967

W. B. Howard, for appellant.

Barrett, Wheatley, Smith & Deacon, for appellees.

LYLE BROWN, Justice. Appellant Rouse was the plaintiff below. His action against Weston and Chadwick arose out of a minor automobile collision in which vehicular damages resulted. Before filing suit, plaintiff gave notice to the defendants in accordance with the Small Property Damage Claims Act 283 of 1957. Ark. Stat. Ann. § 75-918 (Repl. 1957). Plaintiff's notice, as well as his complaint, alleged damages to be $200.

At the trial plaintiff introduced two estimates of repairs to support his prayer for damages. Those estimates slightly exceeded $200. That was all the evidence offered to prove damages. At the conclusion of plaintiff's testimony the trial court deleted from plaintiff's complaint the pleas for double damages and attorney's fee. Under an instruction which limited Rouse's recovery to a maximum of $200, the jury returned a verdict for that amount.

Plaintiff-appellant asks us to approve the jury verdict and to direct the trial court to enter a verdict for double damages and attorney's fee.

The court's action in striking the prayer for double damages and attorney's fee was error. Apparently that

action was taken on the theory that the estimates exceeded $200; therefore, so the court reasoned, the damages exceeded $200. The estimates are merely evidence to be considered in determining the fair market value of the automobile before and after the accident. Jurors are permitted to examine the estimates; they are allowed to take into consideration their own common knowledge. Utilizing those factors the jury may well have concluded that the fair market value of the car should be upgraded or downgraded from the estimates. It is common knowledge that repairs will ofttimes not fully restore an automobile substantially damaged. On the other hand, it is similarly true that an old automobile, moderately damaged, could be a better car with new parts.

First, appellant asks this court to hold that a claimant can reduce his claim and bring himself within the cited small claims act. This Act imposes double damages and attorney's fee on a defendant, who, "without meritorious defense," fails to pay the damages when they are $200 or less. The tenor of the statute is penal in nature and the title of Act 283 removes any doubt as to the intent of the Legislature to treat the provisions as penal. The title specifies the purpose of the Act is to provide a penalty for failure to pay small property damage claims. The title of an act may be looked to, in event of doubt, to shed light on legislative intent *Warfield* v. *Chotard,* 202 Ark. 837, 153 S. W. 2d 168 (1941).

It is well settled that penal statutes should be strictly construed. We are bound by the legislative declaration that the Act is restricted to those cases whose "loss or damage occurs . . . amounting to two hundred ($200.00) dollars or less . . ." We are not permitted to apply the penalty in a case where the damages exceed the ceiling fixed by the Legislature.

Second, we are asked to direct the trial court to enter a judgment for $400 and attorney's fee. That we cannot do, because it would have to be predicated upon

a finding that has not yet been determined, namely, that the actual damages were $200 or less. The jury was specifically told that any recovery by Rouse should be limited to $200; additionally, the jury was instructed to reduce any award to Rouse in proportion to any negligence on his part. The case was submitted on general verdicts and Rouse's award was fixed at $200. It is impossible to tell whether (1) the jury thought Rouse was damaged more than $200 but reduced the verdict to the maximum fixed by the court, or (2) whether Rouse was found to have been damaged more than that amount but his negligence caused a reduction, or (3) whether the verdict represents the exact amount of full damages.

For the error indicated with respect to the striking of the prayer for double damages and attorney's fee, the case is reversed. Since a determination of *full* damages has not been made, only a new trial can resolve that amount. Because of the need for a special finding on *total* damages, the case could better be handled by the use of interrogatories.

Reversed and remanded.

HAROLD R. CLARK *v.* GENERAL ELECTRIC CO. ET AL

5-4288 420 S. W. 2d 830

Opinion delivered November 6, 1967
[Rehearing denied December 11, 1967.]

Michael Heindle, Wayne Owen and *James R. Howard,* for appellant.

Wootton, Land & Matthews, Roy H. Mitchell, M. C. Lewis, Jr., William R. Mitchell, Robinson, Thornton, McCloy & Young, Clayton Farrar, and *Wood, Chesnutt & Smith,* for appellees.

JOHN A. FOGLEMAN, Justice. The principal question in this case requires the determination of priority between a construction money mortgage on the one hand

and several liens of materialmen, suppliers and mechanics on the other.

In 1964 Morehead Properties, Inc., (hereinafter called Morehead) having in mind construction of a large complex of "garden apartments," acquired certain lands in Hot Springs. Morehead had previously dealt with appellant for materials, supplies and financing in connection with similar construction in Texas. Appellant arranged for both permanent and construction financing for Morehead on the project in question. He accomplished this by guaranteeing the $400,000.00 construction loan by the Exchange National Bank of Dallas and acquiring a commitment for permanent financing by John Hancock Life Insurance Company when construction was completed and the apartments occupied. On April 14, 1965, Morehead executed a proper and valid mortgage on the property to the bank as security for the construction loan. It was not filed for record until April 21, 1965, at 11:21 a.m. It contained a recital that the money was to be advanced to Morehead from time to time. Actually, the entire amount of the loan was disbursed pursuant to preliminary agreement, however, by advances by the bank to appellant from time to time. He, in turn, made advances to Morehead for the payment of various costs incident to the project, with the proposed application of the advances usually specified by Morehead. The latter commenced construction on the project, making contracts with appellees for labor and materials. Morehead became insolvent before the buildings were completed or appellees paid. Appellant then paid the Morehead note upon demand of the bank and took an assignment of the note and mortgage. He also took possession of the apartment complex. Appellees then filed suits to enforce their liens and appellant filed a suit for foreclosure of the construction money mortgage. The suits were consolidated for trial and the chancellor found that the liens of appellees were prior to the lien of the construction money mortgage. The principal contention of appellant is that the trial court erred

in holding that the appellees' liens had priority over his mortgage.

The court's findings in this respect were based upon the activities of appellee Carroll Pyron, d/b/a Carroll Pyron Construction Company. Pyron was a heavy construction contractor, operating bulldozers and similar machinery. He was employed in October 1964 to clear the land of brush, debris and trees in order for a topographical survey of the premises to be made. This assignment was completed, Pyron billed Morehead and was fully paid. While no agreement was reached, Pyron was told at the time he did this work that Morehead would like to have him do the excavation for the concrete work. In the early part of April 1965 Morehead contracted with Pyron for the leveling of the land for a proposed apartment complex to consist of more than one building. After the clearing in 1964, several large trees and two old houses remained on the site, but these latter had been removed when Pyron first went there in 1965. The old foundations remained, however, and the land itself was of an uneven elevation. Pyron was furnished with a set of plans and building elevations were discussed. An agreement was made for Pyron to clear the property of remaining debris and to grade elevations for the building sites with compensation to be paid on an hourly basis. The latter undertaking was to be accomplished by moving dirt from one place to another on the site so as to bring the sites for the buildings to elevations satisfactory for the laying of concrete slab foundations.

On the morning of April 19th Pyron went to the building site with an employee named Terry to commence work. Pyron spent about 45 minutes establishing cut and fill elevations with a transit and an elevation rod. Terry had brought a large bulldozer with which he started moving the foundations of the old houses. That day he worked approximately six hours, during which he removed the foundations of the old buildings and

commenced the leveling operation. The condition of the soil after this work would have revealed that it had been "bulldozed over." The machine remained on the job site and was actually not removed therefrom for at least one week. An employee named Taylor went to the property at 7 a.m. on April 21st and spent about thirty minutes with Pyron, becoming oriented to the elevations. He then worked for an hour and a half, using the same machine. Nothing else was done on the apartment site before the filing of the mortgage. Ultimately Pyron completed the leveling work. Shortly prior to May 13th he dug the footings for the concrete foundations. This was the first actual work in connection with building the apartments, other than the bulldozer work.

Appellees contend that the work done by Pyron establishes the priority of all their liens, relying upon Ark. Stat. Ann. § 51-607 (1947). They argue that this work constituted "commencement of the buildings or improvements" in the sense of that section of the statute, so that all such liens dated from this "commencement" under the rule announced in *Planters Lumber Co.* v. *Jack Collier East Co.,* 234 Ark. 1091, 356 S. W. 2d 631. Appellees have virtually abandoned their original contention that the work in October 1964 constituted a commencement from which the priority would date, but rely on the work done on April 19th and 21st. We had occasion to determine whether there was a "commencement" of a building sufficient to establish lien priority recently in *Mark's Sheet Metal, Inc.* v. *Republic Mortgage Co.,* 242 Ark. 475, 414 S. W. 2d 106. There we held that the work done must be such as to make it obvious that improvements on the property were being commenced or were underway. We said that the clause in question 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. Reference was made in that opinion to *Rupp, Trustees* v. *Earl H. Cline & Sons,* 230 Md. 573, 188 A. 2d 146, 1 ALR 3d 815. In that case, the Maryland Supreme Court

held that neither the removal of soil from a part of a development site intended for the erection of an apartment building to another part of the site, intended for the construction of cottages, nor the grading and leveling of the apartment site constituted such "commencement" under a similar statute as to give a mechanic's lien preference over a subsequently recorded mortgage. They relied on their previous decisions holding that commencement of the building is "the first work on the ground which is made the foundation of the building and forms a part of the work suitable and necessary for its construction" (*Brooks* v. *Lester,* 36 Md. 65) and that driving of stakes and digging away of soil to level the ground prior to beginning construction were not sufficient (*Kelly* v. *Rosenstock,* 45 Md. 389). They had said in the earlier cases that the work must be such that everyone can readily see and recognize it as commencement of a building. This rule is followed by a great majority of the cases in which the question has arisen in states with statutes similar to ours. It is generally held that the mere preparation of the land for the construction is not sufficient. See Annot., 1 ALR 3d 822.

Even though not followed as an unqualified rule, actual and visible improvement to establish priority has been held in many of these cases not to begin until such work as excavation for a basement or foundation has begun. *National Lumber Co.* v. *Farmer & Son, Inc.,* 251 Minn. 100, 87 N. W. 2d 32; *North Shaker Boulevard Co.* v. *Harriman Nat'l Bank,* 22 Ohio App. 487, 153 N. E. 909; *Hagenman* v. *Fink,* 19 Pa. Co. Ct. R. 660; *Roy Bldg. & Loan Ass'n* v. *King,* 17 Pa. D & C 83, 22 Del. Co. 297; *Davis-Wellcome Mtge. Co.* v. *Long-Bell Lbr. Co.,* 184 Kan. 202, 336 P. 2d 463; *George M. Newhall Engineering Co.* v. *Egolf,* 185 F. 481 (3d Cir.). It has also been held that the labor or materials must be such as could afterward become, or be considered, a component part of the structure. *Conn. General Life Ins. Co.* v. *Birzer Bldg. Co.,* 61 Ohio L. Abs. 477, 101 N. E. 2d 408; *Sheridan, Inc.* v. *Palchanis,* 172 So. 2d 872 (Fla. 1965). At any rate, the weight of authority seems to be that

clearing, grading and filling of the land do not constitute the commencement of a building for the purpose of establishing priorities of mechanics' and materialmen's liens. See, *Kiene* v. *Hodge,* 90 Iowa 212, 57 N. W. 717; *Central Trust Co.* v. *Cameron Iron & Coal Co.,* 47 F. 136; *New Hampshire Savings Bank* v. *Varner,* 216 F. 721 (8th Cir.); aff'd 240 U. S. 617, 36 S. Ct. 409, 60 L. Ed. 828; *Maule Industries, Inc.* v. *Gaines Const. Co.,* 157 So. 2d 835 (Fla. 1963).

We hold that the work done in this case by Pyron was not such as to be visible or manifest action on the premises, making it apparent that a building or improvement was being commenced or underway. It was at most a preparatory operation.

Appellees contend, however, that there is no evidence that the bank or appellant made any visual inspection of the premises before the construction money mortgage was recorded so they could not have relied upon what they saw. This is analogous to an argument that one who does not examine the public records of mortgages would not be entitled to assert the priority of a mortgage taken by him and filed for record over a subsequently filed mortgage of which he had no notice otherwise. The question is not whether an inspection was made, it is rather what an inspection would have disclosed.

Appellees also contend that removal of the old foundation was sufficient to establish the priority, relying upon *Pratt* v. *Nakdimen,* 99 Ark. 293, 138 S. W. 974. In that case this court only held that the trial court correctly included the amount paid by a defaulting contractor for the removal of an old building and its foundation from the job site in the total sum of liens against the building for the purpose of fixing the percentage to be distributed upon the lienable claims asserted against the building, after default and completion of the building by the owner. No question of priorities was involved. In that case the court said that this cost was for

labor that went into the construction of the new building because it was impossible to build the new without the removal of the old. It must be noted that the contract with the original contractor called for the removal of a three-story building and the construction of a six-story structure. Even if it can be said that the cost of removing the old foundations was a lienable claim, this does not mean that this step establishes the priority of the lien. The statute provides for a lien for work upon a building or improvement [Ark. Stat. Ann. § 51-601 (1947)] but the priority is determined by the "commencement" (§ 51-607). The mere fact that the work was the proper subject of a lien cannot establish priority when it does not give notice of the commencement. The removal of the old foundations would no more give notice that a new building was to be erected than the wrecking and removal of the old building did, yet the lien claimants have not sought to use that date as the date of commencement. It is to be noted that priority was denied by the court in the *Rupp* case, even though Maryland's lien statute gave a lien for grading, filling and landscaping. Maryland Code (1957) Art. 63, § 1. The point is further illustrated by considering that the fabrication of fittings for the heating and air conditioning system was a proper item for a lien when the system was put in the building involved in *Mark's Sheet Metal* v. *Republic Mortgage Co.,* 242 Ark. 475, 414 S. W. 2d 106, but this step furnished no notice whatever of the commencement of the building.

We cannot say that appellant is entitled to priority for the entire amount of the judgment awarded him, however. Appellees question his entitlement to priority for the cost of the land, brokerage fees paid to Clark, a stand-by mortgage fee, title insurance, taxes and interest. The testimony showed that of the total advanced, the sum of $57,780.00 was for the purchase price of the land and was advanced by Clark to Morehead. This item may properly be considered as secured by appellant's prior lien, as the purpose of the loan and not the use of the proceeds is the determining factor. *Sebastian Build-*

ing & Loan Assn. v. *Minten,* 181 Ark. 700, 27 S. W. 2d 1011. The present case is distinguishable from *Planters Lbr. Co.* v. *Wilson,* 241 Ark. 1005, 413 S. W. 2d 55, in that there is no evidence here that either Clark or the Exchange Bank ever represented in any way that the purchase price of the lot had been paid, nor did either of them receive or retain any part of the purchase price, as did the construction money lender in the case last cited. However, under the holding of the *Wilson* case, appellant would not be entitled to priority for his brokerage fee of $4,000.00 or the stand-by mortgage fee of $8,000.00 paid to the insurance company which was to make the permanent loan after completion and occupancy of the building.

Appellees also question the disbursements for interest, title insurance and taxes. We need not consider the effect of control of loan disbursements (as we did in the *Wilson* case) on the general rule that loan purpose, not use, is the key priority factor because the question of lien priority on the remaining items is not dependent thereon. The item of taxes is a proper item for priority as it was paid to protect the property from what was or would be a prior lien. *Ashdown Hardware Co.* v. *Hughes,* 223 Ark. 541, 267 S. W. 2d 294. We see no reason why the charge for title insurance—an outlay for a necessary prerequisite for temporary financing —should not be a proper item. Interest would not be allowable on those sums deducted or paid for brokerage and stand-by mortgage fees (*Planters Lbr. Co.* v. *Wilson, supra*) but this appears to have been included in the judgment in favor of appellant and included in the court's decree.

We find no reason why payment to Clark for materials and supplies furnished by him or companies in which he had an interest should not be allowed as items properly disbursed under the construction loan.

Many other interesting questions are presented on the appeal, as well as on the cross-appeal of General

Electric Company which seeks to establish a lien for electric ranges furnished for the apartments. In view of our holding, these questions have become moot. By stipulation of the parties, a commissioner's sale of the property was had pending this appeal. The proceeds of that sale are to be distributed after final determination of this case. At that sale appellant became the purchaser for $340,000.00. He is entitled to priority for an amount in excess of this sum, so there will be nothing for distribution to the lien claimants in any event.

Reversed and remanded for entry of a decree pursuant to this opinion, an appropriate order on distribution of the proceeds of sale, and a release of supersedeas bond posted by appellant pursuant to stipulation of the parties.

A. E. HENSLEY ET UX *v.* FARM BUREAU MUTUAL INSURANCE COMPANY OF ARKANSAS

5-4326 420 S. W. 2d 76

Opinion delivered November 6, 1967

Lightle & Tedder and *Catleit & Henderson,* for appellants.

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

J. Fred Jones, Justice. Mr. and Mrs. A. E. Hensley brought suit in the White County Circuit Court against Farm Bureau Mutual Insurance Company of Arkansas to recover on a fire insurance policy issued in the face amount of $2,000.00. A jury was waived and the cause was tried before the trial court sitting as a jury. The trial court denied recovery and dismissed the complaint on the equitable theory of unjust enrichment. Mr. and Mrs. Hensley have appealed and rely upon the following points for reversal:

> "1. The contract of insurance was valid at its inception, and remained valid until the time the insured property was totally destroyed, and under the 'Valued Policy Statute' became a liquidated demand on the date of loss.
>
> "2. Appellants as vendors under a Contract of Sale of the realty upon which the insured property was located retained a separate insurable interest in the insured property and subsequent transactions with persons not parties to the contract sued upon did not alter the fixed liability of the insuror.
>
> "3. The lower court erroneously applied the doctrine of unjust enrichment to an action at law controlled by the 'Valued Policy Statute.' "

For some time prior to 1965, appellants had carried their fire insurance in separate policies with the appellee, Farm Bureau Mutual, and one of the policies was on a rent house in the face amount of $2,000.00. This policy was renewed on January 24, 1965, with loss payable clause in favor of the Searcy Bank who held a mortgage on the property, and the annual premium for 1965 was paid by appellants. On March 2, 1965, appellants entered into a sales contract with H. D. Taylor whereby they agreed to sell the property to Taylor for $2,000.00, with $200.00 paid in cash and the balance to be paid over a period of three years in $600.00 annual installments. The contract of sale provided:

> "BUYER hereby covenants and agrees that he will keep the improvements on the property fully and adequately insured with a reputable insurance company with minimum coverage of $2,000.00, and will reflect the interest of SELLERS and of the Searcy Bank, Searcy, Arkansas."

Mr. Taylor did not have money for an insurance premium when the contract of sale was entered into, but subsequently, and without notice to, or knowledge of, the appellants, he did procure an insurance policy on the property from Glens Falls Insurance Company in the amount of $2,000.00 with loss payable to himself and to the Searcy Bank as mortgagee. On September 9, 1965, the house was completely destroyed by fire. Glens Falls paid the face amount of its policy to Taylor, who in turn paid appellants the balance due on the sale price. Appellants paid their indebtedness to the Searcy Bank and transferred title by appropriate deed to Taylor as provided in the contract of sale.

We agree with appellants on all three points relied on for reversal. As a matter of fact, appellee agrees with appellants on the first two points, but contend in their argument as follows:

"This appeal does not involve a question of the amount of damages, but whether appellants have a *right* to recovery.

"A question for determination is whether appellants breached a condition or conditions of their policy so that appellee may avoid a liability it would otherwise owe. The trial court found that they did. A second issue is whether appellants would be unjustly enriched if permitted to recover. The trial court found that they would."

We do not agree with the trial court on either of these points. We find nothing in the declaration, or in the application for membership and insurance signed by appellant, that is shown to be false when signed by appellants. As a matter of fact the declaration recites that the premises were inspected by appellee's agent, Lloyd L. Brown, who personally inspected the risk, and considering utility value, recommended that appellee accept same. The property insured was a "one-story one-family tenant dwelling." Appellant testified that this property had been sold the previous year on a contract which was forfeited, and that agent Brown advised him, upon inquiry, that such contract would not affect the insurance so long as a deed had not been delivered. This is not denied by appellee. Certainly the insurable risk should be no greater on premises occupied by a prospective purchaser who had paid $200.00 toward the purchase price than it would be when occupied by a tenant.

We find no merit to appellee's contention that appellants violated any of the provisions of the policy by willfully concealing or misrepresenting any material facts concerning the insurance subsequently procured by Mr. Taylor and of which the appellants knew nothing, until several days after the house burned down.

The policy contains a clause providing that "other insurance may be prohibited or the amount of the in-

surance may be limited by endorsement attached hereto," but we find no such endorsement to the policy.

The policy also contained a provision as follows:

> "This Company shall not be liable for a greater proportion of any loss than the amount hereby insured shall bear to the whole insurance covering property against the peril involved, whether collectible or not."

This provision in the policy avails appellee nothing in the way of defense in this case, as the insured property was a total loss.

We have in Arkansas a "valued policy law" with little change since 1889. Ark. Stat. Ann. § 66-3901 (Repl. 1966) provides as follows:

> "A fire insurance policy, in case of a total loss by fire of the property insured, shall be held and considered to be a liquidated demand and against the company taking such risk, for the full amount stated in such policy, or the full amount upon which the company charges, collects or receives a premium; provided, the provisions of this section shall not apply to personal property."

The Arkansas case of *Mann* v. *Charter Oak Fire Ins. Co.,* 196 Fed. Supp. 604, was a very similar case to the one involved here. In the *Mann* case, Mr. Mann had a policy in force with Trinity Universal Insurance Co. for $15,000.00 with a mortgage clause to First Federal Savings and Loan. He owed First Federal $8,000.00. The Trinity policy prohibited other insurance. First Federal requested physical possession of the Trinity policy from Mann, but never did receive delivery of it, so First Federal procured an additional policy from Charter Oak in the amount of $8,000.00. The house was destroyed by fire, Mann collected on the Trinity policy, paid off the First Federal mortgage and sued on the Charter Oak policy.

In holding that Mann was entitled to recover, the court said:

> "The defense based on the prohibition of other insurance contained in the Trinity policy and upon the conduct of Mann in connection with his obtaining payment under that policy does not lack some ethical appeal, but it cannot be sustained legally.
>
> "An insurance company has the right to stipulate against other insurance on the insured premises, and Trinity exercised that right. Charter Oak did not do so, and, in fact, the prorata clause in its policy recognizes that the insured may carry other insurance on the property. Since the Mann property was totally destroyed by the fire, the Arkansas 'valued policy' statute, Ark. Stats. 1947, Cum. Supp. § 66-3901, is applicable, and the measure of the loss is the aggregate of the concurrent policies in force, with each insurer being liable for the full amount of its policy. 29 A Am. Jur. Insurance, § 1552; 45 C.J.S. Insurance § 922, p. 1032, *supra;* see also *Tedford* v. *Security State Fire Ins. Co.,* 224 Ark. 1047, 278 S. W. 2d 89."

In 29 Am. Jur., Insurance § 1196, we find the following:

> "It is recognized by all the cases decided upon the question that under a valued policy or the provisions of a valued policy statute, the insured insuring the property at a given valuation accepted by the insurer at the time of the issuance of the policy as the value of the insured's interest may recover the full value insured, even though he in fact has a limited or qualified interest worth less than the amount of the insurance. The insurer may not go behind the policy and show that the insured's interest is worth less than the amount of the policy."

In Couch on Insurance 2d Vol. 16, § 62:28 is found the following statement:

"The cases in general hold that provisions of policies on real property for a proportionate liability in case of co-insurance are inconsistent with statutes providing for valued policies, and are therefore invalid."

And again in Couch §§ 62:94-95 appears the following:

"A provision in a policy that in case of other insurance on the property insured, made prior or subsequent to the policy, the insured shall be entitled to recover no greater proportion of the loss than the sum insured bears to the whole amount so insured therein, applies only to cases where the insurance covers the same interests, and can have no application to insurance obtained upon another distinct insurable interest in the property. Conversely stated, 'other insurance' within the meaning of an apportionment of loss clause in a policy is other insurance on the same interest.

"Other insurance relates only to insurance held by the person insured by the policy in question, as contrasted with policies naming other persons as the insured."

See *United States Fire Ins. Co.* v. *Hodges,* 275 Ala. 243, 154 So. 2d 3; *American Century Ins. Co.* v. *Harrison,* (Texas Civ. App.) 205 S. W. 2d 417

Couch at § 62:100 states

"The policy covering the interest of a vendee under a purchase contract has no application to the insurance issued on the vendor's separate and distinct insurable interest."

In the Wisconsin case of *Ciokewicz* v. *Lynn Mut. Fire Ins. Co.,* 248 N. W. 778, Wisconsin had a standard value policy statute and also had statutory provisions whereby an insurance company could provide by policy

provisions for non-liability for loss or damage occurring while the insured has another contract of insurance, etc. The owner of a barn obtained a fire insurance policy on the barn in the amount of $1,400.00 from Lynn Mutual. He later applied to Lynn Mutual for additional insurance and the application was denied. He then purchased a policy from American Insurance Company in the amount of $1,900.00 and attempted to cancel his policy with Lynn Mutual. The barn was totally destroyed by fire before the cancellation was fully accomplished and American paid the face amount of its policy. The owner sued Lynn Mutual on its policy and the facts of that case, the contentions of the parties, and decision of the court on the pertinent point involved, may be concisely quoted from the body of that opinion as follows:

> "[4] The policy issued by the defendant contained the following clause: 'This Company shall not be liable under this policy for a greater proportion of any loss on the described property or for loss by an expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, covering such property.' It is contended by the defendant that in view of this provision in the policy, the so-called Valued Policy Law, section 203:21, which provides: 'Whenever any policy of insurance is written to insure real property and the property insured is wholly destroyed, without criminal fault on the part of the insured or his assigns, the amount of the insurance written in such policy shall be taken conclusively to be the true value of the property when insured and the true amount of loss and measure of damages when destroyed,' does not apply in this case." * * *
>
> "[6, 7] It is further argued that the plaintiff, having already been paid $1,300 by the American Insurance Company, if he be now permitted to recover the amount named in the policy of the defendant,

his total recovery will exceed the value of the property. This is no doubt true. Most insurers protect themselves in a situation of that kind by including in their policies a provision that the insurer shall not be liable for loss or damage occurring while the insured shall have any other contract of insurance, etc., in which event section 203:215 appears to be applicable. The provisions of the valued policy law are valid and we perceive no reason why the law does not apply in this case. *Fox* v. *Milwaukee Mechanics Insurance Co.* (Wis.) 246 N. W. 511. Courts cannot suspend the operation of statutes merely because an unexpected result may work out in a particular case. The Valued Policy Law being applicable, it being stipulated that the property was totally destroyed and the fire was accidental, the plaintiff should have had judgment for the amount named in the policy, $1,400, with interest."

In the case before us there is no evidence at all of fraud in the procurement of either of the policies. Each insured had a separate insurable interest. Subrogation rights as between the two insurance carriers are not involved. Had the contract purchaser not procured his own policy, certainly appellee would have been liable on its policy and payment to appellant on that policy would not have affected the purchaser's liability under the sales contract in the least. Whether the purchaser paid his indebtedness to appellant out of funds paid to him by his own insurer or out of some other funds is no concern to appellee. The liability of Glens Falls to its own insured is not before us, but its liability could in no wise affect appellee's liability to its insured. Although appellee's policy provided "other insurance may be prohibited or the amount of insurance may be limited by endorsement attached hereto," no such endorsement was attached. Although the policy provides "this company shall not be liable for a greater proportion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the peril involved, whether collectible or not," we interpret "the

whole insurance covering the property'' to mean the whole insurance procured by the insured on his own insurable interest and not including insurance on the insurable interest of some third party who has contracted to purchase the insured premises. Even if we should interpret this provision otherwise, it would be ineffective as in conflict with the Valued Policy Statute in this case. (*Mann* v. *Charter Oak, supra.*)

The appellant did not breach his insurance contract by not advising appellee of matters he had no knowledge of until some thirty days after the fire. The actual value of the insurable interest of the purchaser was not necessarily confined to the amount he agreed to pay for the premises or the cost of rebuilding the house. The value of the interest he did insure was fixed at the full face amount of his policy under the statute, and what he did with the proceeds was of no concern to appellee. The insurable interest of the appellants is not questioned, and we fail to see where unjust enrichment is involved in this case.

If the appellants were unduly enriched at all in this case, it was because the purchaser honored his purchase agreement and paid for the property even though the house had been destroyed by fire. As between the appellants and appellee, there was no unjust enrichment involved. Appellants paid the premium for one year on insurance in the amount of $2,000.00. The house was totally destroyed by fire within the year, so appellants should be paid the face amount of the policy in the amount of $2,000.00. The record does not show how many annual insurance premiums appellants had previously paid to appellee on this and his other property, but if he had continued to pay premiums on a $2,000.00 policy for any number of years and no fire had occurred, appellants would be entitled to no payment under the terms of their policy, neither would the appellee be unjustly enriched by the premiums paid.

We conclude that the judgment of the trial court should be reversed and this cause remanded to the trial

court for entry of a judgment not inconsistent with this opinion. The trial court will fix and award the penalty and attorney fee.

Reversed and remanded.

BASIL PATRICK ET UX *v.* WARREN E. WOOD, JUDGE

5-4334 420 S. W. 2d 92

Opinion delivered November 6, 1967

Jones & Stratton, for petitioners.

Gannaway & Darrow, for respondent.

CONLEY BYRD, Justice. This is a petition for prohibition. At issue is the question of whether the Pulaski Circuit Court dismissed cause No. 56930 therein pending, in which Vada Cowan was plaintiff and Basil Patrick and Florence Patrick, his wife, were defendants.

The docket sheet shows that Vada Cowan's complaint for injuries arising out of an automobile collision in North Little Rock was filed on December 3, 1964. On December 18 the case was assigned to the Second Division of Pulaski Circuit Court. Defendants' motion for summary judgment and their answer and counterclaim were filed on December 28, 1964. On January 5, 1965, plaintiff filed her answer to defendants' counterclaim.

The next docket notation is on March 13, 1967, dismissing the cause for failure to prosecute. On April 28, 1967, the Pulaski Circuit Court entered its order setting aside the "dismissal of failure to prosecute."

After the March 13, 1967 dismissal for failure to prosecute in the Pulaski Circuit Court, Basil Patrick et ux, on April 13, 1967, filed a complaint in the Faulkner Circuit Court for injuries arising out of the same accident. Service on this complaint was obtained on Vada Cowan in Pulaski County on April 17, 1967.

The order of dismissal of March 13, 1967, in the Pulaski Circuit Court is as follows:

> "PULASKI COUNTY CIRCUIT COURT,
>
> MARCH TERM, 1967
>
> MONDAY, MARCH 13, 1967
>
> "By order of the court upon its own motion after reviewing the civil docket and finding that there has been no activity in the following cases for a substantial length of time; notices having been sent in these cases and no notices having been sent in others, said cases are to be dismissed for failure to prosecute without prejudice to wit:
>
> "VADA COWAN PLAINTIFF
>
> VS 56930
>
> "BASIL PATRICK and
> "FLORENCE PATRICK DEFENDANTS"

The record does not show that the foregoing order was signed by the court.

The Pulaski Circuit Court order which was signed by the judge on April 28, 1967, provides:

> "The Court finds that on March 9, 1967 it denied the motion of Florence Patrick for summary judgment, and on that same date mailed to Attorneys

Guy H. Jones, Homer Tanner and Bert Darrow a letter enclosing a copy of the order denying said motion and notifying the attorneys that this court had set this case for trial on June 27, 1967.

"The Court further finds that thereafter on March 13, 1967, one of the deputy clerks of this Court inadvertently made a notation on the docket that this case had been dismissed for failure to prosecute, that this docket notation should not have been made, that it in no way constituted a dismissal of this case and that this case is now fully pending in this Court and has been continuously without interruption.

"IT IS THEREFORE BY THE COURT CONSIDERED, ORDERED AND ADJUDGED that the entry referred to herein shall be stricken from the docket as having been inadvertently made, that this case is fully pending in this Court now, and has been continuously active and pending since its original inception, without any interruption."

Under our holding in *Oliver* v. *Miller,* 239 Ark. 1043, 396 S. W. 2d 288 (1965), petitioners had a right to file their cause of action in the Faulkner Circuit Court IF cause No. 56930 in the Pulaski Circuit Court had been dismissed. Herein lies, under the record, a fact issue which we are unable to determine upon a writ of prohibition in this court. In *Keenan* v. *Strait, Judge,* 221 Ark. 83, 252 S. W. 2d 76 (1952), we held that prohibition did not lie where the jurisdiction of the trial court turned upon a fact issue—the remedy for correcting an erroneous ruling by the trial court being by way of appeal.

In the record before this court, there appears to be a disputed fact as to whether the cause of action No. 56930 was dismissed by the court or whether the clerk made an inadvertent or unauthorized entry of an order. Therefore the petition for writ of prohibition is denied.

BROWN, J., not participating.

ROBERT Y. McCLURE v. WILLIAM H. McCLURE Jr., TRUSTEE

5-4336 420 S. W. 2d 98

Opinion delivered November 6, 1967

Laws & Schulze and *Lester & Shults*, for appellant.

Williams & Garner, for appellee.

CONLEY BYRD, Justice. Appellant Robert Y. McClure brings this appeal to determine the authority of appellee William H. McClure, Jr., as trustee of the "W. H. McClure Trust," to place the cotton allotment assigned to lands belonging to the trust in the Cropland Adjustment Program, Pub. L. 89-321, Title VI, § 602, Nov. 3, 1965, 79 Stat. 1206, 7 U.S.C.A. § 1838. For reversal of the trial court's decree upholding the authority of the trustee to place said lands in the Cropland Adjustment

Program for a period of ten years, appellant relies on the following points:

I. Placing the trust lands under the Cropland Adjustment Program was in violation of the trustee's mandatory obligation to "obtain a tenant or lessee for all farm lands owned by the trust."

II. The Trustee had no authority to enter into the Cropland Adjustment Agreements for a period of ten years.

The trust principal consists of some 3,100 acres of land located in the Dardanelle District of Yell County. Appellee is made trustee. He is also a life beneficiary thereof along with appellant, their brother, David B. McClure, and their sister, Janet M. Chivers. The remainder beneficiaries are the natural grandchildren of the settlor, who take upon the death of the last surviving life beneficiary. The authority and duties of the trustee are described in the trust agreement as follows:

"The Trustee is charged with the custody, management and protection of all assets of the Trust estate. The Trustee is expressly authorized to lease any real estate owned by the Trust to himself individually or to any other beneficiary of the Trust, provided that any such lease shall not exceed a term of ten years and the rental shall not be less than the prevailing rental value of comparable lands in the surrounding area. *The Trustee shall obtain a tenant or lessee for all farm lands owned by the Trust,* and shall not without the unanimous consent of Grantor's living children, use Trust funds to finance the cultivation of or any farming operation upon the lands owned by the Trust.

"The Trustee is authorized, with the consent of Grantor's living children, to purchase additional real or personal property to be added to and become a part of the principal of the Trust, pledging and using the net income of the Trust to pay the purchase price for such

additional assets. The trustee shall not have the authority to sell, exchange, convey, mortgage or hypothecate any real or personal property of the Trust without the unanimous consent of Grantor's living children.

"The Trustee is authorized to receive and receipt for all rents, property or interests received by the Trust estate; to satisfy liens upon real or personal property of the Trust; to institute or defend legal proceedings for the recovery or protection of assets of the Trust estate; . . . and otherwise, to exercise all duties, rights and authority reasonably incident to the holding of legal title to the Trust assets and discharge of his Trust responsibilities.

"The Trustee shall not be required to give bond and shall not be required to render any accounting to, or be subject to the supervision of, any Court. The Trustee shall not be personally liable for any losses incurred by the Trust for any reason other than fraud.

"No person dealing with the Trustee shall be bound to inquire into the power or authority of the Trustee to do or perform any acts as Trustee of this Trust. Nor shall any person paying money or other valuable consideration to the Trustee be required or bound to see to the application, reinvestment or disbursement of such money or other consideration paid or delivered to the Trustee.

"The Trustee shall keep proper records and books of account of his administration of the trust, which books and records shall be subject to inspection at all reasonable times by the income beneficiaries of the Trust. . . ." (Emphasis supplied.)

The Cropland Adjustment Agreement, after identifying the fields placed in the program and the payment schedule, provides:

"Each undersigned producer agrees to participate in the Cropland Adjustment Program and to comply

with the terms and conditions herein and the provisions of the regulations governing the program which are hereby made a part of the agreement. Each such producer agrees that in accordance with the provisions of the regulations: (1) The designated acreage shown above will be diverted for the agreement period from the production of crops to approved practices and uses as shown in column 23. (2) No crop will be harvested from the designated acreage and such acreage will not be grazed during the agreement period except as provided in the regulations. (3) The acreage permitted to be devoted to the crops diverted from production as shown above shall be zero except as provided in the regulations. (4) The feed grain base and acreage allotments on this farm with respect to which no diversion is shown above and the feed grain base and acreage allotments on any other farm in which the producer has an interest will not be exceeded. (5) The conserving base for the farm will be maintained for the agreement period. Each producer understands that he is jointly and severally responsible with the other producers on the farm for compliance with this agreement and for any refund or forfeiture of payments determined according to the regulations for failure to comply fully with the agreement. All producers entitled to share in the annual adjustment payments under this agreement are shown herein and the division of the annual adjustment payments is fair and equitable. Each undersigned producer applies for the total number of annual adjustment payments due him under this agreement."

The proof shows that appellee in his individual capacity has been leasing a portion of the lands on a crop rental basis, and that M. Y. Chivers, Jr., husband of Janet M. Chivers, as a partner in a partnership d/b/a Cotton Town Farm, has been leasing the remainder of the lands.

We are assuming that counsel for appellant are correct in their statement that the lands can be withdrawn from the Cropland Adjustment Agreement on request of appellee.

There was ample evidence from which the trial court could have found that the Cropland Adjustment Agreement was temporarily more beneficial to the trust from the standpoint of income than a crop rental of the lands, but for purposes of our decision herein, we do not concern ourselves with the issue.

I

Appellant's argument that the trustee was without authority to enter into the Agreement is based on two premises: (1) that the trust agreement is mandatory in requiring that "the Trustee shall obtain a tenant or lessee for all farm lands owned by the trust," and (2) that the placing of lands under a Cropland Adjustment Agreement does not amount to obtaining a "tenant or lessee." From these two basic premises appellant concludes that the lands cannot be placed in the Cropland Adjustment Program without his consent.

The purpose of the Cropland Adjustment Program is to hold acreage out of production as a supplement to the Commodity Adjustment programs, 1965 U. S. Code Congressional and Administrative News, 89th Cong. P. 3963. A review of the act, 7 U.S.C.A. § 1838, shows that the landowner, in agreeing to the program, is required to do little more than permit the lands to remain idle with some sort of conserving cover crop for the period of the agreement. The act, 7 U.S.C.A. § 1838(m), recognizes that lands under lease to a tenant can be placed in the program and contains directions to the Secretary of Agriculture to set up safeguards to protect the tenant's rights to share in the payments.

We hold that appellant's contention is not sustained by the trust agreement. While the Cropland Adjustment Agreement is not, strictly speaking, a lease, it accomplishes the purposes of a lease—*i. e.*, it furnishes the landowner an income for a period of years without any appreciable financial risk or necessity for management. The Agreement certainly cannot be classified as a sale, exchange, conveyance, mortgage or hypothecation for

which the trust requires the unanimous consent of the settlor's living children.

Furthermore, when the section on which appellant relies as mandatorily requiring a "tenant or lessee" is read in its entirety, it appears that the dominant purpose of the trust settlor was that the lands, while producing an income, should not be subjected to the risks and hazards of a farming operation. Reading the section in this light, we are unwilling to hold that the trustee was not authorized to enter into the Cropland Adjustment Program.

It should be noted that the trustee, in his individual capacity, and M. Y. Chivers, as tenant of the lands prior to the Cropland Adjustment Agreements, were, under the Cropland Adjustment Program, entitled to a portion of the payments. It appears, however, that they have elected to turn the total payments over to the trust.

II

Nor can we agree with appellant that the trustee exceeded his authority by placing the lands in the program for ten years. There was ample testimony to show that men of prudence, discretion and intelligence in the management of their own affairs were signing up their cotton allotments in the Cropland Adjustment Program for a period of ten years. We think this sufficiently meets the test for a trustee's conduct as authorized by Ark. Stat. Ann. § 58-302 (Supp. 1965).

Affirmed.

HARRIS, C. J., dissents.

CARLETON HARRIS, Chief Justice, dissenting. I cannot agree with the disposition of this case. The extent of the duties and powers of a trustee depends upon the terms of the trust, and we have held that a court should restrict a trustee's powers to those conferred in the trust instrument; further, that mandatory language

must be given full effect. *Patterson* v. *Polk,* 229 Ark. 272, 317 S. W. 2d 286. In that case, we said:

"The distinction between *mandatory* and *precatory* words in wills and trust instruments could make a treatise in itself. In wills and trust instruments, directions are held to be mandatory when such words direct, command, or require something to be done; and directions are held to be *precatory* when such words merely express a hope or wish, and leave it to the trustee or the occurrence of some fortuitous circumstance as to whether the desires will be accomplished."

The language of the trust instrument here at issue is quoted in the majority opinion. To me, "The trustee *shall* [my emphasis] obtain a tenant or lessee for all farmlands owned by the trust" is absolutely mandatory, and I cannot view it in any other way.

To my way of thinking, the only valid reason that the trustee could have (under the trust) for placing the lands under the Cropland Adjustment Program would be the failure to find a tenant. This certainly was not true in the present case. The record reflects that a Mr. Harold Snyder made a bid to lease the bottom land of the trust property for $50,000.00 per year for a ten-year period.[1] Of course, I do not think that the matter of whether the trust would earn more money by leasing the land, or by placing it in the government program, is pertinent, and the majority say that they do not concern themselves with that issue.

This trust was created by Mr. W. H. McClure, Sr., and he had a perfect right to make the requirement under discussion—whether it be wise or unwise. The majority admit that the Cropland Adjustment Agreement is not a lease, and certainly the government agency is not a tenant. In *Chastain* v. *Hall,* 182 Ark. 920, 33 S. W.

[1]The payment from the government agency to the trust for the year, 1966, amounted to a little over $24,000.00.

2d 45, this court defined a tenant as, "One who holds possession of real estate by any kind of right; one who has the occupancy or temporary possession of land or tenements, the title of which is in another." Here, the government agency (Agricultural Stabilization and Conservation Service) does not occupy, nor have temporary possession, of the trust lands. Possession remains with appellee, who is obligated to plant some type of cover crop. It simply appears to me that the trial court, and now, this court, have rewritten the contested portion of the Declaration of Trust.

I also agree with appellant that the trustee exceeded his authority by placing the lands in the program for ten years. The lands could have been placed there for a period of five years, which is much more in line with leasing customs in Yell County. The majority say:

"There was ample evidence from which the trial court could have found that the Cropland Adjustment Agreement was *temporarily* [my emphasis] more beneficial to the trust from the standpoint of income than a crop rental of the lands, but for purposes of our decision herein, we do not concern ourselves with the issue."

I cannot agree that ten years constitutes a temporary period.

For the reasons herein stated, I would reverse the trial court.

W. J. STYERS ET AL *v.* DALTON NORTHERN ET AL

5-4349 420 S. W. 2d 74

Opinion delivered November 6, 1967

J. B. Milham, for appellants.

Fred E. Briner, for appellees.

CONLEY BYRD, Justice. This case was here before, *Styers* v. *Northern,* 241 Ark. 1023, 411 S. W. 2d 296 (1967). Appellants W. J. Styers and Chloe Styers Lord appeal from the decree entered on the mandate, contending that it does not comply with our opinion. The decree entered by the trial court describes only a portion of the lands on which we held appellants were entitled to have their title quieted. It also gives appellee Davis an easement in perpetuity over a greater portion of the lands than was included in the agreement between appellant W. J. Styers and Davis's predecessor in title, Dr. Buffington.

The facts show that in 1929 appellant's son, W. A. Styers, acquired title to the tract of land now owned by appellee Davis under the following description:

> Beginning 358 feet West of the East line and 15 feet South of the North line of Section 14, Township 2 South, Range 15 West, thence runs West ac-

> cording to Section line 111 feet. Thence South according to Section line to the right of way of the St. Louis Iron Mountain and Southern Railway. Thence North Easterly along said right of way to a point exactly South of point of beginning according to Section line. Thence North to point of beginning.

Appellants acquired title to the tract of land in the East ½ of the Northeast ¼, Section 14. Township 2 South, Range 15 West, described as follows:

> Beginning at a point which is 15 feet South and 499 feet West of the Northeast corner of said Section 14 and runs thence West according to Section line 100 feet; thence South to right of way of Missouri Pacific Railroad; thence Northeasterly along right of way to a point due South of point of beginning; and thence North to point of beginning.

In our opinion we held that the trial court erred in failing to quiet appellant's title to the 30-foot strip of land between the two above-described tracts, subject, however, to the easement by way of estoppel, with Dr. Buffington, respecting the concreted portion of the driveway.

Furthermore, as pointed out in our former opinion, the easement by estoppel in favor of Davis, as per the agreement between Mr. Styers and Dr. Buffington, runs only so long as the Davis tract is used for a service station. On this appeal appellants contend that the easement expires with the death of either Dr. Buffington or appellant Styers, but this matter is concluded by our previous opinion.

Therefore, the decree of the trial court entered June 1, 1967, is hereby set aside and this matter is reversed and remanded to the trial court with directions that title to the 30-foot strip north of the railroad tract be quieted in appellants, subject to the right of appellee Davis to

use same for driveway purposes so long as the service station is maintained on his premises. The order should further direct that the driveway shall also be kept open for the use and benefit of appellants.

Reversed and remanded.

HOMER L. BAILEY ET AL *v.* CLINT JONES, SECURITIES COMMISSIONER

5-4163 419 S. W. 2d 585

[Rehearing denied November 6, 1967; original opinion delivered May 22, 1967, Ark. 242, 668]

Spitzberg, Bonner, Mitchell & Hays, for appellants.

Leon B. Catlett, for appellee.

CARLETON HARRIS, Chief Justice, concurring. On petition for rehearing, an entirely new argument is presented by appellant. The argument is relevant to the issue in the litigation, but I do not think that it can properly be considered. For the first time, it is urged that Act 459 of 1965 was passed as a matter of enabling the Insurance Commissioner to adopt the N.A.I.C. regulations. Appellant, in its rehearing brief, says:

"Act 459 represents the legislation necessary to enable the Insurance Commissioner to adopt the N.A.I.C. regulations. The Commissioner is directed by sub-paragraph 5 of the Act to conform to the regulations adopted by the N.A.I.C. insofar as possible. * * *

"In amending Section 66-4220 (Supp. 1963) to enable the Insurance Commissioner to adopt N.A.I.C. Reg-

ulations, it was necessary to eliminate any provisions of the section which appeared inconsistent in any respect with the N.A.I.C. regulations. The provision of the former section authorizing an irrevocable proxy if coupled with an interest, appeared to be inconsistent with the provision of the Regulations, which provides that "No proxy shall confer authority . . . to vote at any meeting other than the next annual meeting (or any adjournment thereof)" [N.A.I.C. Regulations, Section 6 (4)] and the former provision was therefore deleted from the Act.

"The deletion of the provision relating to a proxy coupled with an interest does not mean that the General Assembly intended to invalidate all arrangements whereby the voting right is separated from a share of stock."

This same argument is used in two *amicus curiae* briefs filed with the court on rehearing.

We have many times said that we will not consider matters that are not argued in the brief, nor will we consider, on rehearing, contentions not originally advanced. In *Bost* v. *Masters*, 235 Ark. 399A, in a supplemental opinion on rehearing, this court said:

"Appellee's petition is without merit for three reasons. In the first place, appellee did not argue in her original brief that service was obtained upon a trustee of the insurance fund, though appellants devoted considerable space in their brief to the argument that service on the fund was not obtained. Appellee's sole argument, relating to service, was to the effect that this action was brought as a class action. * *

"In other words, appellee never made the contention, now advanced, in her original brief. We have said on numerous occasions that we do not consider matters, in civil actions, which are not argued in the brief, and

any point not argued is deemed waived. [Citing cases.]''

As stated, the present position of appellant, as reflected in the quote from appellant's brief on petition for rehearing, and pertinent, because it deals with the legislative intent, was not mentioned in the original brief, nor was it mentioned in appellant's reply brief, though Act 459 of 1965 (amending the Insurance Code), construed together with the General Corporation Statute of this state, was one of the principal points relied upon by appellee for affirmance of the trial court judgment.

I reiterate that I do not feel we can properly, under our rules, and under our prior opinions, consider the argument advanced in the petition for rehearing.

CONLEY BYRD, Justice, dissenting. I dissent from the majority view for the following reasons:

1. The decision is contrary to the overwhelming weight of authority. See annotation 98 A.L.R. 2d 376, 380, which the majority opinion cites as supporting its position. The annotator in § 4 (a) there says:

> ''Although there is language in some cases condemning voting trusts as invalid, the view supported by the overwhelming number of cases is to the effect that a voting trust may be validly created under certain circumstances even in the absence of a statute expressly authorizing its creation.''

2. The majority opinion overlooks the difference between a voting trust and a proxy when applying our proxy statutes. A proxy, or a reciprocal proxy agreement, differs from a voting trust agreement in that the proxy creates an agency whereas the voting trust does not. The difference lies in the location of the legal title. If the stock is transferred to true trustees, their right to vote it is incident to their legal title to the stock, notwithstanding the trust agreement contains terms to

govern the voting of the stock. See 159 A.L.R. 307, 98 A.L.R. 2d 376, *Bankers' F. & M. Ins. Co.* v. *Sloss,* 299 Ala. 26, 155 So. 371 (1934), and *Dougherty* v. *Cross,* 65 Cal. App. 2d 687, 151 P. 2d 654 (1944).

In the *Dougherty* case the court made the above distinction between a voting trust and a proxy and distinguished *Simpson* v. *Nielson,* 77 Cal. App. 297, 246 P. 342 (1926). The voting trust there, in existence for more than 21 years, was upheld notwithstanding a California statute providing that no proxy would be valid after eleven months from the date of execution, unless it specified the length of time for which it would continue in force (in no case to exceed seven years from the date of execution).

This same distinction between a voting trust and a proxy is recognized by the Securities Act enacted by the United States Congress and the regulations issued thereunder. 15 U.S.C.A. § 77 (b) (1) requires that a voting trust be registered with the Securities and Exchange Commission. The regulations promulgated by the Commission, 17 C.F.R. 240, 14a-2 (d), exempt voting trusts from the proxy regulations.

The Arkansas Securities Act, Acts of 1959, No. 254 §§ 13 (g) and 13 (1), contains provisions relative to the registration of voting trusts identical to those set out in the federal act, 15 U.S.C.A. § 77 (b) (1) & (4).

Since there is a basic distinction between the generally recognized definitions of "proxy" and "voting trusts," it follows that a statute regulating the use of a proxy would not apply to voting trusts.

3. Furthermore, I think the majority is placing too much emphasis on the presumed legislative intent of Act 459 of 1965 (Ark. Stat. Ann. § 66-4220 [Repl. 1966]). The act reads as follows:

" '(1) Every proxy of a stockholder of an insurer shall be revocable at will, and this provision cannot be waived.

'(2) The revocation of a proxy shall not be effective until notice thereof has been given to the secretary of the insurer.

'(3) The Commissioner shall have the authority to regulate the solicitation of proxies by any person; to require the disclosure of information deemed relevant to an understanding of issues and matters with respect to which proxies are, or are proposed to be, solicited; to specify general requirements as to form and contents of proxies; to determine the length of time for which proxies may be effective, unless sooner revoked; to prohibit solicitations of proxies which do not comply with such rules and regulations as the Commissioner may issue hereunder, or as to which disclosures required by such rules and regulations are not made; to prohibit the making or use of false or misleading statements, or the distribution of any false or misleading material, with respect to the solicitation of any proxy or with respect to any election or election contest; and to issue such other rules and regulations respecting proxies and elections as the Commissioner may deem necessary or appropriate in the public interest or for the protection of stockholders of insurers.

'(4) Rules and regulations issued by the Commissioner under authority of this section shall be made or amended as provided in Section 26.

'(5) Insofar as may be practical, rules and regulations with respect to proxies, consents, or authorizations then currently approved or formulated by the National Association of Insurance Commissioners, or its successor organization, shall be followed.' "

At the time Act 459 was passed, the United States Congress had just amended the Securities Act to subject all insurance companies to the reporting requirements of Section 13 of the Securities and Exchange Act of 1934 (15 U.S.C. § 78m [1964]), unless the states where they were domiciled met the conditions set forth in 15 U.S.C. § 781 (g) (2) G (iii), as follows:

> "The provisions of this subsection shall not apply in respect of—
>
> "(G) any security issued by an insurance company if all of the following conditions are met:
>
> "(i) Such insurance company is required to and does file an annual statement with the Commissioner of Insurance (or other officer or agency performing a similar function) of its domiciliary State, and such annual statement conforms to that prescribed by the National Association of Insurance Commissioners or in the determination of such State Commissioner, officer or agency substantially conforms to that so prescribed.
>
> "(ii) Such insurance company is subject to regulation by its domiciliary State of proxies, consents, or authorizations in respect of securities issued by such company and such regulation conforms to that prescribed by the National Association of Insurance Commissioners.
>
> "(iii) After July 1, 1966, the purchase and sales of securities issued by such insurance company by beneficial owners, directors or officers of such company are subject to regulation (including reporting) by its domiciliary State substantially in the manner provided in section 16 of this title."

The committee comment upon the Securities Acts Amendments of 1964, with reference to the above exemption, commencing at page 3021 of U. S. Code Congres-

sional and Administrative News, 88th Congress Second Session, 1964, is as follows:

"(b) *Stock insurance companies.*—The bill, as introduced, would have covered stock insurance companies meeting the statutory standards. The committee amendment [to sec. 3 (c) of bill] exempts such a company from the jurisdiction of the Securities and Exchange Commission, but only if the company is regulated under State law or the State insurance commissions in all three of the following respects:

"(1) Such insurance company is required to and does file an annual statement with the commissioner of insurance (or other officer or agency performing a similar function) of its domiciliary State, and such annual statement conforms to that prescribed by the National Association of Insurance Commissioners or in the determination of such State commissioner, officer, or agency substantially conforms to that so prescribed.

"(2) Such insurance company is subject to regualtion by its domiciliary State of proxies, consents, or authorizations in respect of securities issued by such company and such regulation conforms to that prescribed by the National Association of Insurance Commissioners.

"(3) After July 1, 1966, the purchase and sales of securities issued by such insurance company by beneficial owners, directors, or officers of such company are subject to regulation (including reporting) by its domiciliary State substantially in the manner provided in section 16 of the Securities Exchange Act of 1934.

"This committee amendment was adopted following testimony by a number of State insurance com-

missioners and representatives of stock insurance companies who unanimously opposed the subjecting of these insurance companies to the jurisdiction of the Securities and Exchange Commission in addition to the jurisdictions of the various State commissioners. Further, these witnesses opposed departure by the bill from the doctrine embodied in the McCarran Act that the regulation of insurance companies be left to the States. The basic objection advanced by these witnesses went not to the requirements for the protection of investors for disclosure but only to the jurisdictional question.

"The State insurance commissioners through their organization, the National Association of Insurance Commissioners, testified that they recognized some validity to the contention in the commission's special study report that their procedures were primarily directed to matters concerning the protection of policyholders and to the need for some improvement in these procedures insofar as they relate to the protection of investors in the stock of these companies.

"The thrust of the testimony by these representatives of the State insurance commissioners was that they be given an opportunity to demonstrate their ability effectively to protect the investors as well as the policyholders. The committee amendment gives these State commissioners this opportunity so to do.

"The insurance regulatory authorities of all of the 50 States and the District of Columbia are members of this voluntary association, the National Association of Insurance Commissioners (NAIC), one of the major purposes of which is to achieve a substantial degree of uniformity in the regulation of the insurance business by the various States. NAIC has adopted a uniform annual reporting form, known as the convention blank (or convention form

annual statement), which, in turn, has been adopted in every State as the required annual report form for insurance companies. An NAIC committee, under the chairmanship of Mr. Stafford Grady, insurance commissioner for California, has recently developed also a 'stockholders' information supplement' which will become an integral part of the basic form for 1964 and later years. The commissioners of each of the 50 States and the District of Columbia have advised the committee by letters that they would require insurance companies within their respective jurisdictions to file and comply with the supplement and any future revisions thereof as they are adopted by the association."

As pointed out by the majority opinion, the law on proxies in insurance companies at the time of the enactment of the Securities Acts Amendments of 1964 (Acts of 1959, No. 148, § 472), provided as follows:

"(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."

Obviously, before the Commissioner of Insurance of the State of Arkansas could comply with the exemption section of the Securities Acts Amendments of 1964, it was necessary for the legislature to take some action. Section 1(5) of Act 459 shows pointedly that Act 459 was intended to comply with the Securities Acts Amendments of 1964 by specific reference to and recognition of the National Association of Insurance Commissioners.

Act 459 of 1965 does not mention voting trusts. It was passed so that the laws of Arkansas would permit Arkansas's regulation of domestic insurance companies to come within the exemption of the Securities Acts Amendments of 1964, above set out. Consequently, I cannot read into Act 459 of 1965 a legislative intent to put a more stringent regulation on domestic insurance

companies, with respect to voting trusts, than that required by the Securities and Exchange Act of 1934.

4. Furthermore, I can find little distinction between the voting trust established here, whereby the beneficial owner, or *cestui que trust,* is issued a certificate of ownership while the title remains in the trustees, and that which exists in the ordinary "Massachusetts trust" or so-called "business trust." 13 Am. Jur. 2d, Business Trusts, § 1, defines the "Massachusetts trust" or so-called "business trust" as follows:

> "One of the distinctive devices by means of which individuals may combine their resources to operate a business for profit is the so-called business trust, or 'Massachusetts trust,' which may be comprehensively defined as an unincorporated business organization created by an instrument by which property is to be held and managed by trustees for the benefit and profit of such persons as may be or may become the holders of transferable certificates evidencing the beneficial interests in the trust estate. . ."

Surely this court is not finding that the many trustees operating mutual funds (such as Crown Western) are illegally holding stock in the many domestic insurance companies in Arkansas.

Therefore, I would grant the rehearing.

George Rose Smith and Jones, JJ., join in dissent.

ARTHUR MURRAY, INC. *v.* LORENA PARRIS

5-4241 420 S. W. 2d 518

Opinion delivered November 13, 1967

John C. Ward, for appellant.

Donald Ryan, for appellee.

CARLETON HARRIS, Chief Justice. From September, 1963, to January, 1965, Lorena Parris, appellee herein, entered into seven separate contracts for dancing instruction with Samuel Osborne, who operated a dance studio in Little Rock, using the Arthur Murray course of instruction under a licensing agreement. Mrs. Parris paid a total amount of $7,745.92 for the instructions contracted for, a part of this sum constituting an advance payment for future lessons. In January, 1965, Mrs. Parris, asserting matters that she felt constituted a breach of contract, directed a written demand to the New York office of Arthur Murray, Inc., appellant herein, for reimbursement of 415½ unused hours at $10.00

per hour, or a total of $4,150.00. In April, 1965, after correspondence between appellee's attorney and the New York attorney of Arthur Murray, Inc., Murray released $2,000.00, which actually belonged to Osborne, but was being held by Murray in escrow. This money was paid to the attorney for Mrs. Parris. Subsequently, appellee filed suit against both appellant and Samuel Osborne for $2,450.00, such sum representing the cost of the unused lessons, less the amount paid from Osborne's escrow account. On trial, the jury found in favor of Mrs. Parris against both Osborne and appellant, and from the judgment entered in accord with the verdict, the latter brings this appeal.[1] For reversal, it is first urged that the court erred in refusing to grant appellant's motion for summary judgment.

The evidence reflects that counsel for appellee, on April, 1965, wrote Mr. Paul Coonrod, general counsel and assistant secretary for Arthur Murray, Inc., advising as follows:

"Mrs. Parris has agreed to settle this matter with you on the following basis:

(A) Arthur Murray and Sam Osborne will refund a total of $4,150 to Mrs. Parris all of which is to be paid to this office.

(B) Two thousand to be paid immediately and the remaining balance of $2,150.00 to be paid at this office at the rate of $100.00 per month.

(C) The first $100.00 payment to be due and payable on or before the 15th day of each following month, the last payment to be in the amount of $50.00.

[1]The record as to Osborne is here confusing. On Page 83 of the transcript, there is a recitation that Osborne, "not appearing or offering any defense, the court has entered a default judgment against him for the amount of $2,450.00, as prayed by the complaint." The judgment itself recites that the court "directed a verdict in the amount of $2,450.00 against defendant Samuel L. Osborne."

If you have any questions regarding this settlement please contact me. Otherwise, I will expect your check for $2,000.00 by return mail."

Coonrod, on April 13, replied to the letter as follows:

"To clarify this matter I wish to advise you that Mr. Sam Osborne, the licensee of the Little Rock Studio, has agreed to make the settlement of $4,150.00 to Mrs. Parris.

We are advancing Mr. Osborne the sum of $2,000.00 which he has on deposit in escrow with us in order to enable him to complete the settlement terms with you.

Accordingly, any note or agreement providing for the payment of the balance of $2,150.00 to Mrs. Parris will be executed by Mr. Osborne alone and we will not be a party to such an agreement.

Please confirm your understanding of the above as soon as possible so that I may forward you the check for $2,000.00."

Thereafter, on April 15, counsel for appellee replied:

"As set out in your letter of April 13, 1965, I understand that Mr. Sam Osborne the licensee of the Little Rock Arthur Murray Studio is the one who has agreed to make a settlement of this matter for $4,150.00 and that you are advancing Mr. Osborne $2,000.00 by return mail."

On April 20, Mr. Coonrod then acknowledged receipt of this letter and stated:

"In accordance with your request, I am enclosing herewith our check payable to your order as attorneys in the sum of $2,000.00."

After the filing of the suit, Arthur Murray, Inc., moved for summary judgment, supported by the four letters herein mentioned, and an affidavit by Mr. Coonrod. It was asserted that there was no material issue of fact, the letters and affidavit reflecting that Mrs. Parris had entered into an accord and satisfaction with Murray. In opposing the motion, counsel for appellee likewise executed an affidavit.

We cannot agree that the letters and affidavit established an accord and satisfaction, and we think a fact question was presented. Mr. Coonrod clearly wrote that Mr. Osborne had agreed to make the settlement, and that appellant was advancing Osborne money (which actually belonged to Osborne) in order to enable the latter to complete the settlement. Further, it is pointed out that Murray "will not be a party to such an agreement." Counsel for appellee then replied that he understood that Osborne was the one who had agreed to make a settlement, and the company was advancing Osborne the $2,000.00. In view of the other statements made in the letters, it is apparent that this $2,000.00 was to assist the licensee in furtherance of his settlement. It will be noted that none of Coonrod's letters state that the $2,000.00 is being sent on the condition that appellant be released from possible liability; nor is there any statement in the letters written by counsel for appellee that can be construed as definitely releasing or discharging Arthur Murray, Inc., from any liability. There may well have been grounds for appellant to assert accord and satisfaction, but there were also grounds for appellee to contend otherwise. In other words, the letters, taken together, presented a question of fact concerning what had been agreed upon, and this was therefore a matter to properly be passed upon by the jury.

Appellant contends that there was no substantial evidence to the effect that Osborne breached the contract with Mrs. Parris. Without going into detail, let it be said that there was ample evidence to present a jury question on this point, including the fact that when Mrs.

Parris began her dancing lessons, there were six or seven instructors, and in 1965 (when she ceased taking lessons), there was only one instructor qualified to teach the higher rated students. According to Mr. Hillman Johnson, a former instructor at the studio, but now employed by Southwest Truck line of Dallas, that instructor was a disabled veteran, and was suffering from arthritis. Mr. Coonrod testified that, under appellant's agreement with Osborne, the corporation was permitted to make refunds (from the escrow account). Of course, it would appear that appellant recognized the justness of appellee's demand for refund, since it paid to her the full amount in Osborne's escrow account.

It is next asserted that the trial court erred in refusing to direct a verdict for appellant, it being contended that there was no testimony which made a jury question on the issue of whether Osborne was a direct agent of Arthur Murray, Inc. We cannot consider this contention, for, though a motion for directed verdict was made at the conclusion of appellee's evidence (and denied), this motion was not renewed at the conclusion of all the evidence. In *Granite Mountain Rest Home* v. *Schwarz, Admr.,* 236 Ark. 46, 364 S. W. 2d 306, we said:

"We are unable, under our established procedure, to consider the first point for reversal, *viz.,* that the court erred in not directing a verdict for appellant. A motion for directed verdict was made by appellant at the conclusion of plaintiff's (appellee's) testimony, and was denied by the court. Whether this action by the trial court was correct is of no moment, for upon the motion being overruled, appellant proceeded to offer its evidence. We have held that when one proceeds, after the denial of such a motion, to introduce proof, he waives the error of the court in failing to grant same. [Citing cases.] * * As stated in Wigmore on Evidence, Volume 9, Third Edition, one 'cannot take advantage of the judge's *original erroneous refusal* to direct a verdict for insufficiency at the time of the first motion if he does *not renew* the motion at the close of all the evi-

dence.' The reasoning employed, is, of course, apparent, for if one has waived his original motion, and does not renew same, there is nothing to be passed upon by the court at the conclusion of the evidence. No error could have been committed by the court at this point—for nothing was presented."

We also held in *Granite Mountain Rest Home* v. *Schwarz, Admr., supra,* that where no motion for an instructed verdict was requested, the point could be raised in a motion for a new trial questioning the sufficiency of the evidence, but that was not done here (nor there).

It might be added that appellant requested an instruction (which was given) relating to what appellee must prove in order to establish a breach of contract. Since the complaint against Osborne had already been disposed of by the court's action prior to the case going to the jury, this instruction could only have been given on behalf of Murray. Of course, the liability of appellant on the agency question was predicated upon the acts of Osborne, and appellant's sole interest in emphasizing that Mrs. Parris must prove that the contract had been breached by Osborne was due to the fact that appellant was being charged as the principal. As stated in *Granite Mountain,* this action waived the question of the sufficiency of the evidence on that point.

Other requested instructions by appellant related to the question of third party beneficiary, and accord and satisfaction. The instruction relating to third party beneficiary was modified by the court and given, without objection by appellant. This instruction reads as follows:

"If you find, by a preponderance of the evidence, that the contract provided for refunds to be made by Arthur Murray Incorporated in excess of the amount already paid to plaintiff, and that a further refund is

justified under the terms of the contract, then you may render a verdict in favor of the plaintiff.

"If you find, by a preponderance of the evidence, that the terms of the contract do not contemplate refunds in excess of the amount already paid to plaintiff, or that a further refund would not be justified in this case, then plaintiff is not entitled to recover under this contract."

The contract referred to in this instruction is the one between Murray and Osborne.

Appellant and Osborne had entered into a so-called "licensing" agreement, which provided that Osborne would, on each Friday, pay to Murray 3% of licensee's (Osborne's) gross receipts for the preceding calendar week, which would be held by the licensor (Murray) in escrow.[2] The agreement provides that Murray may invest this money in any type of bond, indenture, note or other certificate of indebtedness that it deems safe, and shall not be liable to licensee for errors of judgment or anything other than bad faith or fraud in the handling of the fund. Under the agreement, this 3% is paid until the amount reaches $25,000.00, and the instrument further provides that if this fund is depleted by payments made by Murray (as will be hereafter mentioned), payments to the licensee shall be resumed until the fund again reaches that amount. Among other purposes for which this fund could be used, we find the following:

"The Licensee [Osborne] agrees that he will make refunds to his pupils for unused lessons, at the request of any pupil for a refund when and if a refund is justified.

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[2]For compensation, Section 2 provides that the licensee shall shall pay the licensor, so long as the dancing school is operated, 5% of the gross receipts for the preceding calendar week.

"In the event that the Licensee fails to make such justifiable refund to any of his pupils, the Licensor [Murray], if convinced that such refund is justified, is authorized to make such reasonable refund as Licensor deems proper, and charge the amount so paid to the Licensee, and Licensee agrees to reimburse Licensor upon demand or Licensor may charge such payment against the deposits provided for in Paragraph 6. Licensor agrees to endeavor to keep such refunds to a minimum."

Appellant, from this clause, apparently recognizes that justifiable demands for refund might be made which are in excess of the amount of money which has been paid in by the licensee (here, Osborne), for the quoted language states that Murray may make a refund, and *charge the amount* to the licensee. Of course, if Murray only had in mind making refunds to pupils in an amount not to exceed the funds held in escrow, there would be no need to charge the licensee with anything, for it (appellant) would simply pay only up to the amount he had on deposit.

This was a general verdict, and we do not know the basis upon which the jury reached this decision. Though arguing that it is liable neither under the theory of agency nor the theory of third party beneficiary, it is interesting to note that appellant recognizes that it can be liable to the pupils of licensee. In Section 6 we find the following language:

"* * * Upon termination of this agreement [between Murray and Osborne] (or any renewal or extension hereof) or the termination of the relationship contemplated hereby between Licensor and Licensee (or their respective assigns) or in the event that Licensee's school shall be permanently discontinued, Licensor shall account to Licensee within two (2) years after the happening of either of such events for the fund remaining in Licensor's hands, if any, and shall pay to Licensee the amount remaining on hand after deducting: (1) all

debts and obligations due Licensor; (2) all sums due Licensor or Licensor's other Licensees for redemption of lessons sold by Licensee to Licensee's pupils; (3) *any payments Licensor may have made or expenses or liability incurred as a result of claims or litigations against Licensor arising out of Licensee's conduct of the enterprise contemplated hereby.* [Our emphasis.]"

It makes but little difference what we call the relationship between these three parties; the fact remains that appellant recognized that, under its agreement with Osborne, it could become liable, *inter alia*, because of refunds due pupils for unused lessons, and the jury found such liability.

For the reasons herein set out, the judgment is affirmed.

It is so ordered.

GEORGE ROSE SMITH and BROWN, JJ., dissent.

GEORGE ROSE SMITH, Justice, dissenting. I think that Murray's motion for a summary judgment should have been granted, on the basis of the letters that were exchanged between the lawyers representing the parties.

On April 8, Mrs. Parris's attorney offered to settle the case if "Arthur Murray *and* Sam Osborne will refund a total of $4,150 to Mrs. Parris," with $2,000 to be paid in cash and the rest in monthly installments of $100. Murray promptly rejected that suggestion of joint liability by making this counteroffer: "Mr. Sam Osborne has agreed to make the settlement of $4,150.00 to Mrs. Parris. We are advancing Mr. Osborne the sum of $2,000.00 which he has on deposit in escrow with us in order to enable him to complete the settlement terms with you. Accordingly, any note or agreement providing for the payment of the balance of $2,150.00 to Mrs. Parris will be executed by Mr. Osborne alone *and we will not be a party to such an agreement.* Please confirm

your understanding of the above as soon as possible so that I may forward you the check for $2,000.00."

By return mail Mrs. Parris's lawyer hastened to say: "I understand that Mr. Sam Osborne . . . *is the one* who has agreed to make a settlement of this matter for $4,150.00." (My italics throughout.) Upon that assurance Murray's counsel forwarded a check for $2,000.

Mrs. Parris now contends that the exchange of letters may be construed to mean that the parties did not intend for Osborne alone to be responsible for paying the remaining $2,150 that was involved in the settlement. In other words, the argument is made that Murray would still have forwarded the $2,000 even if Mrs. Parris's final letter had said: "We will accept your offer of a check for $2,000, but please be warned that we are not releasing you from liability and will expect you to pay the remaining $2,150 if Osborne fails to do so." In my opinion the exchange of correspondence is not fairly susceptible of the interpretation that the majority are placing upon it. I would reverse and dismiss.

BROWN, J., joins in this dissent.

ARKANSAS STATE HIGHWAY COMMISSION
v. ROOSEVELT MORGAN ESTATE, ET AL

5-4323 420 S. W. 2d 525

Opinion delivered November 13, 1967

Robert H. Hall, for appellant.

John Walker, for appellee.

CARLETON HARRIS, Chief Justice. In June, 1966, the Arkansas State Highway Commission, appellant herein, filed a condemnation complaint in the Circuit Court of Faulkner County, condemning all of a tract of land owned by the Roosevelt Morgan estate, in contemplation of construction preparations for Interstate Highway 40.[1] In September, 1966, appellee (through Mrs. Georgiana Morgan) filed a petition in which it challenged the taking of 6.19 acres lying outside the physical right-of-way (referred to as Tract No. 444R-2) for Interstate 40, and asked that the court strike that portion of the complaint and declaration of taking relating to 444R2. On trial, the Faulkner County Circuit Court dismissed the complaint and declaration of taking as to 444R-2, and, from the judgment so entered, appellant brings this appeal. For reversal, it is simply asserted that the trial court's judgment was wholly unsupported by the testimony.

[1]The sum of $18,350.00 was deposited into the registry of the court as estimated just compensation, appellees in their answer denying that said amount was adequate. The adequacy of the amount has nothing to do with this litigation, and is not discussed herein.

[2]The same relief was asked as to Tract No. 444R-1 (1.1 acres) lying outside the physical right-of-way, but the highway department amended its complaint and declaration of taking dismissing the condemnation of that tract.

The proposed right-of-way for Interstate 40 includes 2.62 acres belonging to the Arkansas Children's Colony, and the highway department, in condemning Tract 444R-2, intended exchanging this tract for the 2.62 acres belonging to the Colony. Admittedly, Tract 444R-2 is not needed for the right-of-way, and Mr. Donald H. Martin, Assistant Chief of the Right-of-Way Division of the Arkansas Highway Department, testified that if the Colony had owned the Morgan property (444R-2), the state would have had no need of it. The sole purpose of this condemnation was for exchange. The statutory authority for the condemnation is found in Ark. Stat. Ann. 76-532 (Repl. 1957). This section reads as follows:

"The State Highway Commission is hereby authorized to acquire real or personal property, or any interest therein, deemed to be necessary or desirable for State highway purposes, by gift, devise, purchase, exchange, condemnation, or otherwise. Such lands or real property may be acquired in fee simple or in any lesser estate. State highway purposes shall include, but are not limited to the following:

(a) For present and future rights-of-way, including those necessary for urban extensions of State highways within municipalities.

(b) For exchanging the same for other property to be used for rights-of-way, if the best interest of the State will be served and right-of-way costs reduced thereby.

(c) For rock quarries, gravel pits, sand or earth borrow pits, or related purposes, not being commercially operated.

(d) For offices, shops, storage yards, or other necessary or auxiliary facilities.

(e) For roadside areas or parks adjacent or adjoining or near any State highway.

(f) For the culture and support of trees and shrubbery which benefit any State highway by aiding in the maintenance and preservation of the roadbed, or which aid in the maintenance and promote the attractiveness of the scenic beauties associated with any State highways.

(g) For drainage in connection with any State highway, or for cuts and fills, or channel changes, or maintenance thereof.

(h) For the maintenance of an unobstructed view of any portion of a State highway so as to promote the safety of the traveling public.

(i) For the construction and maintenance of stock trails and cattle passes.

(j) For the elimination of public or private crossings or intersections at grade, on any State highway.

(k) For the protection of the State highway system from both physical and functional encroachments of any kind."

The Highway Commission relies on Subsection (b) in this litigation. It is appellant's contention that the burden was on the appellee to establish that the best interest of the state *would not* be served, and right-of-way costs *would not* be reduced by the exchange of properties. From its brief:

"The trial court found that the burden of proof was on the appellee to show that the Commission had acted arbitrarily or that the taking was not for a public purpose. Since the Commission condemned tract number 444R-2 for the stated purpose of exchanging it for tract number 440,[8] the appellee, in order to prevail, would have to show that (1) the taking was not in the public interest and that (2) the right-of-way cost would not be reduced by the taking.

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[8]Owned by the Colony.

"The evidence in this record fails to show that either of these requirements were met by the appellee.

"Since the appellee must positively show the absence of one or both of these conditions in order to prevail, and since he failed to establish the absence of either of the conditions by a preponderance of the evidence, the court was in error in granting the defendants motion striking the complaint and declaration of taking on tract number 444R-2."

Appellant points out that this court has repeatedly held that one, who challenges the scope of a condemnation, takes on the burden of proving that the condemnor has abused its discretion. Several Arkansas cases are cited to that effect. Appellant is correct in stating the holding in the cases cited—but those cases do not apply in the case before us. It might be here stated that the trial court, though finding for appellee, actually erred in its holding that the burden of proof was on the appellee. The citations given by appellant refer to cases where the property condemned *was to be used for the purpose for which* it *was condemned.* In the highway case cited, the property condemned *was to be used for the right-of-way.* Here, of course, this is not true. Subsection (b), relied on by appellant, states:

"(b) For exchanging the same for other property to be used for rights-of-way, *if* [our emphasis] the best interest of the State will be served and right-of-way costs reduced thereby."

This subsection has never been passed on before by this court, and the italicized word is the key to the answer in this litigation. It will readily be seen that the commission is authorized to exchange property (it condemns) for other property to be used for right-of-way *only under certain conditions*—those conditions being *if the best interest of the state will be served and right-of-way costs reduced thereby.* Obviously, the highway department does not have this right until it establishes

the italicized phrase. Unless that is established, the right of exchange does not exist. Accordingly, the burden is on the Arkansas Highway Commission to establish those two facts. After all, would not logic itself dictate such a course? How could a landowner normally show that the best interest of the state would *not* be served, and right-of-way costs *not* reduced? Only the department knows the right-of-way costs, and whether same could be reduced by exchanging other property for that right-of-way, instead of paying the right-of-way owner. Only the department is in possession of the facts that could demonstrate that the best interest of the state would be served. Requiring the landowner to make the showing would not only be placing an almost impossible burden upon him, but would clearly be contrary to the statute itself. Evidence taken at the hearing (testimony of Mr. Martin) reflects that the highway department had not even appraised the value of the Colony's property that was within the right-of-way, *i.* e., the department did not know the value of the property that it was getting for right-of-way use in return for the property it desired to give in exchange, *viz.*, 444R-2.

Mr. Charles Acuff, Superintendent of the Arkansas Children's Colony, likewise, was unable to place a value on the 2.62 acres owned by the Colony, and he stated that he did not know whether the Colony property was worth more or less than the property owned by the Morgan estate, which is under consideration in this litigation.

We have held that the burden was on the commission to establish that the best interest of the state would be served, and right-of-way costs reduced thereby. It is apparent that this showing was not made, and, for that matter, it is not argued otherwise. The only point argued by appellant is that the burden of proof rested upon appellee, and same was not met. This litigation is thus disposed of, and it becomes unnecessary to pass upon other issues that might arise under the statute,

i. e., the constitutionality of the provision (which is not raised) or the scope of the power of exchange granted to the commission.

Affirmed.

BYRD, J., concurs.

CONLEY BYRD, Justice, concurring. I concur in the result reached by the majority. In my opinion, Ark. Stat. Ann. § 76-532 (Repl. 1957), insofar as it authorizes the taking of property by eminent domain not necessary for highway purposes in order to exchange it for property that is to be used for highway purposes, is unconstitutional and void. Ark. Const. art. 2, § 22. *Ozark Coal Co.* v. *Pennsylvania Anthracite Rd. Co.*, [1] Ark. 495, 134 S. W. 634 (1911).

[1]For instance, apparently, under appellant's interpretation of the statute, the State Highway Commission would have the authority to condemn property to the extreme west of Little Rock for the purpose of exchanging it for a right-of-way to be used to the extreme east of Little Rock, the western property being miles away from the proposed highway. We emphasize that the power of the commission to make such an exchange of property is not touched upon in this opinion.

CARL W. WIDMER *v.* ROY G. WOOD ET UX

5-4248 420 S. W. 2d 828

Opinion delivered November 13, 1967
(Original opinion delivered September 18, 1967)

Carl W. Widmer, for appellant.

Hardin, Barton, Hardin & Jesson; By: *William Powell Thompson,* for appellees.

GEORGE ROSE SMITH, Justice. On October 19, 1961, the parties to this suit entered into a written agreement by which the appellees, Wood and his wife, agreed to sell certain lands in Oklahoma to the appellant, Widmer. For reasons not now important the agreement was never fully executed, and eventually the Woods resumed possession of the property. In 1964 Widmer, acting *pro se,* brought this action at law, asserting a number of causes

of action based upon the theory that the Woods had breached the contract and that Widmer was the equitable owner of the lands. This appeal is from a judgment striking one count in the plaintiff's amended complaint, for misjoinder, and dismissing the other count for failure to state a cause of acton.

During the pendency of the case Widmer filed several separate sets of requests for admissions of fact. The defendants answered some of the requests and filed objections to others. At a hearing upon the objections the court stated at the outset that before he could pass upon the objections it was necessary to determine whether the complaint was based upon a breach of contract or upon a tort—either deceit or trespass or both. Widmer stated that his cause of action was for treble damages under Ark. Stat. Ann. § 50-105 (Supp. 1965). The court accordingly struck the other counts in the complaint.

Widmer next filed an amendment to his complaint, asserting (1) a cause of acton for treble damages for the destruction of trees and crops on the lands and (2) a cause of action for the recovery of rents paid to the Woods by tenants. The court struck the second count for misjoinder and sustained a demurrer to the first count.

The court was right. Widmer does not deny that a misjoinder existed, but he insists that the defendants waived that defect by filing an answer to the original complaint instead of a motion to strike. Ark. Stat. Ann. §§ 27-1302 and -1303 (Repl. 1962). Perhaps Widmer might have pressed home that point in the first instance, but he failed to do so. Instead, he acquiesced in the court's ruling by confining his cause of action solely to the treble damage statute. When he later attempted a second misjoinder by amendment to his complaint the defendants promptly filed an appropriate motion to quash. There was certainly no waiver with respect to the amended complaint.

Moneywise, Widmer's principal cause of action was stated in his first count. That count asserted a right to treble damages under Section 50-105. That statute, however, cannot be applied extraterritorially to a cause of action arising in Oklahoma. Ordinarily statutes have no effect except within the state's own territorial limits. *Meekins* v. *Meekins,* 169 Ark. 265, 275 S. W. 337 (1925). That principle is peculiarly applicable to injuries to land, which are governed by the law of the place where the land is.

Widmer is mistaken in thinking that his contention is supported by our decision in *Reasor-Hill Corp.* v. *Harrison,* 220 Ark. 521, 249 S. W. 2d 994, 30 A.L.R. 2d 1213 (1952). That case dealt only with the matter of jurisdiction. We recognize that our courts might entertain an action for damages to land in Oklahoma, but the only contention urged by Widmer in the trial court and in this court is the extraterritorial application of the treble damage statute. We hold that contention to be without merit.

The appellant also argues that the Woods, by failing to answer, admitted certain of his requests for admissions. The statute, however, permits the filing of written objections, Ark. Stat. Ann. § 28-358, and in each instance the defendants either responded to the requests or filed objections. That the objections did not include a notice for a hearing thereon was not, in our judgment, a defect so fatal as to result in the defendants' admission of the truth of the requests.

Affirmed.

PIKE COUNTY POULTRY CO. *v.* ANN E. KELLEY

5-4344 420 S. W. 2d 523

Opinion delivered November 13, 1967

Phillip Carroll, for appellant.

G. W. Lookadoo, for appellee.

PAUL WARD, Justice. This is a Workmen's Compensation case. This appeal by the employer, Pike County Poultry Co., challenges two specific findings of the Referee which, in turn, were upheld by the Commission and the circuit court. Some of the background facts are set out below.

Ann Kelley, appellee, was injured on August 11, 1965 while in the employment of appellant. Appellant, on November 29, 1965 made a payment of $371.80 to appellee to cover the healing period up to that date. Following this date appellee continued to see appellant's doctor (Dr. Durham) until February 7, 1966 when the doctor discharged her, allowing 5% disability to the body as a whole for permanent partial disability. During all this time and for sometime thereafter appellee was also treated by her own doctor (Dr. Haris-

ton). In June, 1966 appellee complained, by letter, to the Commission for not having received further payments. Later appellee contacted her attorney who, on July 1, 1966, filed a claim with the Commission stating, among other things, appellee was not receiving payments for part of the healing period, and requesting a date be set for the purpose of determining all issues. The Commission then fixed July 27, 1966 for a hearing before the Referee.

A hearing was held, with all parties and their attorneys present, at which time testimony was heard and reports by the two doctors were filed. On August 29, 1966 the Referee made, in substance, the following findings:

(a) Appellee's healing period ended February 7, 1966. (Not Nov. 29, 1965 as appellant contended.)

(b) Appellee "suffered a disability of 5% to the body as a whole, and that respondent controverted this finding".

(c) The cost of medical services rendered by Dr. Hariston are not compensable.

(d) Respondent "controverted temporary total disability benefits from November 30, 1965 to February 7, 1966".

(e) An Award was made accordingly, and appellee's attorney was allowed a fee.

As previously stated, the above findings were appealed to, and approved by, the Commission and the circuit court. Appellant appeals only from findings (a) and (e), presented in that order.

One. Attorney Fee. It is our conclusion that this item was properly allowed. The pivotal issue in this connection is whether there is substantial evidence to show appellant *controverted* appellee's *claim* in whole

or in part, on which an award was made. The pertinent portion of Ark. Stat. Ann. § 81-1332 (Repl. 1960) reads:

> "Whenever the Commission finds that a claim has been controverted, in whole or in part, the Commission shall direct that fees for legal services be paid by the employer or carrier in addition to compensation awarded . . ."

Applying the well established rule that we affirm the Commission on substantial evidence, and also on the rule (announced in *Fagan Electric Company* v. *Green,* 228 Ark. 477, 308 S. W. 2d 810) that we must weigh the testimony in its strongest light in favor of the Commission's findings, we are unable to say the Commision erred in finding appellant did controvert part of appellee's claim. Appellee was justified in employing an attorney because appellant was not furnishng needed medical treatment and she had received no payment in thirty weeks and her time for action was running out.

Two. The Healing Period. Likewise, it is our opinion that the Referee was justified in finding the healing period ended on February 7, 1966 (as contended by appellee) and not on November 29, 1965 (as contended by appellant). Appellee testified in substance, that after November 29, 1965; she went to her doctor for treatment several times because she was suffering with her back; she was not able to work, and is not able to work now. Dr. Hariston, in a letter dated July 14, 1966 (in the Record) stated that appellee "still has trouble with her back and probably will until she is operated". It is not denied that the above testimony (and more of the same purport) was controverted by appellant.

Under the liberal rules previously mentioned, we are unwilling to say there was no substantial evidence to support the findings of the Referee, the Commission and the circuit court.

Affirmed.

VICKIE RUTH POWELL, A MINOR BY HER MOTHER AND NEXT FRIEND, HELEN REYNOLDS *v.* KENNETH ALLEN POWELL

5-4330 420 S. W. 2d 528

Opinion delivered November 13, 1967

Brockman & Brockman, for appellant.

Charles S. Goldberger, for appellee.

LYLE BROWN, Justice. Vickie Ruth Powell, appellant, filed suit for divorce against Kenneth Allen Powell. She being a minor, suit was brought by her mother as next friend. After Vickie had testified in her own behalf, the chancellor dismissed her complaint, holding that she had "failed to make a showing of what this court conceives to be adequate grounds for divorce." The request of Vickie's counsel to produce three other witnesses was denied.

The effect of the trial court's ruling was to hold that the complaining spouse must first make a prima facie case by his or her testimony before any other evidence could be produced on behalf of the plaintiff. We know of no statutory or case law which supports that theory. In fact we can conceive of more than one situation where the appearance of the complaining spouse on the witness stand might be merely perfunctory. That would be more particularly true when the spouse is a girl of immature years.

Secondly, this young couple lived together for the better part of five months. She testified that she was physically abused on a number of occasions; that her husband had a violent temper and would curse her; that he would not keep a job; that his misrepresentations to their landlady caused them to be expelled from their apartment; that their parents had to help support them; that he constantly told her falsehoods; that his abuses were frequently in the presence of relatives and friends and those experiences were embarrassing to her; that she had no love or respect for him because of the recited indignities and wanted a divorce.

As pointed out by the chancellor, the plaintiff did not categorically state that the condition to which she testified made her married life unbearable. But from her testimony it could have been reasonably inferred. In that connection we think the immaturity of this girl should be taken into consideration; she should not be held to the same technical requirements as might be required of a person of maturity and experience. Furthermore, Vickie's mother was around the couple during a considerable portion of their cohabitation. She might well have supplied the court with enlightenment as respects the effect of the indignities on Vickie. She was one of the three witnesses whom the court declined to hear.

Unless a full-scale hearing refutes Vickie's testimony, or unless her credibility be discounted by that

hearing, we hold she may well be entitled to a divorce. She need not be corroborated on every assertion. The purpose of requiring corroboration "is to prevent the procuring of divorces through collusion and when it is plain there is no collusion, the corroboration may be comparatively slight." *LaGasse* v. *LaGasse,* 234 Ark. 734, 354 S. W. 2d 274 (1962). Kenneth Allen Powell filed an answer and appeared for trial in person and by counsel. Collusion was not even suggested.

The chancellor permitted counsel for plaintiff to introduce into the record affidavits of the three proffered witnesses. However, the chancellor did not consider them in rendering his decision. We therefore see no need, especially in view of a possible trial, to comment on them.

Reversed and remanded.

C. H. THOMAS *v.* MARION McELROY ET AL

5-4324 420 S. W. 2d 530

Opinion delivered November 13, 1967

James R. Howard, for appellant.

Edgar R. Thompson, for appellees.

JOHN A. FOGLEMAN, Justice. Appellant seeks to reverse a judgment entered against him March 3, 1967. The only point for reversal is the contention that this was actually a modification of a decree of the court entered March 25, 1966, a day of an earlier term of the court.

Appellees brought suit against appellant and another, asserting a landlord and tenant relationship, a liability of appellant to appellee for rent, a right to recovery of certain personal property remaining and a right to an accounting for personal property which they alleged came into the possession of appellant under a lease agreement. On March 25, 1966, the trial court, after having heard testimony offered by both parties, entered what was labeled "Decree." This instrument set out the appearances of the parties, enumerated the components of the record upon which the case was heard and made certain findings. In summary form, these findings were:

1. That the complaint should be dismissed as to one of the defendants.
2. "That a contractual relationship has existed from month to month from December 9, 1963, until July 8, 1965. A Rental of $40.00 per month should have been paid by the defendant C. H. Thomas, to the plantiffs herein."
3. "On motion of the defendant, C. H. Thomas, the said contractual relationship is hereby terminated as of this date."[1]
4. That Thomas shall permit appellees to remove certain personal property from the leased premises.

These findings were followed by a separate paragraph which reads: "IT IS SO ORDERED," after which appeared the signature of the chancellor. Nothing further appears to have been done until the entry of the judgment from which this appeal was taken. It is entitled "JUDGMENT ON DECREE." It recites the hearing of the cause on March 25, 1966, and quotes finding number 2, as set out above. This language follows:

> "IT IS THEREFORE by this Court, Considered, Ordered and Adjudged that the plaintiffs do have and recover of and from the defendant, C. H. Thomas, the sum of Seven Hundred Sixty and No/100 ($760.00) Dollars, together with interest at the rate of six percent (6%) per annum from the 25th day of March, 1966, from all of which garnishment and execution may issue immediately as on a Judgment at Law."

One full term of the court intervened between the two court actions. If appellant were correct in his analysis, the last action would constitute an unauthorized

[1]In view of their significance on appeal, items two and three are copied verbatim.

modification of a judgment, since none of the statutory grounds for such action is asserted.

Decision of this appeal, then, depends entirely upon the determination of the character of the first court action. Formal requirements for a judgment in Arkansas are few. It is the *final* determination of the rights of parties in an action. Ark. Stat. Ann. § 29-101 (Repl. 1962). The *amount* of the judgment must be computed, as near as may be, in dollars and cents. Ark. Stat. Ann. § 29-115. A judgment must specify *clearly* the relief granted or other *determination* of the action. The few basic requirements must be met and the judgment must clearly show that it is the act of the law, pronounced and declared by the court upon determination and inquiry. *Baker* v. *State,* 3 Ark. 491. While a rather technical application was made of this rule in the cited case, strict formality in language used to express the adjudication of the court is not necessary and a "judgment" will be tested by its substance not its form. *Melton* v. *St. Louis I. M. & S. R. Co.,* 99 Ark. 433, 139 S. W. 289. The name by which it is called by the court is not controlling. *State* v. *Donohue,* 11 Wis. 2d 517, 105 N. W. 2d 844. We have held that the designation or title given a pleading is not controlling, but that its effect, character and sufficiency are to be determined by its substance regardless of what it is called. *Rinehart & Gore* v. *Rowland,* 139 Ark. 90, 213 S. W. 17; *Craft* v. *Armstrong,* 200 Ark. 681, 141 S. W. 2d 39; *Askew* v. *Murdock Acceptance Corp.,* 225 Ark. 68, 279 S. W. 2d 557; *Stroud* v. *M. M. Barksdale Lbr. Co.,* 229 Ark. 111, 313 S. W. 2d 376; *Parker* v. *Bowlan, Executrix,* 242 Ark. 192, 412 S. W. 2d 597. There is no reason we should not apply the same rule to a court order. See, also, 49 C.J.S. 29, Judgments, § 5.

When we apply the test of substance to the "decree" of March 25, 1966, in the light of the basic statutory requirements for a judgment, we find it lacking in basic essentials. It has more of the characteristics

of written findings and conclusions than of a judgment. The factors demonstrating this are:

1. The numbered paragraphs purport to be findings of the court.

2. While the court found that the complaint should be dismissed as to a codefendant, there is no final disposition of appellees' prayer for a judgment against defendant for past due rents or for personal property alleged to have been removed and destroyed.

3. While the court found that a contractual relationship existed between appellant and appellees for a period of 19 months and that a rental of $40.00 per month should have been paid by appellant to appellees, there was no declaration of the amount actually due or remaining unpaid, nor was there any dismssal of the action as to Thomas.

The only items which could possibly be said to have been disposed of in the original order are the dismissal of a party and the delivery of certain personal property. Insofar as appellant was concerned, these were subsidiary matters. There was no dispute about appellees' right to possession of the property. The finding that the other defendant was not a party to the action might have been a corollary to the statement that a contractual relationship existed between appellees and appellant.

The decisions, opinions, and findings of a court do not constitute a judgment or decree. They merely form the bases upon which the judgment or decree is subsequently to be rendered and are not conclusive unless incorporated in a judgment or a judgment be entered thereon. *Ex Parte Niklaus,* 144 Neb. 503, 13 N. W. 2d 655; *Employers Ins. Co.* v. *Brooks,* 250 Ala. 36, 33 So. 2d 3 (1947); *Gouger* v. *Sarpy County,* 151 Neb. 207, 36

N. W. 2d 775 (1949); *Gilpin* v. *Burrage,* 188 Tenn. 80, 216 S. W. 2d 732 (1949); *Hays Trucking Co.* v. *Maxwell,* 261 P. 2d 456 (Okla. 1953); *Crowe* v. *DeSoto Consolidated School Dist.,* 246 Iowa 38, 66 N. W. 2d 859 (1954); *In Re Lounsberry's Estate,* 149 Cal. App. 2d 857, 309 P. 2d 554 (1957). They are more in the nature of the verdict of a jury and no more a judgment than such a verdict. *State, Ex Rel Work* v. *Brown,* 44 Ind. 329 (1873); *Galiger* v. *McNulty,* 80 Mont. 339, 260 P. 401 (1927); *Central Republic Bank & Trust Co.* v. *Bent,* 281 Ill. App. 365 (1935).

A judgment is distinguished from an order in that the latter is the mandate or determination of a court on some subsidiary or collateral matter arising in an action not disposing of the merits but adjudicating a preliminary point or directing some step in the proceedings. 49 C.J.S. 29, Judgments, § 5.

In treating similar situations, other courts have found actions such as that first taken in this cause not to be such final determinations as to constitute judgments. In *Alvord* v. *McGaughey,* 5 Colo. 244 (1880), the court entered a finding that the defendants were indebted to the plaintiffs in the sum of $202.00. The court said that while a strict compliance with form was not essential, the record must not only indicate that an adjudicatic took place, but the entry must have been intended as the entry of a judgment in order to constitute a final judgment. The Court of Appeals of Georgia held that a statement in a court's order on certain demurrers with reference to an agreement of the plaintiff to pay the defendant $467.00 if certain cases were settled, was not a judgment but a mere statement of a reason for a conclusion it had reached as to a part of the case. *Aiken* v. *Richardson,* 80 Ga. App. 591, 56 S. E. 2d 782 (1949). A finding by a court in a divorce case that there was due and owing by a plaintiff to a defendant the sum of $275.00 per month for a period commencing January 1, 1947, and ending January 1, 1950, was held not to have the force and effect of an adjudication dispos-

ing of the subject matter in a manner sufficient to constitute a judgment. *Taliaferro* v. *Taliaferro,* 178 Cal. App. 2d 146, 2 Cal. Rep. 719 (1960). A final judgment or decision is one that finally adjudicates the rights of the parties, putting it beyond the power of the court which made it to place the parties in their original positions. *Crowe* v. *DeSoto Consolidated School Dist.,* 246 Iowa 38, 66 N. W. 2d 859 (1954). It must be such a final determination as may be enforced by execution or in some other appropriate manner. *Wilson* v. *Corbin,* 241 Iowa 266, 40 N. W. 2d 472 (1950); *Crowe* v. *DeSoto Consolidated School Dist., supra.*

A judgment or decree for money should state the amount which the defendant is required to pay and the date from which interest is to be computed. *Aldrich* v. *Sharp,* 3 Scammon (Ill.) 261; *Park* v. *Holmes,* 147 Pa. 497, 23 Atl. 769 (1892); *Emig* v. *Medley,* 69 Ill. App. 199 (1896); *Spoor* v. *Tilson,* 97 Va. 279, 33 S. E. 609 (1899); *Marteeny* v. *Louth,* 206 Ill. App. 158 (1917). Even if it could be argued here that the court's *findings* indicated that appellees should have a money recovery from appellant, such findings would not have given the clerk any guide as to the amount of the judgment or the date from which interest would have run for the purpose of issuing execution. As a further indication of uncertainty of the amount, the prayer of the complaint was for $520.00. It might well be that the appellees would have been limited to that amount of recovery had the question been raised.

Clearly, the action of the court on March 25, 1966, was deficient as a *final* determination of the rights of the parties. It is also inadequate in computation of the amount of the judgment and specification of the relief granted. Thus, the judgment of March 3, 1967, was the first actual judgment in the case. Accordingly, it is affirmed.

DONALD WAYNE WARD *v.* STATE OF ARKANSAS

5298 420 S. W. 2d 540
Opinion delivered November 13, 1967
[Rehearing denied December 4, 1967]

Jack Rose and *James E. Shoffley,* for appellant.

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

J. FRED JONES, Justice. Donald Wayne Ward was convicted in the Sebastian County Circuit Court on charges of burglary and grand larceny. He was sen-

tenced to three years in the penitentiary on the burglary charge and to two years on the larceny charge, and has appealed to this court relying upon the following point for reversal:

> "The Appellant contends that the keys taken from his person after his arrest were prejudicial and inadmissible, because the Appellant was actually arrested when he was originally detained, and that the arrest was without probable cause, and that the Trial Court erred in not so finding and in not suppressing this evidence."

About 4:00 a.m. on September 27, 1966, appellant was a passenger in an automobile driven by a Mrs. Anderson in the City of Fort Smith when the automobile was stopped by two police officers for driving too fast on Towson Avenue. Mrs. Anderson was charged with driving without a driver's license and since the automobile bore an Oklahoma license, she was required to go to the police station and post bond. One of the officers drove Mrs. Anderson's automobile to the station while the other officer drove the patrol car, and Mrs. Anderson and appellant rode to the police station with a police captain who had been called to the scene. The Fort Smith Police Department had had a pickup order on the automobile and a warrant had been issued in connection with the purchase of the automobile in Arkansas with worthless checks by Mr. Anderson. The details of this transaction are not important here, but after arriving at the station, in order to prove ownership of the automobile, Mrs. Anderson permitted the police officers to search the automobile. The officers found a payment receipt and a title certificate in the automobile and in addition they found under the front seat of the automobile a motel pillowcase containing over Sixty Dollars in quarters and small change, and also found some men's leather gloves and ladies canvas gloves, a pry bar, a screwdriver, some wire pliers and a jumper cable. Mrs. Anderson and appellant were advised that they were un-

der arrest for investigation for burglary and grand larceny. Appellant was then searched and the contents of his pockets, including some keys, were removed and he was placed in a jail cell.

The officers then retraced with Mrs. Anderson, the route she followed into Fort Smith, and near the place where Mrs. Anderson said she had taken a nap while appellant went for cigarettes, the officers found a pool hall that had been burglarized. The door of the building had been pried open, keys had been taken from an open cash register and money taken from pool tables and a music machine. The owner of the pool hall later identified two of the keys taken from the appellant, as being two keys taken from his cash register. The identification was made by comparing the keys, and the serial number on the keys, taken from appellant, with a duplicate set retained in the possession of the owner's wife. These keys were offered in evidence at the trial and this appeal is based on their admission in evidence.

Prior to the trial of this case, appellant filed a motion to suppress evidence and alleged in his motion as follows:

> "2. That the defendant has reason to believe that certain items of his personal belongings consisting of keys and other personal property, which are now in the possession of the State of Arkansas, will be introduced as evidence against him at said trial; that all items found as a result of search of defendant's person at the time or immediately subsequent to his arrest should be excluded as evidence, for the reason that there was not probable cause nor warrant for defendant's arrest, and hence said arrest was an illegal one; that said arrest and search violated defendant's constitutional rights under the constitution of the United States of America and the State of Arkansas."

A separate hearing was had on this motion, at which time the appellant, as well as the police officers, testified. The trial court overruled the motion to suppress and admitted the keys in evidence.

The evidence is clear in this case that appellant did not part with possession of the keys until after the officers had ample grounds to believe that a felony had been committed. Appellant denied that he parted with possession of any keys at all. He testified that he emptied his pockets at the officer's request, but insists that the officers only took some finger nail clippers and handed back his keys. The officers testified that after the appellant was charged with burglary and grand larceny, they searched him and removed the keys from his pockets. There is no discrepancy in the testimony that this incident occurred after the automobile had been lawfully searched and the money in the pillowcase and the other items were found and removed from the automobile.

Appellant contends, however, that he was *actually arrested* when the automobile was first stopped by the officers and the driver, Mrs. Anderson, was given a citation for driving without a driver's license, and he contends that he was still under this arrest when taken to the police station. It is appellant's contention that his arrest was without probable cause or legal right and that if any keys were taken from his possession without a search warrant, they were obtained through an unlawful search and seizure and were inadmissible in evidence against him. Appellant argues that such search and seizure violates his constitutional rights guaranteed to him under Amendment 4 of the Constitution of the United States, and under Article 2, Section 15 of the Constitution of the State of Arkansas, which is as follows:

> "The right of the people of this State to be secure in their persons, houses, papers and effects against

unreasonable searches and seizures shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized."

The appellant very properly points out in his brief that "the law in the field of arrests, searches and seizures has been a dynamic one in federal courts and other states in this connection," and appellant cites several federal court decisions in support of this statement. Appellant also cites our own case of *Clubb* v. *State,* 230 Ark. 688, 326 S. W. 2d 816, which involved evidence obtained in the search of a house trailer without a search warrant. Appellant urges that under the caveat announced in that case, we should adopt the federal rule that all evidence obtained by searches and seizures in violation of the Federal Constitution is inadmissible in the trial of a criminal case in a state court. We have not deviated far from the caveat announced in the *Clubb* case in 1959, and we do not do so now. Since the 1961 decision of the United States Supreme Court in the case of *Mapp* v. *Ohio,* 367 U. S. 643, we have recognized the rule that where an accused is unlawfully arrested without cause, and searched without a warrant as a result of such unlawful arrest, the search would also be unlawful and keys or anything else seized as a result of such search, could not be used in evidence against him at his trial on a criminal charge unless waived by the accused. See *Cabbiness* v. *State,* 241 Ark. 898, 410 S. W. 2d 867. This is true not merely because of Amendment 14 and Section 15 of Article 2, supra, but because the use of such evidence so obtained, would force the accused to be a witness against himself as prohibited by Amendment 5 of the United States Constitution and in Section 8 of Article 2 of the Constitution of Arkansas.

We do, however, still measure the reasonableness of a search, and determine the lawfulness of any seizure made as a result of it, by the facts of the case before us. It might well be urged in this case that the 4th Amend-

ment to the United States Constitution, as well as Article 2, Section 13 of the State Constitution, protects the security of keys in the owner's cash register where they belonged, as well as in the appellant's pocket where they were found, but that is not the question on this appeal.

We now come to the question of whether or not the search of the appellant was unreasonable and the seizure of the keys was unlawful in this case.

We are of the opinion that the police officers had a right to stop the automobile in which appellant was a passenger. The officers testified that the automobile was speeding when they first observed it and this is not denied. As to whether or not the officers had reasonable grounds for arresting the appellant when the automobile was first stopped, and whether or not the appellant was actually placed under arrest at that time, the evidence is not clear. If the police officers had a warrant for the arrest of Mr. Anderson and had reasonable grounds for believing that the appellant was Mr. Anderson, no one could seriously question their authority in detaining appellant long enough to determine whether or not he was Mr. Anderson.

The record indicates that there was some question in appellant's own mind as to whether he was arrested before the money was found in the automobile he occupied.

> "Q. Did they ever say any words such as 'You're under arrest'?
>
> A. To Miss Anderson. They said that she was under arrest for driving without a license, and I just, more or less, took it that I was under arrest for something.
>
> * * *
>
> At the time they brought us to the station, I knew that Mrs. Anderson—they was supposed to file a

no driver's license on her, and I, more or less, figured some charge would be filed against me."

Neither the appellant nor Mrs. Anderson had a driver's license and Captain Walker was called to where the automobile had been stopped in connection with driving the automobile to the police station, and he testified at the hearing on the motion to suppress, as follows:

"Q. * * * Did you know whether they were under arrest when you went to get them, Captain Walker?

A. The only thing—they didn't have any kind of identification, they had a car. I had had a pickup on a car."

At the hearing on the motion, Officer Balch testified:

"We proceeded up to the car, asked the lady driving if we could see her driver's license. She stated she didn't have any, that she had lost her purse between here and Hot Springs somewhere at a service station. At that time I asked her to step out of the car and asked the other party to step out of the car, asked him for identification and he said he didn't have any identification either, that he had lost his billfold that day somewhere, he didn't know where.

* * *

"I issued Patricia Anderson a summons for no driver's license and we put them in Captain Walker's car and brought them to the PD, and I drove the police car and Officer King drove the '66 Ford with her permission.

* * *

"We had had a pickup on a car like this but it had a different license number than this car, and the detective were called in to investigate the car.

* * *

"Q. Did you have information as to anyone else or just the car?

A. The car and a Marion Anderson had purchased this car in Paris, Arkansas, and had written a hot check, two hot checks to buy the car.

* * *

"Q. Did you talk to anyone on your radio, and someone on the radio told you that that pickup had been cancelled?

A. No, sir, we hadn't had a cancellation on it.

* * *

"Q. * * * Were you advised to bring both to the Police Station to post bond?

A. Yes, sir, we/on an out-of-state ticket they must post bond.

"Q. Now, why both? Why did you bring the defendant down to the station?

A. He was with her and he had no identification on him, and we didn't know whether he was Marion Anderson or not."

At the trial of the case, Officer Balch testified unequivocally that Mrs. Anderson was given a citation for driving without a driver's license, and that he only asked appellant to step out of the automobile. He denied that the appellant was at any time under arrest prior to his arrest in the police station. He testified that appellant voluntarily went along with Mrs. Anderson to the police station. No effort was made to impeach Officer Balch's testimony at the trial.

Certainly the officers had ample grounds for a reasonable belief that appellant had committed a felony when he was "booked" and the keys taken from his possession at the police station. Appellant does not contend that the evidence is not sufficient to sustain the conviction even if the keys had not been introduced.

We are of the opinion that the trial court did not err in denying appellant's motion to suppress the evidence under the facts and circumstances of this case, and that the judgment of the trial court should be affirmed.

The trial court is to be commended in not only seeing that appellant received a fair trial and the service of a competent counsel, but in seeing that appellant also recognized that he had received a fair trial and the benefit of competent counsel.

Affirmed.

BROWN, J., not participating.

BYRD, J., dissents.

CONLEY BYRD, Justice, dissenting. I dissent from the majority view that the keys were properly introduced into evidence—*i. e.* that appellant was not placed under arrest at the time the car was stopped.

Captain Walker of the Fort Smith Police Department testified that appellant and a girl named Anderson were turned over to him by officers Balch and King to take to the police station from the place where they had been stopped at Towson and Rogers Avenues. On cross-examination he testified:

> "Q. Well, I'm asking you did you feel like he was told to come by the other officers and did you tell him to come with you?

A. I just told him to get in the back and he did.

Q. He did under your orders?

A. Yes, sir."

Officer Balch testified on cross-examination:

"We were advised to bring both parties to the station, because on an out-of-state ticket, they must post bond. The reason I brought the defendant was because he was with her, and he had no identification. We did not charge him with anything when we brought him down. We just brought him down because he was in the car. We did not tell him he was free to go. We would not have let him go when we stopped the car, because he had no identification on him. We did not issue a ticket for speeding, even though the speed attracted our attention, because it was not speeding when we got behind it. We did not get a clock on it to be fair enough to issue a summons for speeding, but we stopped them anyway, because we wanted to talk to her about her speed. We had known about a warrant, but it was a different license number. We did not stop the car on the strength of any warrant, but stopped it on account of speed. We did not issue a ticket for speeding, but did for no driver's license. Yes, I told the defendant he would have to come to the Police Department with us so we could establish who he was. He gave us his name, was not driving the car, and was not breaking the law at the time we stopped him, but a person must have an ID card on him at all times. Officer King and myself talked to Captain Walker from the scene of the arrest, and nothing was mentioned about a warrant at that time. We told Captain Walker that we had stopped the car to talk to her about speeding. The reason I stopped the car was not because of any warrant; it was because I wanted to talk to the party driving about her speed. The reason I arrested the defendant was

> because he was a passenger in a car being driven by a person without driver's license, and he himself had no identification."

Under the facts, I cannot agree with the majority that there was no arrest of appellant at the scene where the automobile was stopped. Under the authority of *Beck* v. *Ohio,* 379 U. S. 89 (1964), the evidence concerning the keys is inadmissible because of the arrest without probable cause. In *Beck* it was pointed out:

> "An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment."

I would reverse and remand for new trial.

REYNOLDS METALS CO. ET AL *v.* CARMON CAIN

5-4339

420 S. W. 2d 872

Opinion delivered November 20, 1967

McMillen, McMillen & Turner, for appellant.

McMath, Leatherman, Woods & Youngdahl; By: *Silas Brewer,* for appellee.

CARLETON HARRIS, Chief Justice. This is a Workmen's Compensation case. Carmon Cain, 52 years of age, was an employee of Reynolds Metals Company, working at the Jones Mills plant near Malvern. On April 3, 1964, Cain was tightening electric bar nuts on an ore pot in the plant when he began to experience pain in his chest and arms, finally being forced to stop the work which he was doing. He continued to experience pain during the night, and consulted a physician the next day, following which he was hospitalized for three weeks. On August 31, Cain returned to work, and remained on the job until September 22, when, because of chest pains, he

was forced to quit. A claim for benefits was filed, but the referee held that, though the claimant was disabled, the disability did not arise out of his employment. Upon appeal to the full commission, the referee's decision was reversed, and the commission awarded disability benefits for permanent and total disability.[1] On appeal to the Hot Spring County Circuit Court, the judgment was affirmed, and from that judgment, appellant brings this appeal. It is urged that there is no substantial evidence to support a finding of an accident arising out of and in the course of the employment, and that there is no substantial evidence to support the finding that claimant's present disability is a result of the employment.

It is appellant's contention that appellee's attack was due to pre-existing arteriosclerotic heart disease, and his work had nothing to do with precipitating the attack. It is true that Cain was suffering from arteriosclerosis, and there is no dispute in the medical testimony on that point. The test, however, is whether the work that appellee was doing aggravated the pre-existing condition to the extent that it (the work) was a factor in bringing on the attack. *Reynolds Metals Company* v. *Robbins,* 231 Ark. 158, 328 S. W. 2d 489. Numerous cases hold in like manner. The commission set out pertinent facts, as follows:

"The claimant testified that on the two days preceding April 3, 1964, he had been running a jack hammer and that he experienced pain during this two day period. On the morning of April 3rd, he was tightening electric bar nuts on an ore pot located on the production line when he again experienced pain in his chest and arms which forced him to stop work."

The record supports the above statement.

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[1]Additional medical evidence was presented to the full commission, *viz.*, depositions of Dr. Leeman H. King, Dr. Walter H. O'Neal, Dr. Philip T. Cullen, and Dr. Alfred Kahn, Jr.

Dr. Philip Cullen, who had examined the claimant and taken an electrocardiogram, testified that on the basis of the electrocardiogram, the history, and other physical findings, Cain suffered a myocardial infarction in April, 1964.[2] He stated that the exertion on the job placed demands upon Cain's heart which could not be met by the diseased arteries. The doctor, in a letter of January 30, 1965, stated that the myocardial infarction "was aggravated and precipitated by his activities that day [April 3]. A pre-existing relative coronary insufficiency might well have been aggravated by this type of activity involving a high energy cost. In this case there would be a definite connection between his job activities and the occurrence of an acute myocardial infarction in April of 1964." Dr. Cullen testified that the blood delivered by the narrowed artery was adequate for rest, but not for hard work.

"Well, it would have to be that he was there on the job performing certain duties because I think his arteries at that time were good enough for him to be home sitting in a chair and I don't think if he had he would have experienced the trouble on that particular day at that particular time."

The witness testified that an infarction implies permanent damage to the heart muscle itself, and that the attack suffered on April 3 was a component of the present disability. He stated that at the time he examined Cain (January, 1965), appellee had about "70% to the body as a whole permanent partial disability." He attributed 50% of this to the infarct.

Dr. Walter O'Neal, a Little Rock internist, who examined Cain, took a history, did an electrocardiogram, and made other tests, stated that Cain had "pre-existing arteriosclerotic heart disease and that he was working

[2]He also testified that the coronary artery disease became evident in June, 1956, with the onset of an acute myocardial infarction.

at strenuous activity at the time that his last coronary occurred and that it was my opinion that there was a direct causal relationship between this activity and his myocardial infarct. * * *

"Well, to put it simply, physical stress requires more nutrition to the heart muscle by the way of blood flow than does the heart at rest. If the heart is inadequately supplied, then there occurs an area of ischemia, that is, an inadequate blood supply. This, in turn, produces an irritable area and the blood vessel itself, of course, which is ischemic will go into spasm."

Dr. Alfred Kahn, Jr., disagreed, being of the opinion that Cain's exertion did not have any effect on the underlying arteriosclerosis. He stated that he did not believe that the work activity contributed to the occlusion, though it was conceivable.

It can readily be seen that there was substantial evidence to support the finding by the commission, and, of course, that means we will not disturb the commission ruling. *Reynolds Metals Company* v. *Robbins, supra.* Actually, appellant's brief appears to be mainly directed to a criticism of past holdings in heart cases. Appellant states:

"Apparently, the Court now interprets the Act to include as accidental, within the meaning of the quoted provision,[8] any heart attack which occurs on the job."

Of course, we do not know how a doctor would be able to say that the same result would have occurred— or would not have occurred— if the worker happened to be loading his boat with heavy equipment for a fishing trip. But here, Dr. Cullen did state that this man's work

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[8]This refers to Ark. Stat. Ann. § 81-1302 (d) (Repl. 1960), defining "injury."

aggravated—and thereby hastened—the occlusion. Certainly, we have not held that *any* heart attack occurring on the job is compensable. For instance, only a few weeks ago (October 16, 1967), in *Ottenheimer Brothers Manufacturing Company* v. *Casey,* we denied compensation in a heart attack case, the claimant testifying that the attack occurred on the job. A reading of that case will disclose important distinctions from the case at bar.

However, in a long line of cases, too numerous to recite here, we have constantly held that we will not reverse the commission if there is substantial evidence to support its findings. This is an established rule (and the general rule over the nation), and, if it is to be changed, legislative action by our General Assembly will be required.

In line with the reasoning herein set out, the judgment of the Hot Spring County Circuit Court is affirmed.

BRADLEY COUNTY ET AL *v.* SAMUEL ADAMS

5-4343 420 S. W. 2d 900

Opinion delivered November 20, 1967

Smith, Williams, Friday & Bowen; By: *Boyce R. Love,* for appellants.

Paul K. Roberts, for appellee.

George Rose Smith, Justice. The Workmen's Compensation Commission entered an award granting compensation to the appellee for ten weeks of total disability, together with medical expenses, attributable to a heart attack suffered in the course of his employment by Bradley County. The circuit court affirmed the award. The only question here is whether there is substantial evidence to support the Commission's conclusion that there was a causal connection between the claimant's work and his disability.

On the morning of June 7, 1966, Adams assisted the foreman of the county bridge crew in dismantling a bridge made of heavy timbers. The day was hot, and the work hard. Shortly before noon Adams suffered chest pains that proved to be the onset of his disabling heart condition. That afternoon Adams quit work early and was taken by his wife to a hospital, where he was treated by Dr. Whaley, the only medical witness who testified.

Dr. Whaley's deposition was taken on interrogatories. Counsel for the claimant propounded a detailed

question which summarized Adams's activities just before his illness and asked whether in Dr. Whaley's opinion those activities had been a contributing factor in the onset of the attack. Dr. Whaley answered: "The term used by doctors in this sort of case would be that the physical exertion is a *precipitating* factor, a term very close to the word contributing."

A cross-interrogatory asked if it isn't "highly unlikely that work on the day of the occurrence of the chest pains had any causal relation to the pains?" The answer: "No. The basic lesion had to develop slowly, but it is entirely possible that the *precipitating* event was a more vigorous heart action and flow rate through the diseased artery due to increased workload on the day in question."

The final cross-interrogatory read: "From all you know about this case, in your opinion, did the work on the day in question have any causal relation to the incomplete blockage of coronary blood flow?" Dr. Whaley answered: "As a simple matter of fact, I do not know, and to state an opinion on that basis would be foolish. I understand that the Commission has to determine one way or the other, but there is no clear *medical* reason for me to have an opinion."

Dr. Whaley's testimony is evidently open to two interpretations. On the one hand, he expressed the opinion that the claimant's work was a *precipitating* factor in the onset of the attack. Dr. Whaley twice underlined the the word precipitating. Webster's Second New International Dictionary defines precipitate as "to hasten the occurrence of; as, to *precipitate* a journey, or a conflict." That is plainly the sense in which the witness used the word.

It is true that Dr. Whaley also declared that, as a simple matter of fact, he did not know whether the required causal connection existed. But the Commission were at liberty to take that statement to mean merely

that the doctor was unwilling to express complete certainty about a matter not admitting of such an inflexible view. We considered a similar situation in *American Life Ins. Co.* v. *Moore*, 216 Ark. 44, 223 S. W. 2d 1019 (1949), where we said:

"Appellant insists that Dr. Monroe's testimony is speculative, since he admitted the possibility that death was due to some other cause. But medicine, like the law, is not an exact science. If mathematical certainty were required, a surgeon would act at his peril in advising his patient to undergo an operation. The law does not compel adherence to a standard so precise. The effect of Dr. Monroe's testimony is that in his opinion the most probable cause of death was a pulmonary embolism attributable to the fractured leg. . . No alternate theory has been proposed by appellant. We are unwilling to say that Dr. Monroe's testimony is conjectural merely because his opinion did not preclude every other possible cause of death." In the case at bar the Commission was also justified in considering the fact that Adams's attack occurred under circumstances strongly indicating that it was work-connected.

We have held, in cases too numerous to mention, that it is not our province to decide contested issues of fact in compensation cases, that it is the responsibility of the Commission to draw inferences when the testimony is open to more than a single interpretation, and that the Commission's findings have the force of a jury verdict. Those principles demand that the Commission's decision in the case at hand be upheld.

Affirmed.

BROWN and FOGLEMAN, JJ., dissent.

JOHN A. FOGLEMAN, Justice, dissenting. In view of the testimony in this case, I am compelled to register my dissent from the action of the majority.

There is no presumption that a claim for compensation benefits comes within the provisions of the workmen's compensation law. *Duke* v. *Pekin Wood Products Co.*, 223 Ark. 182, 264 S. W. 2d 834. In reiterating previous holdings that the burden is on the claimant to show a causal connection between an employee's heart attack and his work, this court has said that any change in that rule is a matter for the legislature and not the judiciary. *Auto Salvage Company* v. *Rogers*, 232 Ark. 1013, 342 S. W. 2d 85. I fear that the action of the majority in this case very nearly abrogates that position and amounts to a virtual change by this court. If the claimant actually still bears this burden, then I cannot see how the judgment in this case can be affirmed. The only testimony by which claimant sought to meet this burden was that of Dr. William C. Whaley. If his testimony does not constitute substantial evidence to support the finding of the Workmen's Compensation Commission, we should reverse. His testimony on the causal connection is as follows:

INTERROGATORIES PROPOUNDED TO DR. W. C. WHALEY

"No. 16: What did you diagnose his illness as being on June 7, 1966?

Answer: *Possible* coronary occlusion.

* * *

No. 18: Will you please define what *coronary insufficiency* is?

Answer: Coronary insufficiency means a reduction of blood flow through the coronary arteries usually caused by narrowing of the lumen of the vessel *as a result of arteriosclerosis.* Clinically, *this results in substernal chest* pain intermittently. There is also an alteration of the ECG pattern from the normal. In other words, there is *INCOMPLETE** blockage of the coronary artery blood flow.

* * *

No. 21: Do you have an opinion based upon reasonable medical certainty as to the cause of Mr. Adams' trouble?

Answer: *Coronary arteriosclerosis.*

No. 22: In your opinion, was the coronary insufficiency caused by an insufficient amount of blood being brought to the heart or was it some other cause?

Answer: Yes

No. 23: Is it true that a person engaged in physical activity requires more circulation or more oxygen brought to his heart?

Answer: Yes

No. 24: Could you determine from your examination whether Mr. Adams had a narrowing of any artery or any other pre-existing condition which would make him *susceptible to symptoms of coronary insufficiency* if Mr. Adams engaged in any strenuous work?

Answer: By inference only, one assumes that an atheromatous lesion must have existed in the walls of Mr. Adams coronary arteries before the actual attack, because these plaques grow slowly as a gradual accumulation; they do not suddenly appear. [Emphasis mine. *Emphasis by witness.]

No. 25: Will you state what drugs or treatments you prescribed for Mr. Adams and what result the drugs or treatments were intended to bring about?

Answer: Mr. Adams' primary treatment was in the form of a vasodilating drug to try to enlarge the functional capacity of his coronary arteries in carrying blood to the muscle of the heart.

No. 26: You, as Mr. Adams' physician, know more about Mr. Adams' physical condition before June 7, 1966, and after June 7, 1966, than any other person I know. Therefore, I would like to ask you this question: Assuming that a man who is 57 years of age and who is in Mr. Adams' physical condition as on June 7, 1966, were to engage, with the help of one more laborer, in the carrying of pieces of lumber weighing from 100 pounds each, and upward, for a distance of 20 feet, from approximately 8:30 o'clock, A.M., to 9:00 or 9:30 o'clock, A.M., and the weather was abnormally hot, and this worker would *sustain an attack of coronary insufficiency* during the carrying of the lumber or immediately after, would this activity having been engaged in by the worker, in your opinion, be a contributory or contributing factor in the onset of the *attack of coronary insufficiency*?

Answer: The *term used* by doctors in this sort of case *would be* that the physical exertion is a *PRECIPITATING** factor, a term very close to the word contributing." [Emphasis mine. *Emphasis by witness.]

CROSS-INTERROGATORIES PROPOUNDED TO DR. W. C. WHALEY

1. "After reading your answers to the Interrogatories propounded by the claimant, it is my understanding that it is your *opinion that his chest pains were caused by an incomplete blockage* of the coronary artery blood flow and that this blockage was *a product of Arteriosclerosis, which is a condition that occurs over a long period of time.* Is this correct?

Answer: *Yes.*

2. If this is correct, then since the problem was caused by long, gradual accumulation, isn't it highly unlikely that work on the day of the occurrence of the chest pains had any *causal relation to the pains*?

Answer: No. The basic lesion had to develop slowly, but it is entirely possible that the *PRECIPITATING** event was a more vigorous heart action and flow rate through the diseased artery due to increased work load on the day in question. [Emphasis mine. *Emphasis by witness.]

3. Isn't it true that Mr. Adams gave you a history of doing work on the day in question which was no different than his normal work and that, in fact, on the day in question, he had completed the heavy work, eaten his lunch and was engaged in driving a truck, a relatively easy task, when he experienced the pain?

Answer: Yes.

4. From all you know about this case, *in your opinion, did the work* on the day in question have any *causal relation* to the incomplete blockage of coronary blood flow?

Answer: As a simple matter of fact, *I do not know,* and *to state an opinion on that basis would be foolish.* I understand that the Commission has to determine one way or the other, but *there is no clear MEDICAL* reason for me to have an opinion.*" [Emphasis mine. *Emphasis by witness.]

It is notable that Dr. Whaley *nowhere* expresses *any opinion* that claimant's heart attack was caused by his work. As a matter of fact, the conclusion seems inescapable that he carefully and deliberately avoided doing so. When he first mentioned physical exertion as a "precipitating factor," he avoided answering the question as to his opinion whether claimant's work activity was a contributing or contributory cause of the onset of an attack of coronary insufficiency. That coronary insufficiency is not a damage to the heart, but is a result of arteriosclerosis evidenced by pain, is shown by the doctor's answer to the request for a definition. So whatever construction be put on the doctor's answer, he has

never stated *any* opinion that the claimant suffered a disabling heart attack caused by his work. While he did say that he diagnosed Adams' trouble as "*possible* coronary occlusion," [Emphasis mine.] he gave his opinion that coronary arteriosclerosis was the cause.[1] This certainly is a cause other than the work and is a condition that is not and cannot be brought on by work. It occurs over a long period of time. There can be no question about this in view of the doctor's answer to cross-interrogatory no. 1. His answer to cross-interrogatory no. 2 simply establishes that it is not unlikely that the work had something to do with claimant's *chest pains*. Here, again, the chest pains are not a disability, nor did they cause any disability. I cannot help but believe that the doctor understood all the questions and studiously avoided giving any answers except those he believed to be medically correct, but these do not establish any causal connection. If there was no clear medical reason for the doctor to have any opinion as to causal relation, how could the Commission make any finding of causation, not just of coronary blood flow, but of heart damage? The doctor was not only reluctant to express complete certainty, or to indicate a probable cause, he was positively unwilling to express any opinion at all.

In the case cited by the majority the doctor testified that the most probable cause of insured's death was pulmonary embolism attributable to a fractured leg. He clearly stated and reiterated an opinion that the death resulted from pulmonary embolism caused by accidental injury, even though he admitted on cross-examination that there are cases known to the medical profession in which pulmonary embolism has been caused other than by accidental injury or surgery. If that decision is the yardstick by which the sufficiency of the evidence is to be measured, Dr. Whaley's testimony still comes up con-

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[1]In considering medical testimony, this court has recognized the significance of the use of the word "possible" rather than "probable" to describe the likelihood of causal connection. *Chapman* v. *C. Finkbeiner, Inc.*, 230 Ark. 655, 324 S. W. 2d 348.

siderably short. It was recognized in *W. Shanhouse & Sons* v. *Sims,* 224 Ark. 86, 272 S. W. 2d 68, that questions such as those presented here are peculiarly within the realm of scientific knowledge. It follows that, in order to meet the burden of proof, claimant's contention must be supported by medical testimony. Otherwise, the Commission members must sit as medical experts themselves and arrive at their own independent medical conclusions. In the *Shanhouse* case, this court said that they should not do so.

I recognize that we are not bound by decisions from other jurisdictions. It is obvious though that the great weight of authority supports my position on this testimony to such an extent that there is little dissent. It is the general rule that where evidence of causation of an injury or disease is required in cases where laymen have insufficient knowledge to enable them to say with any degree of certainty that the condition was caused or aggravated by the incident involved, a claimant fails to meet the burden of proof by merely showing by medical testimony that the incident "could have," "might have" or "possibly" caused the condition, but an issue of fact may be made only by evidence that the condition was "probably" or "to a reasonable certainty" the result thereof. As a corollary, testimony as to the "possibility" is not substantial evidence to support a finding of fact. See Annot., 135 ALR 516. Among the cases declaring this rule since the publication of the above annotation are:

Illinois: *Panepinto* v. *Morrison Hotel,* 71 Ill. App. 2d 319, 218 N. E. 2d 880 (1966).

Kansas:* *Bearman* v. *Prudential Ins. Co. of America,* 186 F. 2d 662 (10th Cir. 1951).

Missouri: *Leavitt* v. *St. Louis Public Service Co.,* 340 S. W. 2d 131 (Mo. 1960) [Not sufficient to justify instruction authorizing award of damages for permanent injury]; *Welker* v. *MFA Central Cooperative,* 380 S. W. 2d 481 (Mo. 1964) [Admissible, but

not substantial evidence]; *Bertram* v. *Wunning,* 385 S. W. 2d 803 (Mo. 1965).

North Carolina:* *Gillikin* v. *Burbage,* 263 N. C. 317, 139 S. E. 2d 753 (1965).

Oregon:* *Henderson* v. *Union Pac. R. Co.,* 219 P. 2d 170, (Ore. 1950); *Hawerton* v. *Pfaff,* 425 P. 2d 533, (Ore. 1966).

Ohio: *Brandt* v. *Mansfield Rapid Transit, Inc.,* 153 Ohio St. Rep. 429, 92 N. E. 2d 1 (1950).

Oklahoma:* *Cohenour* v. *Smart,* 240 P. 2d 91 (Okla. 1951).

South Carolina:* *Hines* v. *Pacific Mills,* 214 S. C. 125, 51 S. E. 2d 383 (1949); *Windham* v. *City of Florence,* 221 S. C. 350, 70 S. E. 2d 553 (1952).

Utah: *Moore* v. *Denver & Rio Grande Western R. Co.,* 4 Utah 2d 255, 292 P. 2d 849 (1956).

Washington:* *Arthurs* v. *National Postal Transport Asso.,* 49 Wash. 2d 570, 304 P. 2d 685 (1956); *Bland* v. *King County,* 55 Wash. 2d 902, 342 P. 2d 599 (1959).

Wisconsin:* *Meyer* v. *Fronimades,* 2 Wis. 2d 89, 86 N. W. 2d 25 (1957).

Not only did this court indicate recognition of the rule in *Chapman* v. *C. Finkbeiner, Inc.,* as pointed out in the footnote, but it has further indicated its concurrence when it approved the following conclusion of law stated by the Workmen's Compensation Commission: "The claimant is not required to establish proof of the cause of the death to a mathematical certainty, but when the *probable* cause of death is established to a reasonable *certainty,* the burden of proof has been discharged." *Quality Excelsior Coal Co.* v. *Maestri,* 215 Ark. 501, 221 S. W. 2d 38. [Emphasis mine.]

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*These states were not listed as supporting the general rule in the annotation.

While we are not triers of fact, we should not shirk our responsibility to look behind the finding of the Workmen's Compensation Commission to determine whether it is supported by evidence. In this case, not only is the evidence of cause insubstantial, it is non-existent. If we go traipsing down the path opened in this case, workmen's compensation will become general industrial insurance in heart cases, covering not only "heart attacks" but arteriosclerosis.

I would reverse the trial court and the Commission.

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

GEORGE CHECK *v.* JOYCE MEREDITH ET AL

5-4374 420 S. W. 2d 866

Opinion delivered November 20, 1967

House, Holmes & Jewell, for appellant.

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

GEORGE ROSE SMITH, Justice. Two of the appellees, Joyce and Robert Meredith, were injured in a traffic accident involving their mother's car, in which they were riding, and a car being driven by the appellant. This action for personal injuries and property damage was brought by Joyce, by Mrs. Meredith as the next friend of Robert, a minor, and by Mrs. Meredith in her own right. The jury returned verdicts of $6,000 for Joyce, $3,500 for Robert, and $1,500 for Mrs. Meredith. For reversal the appellant questions the court's instructions to the jury and the amount of the awards.

We think the court erred in instructing the jury that Joyce was entitled to recover the present value of any earnings reasonably certain to be lost in the future. AMI 2201 and 2206. At the time of the accident Joyce was working in Little Rock at a salary of $200 a month. Her injuries disabled her for several months. At the time of the trial, almost two years after the collision, she was employed at a salary of $250 a month, with guaranteed raises in amounts not shown by the testimony.

The trouble is that although there is proof that Joyce may have suffered a loss of *earning capacity,* AMI 2207, there is no evidence to assist the jury in fixing the amount, in dollars and cents, of *earnings* reasonably certain to be lost in the future. Dr. Murphy estimated that Joyce's cervical spinal injuries had resulted in a permanent disability of 5 percent to the body as a whole. Joyce had been back at work for more than a year before the trial. She testified that she experienced dif-

ficulty in working, in that "about the middle of the day my neck will start hurting and I'll have to stop my work and rest for a period of time in order that it would stop hurting, and I can go back to work." Her statement that her employer understood her condition doubtless implied that he was willing to make allowances for her inability to work steadily all day.

Where there is proof that the plaintiff, at the time of the trial, is still unable to work or is unable to earn as much as he did before he was injured, an instruction upon the loss of future earnings is proper. *Holland* v. *Ratliff,* 238 Ark. 819, 384 S. W. 2d 950 (1964); *Abraham* v. *Jones,* 228 Ark. 717, 310 S. W. 2d 488 (1958). Here that essential proof is absent. There is no indication that Joyce missed even a day's work for some fourteen months immediately preceding the trial. No witness testified that it was either probable or possible that she would be unable to continue working regularly. Hence the jury had no basis, except pure guesswork, for estimating earnings reasonably certain to be lost in the future. The judgment in favor of Joyce must be reversed.

We find no error in the court's refusal to give AMI 2214 in its entirety. That instruction would have told the jury that it is an injured person's duty (a) to determine whether medical treatment is needed, (b) to obtain medical treatment, and (c) to follow the instructions of his physician. There was some testimony pertinent to element (c): The orthopedists who testified thought that both Joyce and Robert should have followed their instructions to the letter instead of going to a chiropractor for treatment. But even with respect to that element the proof does not disclose to what extent their failure to follow instructions resulted in an enhancement of their damages. Moreover, there is no proof touching upon elements (a) and (b) in the requested instruction. In the circumstances the court correctly refused to give the charge.

The verdicts in favor of Robert and his mother were not excessive. Robert suffered a permanent disability of at least 5 percent to the body as a whole. At the time of the trial he was still suffering pain, almost two years after the accident. He attributed to the accident a blurring of his eyesight that seriously interfered with his studies and with his efforts to become an architectural engineer. Far from being excessive, Robert's award of $3,500 seems to us to be rather modest.

With respect to Mrs. Meredith the state of the record is rather odd. She sued for medical expenses incurred by her for both children and for damages to her car. It was stipulated that Robert's medical expenses amounted to $710.27, that Joyce's amounted to $682.55, and that the damage to the car was $600.00. The court, however, included the children's medical expenses as items of damage in AMI 2201—which was properly given twice, once for Joyce and once for Robert.

There was no instruction whatever with respect to Mrs. Meredith's measure of damages, either for the medical expenses or for the car. Nevertheless the court apparently gave the jury a separate form of verdict for each of the three plaintiffs. There was no objection by the defendant either to the court's failure to give AMI 2201 with regard to Mrs. Meredith's damages or to the submission of a form of verdict in her favor. In view of these facts we cannot say that the appellant sufficiently preserved his record to be in a position to question the amount of Mrs. Meredith's recovery. We should add, however, that upon the merits of this issue we do not consider the verdict to be excessive.

Affirmed as to Robert and his mother; reversed as to Joyce.

BYRD, J., dissents as to the reversal.

DOYLE MOORE *v.* ELOISE COOK

5-4353 420 S. W. 2d 905

Opinion delivered November 20, 1967

Smith, Williams, Friday & Bowen; By: *George Pike Jr.*, for appellant.

Terral, Rawlings, Matthews & Purtle; By: *Gale Matthews*, for appellee.

LYLE BROWN, Justice. This appeal by Doyle Moore challenges a jury verdict against him for personal injuries arising out of a traffic mishap. The only issues on appeal concern (1) the refusal of the trial court to give defendant Moore's instruction No. 1, and (2) al-

leged error in giving AMI 601 concerning the rules of the road considered applicable by the court.

The accident occurred while both vehicles were traveling east on Ninth Street in Little Rock. The cross-street immediately ahead of them was Broadway. In that block, Ninth Street is divided into four lanes and is restricted to one-way traffic going east. Both sides of the street have parking meters. As to these litigants, Moore was driving the forward car and Mrs. Cook was immediately behind him, both being in the second lane. At a point approximately 118 feet inside the block, Moore began a turning movement to his right. If unmolested he would have crossed what Moore calls the "parking meter lane" and entered a driveway. At about the same time, Mrs. Cook began a right-turn movement. It was her intention to get into the lane nearest the curb, which was unobstructed from her point to Broadway, for the purpose of turning right on Broadway. The lane from which she desired to move was congested completely to Broadway. The two vehicles collided when almost side by side, Moore's car being slightly at an angle to his right with the front end a few feet inside the "parking meter lane."

In his requested Instruction No. 1, Moore wanted the jury told that Mrs. Cook was bound in law to pass Moore on the left. That was on the theory that the lane designated by Moore's counsel as the "parking meter lane" could not be used for passing on the right. Secondly, Moore objected to the court submitting, in the format of AMI 601, those rules of the road governing overtaking and passing on the right. The thrust of that argument was likewise on the theory that the lane nearest the curb was not available for overtaking and passing; so Moore contends the rules of the road given were not applicable.

The primary purpose of building improved streets is for the movement of traffic. And, as has been appropriately said, "parking . . . has always been consid-

ered a right inferior to that of travel or passage." 6 Vanderbilt Law Review 907 (1953). "Parking in the public streets in its broader connotation is a privilege in derogation of the common easement of travel and transport . . . ." *Board of Commissioners* v. *Local Government Board of New Jersey,* 45 A. 2d 139 (1945).

Appellant argues that the extreme right lane was obstructed. He theorizes that the white markings served as notice to the traveling public that the "curb lane was for parking." That theory is not consistent with simple reasoning. It is common knowledge that the white markings indicate the space inside which a vehicle must be parked.

Appellant next argues that Mrs. Cook was driving outside the main-traveled portion of the street, which is not permitted when passing on the right. Ark. Stat. Ann. § 75-610 (Repl. 1957). The answer is two-fold:

(1) It is undisputed Mrs. Cook was making an approach for a right turn on Broadway. She started her approach some 180 feet from Ninth and Broadway when she could see the traffic "stacked up" in front of her in the driving lane she occupied. The extreme outside lane was completely unobstructed all the way to the Broadway intersection. That lane was nine feet in width, which was wide enough to accommodate travel. Ark. Stat. Ann. § 75-615 (Repl. 1957) requires the approach for a right turn to be made as close as practical to the curb. She may or may not have started her approach too soon. That was a question for the jury.

(2) Whether the extreme outside lane is a part of the main-traveled portion of the street is a fact question to be resolved according to the facts in this particular case. See *Ketchum* v. *Pattee,* 98 P. 2d 1051 (1940). The frequency of parking in this block is not to be found in the record. Witness Mallett, the investigating police officer, stated on cross-examination that driving in the involved lane was permitted when it was unobstructed.

Mrs. Cook regularly used this route during school to pick up her children and she customarily used the lane for her approach to the Broadway intersection. The street was paved and curbed, marked for one-way traffic, and had ample room for four cars. By its findings the jury, after appropriate instructions, indicated their conclusion that Mrs. Cook was in a portion of the roadway regularly used, absent parked vehicles.

Finally, the court instructed the jury under Ark. Stat. Ann. § 75-613 (Repl. 1957), which prohibits motorists in laned traffic from moving from a given lane without first ascertaining the probable safety of the movement. We find no merit in appellant Moore's objection to this instruction. Both drivers were moving from one lane to another and both were bound by the same rule. Moore argues he was merely "crossing a parking lane" to enter a driveway and he should not be charged with obedience to the rule. We do not agree. Four lanes were clearly identifiable. The outside marker for each lane was, of course, the curb; the other lines were marked with white paint. The presence of parking meters at the curb did not, of itself, transform the outside lanes into exclusive parking areas, as we have heretofore indicated.

Affirmed.

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

DORIS McCASTLAIN, COMM'R OF REVENUES* v. OKLAHOMA GAS & ELECTRIC CO. ET AL

5-4292 420 S. W. 2d 893

4 Opinion delivered November 20, 1967

*This action was commenced against Doris McCastlain, as Commissioner of Revenues, the judgment was rendered against her as such, and the appeal was taken by her. The briefs were filed in the name of B. Bryan Larey, as Commissioner of Revenues, but no substitution of parties has ever been made. Since the litigation was against the former Commissioner in her official capacity, any judgment or decree would be binding on her successors in office.

Lyle Williams, Tom Tanner and *Hugh Brown,* for appellant.

Bryan & Fitzhugh; House, Holmes & Jewell; *Arnold & Arnold,* and *H. Duane Stratton,* Oklahoma City, Okla., for appellees.

JOHN A. FOGLEMAN, Justice. Appellant made an adjusted assessment against appellee Oklahoma Gas & Electric Company under the Arkansas Compensating Tax Act on the use of certain items claimed to be exempt by the electric company. After paying the tax under protest and exhausting administrative remedies, the company brought suit against appellant seeking to recover the tax with interest. Southwestern Power Company was permitted to intervene, but has actually only asked that Oklahoma Gas & Electric Company have the relief it seeks. Since Southwestern has actually filled the role of amicus curiae, we will refer to Oklahoma Gas & Electric Company as the appellee.

The adjusted tax and penalty in the sum of $21,743.29 were assessed upon some 365 items. Protest was made on items on which the assessment amounted to $21,126.27. These items fall roughly into three categories:

1. Steel towers, wooden poles, crossarms, supports, insulators and other items supporting the wires over which electric current is transmitted and distributed.

2. Items constituting substations.

3. Items used for street and area lighting purposes.

Exemption of these items is claimed under § 6 of Act 487 of 1949 [Ark. Stat. Ann. § 84-3106 (G) (Supp. 1965),] the pertinent provision of which is as follows:

> "Public Electric Power Companies. Tangible personal property, consisting of electric power generating machinery, transformers, control boards, substation equipment, lines, meters, and all other accessory equipment and devices used directly in and connected to and becoming a part of the primary electric power generating and distribution system is declared to be a public transmission facility and exempt from the tax imposed herein. Buildings, dams, shops, tools, maintenance equipment, office machines and supplies, automotive equipment, and all other materials of whatever kind or character incidental to such primary generating transmission facility are not included or classified as exempt."

The trial court granted judgment in favor of appellee on all items involved in the protest. From that judgment appellant brings this appeal, citing the following points for reversal:

I. Exemptions from taxation are never presumed, and to doubt is to deny an exemption.

II. Ark. Stats., § 84-3106 (G), paragraph 3 exempts from the Arkansas Compensatng (Use) Tax a certain class of tangible personal property which is both specific and limited in its composition.

III. The Legislature further limited this exemption by providing four rules or guide lines by which the particular item seeking exemptions must abide before the exemption may be granted.

We find it unnecessary to deal with the first point as we feel that the statute may be applied to the various items in question without reasonable doubt, making resort to presumptions inappropriate. As to the other points, we will deal with them as related to the various items rather than discuss the points separately.

It is the contention of appellant that the word "lines" as used in the exemption statute should be construed to mean "wires" only and that none of the materials utilized for the support of these wires is exempt. On the other hand, appellee contends that this exemption is broad enough to cover transformers, substations, street lighting equipment, and virtually all of the questioned items. Appellant's position is that the popular definition of the word should control, while appellee contends that the technical definition followed in the industry should govern. Appellee bases its contention upon the rule that commercial, trade or professional terms used in a statute dealing with the trade, business or profession are construed in the sense in which such terms are generally understood in that trade, business or profession, even though such meaning may differ from the common, ordinary meaning. As to the items involved, we would come to the same conclusion without regard to the definition used. We base our findings on what appears to us to be the clear legislative intent.

The word "electric" preceding the specification of items of tangible personal property in the first sentence of the applicable subsection quite obviously modifies each of the items specified; *i. e.*, the tangible personal property includes *electric* transformers, *electric* substation equipment, *electric* lines and *electric* meters. In view of the commonly accepted concept of the meaning of the term "electric lines," we do not see how the ex-

tremely narrow definition urged by appellant could have been intended by our General Assembly. Individuals in ordinary conversation refer to electric lines as the entire structure carrying electric current from the point of generation to the place of consumption. We speak of electric lines in the same sense as we do of railroad lines and telephone lines. On those subjects we do not think of railroad lines as consisting of the steel rails only, nor do we mean that telephone lines are composed of the wires only. Definitions of the word "lines" in our dictionaries reflect this usage. Among those given by Funk & Wagnalls New Standard Dictionary are: "The *roadbed* of a railroad" [Emphasis added]; . . . "The system of wires and poles comprising a telegraph or telephone connection between two points, as the Western Union *lines* were all down."

Webster's New International Dictionary, Third Edition, includes: "The principal circuits of an electric power system" . . . "The track or roadbed of a railway."

The General Assembly resorted to this usage in granting to electric power companies the right of eminent domain and the right to use public highways and streets when it authorized the construction, operation and maintenance of "lines of wire, cables, poles, etc., necessary for the transmission of electricity." Ark. Stat. Ann. § 35-301 (Repl. 1962). Rural electric cooperatives are given similar rights for their "lines." § 77-1104 (11) (Repl. 1957).

The legislative intent is further indicated by reason of the fact that the General Assembly specifically mentioned items such as transformers, control boards, and meters. All of these terms identify the articles intended with certainty. It seems only logical that if the General Assembly had intended to exempt only wires, it would have used that word. Furthermore, no logical reason has been offered to explain why it would exempt all generating machinery, transformers, control boards, substation equipment, wires, meters, all other accessory

equipment and devices used directly in and connected to and becoming a part of the primary electric power generating and distribution system and not exempt the steel towers, wooden poles, crossarms, insulators, guying equipment and other items supporting the wires and making it possible for electric current to be transmitted over them. We agree with the chancellor that these items are exempt. We also agree that such items as signs and numerals required to be mounted on the structures are exempt.

Appellant also questions the exemption of the substations and the fences around them. While we do not agree that these are parts of the "lines" exempt, we must consider whether these items constitute "substation equipment" or "other accessory equipment and devices used directly in and connected to and becoming a part of the primary electric power . . distribution system." In doing so, we must keep in mind that buildings, shops, and other materials incidental to such primary generating transmission facility are not exempt.

According to the undisputed evidence, substations serve the purpose of transforming the electricity from the high voltage used for transmission to a voltage suitable for distribution to customers for use.[1] Substations consist of transformers, switches, control systems and other appurtenances necessary to transform electricity from one voltage to another. The *structural* steel which supports substation equipment apparatus (such as capacitors, fuses, switches, busses, insulators, regulator, wave trap, line terminals, current and potential transformers) is one of the principal substation items on which the assessment is questioned. The undisputed testimony is that it is necessary that this equipment be structurally supported and elevated above the ground. It was also shown that the protested *reinforcing* steel

[1]While this is the principal use of the stations involved in this litigation, they are also used in certain instances to increase voltages for transmission.

was an essential component of necessary concrete foundations and pads which supported apparatus constituting substation equipment which includes units such as circuit breakers and lightning arresters as well as the above enumerated items. This steel is also tied to the ground mat—a series of criss-crossed conductors under the earth. It seems to us that all this steel is as essential to a substation as is the apparatus it supports and is exempt as substation equipment.

Appellant also urges that the trial court improperly sustained an exemption of the chain link fencing around the substations. This fencing is required by the Arkansas Public Service Commission through adoption of the National Electric Safety Code. Its purpose is to prevent the general public from coming into the substation, where, due to the presence of extremely high voltage electrical equipment, danger to uninformed persons might be imminent. While safety requirements of the Commission are persuasive, they are not necessarily controlling. The undisputed testimony, however, shows that the fencing complex is bonded into the ground mat through the ground grid connection as a part of the earth feature of the substation. This in itself is sufficient basis for holding this item to be exempt as substation equipment.

By similar reasoning, we find that fluorescent lights are equipment essential to the utilization of control boards and should be considered exempt as a part thereof. The same may be said of conduit for control cables connecting other substation equipment to control boards. An electric heater is substation equipment because it is necessary to control the temperature in which the sensitive devices constituting the control board must operate.

Appellant contends that components of an enclosure for control boards, meters and other substation control equipment should be classified as a building and, thus, subject to the tax. These units are roof ventila-

tors, wall louvers, steel doors and joists, door frames and roof decking. We hold these to be substation equipment. The undisputed testimony is that these components constitute what is known as a control house, the function of which is to protect the very sophisticated and sensitive control board and equipment from adverse environment by providing an enclosure which can be ventilated, heated or air conditioned as the occasion demands.

A line tuner is a control device which automatically disconnects the lines in the event of inadvertant contact with the lines or an uncontrolled flow of electricity and which later automatically reconnects the circuit. When used in a substation, it is substation equipment.

We cannot agree, however, that lighting equipment is exempt. These light fixtures and components are for the consumption, not the transmission or distribution of electric power. Appellee makes the ingenious argument that these items should be exempt because we have held that street lighting fixtures constitute an integral part of a municipal electric system. In *Todd* v. *McCloy*, 196 Ark. 832, 197 S. W. 2d 160, it was said that the provision of ornamental standards and electric lighting equipment to provide modern "white way" electric illumination for city streets was such an enlargement, extension and improvement of a municipally owned light plant and distributing system as to constitute a proper project for financing by issuance of bonds by the city under Amendment Thirteen to our Constitution. Appellee is not operating a municipally owned system which traditionally furnishes street lighting in cities without charge. It is making a charge to cities and private consumers for the service on the basis of a monthly tariff. As a matter of history, the very origin of municipal power systems was in the authority granted to cities to construct or acquire works for lighting the streets. See § 14, Act No. 1 of March 9, 1875. The authority to furnish the power to consumers was added later. See § 1,

Act No. 230 of May 6, 1909. The luminaries, hoods, reflectors and mounting and supporting brackets used for street lighting purposes do not constitute equipment and devices used directly in and becoming a part of the primary electric power and distribution system.

Neither can we agree that pole bandages come within any of the property exemptions under the statute. These bandages are impregnated with chemicals used to protect wooden poles from fungi. They are placed around the ground line of reset poles to restore wood preservatives that have leached out while the pole was formerly set in the ground. If these can be said to be a part of the lines, so could a chemical wood preservative bought for treating poles or chemicals acquired to keep pole attacking insects from the power line right-of-way.

Appellant makes the argument that exemption of these items gives out-of-state vendors an advantage over in-state businesses dealing in these products. We need not go into the purposes or objectives of the legislative department in granting these exemptions. The wisdom of legislation is not for our determination or consideration, but is for the General Assembly.

Appellee has asked that we assess costs for its supplemental abstract upon the contention that appellant's abstract was not in compliance with Rule 9. Appellant's abstract failed to contain reproductions of exhibits introduced, many of which were necessary for a clear understanding of the testimony, since practically all of the principal witness's testimony was directed toward the introduction and explanation of the exhibits. Furthermore, appellant gave references to the record page numbers only at the introduction of the testimony of each witness, then he showed only the respective beginning and ending pages of the record of their testimony. A considerable part of appellee's supplemental abstract was essential to an understanding of all the questions presented to this court. An award of costs might be ap-

propriate if it were not for the fact that the State of Arkansas is the real party in interest. It is a generally recognized principle that a state has no liability for costs unless there is specific statutory authorization, at least where the state is acting in a governmental capacity and did not institute the action. The immunity, an attribute of sovereignty, extends to the officers, boards and agencies of the state. See, Annot., 72 ALR 2d 1379; 20 Am. Jur. 2d 27, Costs, § 32; 81 C.J.S. 1345, States, § 234. We find no authorizing statute. No mention of costs is made in the statute [Ark. Stat. Ann. § 84-3120 (Repl. 1960)] authorizing this action. The policy of Arkansas in this regard may be found in statutes which exempt the Commissioner of Revenues from payment of costs for institution or prosecution of any suit (§ 84-1719) and which exempt the State from giving security for costs (§ 27-2307). Thus, we cannot assess costs against appellant in this case.

The chancery court is affirmed as to that part of the judgment rendered for recovery of the tax paid on the items we find to be exempt and reversed on those we find not to be exempt. While we would ordinarily modify the judgment here, neither the adjusted assessment nor any other exhibit showing the detailed calculation of tax and penalty paid under protest is in the record and we are unable to make the necessary calculation, so we remand this case for entry of a proper decree.

HAROLD FISHER ET AL *v.* J. L. BRANSCUM D/B/A BRANSCUM MOVING & STORAGE COMPANY

5-4328 420 S. W. 2d 882

Opinion delivered November 20, 1967

Louis Tarlowski, for appellants.

Claude Carpenter Jr. and *Reid, Burge & Prevallet,* for appellee.

JOHN A. FOGLEMAN, Justice. Appellants ask that we reverse the trial court's affirmance of an order of the

Arkansas Commerce Commission authorizng the transfer of a certificate of public convenience and necessity. This certificate for the transportation of household goods was issued to one Homer Fisher on March 16, 1955. It covered irregular routes between points in Arkansas, but all shipments were required to originate or terminate in Mississippi County. Fisher entered into a contract with Branscum for the sale of these operating rights. The joint application of these parties was resisted by appellants, intrastate common carriers of household goods. Their protest was based upon the assertion that the certificate was dormant for failure to render reasonably continuous service. Consequently they contend that approval of the transfer is inconsistent with the public interest. One of the appellants held a virtually identical certificate which he had leased to Branscum.

Provision for transfer of certificates is contained in Ark. Stat. Ann. § 73-1767 (b) (Repl. 1957). Transfer is prohibited when the Arkansas Commerce Commission finds that such action will be inconsistent with the public interest or where it appears that reasonably continuous service has not been rendered under the authority granted by the certificate prior to the application.

After a hearing on November 23, 1966, the Arkansas Commerce Commission approved the transfer. It found that the certificate had not been dormant within the meaning of § 14, Act 397 of 1955 (§ 73-1767). It made a specific finding that Homer Fisher had been ill for a considerable period of time and unable to attend to business such as he normally would have conducted had he not become ill, but that afterwards he had been attempting to carry on his business.

The scope of our review on appeals is governed by § 73-134. This section provides that findings of fact of the circuit court are not binding on this court. On the other hand, it requires that we review all the evidence and make such findings of fact and law as we deem

just, proper and *equitable*. The circuit court is required to review the order upon the record presented and to enter its finding and order thereon.

In the opinion in *Wisinger* v. *Stewart,* 215 Ark. 827, 223 S. W. 2d 604, the variable, apparently inconsistent and sometimes confusing statements in some of our opinions with reference to the meaning and application of this statute were harmonized. It is now clear that the review therein provided for is that which we make in chancery cases. *Missouri Pacific Transportation Co.* v. *Inter City Transit Co.,* 216 Ark. 95, 224 S. W. 2d 372. In doing this, we follow these rules:

1. The trial is de novo upon the record—not as if no judgment had been rendered, but for the purpose of determining whether the judgment is against the preponderance of the evidence. *Fort Smith Light & Traction Co.* v. *Bourland,* 160 Ark. 1, 254 S. W. 481; Missouri Pacific RR. *Co.* v. *Williams,* 201 Ark. 895, 148 S. W. 2d 644; *Wisinger* v. *Stewart,* 215 Ark. 827, 223 S. W. 2d 604.

2. Neither the findings of the circuit court nor the findings of the Commission are binding on appeal, but we will not upset the findings of the Commission unless they are clearly against the preponderance of the evidence. *Fort Smith Light & Traction Co.* v. *Bourland, supra; Potashnick Truck Service, Inc.* v. *Missouri & Arkansas Transportation Co.,* 203 Ark. 506, 157 S. W. 2d 512; *Arkansas Express, Inc.* v. *Columbia Motor Transport Co.,* 212 Ark. 1, 205 S. W. 2d 716; *Wisinger* v. *Stewart, supra; Washington Transfer & Storage Co.* v. *Harding,* 229 Ark. 546, 317 S. W. 2d 18.

3. In weighing the evidence, we do not substitute our judgment for that of the Commerce Commission. We will accord due deference to the Commission's findings because of its peculiar

competence to pass upon the fact questions involved and because of its advantage in seeing and hearing the witnesses during the full hearing. *St. Louis S. W. Ry. Co.* v. *Stewart,* 150 Ark. 586, 235 S. W. 1003; *Fort Smith Light & Traction Co.* v. *Bourland, supra; Potashnick Truck Service, Inc.* v. *Missouri & Arkansas Transportation Co., supra; Schulte* v. *Southern Bus Lines,* 211 Ark. 200, 199 S. W. 2d 742; *Wisinger* v. *Stewart, supra; Boyd* v. *The Arkansas Motor Freight Lines, Inc.,* 222 Ark. 599, 262 S. W. 2d 282; *National Trailer Convoy, Inc.* v. *Chandler Trailer Convoy, Inc.,* 233 Ark. 887, 349 S. W. 2d 672.

4. The burden is on the appellant to show that the judgment is erroneous. *Fort Smith Light & Traction Co.* v. *Bourland,* 160 Ark. 1, 254 S. W. 481.

5. When the evidence is evenly balanced, the Commission's views must prevail. *Boyd* v. *The Arkansas Motor Freight Lines, Inc., supra.*

In short, this court's function is to inquire whether the determination of the Commission is contrary to the weight of evidence. *Missouri Pacific Transportation Co.* v. *Inter City Transit Co.,* 216 Ark. 95, 224 S. W. 2d 372. In so doing, we must not lightly regard the findings of the Commission. *Superior Forwarding Co.* v. *Southwestern Transportation Co.,* 236 Ark. 145, 364 S. W. 2d 785.

Appellants now urge that the order approving the transfer is not supported by substantial evidence. The basis of their contention is that there was not substantial evidence to show that reasonably continuous service under the authority granted Homer Fisher had been rendered prior to the application for transfer.

Branscum testified that: During the four or five years he had operated under the lease of Beckham's certificate to the extent that it had been necessary for him to purchase additional equipment and to start con-

struction of a new warehouse; the population of the Blytheville area was increasing and industrial plants were moving in; he did considerable business because of the air base at Blytheville, and a lot of civilian moves were going on; to his knowledge, the only certificates for household goods carriers were those issued to Homer Fisher and three of the appellants, one of whom was previously Branscum's lessor. Branscum also testified, over the objections of the protestants, that he had reviewed the books and records of Homer Fisher and made a list of the moves the latter had made outside the city limits of Blytheville in the preceding two or three years. The list showed 23 moves outside the city limits of Blytheville in 1963, 19 in 1964, 17 in 1965, and 24 in 1966. Although he had access to information as to origin and destination, this was not shown on the list and it was very possible that most of the shipments during 1963 may have gone within a radius of a mile of Blytheville. He could not tell whether any of the moves on the list went to Little Rock or Texarkana or any other place in Arkansas. In the books he saw moves to Jonesboro and West Memphis.

Homer Fisher, at the time of the hearing, only owned one truck which he testified had been in operation continuously. He further testified that: He worked out of his home, a telephone there being listed in his name; he had two part-time employees; he had no warehouse; he was personally in charge of the operation; he had transported one or two or maybe more shipments between various points and places in Arkansas and Mississippi County in 1966; they originated in Blytheville, one going to Jonesboro and one to West Memphis; he handled 24 or 34 shipments to points around the edge of Blytheville, but outside the city limits, over the preceding two years; he had brought one or two to Little Rock and some to West Memphis during the life of the permit; he had not been able to handle more than a very few shipments during the preceding two years because of illness; he judged that there were five or six ship-

ments under the permit in Mississippi County just outside the edge of Blytheville during the month of September 1966; to the best of his memory he handled movements under the permit in August 1966, but didn't know where they went; he had records that would show movements during each month of 1966, but did not have them with him; he moved one or two to Fort Smith and one to Prescott and moved into Jonesboro in 1966, but couldn't remember any others; the service he had rendered in 1965 had been less because he had been in the hospital most of the time; the bulk of his operations under the permit was conducted in the immediate vicinity of Blytheville; he drove his truck himself; he was advertising in the telephone book, in his front yard and on his truck, and by getting in contact with persons, making solicitations and trying to get business; he was incapacitated from July 1965, up until the first of September, but for the preceding two months he had been up and moving people.

Protestants offered no evidence pertaining to the issues.

We are unable to distinguish this case from *The Arkansas Motor Freight Lines, Inc.* v. *Howard,* 224 Ark. 1011, 278 S. W. 2d 118. There the applicant for transfer was authorized to operate as a motor carrier of a wide range of commodities upon designated highway routes extending into every section of the state. It had been unable to exercise its authority to any great extent. It had only one terminal. Its rolling stock consisted of one truck, three tractors and four semi-trailers. It had carried only 39 shipments of freight during its thirteen-month existence, although it advertised for business and never refused any cargo tendered. The Commission found that reasonably continuous service had been rendered and this court affirmed. Language in that opinion which we here deem appropriate is as follows:

> "* * * Inasmuch as the Commission's knowledge of its own specialized field is undoubtedly superior

to ours, its judgment on a question of fact is not to be set aside unless clearly against the weight of the testimony. *Wisinger* v. *Stewart,* 215 Ark. 827, 223 S. W. 2d 604. No difficult problems of law were presented to the Commission in this case. Whether there is a need for the whole range of facilities that might be made available under the Atlas certificate is not the question, for the issue of public convenience and necessity was determined when the permit was granted. Nor was Atlas required to show that it had fully utilized the possibilities lying at its disposal; no law or regulaton requires that a motor carrier systematically travel over all its territory with trucks that are empty for want of business.

* * [T]he Commission was warranted in concluding that the Atlas certificate has not been dormant. This little company, with relatively modest assets, held itself in readiness to render service, advertised its existence, and accepted whatever business was offered. Under the statute complaint might have been made that it was not transporting 'all the commodities authorized . . . over all the routes authorized,' Ark. Stats., § 73-1715; but no such complaint was lodged by the Commission, the public, or any competing carrier. In this proceeding the issue is narrowed to whether the company's service has been reasonably continuous; the Commission's affirmative answer is not contrary to the evidence."

In this case, too, the certificate might have been revoked by the Commission upon complaint of any of the protestants, or upon its own motion, on the very ground of appellants' protest. See § 73-1767 (a). The fact that no such action was instituted could well be the basis for an inference that appellants' anxiety about the transfer is due to the prospect of a more active utilization of the authority by a healthy proprietor. Appellants argue in their brief that we ought not to permit a change in the competitive situation in Blytheville and say that they are willing for Fisher to continue operations under the

certificate. According to the opinion in the cited case, such a change is not a basis for a finding that the transfer is inconsistent with the public interest.

As a point for reversal, appellants allege error in the admission of the lists prepared by Branscum from the Fisher books. Since they were not business records kept in the ordinary course of business, they contend that these exhibits were inadmissible under either the best evidence rule or Ark. Stat. Ann. § 28-928 (Repl. 1962). Appellants' argument on this point is interwoven into, and forms a part of the basis for, their contention that there is not substantial evidence to support the Commission's findings. Even without these lists, the testimony would have been sufficient to meet the test laid down in the *Howard* case. Furthermore, it is not always necessary or advisable that boards, commissions and agencies of the nature of the Commerce Commission be required to adhere strictly to the rules of evidence governing courts in jury trials. See *Piggott State Bank* v. *State Banking Board,* 242 Ark. 828, 416 S. W. 2d 291. The necessity for strict adherence to rules of evidence by this Commission has also been eliminated by statute. The Arkansas Commerce Commission came into existence by virtue of Act 132 of 1957 (§§ 73-151 to 73-162). Under that Act all authority, powers, duties, privileges and jursdiction of the Arkansas Public Service Commission with respect to regulation of carriers were expressly conferred on the new Commission. We have recognized that procedure on appeals from the Commerce Commission is governed by the statutes which applied to the Arkansas Public Service Commission as the successor to the Corporation Commission which, in turn, was the successor to the Railroad Commission. See *Wisinger* v. *Stewart,* 215 Ark. 827, 223 S. W. 2d 604. By the same process of reasoning, the statute on rules of evidence governing the Public Service Commission while it had jurisdiction of matters pertaining to carriers should be applied. These rules were set out as a part of the same Act which changed the name of the Arkansas Corporation Commission to Arkansas Public

Service Commission. Act 40 of 1945. Subsection A of § 2 of that Act (§ 73-127) provides that the Commission shall not be bound by the strict technical rules of evidence, but may exercise such discretion as will facilitate its efforts to ascertain the facts bearing upon the right and justice of the matters before it. We cannot say that the Commission abused its discretion in admitting the evidence attacked.

The uncontradicted evidence offered by appellee is not too insubstantial to support the findings of the Commission. The judgment is affirmed.

HARRIS, C. J., GEORGE ROSE SMITH and BROWN, JJ., dissent.

LYLE BROWN, Justice, dissenting. There is no substantial evidence to show that Homer Fisher rendered reasonably continuous service prior to the application for transfer. To the contrary, his own testimony shows the certificate was practically dormant.

Homer Fisher obtained his permit in 1955. He was authorized as a common carrier to transport household goods over the public highways throughout the State. The only restriction on carriage was "that all shipments must originate or terminate within Mississippi County, Arkansas." The history of his operation for the past four years indicates that practically all of his hauling was confined to Blytheville and the immediate vicinity. In those operations it should be pointed out that he needed no permit from the Commission. Ark. Stat. Ann. § 73-1758 (Repl. 1957). Transportation within a municipality "or within a commercial zone" is exempt from the permit requirements. The term "commercial zone" refers to any municipality *and the area outside its corporate limits* which is prescribed by the Interstate Commerce Commission as a commercial zone. Under the commercial zone table established by the ICC, the "Blytheville Zone" consists of the municipality and all unin-

corporated areas within four miles of its corporate limits. Code of Federal Regulations (1942) § 170.16 (3).

As to trips outside the city limits of Blytheville, appellee's testimony was to the effect that Fisher made twenty-five such trips in 1963, nineteen in 1964, seventeen in 1965, and twenty-four in 1966. But of these trips, appellee offered proof of only four such trips being made beyond the Blytheville area within the last two years. Those consisted of trips to Jonesboro, Fort Smith, Prescott, and possibly West Memphis. In describing all other trips outside of Blytheville city limits, these expressions described the distance of these hauls: "just out of the edge of Blytheville," and "in the immediate vicinity of Blytheville."

The majority opinion gives credit to Homer Fisher for trips made within the commercial zone of Blytheville. Fisher is clearly not entitled to that credit.

The apparent failure of Homer Fisher to render a reasonably continuous service outside the Blytheville zone may well have been caused, in part, by his limited facilities. He possessed only one truck—a 1948 model which he acquired secondhand; it had a fifteen foot van-type bed, six to seven feet in width; he had no warehouse; he used his home as his headquarters; and he had two part-time employees. Homer testified that he was in the hospital during part of 1965, indicating that his illness affected his business. However, in that year he was able, according to his testimony, to do more local hauling than during any of the reported four years.

I cannot agree with the majority in making a favorable comparison of this case with *Arkansas Motor Freight Lines* v. *Howard,* 224 Ark. 1011, 278 S. W. 2d 118 (1955). Fisher possessed by way of equipment one secondhand truck of ancient vintage; Howard's rolling stock consisted of a truck, three tractors, and four semi-trailers. Howard maintained a terminal at Pine Bluff; Fisher operated from his home. In the thirteen months

prior to the Commission's hearing in the *Howard* case, Howard transported thirty-nine shipments into most of the counties in which he was authorized to operate; in a two-year period, Fisher made only four trips under his permit authority.

Finally, I cannot agree with the majority that "when the evidence is evenly balanced the Commission's views must prevail." That statement is taken from an opinion written by Chief Justice Griffin Smith. *Boyd* v. *Arkansas Motor Freight Lines*, 222 Ark. 599, 262 S. W. 2d 282 (1953). The statement is clearly dictum. It weakens the salutary attempt of the majority opinion to clarify our scope of review. Furthermore, I cannot conceive it to be the law; in hearings before the Commission, one of the parties has the burden of proof. How can we say the burden is met "when the evidence is evenly balanced?"

HARRIS, C. J., and GEORGE ROSE SMITH, J., join in dissent.

CARL W. WIDMER *v.* KENNEDY, ALBERS & PHILLIPS, INC.

5-4371 421 S. W. 2d 609

Opinion delivered November 20, 1967

[Rehearing denied December 18, 1967.]

Carl W. Widmer; pro se.

Warner, Warner, Ragon & Smith, for appellees.

J. FRED JONES, Justice. Appellant was sued for debt on open account in the Sebastian County Circuit Court by complaint filed on March 28, 1966, and summons was issued and served on the same date. On April 15, 1966, appellant filed a motion in abatement of the complaint to quash summons and set aside service thereof for the

reason that the summons was not issued, served, or returned according to law and is wholly insufficient as a writ of process, and therefore no action had been commenced against the appellant. This motion is designated:

> "SPECIAL APPEARANCE OF DEFENDANT MOTION TO ABATE COMPLAINT; TO QUASH SUMMONS AND SET ASIDE PURPORTED SERVICE THEREOF."

Appellant appeared specially for the purpose of this motion and on May 4, 1966, the motion was overruled and appellant was given ten days to plead further.

Instead of pleading further as authorized and directed by the trial court, the appellant, on May 12, 1966, filed another motion almost identical to the one that had been overruled by the court only eight days before. This second motion is designated:

> "SPECIAL APPEARANCE OF DEFENDANT MOTION TO VACATE ORDER OVERRULING DEFENDANT'S MOTION TO ABATE COMPLAINT; TO QUASH SUMMONS AND SET ASIDE PURPORTED SERVICE THEREOF."

On February 8, 1967, answers to request for admissions were filed by the appellees, but no further pleading was filed by the appellant subsequent to his motion which was overruled, and his motion to vacate the order overruling the motion.

On February 13, 1967, appellant was advised by letter from the trial judge that the motion to vacate the order overruling the motion to abate and quash, was also then being overruled.

The appellant made no effort to plead further and on March 8, 1967, default judgment was rendered against him and a nunc pro tunc order was also entered overruling the motion to vacate the order overruling the motion to abate complaint and quash summons.

On April 4, 1967, appellant filed a motion to vacate the default judgment for the reason that "no factual or statutory basis exists to support same and no default exists," and to "vacate the nunc pro tunc order filed March 13, 1967, for the reason that order was not handled in manner prescribed by 'Rules for the Twelfth Judicial Circuit.'"

This motion was also overruled on April 11, 1967, and on his appeal to this court the appellant designates the following points for reversal:

> "1. That the trial court erred in not granting appellant's 'motion to abate complaint; to quash summons and set aside purported service thereof;' and in turn for not granting appellant's 'motion to vacate order overruling defendant's motion to abate complaint; to quash summons and set aside purported service thereof.'
>
> "2. That the trial court erred in granting default judgment, and in turn, for not granting appellant's 'motion to vacate default judgment entered on March 8, 1967, and nunc pro tunc order filed March 13, 1967.'"

Ark. Stat. Ann. § 27-301 (Repl. 1962) provides as follows:

> "A civil action is commenced by filing in the office of the clerk of the proper court a complaint and causing a summons to be issued thereon, and placed in the hands of the sheriff of the proper county or counties."

This provision simply means what it says. See (*Burks* v. *Sims,* 230 Ark. 170, 321 S. W. 2d 767).

Ark. Stat. Ann. § 27-1101 (Repl. 1962) is as follows:

"The pleadings are the written statements, by the parties, of the facts constituting their respective claims and defenses."

Ark. Stat. Ann. § 27-1103 (Repl. 1962) is as follows:

"The only pleadings allowed are:

First. The complaint by the plaintiff.

Second. The demurrer, or answer, by the defendant.

Third. The demurrer, or reply, by the plaintiff."

When appellant's motion was overruled and he was given ten days in which to *plead further,* he was obligated to *plead further* within the ten days or risk the consequences of judgment on the complaint.

We conclude that "*pleading further*" simply means (as defined in Ark. Stat. Ann. § 27-1101, supra), and (as allowed in Ark. Stat. Ann. § 27-1103, supra) in addition to what has already been filed, and we hold that when a "motion to abate complaint; to quash summons and set aside purported service thereof" has been overruled and additional time is given in which to *plead further*, an additional motion to vacate the order overruling the original motion and restating the original motion, is not a further plea as defined and allowed by statute and within the meaning of the phrase "plead further."

Circuit courts are designed for the serious business of settling disputes between individuals, and circuit judges are vested with considerable discretion in promulgating and enforcing court rules for the orderly conduct of the courts' business.

As we are unable to say that the trial court erred on either of the points raised by the appellant, the judgment of the trial court is affirmed.

Affirmed.

FRANK UEBE *v.* TROY F. BOWMAN ET UX

5-4338 420 S. W. 2d 889

Opinion delivered November 20, 1967

Fitton & Meadows, for appellant.

Moore & Brockman, for appellees.

CONLEY BYRD, Justice. This litigation is between two long-time friends and neighbors, appellant Frank Uebe and appellees Troy F. Bowman et ux. At issue are the questions whether Uebe's holding over under a lease constituted an election to exercise an option to extend the lease, and whether the contractual requirement of advance payment of rental was waived by appellees.

The lease contract was entered into on February 14, 1947, for the use of water from a spring to operate a canning factory. The clause in issue provides:

"That for said consideration the right herein conveyed shall continue unto the party of the second

part, his heirs and assigns for a fixed period of 16 years from this date, with the option to the party of the second part, his heirs and assigns, to continue said right in full force and effect by the payment of the sum of $25.00 annually, payable in advance."

The facts show that Uebe and Bowman, in a neighborly fashion, have from time to time exchanged labor and assistance to each other. The Bowmans at times have borrowed money from Uebe, purchased feed from him, and used his hay baler. In addition, Bowman sometimes worked for Uebe at the canning factory, at which times Uebe paid Bowman by cash or check. All other dealings between the parties were settled annually. Both parties testified to a settlement of their dealings after February 4, 1963, the expiration date of the 16-year lease, without mentioning or giving credit for the $25 annual payment provided in the lease agreement. In fact, Uebe testified that he was not aware that the lease was up that year or that the payment was due. There is testimony by Bowman that a settlement was had again in 1964. There is also testimony by Uebe that Bowman owed for hay baling, a hay baler and other items for which Uebe considered himself entitled to a set-off against any of the $25 payments due under the contract. Bowman disputes some of the items and admits other items. He acknowledges that he owes $25 for the old hay baler which he bought in December 1964, and that he owes for the use of a truck in hauling some hay.

After February 4, 1963, the expiration date in the lease, Uebe continued to use the water from the spring as before, and Bowman made no complaint or comment about it until Uebe transferred the canning factory to a cooperative which he had organized in 1966. Sometime during the busy canning season of 1966, Bowman went by the canning factory to talk to Uebe about the spring, but Uebe suggested they discuss it at another time because he was too busy. Subsequently, on August 9, 1966, Bowman caused to be served upon Uebe a "No-

tice in Unlawful Detainer,'' notifying Uebe to quit and deliver up the spring property occupied by his pumping equipment. Uebe then filed this suit in chancery court making the contentions herein.

In contending that his holding over amounted to an election to exercise his option to extend the lease, Uebe relies on *Riverside Land Co.* v. *Big Rock Stone & Material Co.*, 183 Ark. 1061, 40 S. W. 2d 423 (1931). We think the *Big Rock* case is distinguishable from the facts here because in the *Big Rock* case the lessor continued to accept payments under the lease and, after the issue concerning increased rental arose, negotiated an increased rental which it continued to accept from sometime in 1923 until 1930, when Big Rock gave the required notice under the option to extend the lease.

In *Heyden* v. *Barnsdall Refining Co.*, 192 Ark. 789, 94 S. W. 2d 709 (1936), the lessor contended that Barnsdall, who held under a five-year lease, exercised its option of renewal by holding over a few months after the expiration of the five-year period. We there held that the holding over did not constitute an exercise of the option of renewal, and in distinguishing the *Big Rock* case, *supra,* pointed out that had the renewal clause ''been a covenant to extend the lease without the performance of a condition precedent, a holding over may have extended same as a matter of law.''

When the option to extend here involved is read in its entirety, we hold that the trial court properly construed the provision for a payment ''of the sum of $25 annually, payable in advance'' as a condition precedent to the exercise of the extension. Since Uebe admittedly did not perform the condition precedent prior to the expiration of the 16-year period on February 4, 1963, we hold that his mere holding over did not constitute an extension of the lease under the option.

Nor can we find a waiver of the condition precedent to the extension of the lease. While the annual bal-

ancing of accounts between the parties for 1963 and 1964 depended to some extent on the recollection of each party with reference to time spent, material delivered, work done and payments made, neither party contends that the $25 payment was discussed or credit given or accepted for the same. Nor was the $25 payment subsequently accepted, as was the situation in the *Big Rock* case, *supra.*

Appellant makes the further contention that there was no repudiation or abandonment of the lease and that the nonpayment of rent is not a cause of forfeiture. We hold this contention to be without merit. The issue is not whether there is a repudiation or a forfeiture of the lease but whether in fact appellant had exercised his option to extend the written lease. We think there is a clear distinction between forfeiture of an existing lease for failure to pay the rental and failure to exercise an option of extension by failing to perform the condition precedent of paying the rental in advance.

Affirmed.

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

JOHN A. FOGLEMAN, Justice, dissenting. I cannot agree with the result reached by the majority in this case. While I have no particular quarrel with the holding that the payment in advance is a condition precedent to the right to renew or extend the lease, it is my opinion that appellees have effectively waived their right to terminate for appellant's failure to comply with the condition.

Waiver occurs upon the failure to assert one's known right. In the present case, the agreement created a lease for the term of 16 years, with a perpetual option to renew or extend, exercisable by advance payment of the annual rental. Upon the expiration of the original 16-year lease period, it was incumbent upon appellant to pay the next year's rent in advance in order to "con-

tinue" the lease "in full force and effect." In such a case, failure of a lessee to make the required payment in advance would entitle a lessor to declare the lease at an end. Failure of a lessor to assert this right would amount to a waiver thereof. There no longer being any condition to the continuation of the tenancy, the lessee's holding over and the lessors' recognition of the lessee's rights under the lease would operate to continue the lease.

I do not feel that the case of *Riverside Land Co.* v. *Big Rock Stone & Material Co.,* 183 Ark. 1061, 40 S. W. 2d 423, can be distinguished from this case. Each involves a condition precedent to the extension of the lease, the condition there being the requirement of thirty days' written notice. While it is true, as the majority opinion indicates, that there the lessee continued to pay, and the lessor to accept, the agreed rental, the performance of this covenant was significant only insofar as it showed that the lessor did not intend to require compliance with the condition precedent, *i. e.,* the notice requirement. Here the advance payment of rent is itself the condition precedent. Other factors must be looked to in order to determine whether waiver of this condition has occurred. Thus, it becomes important to determine the effect of holding over on such a condition.

I do not agree that the case of *Heyden* v. *Barnsdall Refining Co.,* 192 Ark. 789, 94 S. W. 2d 709, is precedent for the proposition that a lessee's holding over can never amount to an exercise of an option to renew or extend. The opinion in that case only said that the mere holding over for a few months would not constitute, *as a matter of law,* a renewal of the lease. The court went on to say that, on the facts, the trial court's finding (that there had been no holding over) could not be said to be against the preponderance of the evidence. Certainly, if the facts had shown clearly that there had been a holding over, this factor could have been considered in determining whether the option had been exercised.

Whether the appellant's holding over be considered a means of exercising the option to renew or a factor in determining if waiver of the condition precedent has occurred, the result in the present case would be the same.

Although the chancellor has found, as a matter of fact, that there has been no waiver of the condition precedent, this case is to be reviewed de novo. The chancellor's determination, while not to be lightly regarded, is not binding on this court. A review of the evidence indicates clearly that the lessors, by their recognition of the tenancy after February 4, 1963, effectively waived their right to stand on the condition precedent. The record, with regard to the issue of waiver, shows the following facts which appellees either admitted or failed to deny on rebuttal:

1. That Uebe's use of the spring has been continuous and uninterrupted from the inception of the lease contract until Bowman's objection in the spring of 1966, which was three years after the expiration of the original 16-year period.

2. That when Uebe told Bowman that the latter owed him for the hay baler, he also mentioned to Bowman that this was to be payment on the contract.

3. That Bowman, in 1966, told a fellow worker the lease had been expired for two or three years. That he "thought he could get along with Uebe, but he didn't know if he could get along with this board of directors that was on this cooperative."

4. That when Bowman first approached Uebe in the spring of 1966, he intended only to determine the extent to which he (Bowman) was restricted in his use of the land surrounding the pump.

5. That Bowman helped Uebe repair his pipe line when it was damaged.

6. That the Bowmans, on separate occasions in 1965, had warned others about using the pump without the permission of Uebe.

The combined effect of these undisputed facts is to show that, although lessors knew of their rights under the lease contract, they nevertheless made no objection for over three years, during which period they continued to recognize the lease to be in effect. Such recognition of the lessee's rights under the lease, together with the failure of the lessors to assert the condition precedent and declare the lease to be at an end, clearly demonstrates that the condition has been waived. Thus, the finding of the chancellor in this regard is clearly against the preponderance of the evidence.

I would like to make clear my position on this matter by way of summary. My view is that the *condition precedent* has been waived, the condition, of course, being the required *advance* payment. I by no means intend to convey the idea that the Bowmans are not entitled to the agreed rental. The requirement of advance payment constitutes both the condition precedent and a *covenant* to pay rent. The covenant to pay rent is separate and distinct, and is not waived. But the requirement that it be made in *advance* was clearly waived. When the similarity between this requirement and the requirement of thirty days' written notice in the *Riverside Land Company* case is noted, it seems clear that the requirement of advance payment, being a condition precedent, may be waived on a proper showing of facts. I believe that such a showing has been made.

The effect of the majority opinion is to preclude a finding of waiver of a condition precedent to a lessee's right to renew or extend in any case where the rental has not been paid. I can see no reason to attach such controlling significance to the performance of this *covenant*. My view is that, where there are other factors indicating that the lessor intentionally fails to assert a

known right, there may be a waiver of the condition precedent, whatever it may be, even though the rental covenant is not performed.[1]

I would reverse and remand for entry of a decree consistent with this opinion.

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

GEORGIA-PACIFIC CORP., SELF-INSURED EMPLOYER *v.* ELSIE CRAIG ET AL

5-4351 420 S. W. 2d 854

Opinion delivered November 27, 1967

Paul Sullins and *W. D. Rothwell,* for appellant.

Switzer & Griffin, for appellee.

CARLETON HARRIS, Chief Justice. This is a Workmen's Compensation case. Mallie Craig, age 55, an employee of Georgia-Pacific Corporation and its predeces-

[1]For the purposes of this appeal, it is not necessary to consider the extent of the waiver or the effect of the tender of the 1967 rent by appellant.

sor, was a crew leader of the bridge crew, operating a pile driver on the job, and acting as foreman when the regular foreman was absent. His normal working hours were 7:00 A.M. to 4:30 P.M. On March 31, 1966, he began his work at the usual time, worked throughout the day, and was on his way back to Crossett to make the 4:30 P.M. quitting time, when he was met by the foreman, and requested to go to a forest fire in Drew County, approximately twenty-five miles away. He arrived there between 5:30 and 6:00 P.M., and left after the fire was extinguished to return home. He arrived at his residence sometime before 11:00 P.M., soon thereafter became ill, and was taken to the Crossett Health Center. At 2:40 A.M., on April 1, he was pronounced dead by Dr. W. A. Regnier, a physician of Crossett. The death certificate, signed by the doctor, stated that Craig's death was caused by a massive coronary occlusion, due to arteriosclerosis. Mrs. Elsie Craig, the widow, filed a claim with the Arkansas Workmen's Compensation Commission on behalf of herself and her minor daughter, Vicki. Dr. Regnier testified at a hearing before the referee, and at the conclusion of the hearing, compensation was awarded. Appellant appealed to the full commission, and there offered the deposition of Dr. Drew F. Agar, a Little Rock internist. The commisson affirmed the referee's award, and on appeal to the Circuit Court of Ashley County, the commission was affirmed. From the judgment so entered, appellant brings this appeal.

Fellow workers on the bridge crew testified relative to their normal duties, and also the work required in extinguishing the fire. No one testified that he observed Craig engaging in any particularly strenuous activity. Mrs. Craig testified that her husband had never missed more than one day of work due to sickness for the nineteen years that he had worked for the company. She said, however, that he had gone to Dr. Regnier; that "he was bothered with his heart, and he would get awfully tired, and he said the truck would just about shake him to death, especially when they'd be on those long

hauls down in Louisiana, lots of times way up in Drew County." Claimant testified that on March 31, her husband arrived home about 11:00 P.M., dirty and smutty, and went straight to the bathroom to take a bath. When she advised that his supper was ready, he replied that he did not want any supper, that he had already eaten a sandwich and drunk a coke, and that his chest was hurting. She stated that he thought it was probably indigestion caused by the sandwich. Shortly thereafter, he went to bed, but got up within a few minutes, walking back and forth, and she asked if she should call a doctor. He declined, saying that "maybe it will wear off in a few minutes." After a while, Craig remarked that he was "deathly sick." Mrs. Craig testified:

"* * * And I just ran out to the utility room and got a little ole plastic pail we had out there and ran back into the bed; then I ran to the bathroom and got a wash cloth and when I got back to him I started to bathe his face and when I did he just slumped over to the floor. Well, I called Don, my son, he was sleeping or had laid down up in the front bedroom, he hadn't gone to sleep, and I run in there and called him and of course we called Doctor Regnier and called the ambulance and carried him to the hospital but he was dead on arrival. I found out later that he died in the bedroom, that he didn't live to get on the stretcher."

Dr. Regnier testified that in October of 1964, Craig had complained to him that his heart was bothering him; that Craig's death was due to a massive coronary occlusion due to arteriosclerosis from which Craig had suffered for about five years. He stated that it was his opinion that the work performed by Craig from 7:00 A.M. until his return to Crossett was a contributing cause to his death.

Dr. Agar was furnished with a copy of the transcript of the hearing before the referee, and he said that, from the testimony, he could see no causal relation-

ship between the activity Craig was engaged in and his subsequent demise.

Appellant mentions that there was no evidence that Craig was ill at any time during the day, and that, on leaving his fellow employees to return home after the fire, he stated, "I'll see you boys in the morning." It is pointed out rather vigorously that Dr. Regnier was far from emphatic in his testimony, and that he would only say that the work *may* have contributed to the attack; further, he would not say that the attack started on the job; also he admitted it was possible that Mr. Craig could have died if he had not worked in a week. Appellant emphasizes that Regnier could not pinpoint any particular work that might have contributed to the attack, nor would he absolutely say that the attack was hastened by the number of hours Mr. Craig worked on the day under discussion. The doctor did say, however, that he did not believe he would have the same opinion if Craig had only worked five hours that day.

It is true that Dr. Regnier's testimony is not as positive as that in some other cases that have been before the court, but it does appear that the doctor was being as conscientious as possible in making his answers. It is evident that he held the opinion that the activities of the day, particularly the long hours, hastened the attack. From the cross-examination:

"Q. So you cannot say or not say whether or not the day that he spent was a contributing factor to his death?

A. In my personal opinion I think it did."

Of course, in this type of case, a doctor can hardly be exact in his testimony. In fact, there are many such instances in the medical field. In *U. S. Fidelity and Guaranty Company* v. *Dorman,* 232 Ark. 749, 340 S. W.

2d 266, this court, quoting from an earlier case,[1] said:

"'Appellant insists that Dr. Monroe's testimony is speculative, since he admitted the possibility that death was due to some other cause. But medicine, like the law is not an exact science. If mathematical certainty were required, a surgeon would act at his peril in advising his patient to undergo an operation. The law does not compel adherence to a standard so precise. The effect of Dr. Monroe's testimony is that in his opinion the most probable cause of death was a pulmonary embolism attributable to the fractured leg.'"

Here, though unable to pinpoint the work, or the exact number of overtime hours that would have contributed to the heart attack, Dr. Regnier, like Dr. Agar, gave his best opinion after acquainting himself with the history and the facts deemed pertinent. Doctors are experts in their field, and as pointed out in *Dorman,* it is for that reason that they are permitted to express an opinion.

The commission took the view of Dr. Regnier, and, when all the facts are considered, we are not willing to say that there was no substantial evidence to support the award.

Affirmed.

[1]*American Life Insurance Company* v. *Moore*, 216 Ark. 44,223 S. W. 2d 1019.

FRANCES MABRY ET AL *v.* DAN MABRY

5-4365 420 S. W. 2d 856

Opinion delivered November 27, 1967

Francis T. Donovan, for appellants.

George Hartje Jr., for appellee.

CARLETON HARRIS, Chief Justice. This is a child custody case. On July 16, 1963, Daniel L. Mabry, appellee herein, was granted a divorce on a cross-complaint from his wife, Winona Mabry, and was given custody of the three minor children born to the parties, Danny Mabry Jr., Steven Mabry, and Ronald Mabry. In late 1966, the oldest boy, Danny, ran away from home, and went to live with his mother in Carterville, Illinois. In January, 1967, Mrs. Wilma Mabry, age 64, and mother of Daniel Mabry, and Frances Mabry, sister of Daniel, petitioned the court for custody of Steve and Ronnie,[1] asserting

[1]At the time of the hearing on this petition, Danny was 16 years of age, Steve, 13, and Ronnie, 4.

that their son and brother (appellee) had subjected the minor children to repeated and unnecessary whippings, these whippings occurring for ridiculous reasons, and they alleged that great mental damage was being done the children thereby. The petitioners, appellants herein, who live in Jacksonville, Florida, desired that the boys be removed from their present environment, and placed with appellants. Before this petition was heard, Steve also ran away from home and joined his mother and brother. Thereafter, the court conducted a hearing on the petition, and found that as between petitioners and the father, the latter was entitled to the custody of Ronnie.[2] From the decree so entered, appellants bring this appeal.

The two older boys testified[3] that their father would become angry, and whip them with a belt over the entire body. Each had a paper route, and each testified that if he were late getting back from the route, a whipping would be administered, and the same would occur if the boys were late from school. Danny testified that he earned about $40.00 per month on his route, and that his father and stepmother always took the money, leaving him only enough to pay for his lunch. He stated that his father hit him with his fist on one occasion after accusing him of taking drugs. Steven testified that appellee treated him and his brother all right until he remarried, but that after that his father would get very angry, make a "big thing" out of small matters, and

[2]The court also found: "As to the two older children, Danny, age 16, and Steve, age 13, no decision is made, and the petition is dismissed. This is done because the children are not in the State of Arkansas and are not in the custody of either petitioners or respondent. The proof shows that the children are now with their mother, Winona Mabry, in Carterville, Illinois. A decree of this court fixing custody between the parties to the present action would be meaningless because Winona Mabry is not a party, the children are not before the court, and in any event, the court of whatever state the children may be in at the time will determine the question of custody based upon conditions at the time of such determination."

[3]By deposition.

would whip them with his belt. "She [referring to stepmother] put him up to it, though." He also testified that the young boy, Ronnie, had been whipped with a belt.

Emma Lasiter, 88 years of age, and great grandmother of the Mabry children, testified that she had seen bruises on their bodies, including "the print of the whip on them." Mrs. Lasiter, on one occasion, called the sheriff to her home to view the boys; the officer stated that, as he remembered, there was a skinned place above the left eye on Steve, which the boy said had been placed there by the father.

Wilma Mabry, one of the appellants herein, lives in Jacksonville, Florida, where she is principal of Fairfield School. She testified that she earned about $10,000.00 per year. Mrs. Mabry had no personal knowledge of what might have happened in the home, acquiring her information from Steve, who, according to the witness, was extremely nervous, upset, and unsure of himself, and she said he cried during the whole time he told her about the situation at home. Dr. Ann R. Poindexter, who specializes in pediatrics, and is employed at the Arkansas Children's Colony, testified as to the effect of home brutality on the mental and physical development of children. She had no personal knowledge of alleged events, expressing her opinion from having read the depositions. Frances Mabry, the other appellant, who lives in the home with her mother, Wilma, testified that she visited her brother (appellee) at his home, and on one occasion, heard him and his wife discussing the fact that Danny had bent his bicycle wheel. She said her brother started hollering at Danny, stating that the latter had taken the bicycle out and bent it on purpose. Miss Mabry said that she defended the boy, asserting that, in her opinion, the weight of the newspapers carried by Danny in the bicycle basket had bent the wheel.

"* * * So when I said that, Dan tore into me. Said for me to shut my face and go back where I came from,

that I had no right to be there. And started wagging his finger in my face and coming at me. And he had these big blaring eyes, had a sort of glassy look in his eyes. And then he started shoving me backwards three or four times pretty hard and I felt like he was trying to knock me down, although he didn't. And he more or less turned his temper, this tirade or whatever it was that he'd started on Danny, because I had defended Danny, and he turned it on me."

Mrs. Delma Turner, whose husband is the uncle of appellee's first wife, testified that the boys appeared to be emotionally disturbed when they would come to her home, and she said they had told her of their unhappiness. Mrs. Turner testified at length, but most of her testimony related to what had been told her by the younger boy, Steve. Here, again, the witness had no personal knowledge of what had happened in the home, having acquired her information from the boys.

Appellee testified that, as to the bicycle, he had told Danny three times during the week to get the bicycle fixed; on another occasion, an acquaintance advised that the oldest boy had thrown bricks at a horse, cutting a large gash in the animal's head. A neighbor complained that the boys were throwing rocks at children, and he had punished them for these, and similar offenses. The father testified that they were supposed to get up around 4:00 o'clock as a matter of preparing to go on their paper routes, but he discovered that on one occasion, they had already left the house at 2:00 A.M., and on another occasion, they were gone at 2:30. When he asked as to the reason, their reply was that they were "just riding around town. Just riding around, was all they said, on their bicycles." Mr. Mabry is vehicle dispatcher at the Little Rock Air Force Base, and he readily stated that he had used a belt on the two larger boys after they "got too big" to be spanked. He denied any brutal whippings, but did say that he accidentally hit Steve in the face, which was caused by the boy

squirming and trying to get away from him.[4] As to the paper routes, he testified that he had whipped them for coming in an hour or an hour and a half late. He stated that he had spanked the youngest boy for such incidents as talking in church and playing in the commode. Mrs. Glenda Mabry, appellee's wife, testified that she loved the boys and that her husband always tried talking with them before inflicting any whipping. She said that at one time he whipped them for going inside the hospital and drinking cokes instead of coming straight home from their paper routes. She also mentioned that Mr. James Cox, the Gazette agent in Faulkner County, had come to the house on one occasion, because the boys had not shown up to deliver papers, and he thought they had overslept. As a matter of fact, they had already left, and on returning home, stated "they were riding around looking at some tractors or something." At another time, Cox came over about 4:30 looking for them, and again, around 5:15. She testified the boys gave no explanation of what they had been doing.

Mr. Cox testified that he had received "more than average" complaints about the boys delivering the papers late, and he added that they left their employment without ever giving any notice to him that they would not be back.

Appellants point out that this court has stated that the controlling consideration in all custody cases is the child's best interest and welfare. *Powell* v. *Woolfolk,* 233 Ark. 893, 349 S. W. 2d 657, and cases cited therein. We agree that appellants, in that respect, state the law correctly, but the difficulty in the present instance is in determining just what is for the best interest of the child.

The entire argument of appellants is based on the alleged brutality of the father toward the two older

[4]He said, however, that the mark on Steve observed by the sheriff was caused by the older brother (Danny) hitting Steve in the eye with a clothes hanger.

boys. Of course, no normal human being would condone unmerciful or brutal beatings of a minor, but on the other hand, we think unquestionably that a parent has the right to properly discipline his child. Those who testified to personal knowledge of brutality were the two older boys themselves, and the great grandmother. The other witnesses based their opinions largely on what they had been told by Danny and Steve. The boys expressed resentment over several matters, Danny stating that he would rather live with his mother because he received "better treatment * * *. She will let us have any money we make, and will let us go places, and she doesn't whip us all the time like he did. In fact, she's never whipped us." Steve testified that he preferred to live with his grandfather and stepgrandmother, Ron and Gerrie Mabry (who are not parties or witnesses in this case). "They treat me nice, but when I do something bad wrong, they don't whip me but they scold me. It is better than getting a whipping." There is nothing unusual in this testimony. Probably most teenage boys would prefer to keep their money or be "scolded" rather than whipped when they do something "bad wrong." The testimony of the great grandmother was to the effect that she had seen bruises and marks on the boys (which they said were caused by their father whipping them) but the testimony of the sheriff, who was called to the home by Mrs. Lasiter does not indicate that he was very concerned over her charge of brutal treatment. It does appear that the boys were, on some occasions mentioned in the testimony, due to be disciplined.

The strongest circumstance for appellants in this case is that the petition is filed by the mother (and sister) of appellee—and mothers normally "stand up" for their children. Still, there are instances of litigation between parents and their children, and when this happens, feelings become intense.

In *Wilson* v. *Wilson,* 228 Ark. 789, 310 S. W. 2d 500, we used language that is quite pertinent to this case:

"The chancellor saw and heard the witnesses, and all the parties to the litigation, and evidently saw the child, as the testimony reflects she was present. We know of no type of case wherein the personal observations of the court mean more than in a child custody case. The trial judge had an opportunity that we do not have, *i. e.,* to observe these litigants and determine from their manner, as well as their testimony, their apparent interest and affection, or lack of affection for the child."

In fact, that case was similar in another respect to the present litigation, in that the dispute over custody was between a father and a stepmother on one side, and grandparents on the other. We affirmed the Chancellor who awarded the child to the grandparents for a period of six months in one of the few instances where this has been done. However, the facts were vastly different, nine witnesses, seven of them disinterested, testifying that the child had not been taken care of, some stating that the little girl "looked starved * * * her little ribs sticking out," one testifying that she was so poor and skinny that he did not recognize her; the others testified to similar facts. In a four to three opinion, this court affirmed the Chancellor's action in giving the custody to the grandparents for six months, but we said:

"Our thinking in this matter is influenced to a great extent by the fact that the order is only temporary."

Of course, all things being equal, a parent has, and should have, paramount rights to the custody of his or her child.

In summary, we cannot say that the Chancellor's finding was clearly against the preponderance of the evidence, and we are unwilling to substitute our judgment for that of the trial court.

Affirmed.

ELLIE PORTER, EX'X *v.* CHARLES TRAINOR AND ED CAMPBELL, EX'RS

5-4370 420 S. W. 2d 860

Opinion delivered November 27, 1967

Eugene L. Schieffler, for appellant.

John L. Anderson and *Patrick Reilly,* for appellees.

GEORGE ROSE SMITH, Justice. At David Porter's death on May 18, 1964, he held two promissory notes of $2,500 each, executed by James Carter and payable to David Porter alone. David was survived by his widow, Elizabeth Trainor Porter. The question here is whether the two notes, although payable to Porter alone, were actually owned by the couple as a tenancy by the entirety, owing to the fact that they were given for money that Porter withdrew from a joint bank account and lent to Carter. The probate judge found that there was in fact a tenancy by the entirety in the notes.

The proof is so meager that it may be quickly summarized. In 1960 the Porters had about $14,000 on deposit in a joint account in a West Helena bank. It is fair to say that both spouses had contributed to the account, but there is no way of determining what each one's contribution was (assuming that fact to be relevant). In July of that year David lent $5,000 to James

Carter, drawing a check upon the joint account for the advancement and receiving in return from Carter the two notes payable to Porter, secured by a real estate mortgage.

Porter died testate almost four years later, in May of 1964. We attach no importance to the fact that his executrix, the appellant, did not inventory the notes as a part of his estate. Porter's widow, prior to her own death on March 18, 1966, had made no move toward recapturing the proceeds of the notes, which Carter paid off after Porter's death. Later on, however, the executors of Mrs. Porter's estate filed a motion in her husband's administration proceeding, asking that the proceeds of the notes be declared to be the proprety of Mrs. Porter's estate. This appeal is from an order granting that relief.

We think the court made a mistake. Only two of our earlier cases need be mentioned. In *Union & Mercantile Tr. Co.* v. *Hudson,* 147 Ark. 7, 227 S. W. 1 (1921), the husband, only 12 days before his death, wrongfully took funds belonging to him and his wife and deposited them in a bank account in his name only. We held that his conduct was a fraud upon his widow's rights and that the funds belonged to her, as the surviving tenant by the entirety. By contrast, in *Dickson* v. *Jonesboro Tr. Co.,* 154 Ark. 155, 242 S. W. 57 (1922), we held that where the husband, "with the knowledge and consent of his wife," withdrew funds from a joint bank account and used them to purchase securities payable to bearer, the tenancy by the entirety was destroyed, so that the wife was not entitled to the securities upon her husband's death.

The controlling rule is so clear that we see no serious problem in the case at bar. There is no persuasive proof that David Porter defrauded his wife in writing a $5,000 check upon their joint account almost four years before his death. Counsel for the appellees argue

with some ingenuity that the transaction was actually a renewal of an earlier mortgage debt payable to both Mr. and Mrs. Porter, but if that were so there was no reason for Porter to advance fresh funds instead of merely renewing the old debt. When we recall that the loan to Carter was made almost four years before Porter's death, and that his wife had access to the bank's records of the account, there is hardly even a plausible reason to suppose that Porter secretly defrauded his wife and concealed his wrongdoing until his death. Fraud must be proved.

In reaching our conclusion we have taken into account, as of course we should, the soundness of the precedent that is being laid down for the future. In our present-day society we know that millions of married couples utilize the convenience of a joint bank account, which under our law is a tenancy by the entirety. We also know that most husbands and wives trust each other, confide in each other, and conduct themselves with honesty and with honor in the management of their property. It would be altogether undesirable to permit the rival heirs of the two spouses (who are the real parties in interest here) to reach far back into the past in an effort to raise a bare suspicion that one spouse may have cheated the other in the disposition of funds jointly owned. That sort of posthumous litigation is decidedly to be discouraged.

Reversed.

FOGLEMAN, J., concurs.

JOHN A. FOGLEMAN, Justice, concurring. I concur in the result and essentially agree with the basis for reaching it. I also agree that the record is quite meager, particularly with reference to the key issue. To me the key issue is whether the notes made payable to David Porter were made and accepted with the *knowledge* or *consent* of the wife. The rule that the destruction of a

tenancy by the entirety is accomplished by the unilateral act of one of the tenants when the other has knowledge thereof and consents thereto is clearly established in *Dickson* v. *Jonesboro Trust Co.*, 154 Ark. 155, 242 S. W. 57. This rule was so essential to that decision that the opinion establishes the converse of that rule, *i. e.*, that act of one of the tenants when the other has knowledge edge or consent of the other does not destroy the tenancy as between the parties.[1]

The inference may be drawn from the majority opinion that *fraud* on the part of the tenant withdrawing funds from a joint bank account held as a tenancy by entirety is essential to the retention of any interest by the other tenant after withdrawal. The primary importance of the finding of fraud in *Union & Mercantile Bank* v. *Hudson,* 147 Ark. 7, 227 S. W. 1, is that a third party bank was involved. Proof of fraud was essential to impress a trust on funds in his hands. It was alleged that the bank participated in the act of the administrator of the husband in treating the funds deposited in the husband's name as an asset of his estate, without the knowledge or consent of the wife, even after notice from the wife that she claimed the funds. While the court did say that it was a *fraud* on her rights for the husband to have deposited the proceeds of a loan on lands held by the entirety without the knowledge or consent of the wife and that his actions constituted him a trustee of her interests, the essence of this statement is the rule in the *Dickson* case. So, even in the light of the *Hudson* case, the only real issue is whether Mrs. Porter had knowledge of, or consented to, the transaction as handled.

I believe that two statements made in the majority opinion are unwarranted, but I do not consider them to be determinative of the issues. I do not agree that the failure of the executrix to list the note in the inventory

[1]Clearly the rights of third parties are not involved. If they were, perhaps a different result would be reached.

of the estate is of no importance. The husband's executrix, appellant here, admitted that she had seen the deed of trust securing the note before she made the inventory she later filed. Nor do I think that the declaration that the wife had access to the statements of the joint bank account is supported by the evidence. There was a petition by the wife to require the executrix to turn over to her the statements of the joint bank accounts. The basis of this request was her statement that she was claiming certain of the assets as her own property. Her mere access to the statements of the accounts is not of controlling significance, however. It is entirely plausible to believe that she knew of the loan and of the source of the funds loaned but did not know that the notes were made payable to the husband alone.

In spite of the lack of substance in these statements of the majority, I would reverse the case. I think that, when the executrix included this note as an asset in her accounting, the appellees had the burden to establish the title of their decedent (the widow) by a preponderance of the evidence. This accounting was filed several months prior to the death of the widow and the widow herself never questioned this item.

Since the asset in question was not listed in the inventory, having first appeared in the final accounting of the executrix, it was permissible for the personal representatives of the widow to file objections to this item. Ark. Stat. Ann. § 62-2808 (Supp. 1967). Upon hearing, there was a presumption that the notes were the property of the husband since they were made payable to him. *Landis* v. *Landis,* 343 Pa. 252, 22 A. 2d 908; 11 C.J.S. 91, Bills & Notes, § 659; 12 Am. Jur. 2d 214, Bills & Notes, § 1188. While this presumption alone is sufficient to place the burden of proof on an adverse claimant, appellees also bear the burden of sustaining an objection to the accounting of the personal representative based on a claim of ownership adverse to the estate. *In re Kellas Estate,* 38 N.Y.S. 2d, 197. This authori-

ty seems to be more than slightly persuasive because its result is based, at least in part, upon the New York rule that the adverse claimant has the burden of proof in a probate discovery proceeding. We have also held that in a hearing of a probate discovery proceeding, a widow who asserted an adverse claim to certain notes made payable to her and her husband, of which she had possession but had assigned to him, had the burden to establish her claim to ownership based on invalidity of the assignment. *Hartman* v. *Hartman,* 228 Ark. 692, 309 S. W. 2d 737. I consider this decision authority for saying that an adverse claimant in probate court has the burden of proof under the circumstances prevailing here, regardless of the stage of the proceedings at which the question arises.

I do not believe that the inferences to be drawn from the meager evidence offered by appellees are sufficient to sustain this burden of proof. On the contrary, inferences to be drawn from the relationship of the parties and other factors hereinabove set out clearly preponderate in this case. Strong inferences against the widow's executrix may be drawn from the fact that the note was four years old and that Mrs. Porter took no affirmative steps to question the ownership of the note even after the accounting was filed, which was after the court granted her petition to have access to the bank statements.

I do not concur in some of the reasons given by the majority for reaching this result, but I would reverse the lower court on this failure to meet the burden of proof.

FRANK "SONNY" DAVIS *v.* HENRY M. BRITT, JUDGE

5304 420 S. W. 2d 863

Opinion delivered November 27, 1967

Holt, Park & Holt, for petitioner.

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

PAUL WARD, Justice. The question here presented is novel, important and, insofar as we can ascertain, is without direct precedent in this State.

Briefly stated, the question is: Does the judiciary or the State Hospital have the authority to determine the "sanity" or the "insanity" of a person on trial for first degree murder? The material background facts out of which this question arose are set out below.

We now examine the statutes relied on to sustain this contention.

(1) Ark. Stat. Ann. § 41-108 (Repl. 1964), which reads:

> "A lunatic, or insane person without lucid intervals, shall not be found guilty of any crime or misdemeanor with which he may be charged".

(2) Ark. Stat. Ann. § 41-109 (Repl. 1964), which reads:

> "An idiot shall not be found guilty or punished for any crime or misdemeanor".

It is obvious from a casual reading of the above two statutes that they have no bearing on the question here involved. It is not an issue as to whether petitioner can be "found guilty" or "punished" but whether he can be "tried".

(3) The statute which is the main support for petitioner's contention is Ark. Stat. Ann. § 59-237 (Supp. 1965). The portion of this statute which is pertinent to the issue here reads:

> ". . . when any person who has been informed against or indicted upon a felony charge and who has been committed to the State Hospital for a mental examination under [Ark. Stats. (1947) § 43-1301] *and has been found to be insane*, the Superintendent shall request a writ of commitment from the judge before whom the case is pending. The request for commitment shall be accompanied by a certificate from the medical staff of the State Hospital setting forth the facts as to the patient's mental condition, and that he is insane; and thereupon the Court before whom the case is pend-

ing shall issue an order of commitment to the State Hospital. *Thereafter such person shall be confined in the State Hospital* until he regains his sanity." (Emphasis ours.)

Petitioner, Frank "Sonny" Davis, was charged with first degree murder. Upon arraignment January 30, 1967 petitioner entered a plea of "not guilty by reason of insanity". Thereupon the trial court committed petitioner to the State Hospital for observation for a period not to exceed thirty days, as provided in Ark. Stat. Ann. § 43-1301 [Repl. 1964.]

On February 28, the Hospital made a written report to the court stating: "Their diagnosis was: Manic Depressive Reaction, Manic type", and that petitioner "was probably mentally ill to the degree of legal irresponsibility at the time of the alleged commission of his acts". The report also recommended that the petitioner remain in the Hospital for treatment, and requested the court "to issue a Writ of Commitment to give the Hospital the legal authority for the petitioner's detention" under Ark. Stat. Ann. § 59-237 (Supp. 1965).

On March 2, the court asked the Hospital to furnish a statement of its findings, which was done on May 5, but in the meantime the Hospital had asked the court for a commitment since, otherwise, it had no legal authority to hold petitioner.

The trial court refused to re-commit petitioner to the Hospital, and set his trial for August 10, 1967. Previously, however, this "Petition for a Writ of Prohibition" wherein this Court is asked to prohibit the circuit court from proceeding with the trial "until Petitioner has regained his sanity" had been filed.

Contention of Petitioner. It is the contention of petitioner that the trial court is legally bound to recommit him to the Hospital and that, therefore, it has no jurisdiction or authority to proceed with the trial.

We call attention to the words first emphasized above which require interpretation. If they mean "found to be insane" by a trial court, then this petition must necessarily be denied because no such finding has been made by the trial court in this case. Necessarily, therefore, petitioner must have taken the position that the words mean—"found to be insane" by the Hospital personnel. We accept this interpretation, for the purpose of this opinion, as being correct because the statute also says the Writ is requested "from the judge before whom the case is pending". It would appear evident that if the case is "pending" there would have been no final judgment.

We now call attention to the last sentence in the statute which gives the State Hospital the right to retain petitioner until "he regains his sanity". At this point we also call attention to the fact that this is the exact relief which the petitioner here requests.

Consequently this Court is called upon to answer the following question: Is a statute constitutional, which takes away from the judiciary and delegates to a branch of the executive department, the right and power to finally decide whether a person (charged with murder) is "sane" or "insane"? Our answer to the question is "no".

Where a person charged with murder and enters a plea of insanity a *fact* question is presented, and this *fact* question should be, and has uniformly been, decided by a jury in a court of law. See: *Duncan* v. *State*, 110 Ark. 523, 162 S. W. 573; *Wilhite* v. *State,* 158 Ark. 290, 250 S. W. 31; *Green* v. *State,* 222 Ark. 308, 259 S. W. 2d 142, and; *Downs* v. *State,* 231 Ark. 466, 330 S. W. 2d 281. Numerous other cases to the same effect could be cited. Petitioner cites no decision of this Court or any court to the contrary, and our research reveals no such case.

Volume 32 of Corpus Juris at page 756, under the topic of "Insane Persons" deals with "Proof of Sanity or Insanity; Province of Court and Jury". Among other things it is there stated:

> "It is presumed in law that all men are sane, and the burden to prove insanity is on the person alleging it," citing cases from sixteen different states.

There are two recent articles in volume 20 of the Arkansas Law Review, one at page 121 and the other at page 398, both dealing with the Burden of Proof of Insanity in criminal cases. The essence and effect of both discussions, insofar as they bear on the issue here, is to require "the defendant to establish his incapacity to the satisfaction of either the court or jury".

It is our conclusion in this case; that the Hospital has no power or legal right to demand custody of petitioner for an indefinite time to be determined by it; and that the trial court cannot, at this stage of the proceedings, be forced to deliver petitioner to the Hospital.

Writ denied.

HIRAM SMITH ET UX *v.* GEORGE E. MEFFORD ET UX

5-4345 420 S. W. 2d 848

Opinion delivered November 27, 1967

J. Marvin Holman, for appellant.

Edward H. Boyett, for appellees.

LYLE BROWN, Justice. This is a boundary line case. Smith and Mefford orally agreed on a line. Smith purported to rescind the agreement and brought this suit to establish his title by deed and adverse possession. The chancellor denied relief to Smith, holding that the oral agreement fixed the common boundary. Appellant Smith here contends that the true boundary line was never in doubt; that there was no consideration; and that the agreement was rescinded by the parties.

In 1958 Hiram Smith bought the major portion of a forty-acre tract in Johnson County. His deed called for the west 33 acres. Shortly after June 1966, Mefford purchased the balance of the forty from Smith's neighbor. Mefford's deed called for the easterly seven acres. A survey made during the period of boundary line discussions disclosed a "short forty." That revelation made a contribution to the misunderstanding which brought about this litigation.

We start with the premise that a question developed between these neighbors about the location of the boundary line between their lands. It came about when Mefford approached Smith about straightening and rebuilding a meandering fence. Smith advised that he would first like to have a survey in order to put it on a straight line. Mefford testified that Smith stated the old fence was not actually on the line. Before the line was surveyed the two landowners, according to the surveyor, agreed that the fence would be established on the line determined by the surveyor to be the boundary. The surveyor determined the true boundary line to be several feet west of the old fence. That line would of course result in the loss of acreage by Smith, who had for some time occupied up to the old fence.

Smith was disappointed at the anticipated loss of acreage and in fact disputed the accuracy of the survey. Since Mefford would of course gain acreage on the basis of the survey, his first expression was they should abide by what he considered to be their agreement. Mefford, however, indicated that he would consider a compromise rather than the expense of a lawsuit. In fact, Mefford offered to pay Smith for the land between the old fence and the surveyed line, but Smith declined. It was then that the landowners, in the presence of the county surveyor, entered into an oral agreement advanced by Smith. He proposed that the boundary fence be constructed at a distance six feet east of the surveyed line; that Smith would furnish the wire and

the labor of himself and a helper; and that Mefford would furnish the posts and a laborer. Actually, the extra six feet would place the fence on a line where it had originally stood. Smith and the predecessor in title of Mefford had moved the fence to avoid a flooding problem. This is apparently the reason Smith thought he was entitled to the six feet; it strongly indicates Smith believed that line to be the true boundary—six feet east of the surveyor's line.

The day following the agreement on the line location the work was begun. Smith and two helpers started at the agreed south corner and proceeded, without incident, to set posts for a distance of approximately 300 feet. At that point and on the second day of work, Mefford arrived and complained that a straight line was not being followed, to his disadvantage. A heated argument ensued. Smith called off the work project and went home, declaring the agreement at an end. A few days later Mefford completed the project. However, the fence veered slightly to the west from the point where Smith stopped the work and came out on the north end some two feet from the northern point agreed upon. It was then that Smith filed this suit, claiming title by deed and by adverse possession to all lands inside the old irregular fence line.

The chancellor held that a boundary line had been agreed upon; that Mefford should be required to relocate that part of the fence which protruded over the "six-foot line"; that since Mefford supplied the shortage of posts, most of the labor and the wire, ownership of the fence should be vested in Mefford unless Smith shared the moving cost. The only exception made by the chancellor to the "six-foot line" was a few feet on the north end where a gully required a slight modification. That slight change is not here questioned. We hold that the chancellor's findings were in all respects correct.

Unfortunately, the need for straightening an irregular fence line developed into a dispute over the actual

property line. There were *three* possible true boundary lines: (1) the line from which Smith and Mefford's predecessor removed the boundary fence; (2) the irregular fence which Smith relied upon in his complaint; and (3) the line fixed by the county surveyor. In that situation our court has many times held that agreements between adjacent landowners as to their boundaries are encouraged. "Convenience, policy, necessity, justice, all unite in favor of such an amicable settlement." *Krutz* v. *Faught,* 204 Ark. 1036, 166 S. W. 2d 655 (1942). Settlement by parol agreement is valid on the principle that the agreement does not pass real estate from one party to another; it merely defines the boundary lines to which the respective deeds extend. *Sherman* v. *King,* 71 Ark. 248, 72 S. W. 571 (1903). Mutual concessions by the parties are sufficient consideration. *Randleman* v. *Taylor,* 94 Ark. 511, 127 S. W. 723 (1910).

In the fact situation before us, we find a state of uncertainty as to the true boundary line; that there was a bona fide dispute as to its location; and that the parties agreed on a dividing line. The beginning and ending points were marked. Labor and materials were advanced by the parties. Installation of the fence was started and posts were erected extending more than 300 feet.

> Restatement, Contracts, § 196 (1) reads as follows: "An oral agreement between owners of adjoining tracts of land fixing a dividing boundary the location of which was honestly disputed, ceases to be within Class IV of § 178 [Statute of Frauds] and becomes enforceable when *the agreed boundary has been marked* or has been recognized in the subsequent use of the tracts, *or when other action has been taken by either party in reliance on the agreement.*" (Italics supplied.)

In *Sherman* v. *King,* 71 Ark. 248, 72 S. W. 571 (1903), there was an oral agreement as to a disputed boundary line. All elements of the agreement were performed except the removal "of that portion of the boundary fence that did not conform to the line estab-

lished between them by this agreement." This court held that Sherman could hold King to the agreement if he could prove that the land which Sherman sought to recover by suit was within the lines established by the agreement. The case was reversed for lack of sufficient proof on that point; however, this court's pronouncement became the rule of the case on remand.

In *Garvin* v. *Threlkeld,* 190 S. W. 1092 (Ky. 1917), it was said:

> "While the validity of parol agreements to settle disputed boundaries was long resisted on the ground that, in effect, they passed the title to real property without the solemnities required by the statute, it is now settled that, where the dividing line is uncertain and there is a bona fide dispute as to its location and the parties agree on the dividing line and execute the agreement by marking the line or building a fence thereon, such an agreement is not prohibited by the statute of frauds, nor is it within the meaning of the provisions of the law that regulate the manner of conveying real estate."

The performances by the parties, which we have enumerated, bring the case within the law just recited. Therefore Smith could not rescind the contract by abandoning the construction of the fence.

Affirmed.

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

JOHN A. FOGLEMAN, Justice, dissenting. I respectfully dissent. The learned chancellor made a positive finding that the old fence line constituted a boundary by acquiescence for many years. This fact is undisputed. He did not make any finding that there was an uncertainty as to the dividing line nor did he find that a dispute as to its location existed between appellants and

appellees. I submit that the clear preponderance of the evidence is that there was no uncertainty or dispute as to this boundary line. One or the other is essential to any boundary by agreement.

Ollie Lindsey was the predecessor in title to appellants and her brother was predecessor in title to appellees. When she sold her property to Smith, he was put into possession up to the fence which had constituted the boundary between her and her brother for nearly forty years. She stated that so long as the fence had been there, there never had been any dispute about that being the property line.

Appellant Hiram Smith said that he took possession up to the fence and maintained it. He said that appellee Mefford recently asked if he would go in with him to build a new fence. Smith said that he then agreed to furnish the wire and one man and himself if Mefford would furnish the posts and one man and they would try to *straighten out the old fence*. His intention was to build a new fence as near as possible to the old fence but to make it straight. He and Tate, the county surveyor, agree that Tate was called to make a survey only because the parties wanted to build a straight fence. While Mefford says the surveyor was called to establish the property line, he admits that Smith called him. Mefford does not even say that the surveyor was to establish a new property line. He does claim that Smith said he was going to have the property surveyed and "make a line fence of it."

Mefford does not contradict Smith about the agreement as to building the fence, but he affirmatively answers leading questions as to whether there was a dispute about the line. He never stated what the dispute was. He admits that all he wanted to do was straighten out the old fence and that he didn't claim to own anything west of it. He said that Smith told him that he could not straghten up the old fence because it was not on the line. On redirect examination Mefford said that

Smith admitted that he didn't own *up to the fence* and knew it wasn't on the line. This certainly was not a dispute. Appellee Mefford *admits* that there was no dispute about the property line until it was surveyed. Then he says it was not until the new fence was half-built. So there was no *dispute* about the *location* of the boundary line. Even after Tate's *admittedly erroneous* survey, Mefford tried to buy the strip of land between the old fence and the survey line from Smith.[1] Although there is testimony that the parties first agreed to build the new fence on the erroneous survey line, and later agreed to build six feet east of the survey line, there is *no* testimony about a dispute until the fence was actually commenced. I respectfully submit that this background will not support an "agreed boundary" and that consequently the court's decree should fall.

The rules as to "agreed boundaries" in Arkansas have been stated and restated dozens of times. They were set out in *Clauss* v. *Baumgartner,* 227 Ark. 1080, 305 S. W. 2d 116, which quoted from *Malone* v. *Mobbs,* 102 Ark. 542, 145 S. W. 193, 146 S. W. 143, as follows:

> "In the case of *Payne* v. *McBride,* 96 Ark. 168, we held: 'Where there is doubt, dispute or uncertainty as to the true location of the boundary line the parties may by parol fix a line which will, at least when followed by possession with reference to the boundary so fixed, be conclusive upon them although the possession is not for the full statutory period.' To the same effect is *O'Neal* v. *Ross,* 100 Ark. 555, 140 S. W. 743; *Butler* v. *Hines,* 101 Ark. 409, 142 S. W. 509."

In *Randleman* v. *Taylor,* 94 Ark. 511, 127 S. W. 723, this court said:

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[1]The surveyor said that the line would have been close to the old fence if he had located it correctly. His error was due to his failure to recognize that the tracts were in a "short forty."

> "* * * It is only where the true line is unknown or is difficult of ascertainment, and the parties establish the line to settle a disputed and vexatious question as to the boundary line between them, that the agreement is binding."

Here there is lacking another important element in the establishment of this type of boundary. The parties certainly never went into possession of their respective lands according to the agreement. The filing of this lawsuit was the immediate outgrowth of appellees' building or completing of the fence. I do not believe that it can be seriously urged that the unilateral possession of Mefford meets the test. While the adoption of a new rule validating these agreements when the boundary has only been marked, or other action taken pursuant to the agreement by the parties might be thought by some to be wise, I do not think so. We have always followed the rule that parol agreements relating to boundaries, even when made under the required circumstances, must be carried into execution in order to be binding upon the parties. In *Stroud* v. *Snow*, 186 Ark. 550, 54 S. W. 2d 693, this court reversed a jury verdict based on such an agreement because of the court's error in instructing the jury that just such an agreement as Mefford alleges was made in this case was sufficient. There the evidence was that appellant agreed that when the line was run by the county surveyor, he would put his fence back on the true line and reiterated his agreement *when the line was run*. There this court said:

> "* * * The jury found for the defendant and settled the disputed question of fact against the appellant, so that we must treat the agreement as established. This presents the single question, is the agreement sufficient to divest the title to the land in controversy acquired by lapse of time and the adverse possession of the appellant beyond the statutory period? The general rule is stated in 2 C. J., § 559, p. 256, as follows: 'A title which has ripened by adverse possession cannot be divested by

parol abandonment or relinquishment, but must be transferred by deed.' This rule is recognized by this court in *Hudson* v. *Stillwell*, 80 Ark. 575-578, 98 S. W. 356, where we said: 'If the occupancy was adverse for the statuory period, it operated as a complete investiture of title, and a subsequent executory agreement to readjust the boundary lines or any other act done in recognition of the validity of plaintiff's claim to the land would not remove the statute bar and reinvest the title.' To the same effect are the decisions in *Parham* v. *Dedman,* 66 Ark. 26, 48 S. W. 673; *Shirey* v. *Whitlow,* 80 Ark. 444, 97 S. W. 444; *O'Neal* v. *Ross,* 100 Ark. 560, 140 S. W. 743; *Hutt* v. *Smith,* 118 Ark. 10, 175 S. W. 399; *Blackburn* v. *Coffee,* 142 Ark. 430, 218 S. W. 836; *Dermott* v. *Stinson,* 144 Ark. 208, 222 S. W. 54, cited by the appellee.

In the recent case of *Haskins* v. *Talley,* decided by the Supreme Court of New Mexico, November 17, 1923, and reported in 29 N. M. 173, 220 Pac., at page 1007, our cases are reviewed, and the doctrine therein announced is approved as the general rule. See also *Lusk* v. *Yankton,* 40 S. D. 498, 168 N. W. 375.''

The court then goes on to reverse on the basis that the contract was executory, not executed. I submit that, until this fence was built by the parties and the extent of their right of possession delineated by it, the contract was still executory.

The majority implies that the only reason for the distinction is that the executed agreement takes the case out of the statute of frauds. This assumption seems unfounded to me. We have repeatedly held that boundary agreements are not contracts for the sale or conveyance of lands or any interest therein. See, *Sherman* v. *King,* 71 Ark. 248, 72 S. W. 571; *Payne* v. *McBride,* 96 Ark. 168, 131 S. W. 463; *Sherrin* v. *Coffman,* 143 Ark. 8, 219 S. W. 348; *Robinson* v. *Gaylord,* 182 Ark. 849, 33 S. W.

2d 710. The *Sherrin* case states the rule as clearly as it could be stated:

> "The agreements in cases of this kind do not operate as a conveyance, so as to pass title from one to another, but they proceed upon the theory that the true boundary line is in dispute, and that the agreement serves to fix the true line to which the title of each extends. The parties thereafter hold up to the line as they did before by virtue of their respective deeds. The theory is that the parties have simply by agreement settled the location of their boundary lines, which was in doubt, instead of having the court settle it for them. So when they orally agree upon the line, and the agreement is accompanied by possession to the agreed lines, such agreement will be valid and binding."

In the *Robinson* case this court quoted the United States Supreme Court's statement, "that such agreement is 'not a contract for the sale or conveyance of lands. It has no ingredient of such a contract.' " In view of these holdings, a simple reading of the statute of frauds [Ark. Stat. Ann. § 38-101 (Repl. 1962)] shows conclusively that it could not have any application because this is not an action "* * * to charge any person upon any contract for the sale of lands, tenements and hereditaments, or any interest concerning them; * * * ." This view is supported by an overwhelming weight of authority. See, 12 Am. Jur. 2d 619, Boundaries, § 84.

Even if the statute of frauds could be said to apply, there is no evidentiary basis here for taking the case out of the application of this statute. The agreement about the method of construction of the fence was entered into before any dispute arose. Smith says it was made when Mefford first came to him and when their only objective was to straighten out the fence. Mefford does not contradict him and agrees with him as to the

substance of that agreement. As hereinabove pointed out, even Mefford does not contend that there was a dispute about the boundary before the fence was half-built. Consequently, the agreement as to contributions to the fence building did not constitute any part of a boundary agreement, or any such "part performance" as to take the case out of the statute of frauds. Certainly it did not make the agreement an executed one.

In *Sherrin* v. *Coffman, supra,* the court again pointed out that the binding effect of these agreements depended upon their execution. There it was said that the request of an adjoining owner to remove a house from the disputed strip falls short of establishing an agreement or the execution thereof. The validity of this rule distinguishing executory and executed contracts was recognized in *Dewees* v. *Logue,* 208 Ark. 79, 185 S. W. 2d 85, and *Adkins* v. *Willis,* 217 Ark. 287, 230 S. W. 2d 32.

Perhaps basically my disagreement with the majority is based upon a different understanding of the facts. In addition to the matters already pointed out, the majority states that the surveyor determined the true boundary line to be several feet west of the old fence. I do not so understand the testimony. The surveyor said that the line run by him was erroneous and that if he had run it correctly, it would have been very nearly the old fence line. Mefford recognized this and offered to *purchase* the strip between the surveyor's line and the old fence line.

In setting up what is asserted to be the uncertainty as to the boundary line, the majority refers to three possible lines. I have already pointed out the fallacy of relying on the surveyor's line as a possible line. I do not understand the significance of a line from which Smith's and Mefford's predecessors in title removed a boundary fence forty years ago. The fact that this was intended

as a "swap" or "conveyance" between a brother and sister is inescapable. When these two possibilities are elminated, only one possible line remained. The fence to which both Smith and Mefford took possession was so conclusively the boundary between the two tracts that the chancellor correctly foreclosed the presentation of any further testimony on that subject.

I would reverse and remand with directions to the court to grant the relief sought by appellants.

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

J. N. MASSEE AND WIFE, JENNESS C. MASSEE *v.* BRUNO SCHILLER, ALSO KNOWN AS BRUNO D. SCHILLER AND B. E. SCHILLER AND WIFE, BERTA SCHILLER

5-4337 420 S. W. 2d 839

Opinion delivered November 27, 1967

John B. Hainen, for appellants.

Shaw & Shaw, for appellees.

J. Fred Jones, Justice. Mr. and Mrs. Schiller own most of the Northeast Quarter of the Southeast Quarter of Section 36 in Township 4 South of Range 32 West in Polk County, Arkansas, and Mr. and Mrs. Massee own the forty-acre tract immediately south of the Schiller tract. This is the second appeal to this court from decrees of the Polk County Chancery Court involving the same parties and concerning the south twenty feet of the Schiller tract.

In the first case, *Massee* v. *Schiller,* 237 Ark. 809, 376 S. W. 2d 558, Massee and his wife, as plaintiffs, alleged title by adverse possession to the south twenty feet of the Schiller tract. The background facts and de-

cree in that case being necessary to an understanding of the issues and decree in the case at bar, we restate the pertinent facts as follows:

Many years ago a roadway had been in use over the entire length of the south twenty feet of the Schiller tract and fences had been erected on each side of the roadway forming a lane. The east 822 feet of the lane had fallen into disuse and had long been abandoned as a roadway, but Massee continued to use the west 498 feet for ingress and egress to and from a house on his own tract of land. Schiller cleaned out the east 822 feet of the old lane and erected a new fence on the south side, thus enclosing that portion of the old roadway within his cow pasture. The west 498 feet of the lane or roadway was still in use by Massee and had not been disturbed by Schiller, when Mr. and Mrs. Massee brought suit against the Schillers to quiet title in themselves to the entire south twenty feet of the Schiller tract.

The chancellor found from the evidence in that case, including the testimony of a court appointed surveyor, that the Schillers owned no land *"South of the old established fence and survey line as found by the Court to be the division line between these two forty-acre tracts."* Title to the south forty-acre tract was quieted and confirmed in Mr. and Mrs. Massee and the chancellor's decree, insofar as it relates to the Schiller tract and to the present litigation, is as follows:

> "Bruno E. Schiller, (B. E. Schiller) and wife, Berta Schiller, are the owners of the Northeast Quarter of the Southeast Quarter (NE¼ SE¼) of Section 36 in Township 4 South of Range 32 West in Polk County, Arkansas, and the title to this tract of land is quieted in the defendants as against the plaintiffs, J. N. Massee and wife, Jenness C. Massee, *subject to a roadway easement across the South side of the West 498 feet of said forty-acre tract, as the same is now located."* (Emphasis ours)

The decree was affirmed by this court, (*Massee* v. *Schiller, supra*) and it is the italicized portion of that decree that gives rise to the present litigation.

Following our mandate of affirmance, Schiller removed the old fences on each side of the easement over the *west* 498 feet of the south twenty feet of his 40-acre tract and erected a new fence along his property line south of the easement and placed cattle guards in his fence at each end of the easement.

Massee brought the present action for trespass alleging that Schiller has encroached upon the Massee land by building a new fence some 10 to 12 feet south of the survey along the old fence line south of the old roadway, and by removing the old fence along the north side of the easement, thereby enclosing the easement into pasture; in permitting cattle to roam over the easement and by placing cattle guards across said easement, thus interfering with Massee's free use of the easment.

After hearing all the evidence, the chancellor entered a decree as follows:

> "IT IS THEREFORE, BY THE COURT, CONSIDERED, ORDERED, ADJUDGED AND DECREED that defendants Bruno Schiller and wife, Berta Schiller, should have full use of their land subject to the prescriptive easement of the plaintiffs for ingress and egress. Old fences are not to be restored. Plantiffs are, at plaintiffs's expense, to build and maintain cattle guards at the West end of the 498 foot lane and at the East end of said lane. Plaintiffs can continue to use the said lane. Plaintiffs are given the right to maintain the lane by deposit of gravel from time to time and by grading. Plaintiffs are granted the right to maintain a walk-way and hand rail across the two cattle guards.
>
> "Both parties to this litigation, plaintiff and defendant are, each and both, restrained and enjoined from interfering with the herein specified rights of the other party.

"All other relief sought by parties plaintiff and defendant, is specificly denied.

"Court costs to date in this cause are to be paid by plaintiffs and defendants, one-half each for which execution may issue."

Upon their appeal from this decree, Mr. and Mrs. Massee rely upon the following points for reversal:

"1. The Court erred in following the Prior Supreme Court Opinion which was res judicata on the law and the facts, permitting further encroachment and enlargement of rights at the expense of appellants.

"2. The Court erred in permitting a reduction in the prescriptive rights of appellants to use the established lane unimpeded by cattle, gates and cattle guards.

"3. The Court erred in permitting the erection of a new fence contrary to the established law of the case."

We find no difficulty in disposing of points one and three relied on by appellants. The survey maps introduced as exhibits 8 and 9 to surveyor Woods' testimony at the trial in the former case, show the true boundary line between the two forty-acre tracts to be some ten to twelve feet south of the old fence line on the south side of the old lane, the deviation being in the old fence line and not the survey line. In the second trial, appellee Schiller testified that he built his fence one foot inside the survey line as marked and staked out by the court appointed surveyor. We conclude that the appellees did not violate the original decree, as affirmed by this court, in erecting their fence one foot within the boundary line as indicated on survey plats introduced as exhibits 8 and 9 in the original trial of this case, and we conclude that the chancellor did not err in so holding.

The second point relied on gives us the most difficulty. The precise question on this appeal is whether appellees must re-erect a fence along the north side of the easement where it originally stood in order to keep their cattle in their pasture and out of the easement, or whether they may maintain their fence along their property line south of the easement, thus taking the easement into their cow pasture. The most important part of this question is whether appellees may maintain cattle guards at each end of the easement to prevent their cattle from straying from the confines of the pasture and from their own land. The chancellor held that this may be done, and we agree.

As new lands are placed under fence, or into agricultural production, and the communities become more thickly settled, the acquisition of roadway easements by prescription becomes less frequent. The cattle guard is a well known device extensively used as a substitute for a gate since the comparatively recent exit of the horse and buggy days, consequently, most of cases in point concern gates and bars rather than cattle or stock guards, but the *problem* involved is not new to the courts. The reported cases are of little value in determining the precise question before us, however, because the decisions are as varied as the facts supporting them.

We are not unmindful of the line of decisions from other states seeming to follow the general proposition that the right in a prescriptive easement is measured by its use and where a roadway has been gained by prescription, and no gates or bars have been erected during the requisite term, none can afterwards be erected. *Melton* v. *Donnell*, 173 Tenn. 19, 114 S. W. 2d 49; *Shivers* v. *Shivers*, 32 N. J. Eq. 578; *Switzer* v. *Armantrout*, 106 Ind. App. 468, 19 N. E. 2d 858; *Bolton* v. *Murphy*, 41 Utah 591, 127 P. 335; *Bishielbs* v. *Campbell*, 200 Md. 622, 91 A. 2d 922.

We think the better rule to be as stated in Restatement of the Law, Property-Servitudes, § 481, as fol-

lows:

> "The possessor of land subject to an easement created by prescription is privileged, as against the owner of the easement, to make such uses of the servient tenement as are not incompatible with the use authorized by the easement."

In the comment under this section of the restatement we find as follows:

> "Subject to the privileges of the owner of the easement, the possessor of a servient tenement retains the usual privileges that go with possession. In so far as his relations with the owner of the easement are concerned, the possessor of the servient tenement is privileged to make all uses of his land which do not interfere with the use authorized by the easement.
>
> * * *
>
> As the extent of the easement becomes more difficult to discover, the relations between the owner of it and the possessor of the servient tenement become increasingly subject to the governing principle that neither shall unreasonably interfere with the use of the land by the other. * * * An interference by one with the use by the other which is reasonable in one situation may become unreasonable in another. Thus, as the land of the servient possessor becomes more highly developed it may be proper to require the owner of an easement to submit to inconveniences to which it would have been improper to have required him to submit before the additional development. The determination as to what constitutes an unreasonable interference on the part of the possessor of the servient tenement with the use of the land by the owner of the easement depends primarily upon a consideration of the relative advantage to him of his desired use and

the disadvantage to the owner of the easement."

The extent and limitations of an easement created by conveyance are usally fixed by the conveyance and set out in its terms, so it is in prescriptive easement, much as the one we have here, where difficulty arises in measuring the rights of the owner of the easement and the rights of the possessor of the servient estate, and adjusting the conflicts between their respective rights. Where the owner of the land has a right to use it, subject to the prescriptive right of another to travel a well defined designated route across the land, some degree of inconvenience is to be expected and tolerated in the exercise of these overlapping rights, and the conflicts that arise in the exercise of such rights, are measured by reasonableness of interference of one with the other. What is reasonable or not reasonable depends on the facts and circumstances of each case and is a matter on which the minds of reasonable men may differ.

The chancellor held that the appellee had a right to erect his fence on boundary line south of the easement, and that cattle guards may be installed at each end of the easement and in this holding we agree with the chancellor. The chancellor further held that the *appellant* is to build and maintain the cattle guards at each end of the easement, and in this we do not agree with the chancellor.

During the running of the prescription in this case, no cattle guards were constructed or maintained across the easement and none were needed by the appellants or required for their use and benefit. It was through the acts of the appellees that cattle guards became necessary at all in this case, and if appellees now desire to use appellants' right-of-way easement for their purpose, they must do so in such manner that will not unreasonably interfere with appellants' use, so *appellees*

must provide the means for the continued unobstructed passage for the appellants through appellees' new fence at both ends of the right-of-way easement. If appellees are to enclose appellants' right-of-way by a fence, the appellees must construct and maintain the cattle guards with the walk-way and hand rails as provided in the chancellor's decree, and in such manner that appellants may enjoy uninterrupted and unobstructed travel over the roadway along their easement.

We find no cases involving cattle guards as such, but similar situations concerning gates and bars have been before the courts many times. In the Mississippi case of *University of Mississippi* v. *Gotten,* 119 Miss. 146, 80 So. 522, the court said:

> "There is another question yet to answer. Conceding the easement, can we say that the erection and maintenance of the gate across the roadway appreciably interfered with, or unreasonably limited, the enjoyment of the easement?
>
> "Upon this phase of this case the authorities are not in harmony, but we believe that the facts of each case should control. If it appears that the erection of gates will not unreasonably interfere with the enjoyment of the easement, it is our opinion that the owner of the servient estate is justified in erecting gates. Generally speaking, every owner of lands has a perfect right to fence them, provided, of course, to do so will not appreciably interfere with vested rights of others."

In *Chesson* v. *Jordon,* 224 N. C. 289, 29 S. E. 2d 906, we find the following language:

> "While the authorities are at variance as to the right of an owner of land burdened with a right-of-way acquired by prescription to erect gates across the way, the weight of authority is in accord with

the holding that such a right exists in the case of agricultural land. 17 Am. Jur., 1012, sec. 122; 28 C.J.S., Easements, § 91, p. 770; Annotation 73 A.L.R. 788. See also *Alexander* v. *Autens Auto Hire,* 175 N. C. 720, 95 S. E. 850; *Jacobs* v. *Jennings,* 221 N. C. 24, 18 S. E. 2d 715.

"Generally speaking, the nature of the easement acquired rather than the character of the use must control the rights of the parties. Hence, no hard and fast rule may be prescribed. Each case must be controlled, in large measure, by the particular facts and circumstances being made to appear.

"Ordinarily, however, a mere private easement for the general purpose of ingress and egress over and across agricultural lands carries with it no implication of a right to deprive the owner of the servient estate of the full enjoyment of his property. It is subject only to the right of passage. Hence, he may erect gates across the way when necessary to the reasonable enjoyment of his estate, provided they are not of such nature as to materially impair or unreasonably interfere with the use of the lane as a private way for the purposes for which it has theretofore been used."

In the Kentucky case of *Willard Wynn* v. *Alex Powell,* 286 S. W. 2d 367, gates and bars had been maintained across the right-of-way through the running of the prescription and the servient owner claimed the right was by sufferance instead of prescription, but in that case the court said:

"Under our rules governing passway cases, even if we should ignore the evidence concerning the existence of gates across the passway, the appellants would still be entitled to maintain gates. In *Bridwell* v. *Beerman,* 190 Ky. 227, S. W. 165, at page 166, it was said:

> " 'If one should acquire a passway by long use over and through the fields of a neighbor, and this passway was unfenced, the owner of the servient estate would have the right to erect a gate or gates across the way to aid him in fencing his farm or in dividing it up into fields.'
>
> "Appellant as the owner of the property in fee is entitled to use it in a lawful manner, as in this case, to pasture his livestock. But in doing this as the owner of the servient estate, he cannot destroy or unduly obstruct the rights of the dominant estate created by the easement over the property. The servient owner must permit the free and unrestricted use of the passway by the owner of the dominant estate while the latter must use his right so as to be as little burdensome as possible to the servient estate."

In our own early case of *Hockersmith* v. *Glidewell,* 153 S. W. 252, suit was instituted to enjoin the servient owner from maintaining a bar across a road right-of-way over a prescriptive easement. The chancellor granted the injunction and in reversing the chancellor, this court said:

> ". . . [W]e do not think that the evidence shows that the placing of the bar across the road by appellants, for the purpose of keeping their horses off of their crop, was an obstruction of such a material character as to interfere with the reasonable enjoyment of the easement by appellee."

We conclude that the chancellor was correct except in requiring the appellants, rather than the appellees, to construct and maintain the cattle guards. In citing cases, supra, pertaining to gates and bars erected across rights-of-way, we do not imply that the appellees in this case, or the owner of the servient estate in any other case, would have the right to erect gates or bars or anything else that would unreasonably interfere with

the useful enjoyment of the easement.

Appellants' easement for a roadway in this case was established by prescription and fixed by court decree which has been affirmed by this court. The easement runs with the ownership of the appellants' land and its use continues free of unreasonable interference by the servient owner until the ownership of the easement is merged with the ownership of the servient estate, or until the easement is abandoned by its owner.

We simply hold that the building of cattle guards at each end of the easement in the case at bar, does not unreasonably interfere with appellants' use of the easement under the facts of this case, but we hold that the duty of building and maintaining the cattle guards with walk way and hand rails, as provided in the decree, falls upon the appellees.

This cause is remanded to the trial court for the entry of a decree not inconsistent with this decision. Each of the parties will bear their own costs.

Affirmed as modified.

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

JOHN A. FOGLEMAN, Justice, dissenting. I respectfully dissent. I cannot understand how either the trial court or the majority of this court arrives at a result which permits or approves the action of appellees in erecting a new boundary fence south of the easement of appellants. I agree that a review of the first appeal[1] in this case is essential to an understanding of the issue involved here. I do not agree with the majority's analysis of facts in that case. Then, appellants sought, among other things, a decree:

[1]Reported as *Massee* v. *Schiller*, 237 Ark. 809, 376 S. W. 2d 558.

1. Quieting their title against all claims of appellees to a 20-foot lane across the entire width of the NE¼ SE¼ of Section 36, Township 4 South, Range 32 West;

2. Directing appellees to replace a fence in its former location on the north side of the approximately 790 feet of the east end of the lane, and to place same in as good condition as it was at the time of removal;

3. Restraining appellees from further relocation of said fences and from interference in any manner with appellants' use of the lane, including moving fences and permitting cattle to come into and through the lane.

Appellees prayed in their answer that their title be quieted to the NE¼ SE¼ of Section 36, Township 4 South, Range 32 North, *subject to a roadway easement in favor of appellants over that part of the lane which extends along the dividing line* between the two forties for a distance of approximately 530 feet. In their amended answer, appellees prayed that the court order that the boundary line fences be located upon the true boundary line, *subject only to the roadway easement,* "which these defendants admit the plaintiffs are using, but that this easement should be across the south 20 feet of the west 498 feet of the NE¼ SE¼, Section 36 in Township 4 South, Range 32 West * * *."

The trial court ordered that each party be permitted to make a survey without interference of the other. At the request of appellants, the county surveyor made a survey, witnessed by Schiller. This survey located a lane or road completely across the south side of the Schiller tract described as the NE¼ SE¼ of Section 36 in Township 4 South, Range 32 West, varying in width from 20 to 24 feet. There was a fence north of this roadway and one south thereof. The fences appeared to have

once extended all the way across the tract, but were down and in a state of disrepair east of the point where a roadway from this lane entered the Massee tract some 495 to 498 feet east of the west boundary line. For the west 498 feet, the north fence was the south boundary of the Schiller *pasture*. On the south side of this roadway, the fence had been partially removed. The north fence was 32 feet north of the true southwest corner of the NE¼ SE¼, Section 36. The south fence was, thus, approximately 12 feet north of this true corner. The roadway and fences angled slightly toward the south as they proceeded eastward but all remained north of the true line. The roadway and south fence had fallen into partial disuse and decay east of the turn-off to the Massee house, but the north fence connected with an old fence crossing the entire 40-acre tract. Trees had grown up between the old south fence and the true boundary line. The trial court found that (1) *the established bounadry line between the two 40-acre tracts was "the old fence line which divides" them;* (2) appellants' claim to a strip twenty feet in width across the east 822 feet laying wholly upon appellees' land was without merit because of abandonment; (3) appellants had a prescriptive easement for roadway purposes across appellees' lands in the place it was then located on the south side of the NE¼ SE¼ along the west 498 feet of the 40-acre tract; (4) *appellees had no claim of ownership to the SE¼ SE¼ "south of the old established fence and survey line as found by the court to be the division line between these two 40-acre tracts."* This decree was affirmed by this court. There can be no question that the south fence line of the roadway or lane was definitely determined to be the boundary line between appellants and appellees for the west 498 feet of each tract.

After the mandate of this court was filed, appellees cut down the trees south of the boundary fence, took down their pasture fence along the north line of this roadway and put a new fence some 10 or 12 feet south of the old fence line which had been determined to be

the boundary line. In its decree now appealed from, the trial court disregarded its previous decree and the mandate of this court by not requiring the removal of this new fence, at least to the property line along the old fence line on the south side of the roadway.

I would reverse and remand with directions to enter a decree requiring the appellees to remove any and all fences south of the old fence line south of the roadway easement across the west 498 feet of appellees' lands.

I am authorized to state that Harris, C. J., and Byrd, J., join in this dissent.

CONLEY BYRD, Justice, dissenting. My dissent is based upon the premises that the court is permitting a material alteration of the easement acquired by appellants; that a cattle guard is but another form of a gate or gap; and that the roaming of cattle on a road, if not a type of obstruction, is at least a nuisance.

In *Craig* v. *O'Bryan*, 227 Ark. 681, 687, 301 S. W. 2d 18 (1957), we said:

> "As a general rule, when the character of an easement is once fixed, no material alteration can be made in physical conditions which are essential to the proper enjoyment of the easement except by agreement."

The logic of not permitting a material alteration in the physical conditions essential to an easement is amply demonstrated in the present case. Here appellants had acquired an easement by prescription to the use of a road within a lane. The important element is not the existing improvements to the property of either party, but the extent of the *right* to utilize the easement. It is common knowledge that the access to property materially affects its market value—for instance, many people will pay more for property at the end of a road,

and property along an improved public road is always more valuable than property back off the road. Consequently, it logically follows that in purchasing or improving property one should be entitled to rely on reasonable permanence of the access as it exists. Having to drive through a cow pasture to reach a proposed home site would materially affect the desires of many people to make substantial improvements. Therefore, in my opinion, today's decision will materially reduce the market value of the property of many of our citizens, who through the years have come to rely on roads acquired by prescription.

I agree with the majority that a ". . . cattle guard is a well known device extensively used as a substitute for a gate . . ." Consequently, the majority opinion runs counter to the many decisions of this court which hold that acquiescence for more than seven years in the existence of a gate across a road established by prescription amounts to abandonment of the prescription right. See *Nelms* v. *Steelhammer,* 225 Ark. 429, 283 S. W. 2d 118 (1955), and *Lusby* v. *Herndon,* 235 Ark. 509, 361 S. W. 2d 21 (1962). Not only is that the effect of the decision but the majority opinion, for precedent to support its position, quotes and relies on cases from other jurisdictions which specifically permit the placing of gates across private ways. In *Brooks* v. *Reedy,* 241 Ark. 271. 407 S. W. 2d 378 (1966), we held that the parties claiming the road by prescription lost or abandoned their right thereto when Brooks enclosed his land and placed gates across the road for a period in excess of seven years, *even though the gates were left open during certain seasons of the year, especially during winter months.* If the acquiescence in the existence of an unlocked wire gap or gate for the statutory period of seven years amounts to the abandonment of a prescriptive easement, how much less does this apply to the existence of a cattle guard? It appears to me that the property owner asserts the permissiveness of the passage as forcefully in one instance as in the other.

The majority opinion leaves dangling the issue of whether the maintenance of a cattle guard across an easement for seven years will result in an abandonment of the easement, or whether one who uses a road where a cattle guard is maintained can ever acquire an easement. I think the citizenry of this state would best be served by treating a cattle guard as a gate, as is recognized by the majority opinion, and the rights of the respective parties should be determined in accordance with our existing law on gates and gaps.

The proof in the record shows that Miss Sarah Crawford, the sister and sister-in-law of appellants, resides on their property, and that the roaming of the cattle on the road amounts to an obstruction of the road as to her. While prior to Initiated Measure No. 1 of 1950 (the so-called Stock Law) this argument might not have been tenable, it appears that the people of this state, by prohibiting the roaming of cattle on the public roads, have recognized cattle to be, if not an obstruction to the use of the roads, at least a nuisance. As far as an individual's use of a private road is concerned, the roaming of cows on the road to his home is certainly as obnoxious and obstructive as their roaming on a public road would be.

Finally, even if I should accept the majority theory that the trial court has some discretion in permitting the use of cattle guards on a private way, I think the trial court abused its discretion in this instance. The record conclusively shows that the road in issue, 20 feet wide, extends along appellees' southern boundary for a distance of only 498 feet. This total area amounts to less than one-fourth of an acre, and when the roadway, which appellants have been granted the right to grade and maintain, is taken out of the area involved, little or no practical benefit from the use of the area as a pasture will result to appellees except as it may add fuel to the feud that has been existing between these

parties.

Therefore, I would reverse and remand the case with directions to appellees to take the road out of their pasture.

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

CONTINENTAL GEOPHYSICAL CO. *v.*
JEFF ADAIR ET AL

5-4319 420 S. W. 2d 836

Opinion delivered November 27, 1967
[Rehearing denied January 22, 1968.]

Daily & Woods, for appellant.

Jeptha A. Evans, for appellees.

CONLEY BYRD, Justice. Appellant, Continental Geophysical Company, appeals from judgments entered in five consolidated cases brought by appellees Jeff Adair, Pleas Garner, R. H. Swint, Johnny McAnally, and Homer Wilkins. The allegation is that appellant's seismograph operations partially destroyed the water supply to appellees' wells.

For reversal, appellant sets out six separate points, but since we hold that the proof fails to show a causal relationship between appellant's seismograph operations and the failure of the water supply in appellees' wells, we deal only with that issue.

The record facts show that some time prior to March 13, 1964, appellant drilled ten holes in the vicinity of the Sugar Grove and Dry Creek areas of south Logan County, at a depth of 100 feet, except for one hole 95 feet deep. In each of seven of these holes appellant placed 200 pounds of dynamite, which took up 40 feet of the hole. The remaining 60 feet was filled with gravel. The charges packed in the holes were set off by appellant on March 13, 14 and 15, 1964. The closest test hole to any of appellees' wells was 1,600 feet; the farthest was 6,300 feet. It was also undisputed that in 1963 Logan County was declared a drouth area, the recorded rainfall being 26.41 inches. (Average rainfall from 1945 to 1965 was 43.82 inches.) Wells other than those here involved also went dry and lawsuits are pending against appellant with respect to some of them.

The depth of most of appellees' wells ranged from 28 to 50 feet. Mr. Swint's well, a drilled well, was 90 feet deep.

Mr. Swint testified that his well was drilled in 1964, before appellant's operations; that it was capable of pumping 750 gallons of water per hour and was supplying, in addition to his home, two chicken houses with a capacity of 12,500 brooders each; that his well quit some time in the spring of 1964; that when it got to where it

would not furnish water for one of the chicken houses he got a driller to set up over it and lower the depth and did get a little more water; and that he did not know exactly how long after appellant's crews left before he noticed the water was getting low, but it was not too awful long.

Appellee Homer Wilkins testified that he had owned his place for 12 or 15 years; that he had never had any trouble with his well before; and that he first noticed the lack of water in his well during the summer of 1964.

Appellee Pleas Garner testified that his well had been in existence to his knowledge for more than 40 years and had not gone dry, and that he first noticed his problem some time in the summer of 1964. He at first said it was probably in October, but later testified that it happened just after the time of the exploration of the defendant company. He did not know whether it was 30 or 60 days or what. He knew he had run out of water about the time the defendant put dynamite shots off and had been out ever since. He testified that if the dynamite had not caused the damage it was funny because that well had been there some 40 years and had not gone dry. He was willing to say that he felt that the dynamite was what did it because it never happened before to his knowledge and he had been around there all his life. He felt the shots were what caused it. He could not say he knew the dynamite caused it but he had that feeling that that was what happened to turn the water off. He was going to say that. He guessed that God Almighty was the only one that really knew what caused it but he thought he knew.

Appellee McAnally testified that he had owned his place since 1946 and the well had never gone dry before, and that it had started going dry in the summer of 1964.

Mrs. Adair testified that she and her husband owned places at both Sugar Grove and Dry Creek; that they had had plenty of water up until appellant's seismograph operations; and that their wells had gone dry in mid-July, 1964. Her testimony was that she knew they set off some dynamite down there; that she heard and felt the blast and could hear the windows shake; and that it was in 1964 some time and right after they did it that the wells all went dry and they went to hauling water.

The only testimony about the geology of the area was given by appellant's witness, Dr. Leslie Mack. He testified that all the wells in the town of Sugar Grove were in the alluvial or unconsolidated settlements; that the water supplying these wells did not move in streams as such, but that it moved as a body en masse, as a saturated mass. He stated that you could dig a well almost any place in the Sugar Grove area and find water at the same level—that it is all saturated and there are no underground streams in the area. He did point out that in areas of limestone formation, such as in north Arkansas, you can have a cavernous limestone where water actually flows through fissures and cracks in the rock, but that so far as Sugar Grove is concerned there are no such streams.

Under the facts, therefore, it appears that in 1963 there was a severe drouth; that on March 13, 14 and 15, 1964, appellant detonated its seismograph test holes; and that some time in the spring or midsummer appellees' water wells began to fail. We think the proof is insufficient to show a causal relationship between the detonation of the test holes and the failure of appellees' wells.

In *Western Geophysical Co.* v. *Mason,* 240 Ark. 767, 402 S. W. 2d 657 (1966), we had before us a case of damage to a well by seismograph operations similar to those here. But there the proof showed that the well had been damaged once before by similar explosions,

and that soon after the explosions the water in the well turned red and muddy and became unfit for use. Here appellees lack the previous experience found in the *Western Geophysical* case, and the further element of the muddying of the water.

O'Brien v. *Primm,* 243 Ark. 186, 419 S. W. 2d 323 (1967), involved damage to a water well following a sand fracting operation on an oil well. The proof showed that acid had been placed in the oil well in connection with the sand fract job and that shortly after the 3,500-pound pressure had been applied to the oil well the acid had appeared in Primm's water well. The record here shows no proof of the transfer of any substance from appellant's test holes to appellees' wells.

When we consider the distance from appellant's test hole explosions to appellees' wells, and the time lag between the date of the explosions and the failure of the water supplies, we can find no evidence to show that the test hole detonations were a cause which, in a natural and continuous sequence, produced the damages to the wells and without which the damages would not have occurred. Therefore, we hold that the trial court should have directed a verdict in favor of defendants at the conclusion of plaintiffs' case.

However, our ruling herein does not necessarily require that the case be dismissed. In a similar situation in *St. Louis S. W. Ry. Co.* v. *Clemons,* 242 Ark. 707, 415 S. W. 2d 332 (1967), we said:

"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)."

Counsel for appellant readily advises this court that lawsuits involving other wells are still pending. It is not impossible that the defects in the proof could be supplied on retrial. We need not speculate on the nature of the proof. But should we dismiss plaintiffs' causes of action here and should other plaintiffs furnish the needed proof, the practical result would be that some people in the community would recover for their wells while the plaintiffs here involved would be denied. This seeming inconsistency in the law would be contrary to the philosophy that justice should not only be fair but appear fair.

Reversed and remanded.

FOGLEMAN, J., concurs.

JOHN A. FOGLEMAN, Justice, concurring. I concur in the majority opinion and its disposition of the case. My concurrence in the remand of the case is not for the reasons stated in the majority opinion, however. In view of my dissent from the remand in *St. Louis Southwestern Ry. Co.* v. *Clemons,* 242 Ark. 707, 415 S. W. 2d 332, I feel that I should express my reasons for this concurrence.

There is direct precedent for remanding a case in which judgment based on a jury verdict is reversed for insufficiency of the evidence to support it. The touchstone for the departure from the usual disposition in

such case is that there be some *unusual circumstance* to justify the different treatment. It has been held that such unusual circumstance exists when the lack of substantial evidence is due to the failure of the plaintiff to show causation where expert testimony might have supplied the deficiency. In *Reynolds Metal Company* v. *Ball,* 217 Ark. 579, 232 S. W. 2d 441, the appellee-plaintiff sought to recover from the appellant for damage to his farm and pasture land. He contended that the damage was caused by sediment from the alumina extraction plant of the appellant some six or seven miles upstream. The plaintiff failed to prove that the sediment came from the plant and could only testify that he never had any of the sediment until the plant went in. He also failed to prove that the sediment included chemical constituents that were poisonous to vegetation. This court held that the trial court should have directed a verdict, but found that there were special circumstances to justify remanding the cause for a new trial rather than dismissing. The identical factors relied on in that case are the deficiencies in appellees' proof in this case, so I agree that a remand is proper here, as I consider that precedent controlling.

THE NORTH LITTLE ROCK TRANSPORTATION CO., INC. ET AL *v.* JOE P. FINKBEINER ET AL

5-4270 420 S. W. 2d 874

Opinion delivered November 27, 1967

Rose, Meek, House, Barron, Nash & Williamson and *Louis Rosteck,* for appellants.

Wright, Lindsey & Jennings, for appellees.

HENRY WOODS, Special Justice. This is a suit for property damage and personal injuries filed by appellants in circuit court. Litigation resulted when a cab owned by appellant North Little Rock Transportation Co., Inc. and occupied by appellant Baxter skidded on water flowing across a street from a lawn sprinkling system owned by appellees Mr. and Mrs. Joe P. Finkbeiner. At the close of all testimony, the trial judge directed a verdict for the appellees, and the sole issue is the correctness of the ruling. Two basic questions must be answered. First, were the Finkbeiners negligent? Secondly, even if they were not negligent, can liability be imposed under the doctrine of *Rylands* v. *Fletcher,* L.R. 3 H.L. 330, *i. e.,* under a theory of absolute or strict liability?

There is no material dispute as to the facts. Mr. and Mrs. Joe Finkbeiner, the appellees, own a home on the south side of Cantrell Road near the crest of what is known as Cantrell Hill in western Little Rock. On June 10, 1966 Mrs. Finkbeiner decided to activate their lawn sprinkling system for the first time since the winter months. To accomplish this, a city water company employee, using a special tool, must first open a cutoff valve located in a steel box near the road. After this valve is opened, the sprinkling system is then controlled manually by two toggle switches on the porch of the Finkbeiner home, each of which controls the sprinkler heads on one-half of the lawn. In response to a call by Mrs. Finkbeiner, a water department employee opened main cutoff valve sometime between 9:00 and 9:30 A.M. The sprinkler heads on one side of the lawn immediately began operating, and Mrs. Finkbeiner was so advised by the water company employee. She told him to

leave it on, that she would turn on the other side, and cut both off when she had finished watering the yard. There is no evidence in the record that either Mrs. Finkbeiner or the water company employee then realized that something was amiss with one of the toggle switches.

At approximately 11:00 A.M. Mrs. Finkbeiner attempted to cut off the sprinkler system, but one of the switches would not operate. Mrs. Finkbeiner immediately called her husband at his meat packing plant, and the plant's chief maintenance engineer was sent to repair it. At the same time she called the city water department and asked them to send someone to cut off the main valve. Mr. Finkbeiner's maintenance engineer arrived in a few minutes and was attempting to repair the switch at the time of the accident hereinafter described.

Water from the sprinkling system flowed into Cantrell Road and down the curb on the south side for about a block until it reached a point where the road cruves from its generally eastward direction. At this point the water continued eastward, crossing the road in rather large quantities. At approximately 11:35 A.M. a westbound cab owned by appellant North Little Rock Transportation Co., Inc. and occupied by appellant Baxter skidded on the wet road surface and crashed into a telephone pole damaging the cab and injuring Mr. Baxter.

Mrs. Finkbeiner denied any knowledge that the water on this occasion had been discharged in sufficient quantity to flow across Cantrell Road, and both appellees denied knowledge of such flow on any previous occasion. However, the sprinkler system had never been permitted to operate for this length of time. The Finkbeiners testified that in six years of occupancy the sprinkling system had been checked on several occasions and the switches had never before given trouble.

The rule with regard to negligence in this type of fact situation is given in the Restatement, Second, Torts

§ 368 as follows:

> "A possessor of land who *creates* or *permits to remain thereon* . . . an artificial condition so near an existing highway that *he realizes or should realize* that it involves an unreasonable risk to others accidentally brought into contact with such condition while travelling with reasonable care upon the highway, is subject to liability for physical harm thereby caused to persons who (a) are travelling on the highway. . ."

Here the condition was "created" by the defective switch. Did the Finkbeiners fail to use ordinary care with respect to its condition? This question must be answered in the negative. The sprinkler system had been checked on several prior occasions. This switch had never given trouble before. The cases, including one in Arkansas, uniformly refuse to predicate negligence on this basis alone. *Haizlip* v. *Rosenberg,* 63 Ark. 430, 39 S. W. 60 involved a defective ballcock in a water closet. "The appellant did not know, and had no actual notice that the water fixtures were in bad repair before or at the time of the overflow." *Id.* at 431, 39 S. W. at 61. As was said in a leading English case almost identical in facts to *Haizlip,* there was "no reason to suspect the valve had given way or was in any danger of giving way or that anything was wrong with the closet, and I see no negligence in not guarding against a danger which there is no reason to anticipate." *Ross* v. *Fedden,* 7 L.R. 661, 662 (Q.B. 1872). See also *Blake* v. *Land and House Property Corp.,* 3 T.L.R. 667 (Q.B. 1887) for similar facts and result; *Armstrong* v. *Milgrim,* 172 N.Y.S. 454 (actual or constructive notice to landowner necessary to charge landowner with negligence in leakage of pipe from defective valve); *Uhl Bros.* v. *Hull,* 130 Wash. 90, 226 P. 723 (no negligence where leakage from concealed pipe, which could not be discovered except with great difficulty); *Reedy* v. *St. Louis Brewery Ass'n* 161 Mo. 523, 61 S. W. 859, 53 L.R.A. 805 (no

negligence on part of brewery whose pipe burst and discharged water across sidewalk; water froze and caused plaintiff to fall).

Even though a landowner might not be negligent in causing a discharge of water from his premises onto adjoining property or into an abutting highway, ordinary care might well require that immediate steps be taken to correct the condition, once it is discovered. In the words of the above-quoted section of the Restatement, there may be a failure of ordinary care if the landowner "permits it to remain." Yet in this respect the actions of the Finkbeiners were exemplary. Upon discovering that the switch was broken, Mrs. Finkbeiner immediately called her husband, who dispatched his chief maintenance man to make repairs. She also called the water company and asked them to send a man to cut off the main valve.

Appellants, however, urge that a jury question was made on the failure of the Finkbeiners to warn them that the water was flowing across Cantrell Road and creating a hazardous condition to traffic. Such a duty on their part could only arise if they knew or *should have known* this fact. There is no evidence in this record that they had actual knowledge, so this allegation must necessarily be based on the contention that they *should have known* the course and possible result of the water's flow. We cannot sustain this contention. The point where the water crossed Cantrell Road was a block from the home. On previous occasions when their sprinkler system was used, the water flowed along the curb on the south side of Cantrell Road into a drain past the point of the accident. We do not think it would be reasonable to charge them with constructive knowledge not only that the water would cross the road, but that a car travelling up the hill would skid on the wet surface. Nor do we consider that ordinary care would dictate that Mrs. Finkbeiner should go more than a block from her home and flag traffic proceeding up Cantrell Hill.

To control traffic of the speed and density found at this location would certainly have been beyond the competence of a housewife. Mr. Finkbeiner is an executive in a meat packing firm located in the extreme eastern part of Little Rock at a considerable distance from his home. The accident happened about thirty minutes after his wife notified him telephonically of her difficulties with the switch. Even if he had realized on the basis of a phone call that a dangerous condition was being created for traffic on Cantrell Road, we do not see how he personally could have taken steps to warn motorists, in view of the time element. He did immediately dispatch his chief maintenance man to repair the switch, and Mr. Finkbeiner was at the scene within an hour after his wife's call.

Appellants place principal reliance on the Texas case of *Skelly Oil Co.* v. *Johnson,* 151 S. W. 2d 863, which bears some superficial resemblance to the case at bar. Water from Skelly's cooling tower was blown by the wind onto a nearby road, causing a slippery surface on which plaintiff's car skiddel. The clear distinction between *Skelly* and the case at bar appears in the court's finding that "when wind was from the west, water would be blown from the cooling towers onto the road east of the towers and *for a number of years wet places had been created. . .*" (Emphasis added.) The distinction is made more evident by the Texas court's principal authority, *Stephens, Adm'r* v. *Deickman,* 158 Ky. 337, 164 S. W. 931, a case wherein a downspout discharged water across a sidewalk, ice formed, and plaintiff was injured in a fall. The court in that case said:

> "[I]n case such an obstructon or nuisance should arise suddenly or unexpectedly, it is the landlord's duty to remove the obstruction or nuisance as soon as he has knowledge of its existence, or could have had such knowledge by the exercise of ordinary care. In the case at bar the ice had remained upon the sidewalk for more than two weeks before the

accident, and *to the knowledge* of the appellee." (Emphasis added.) 164 S. W. at 934-35.

Skelton v. *Thompson,* 3 Ont. Rep. 11, involved the same fact situation, except that the ice had formed two or three hours before the accident. In conformity with the rule expressed in the above Kentucky case, judgment was for the defendant because there was in finding that the abutting owner *either knew or should have known* of the slippery condition which caused the plaintiff to fall. A similar view was expressed in *Lansing* v. *John Strange Paper Co.,* 227 Wis. 439, 278 N. W. 857. The defendant's plant emitted vapor from exhausts in proximity to a bridge, causing ice to form on the bridge. Plaintiff sustained injuries when his car skidded on the ice. The court pointed out that there was a complete absence of any proof that ice had ever formed theretofore upon the bridge as a result of vapor emitted from defendant's plant. In denying liability it was said that "to sustain liability it is not enough to show that the defendant permitted a dangerous condition to exist. It must also be shown that it was negligently permitted to exist. If risks of harm cannot be foreseen by a reasonably prudent and intelligent man, the risk is not unreasonable, hence there is no negligence, consequently, no liability." 278 N. W. at 859.

The question therefore shades into what is a patent defect in appellants' entire negligence case—the absence of foreseeability. Foreseeability is a necessary ingredient of actionable negligence in Arkansas. *Collier* v. *Citizens Coach Co.,* 231 Ark. 489, 330 S. W. 2d 74. As Justice Leflar wrote in *Hill* v. *Wilson,* 216 Ark. 179, 183, 224 S. W. 2d 797, 800: "There is no such thing as 'negligence in the air.' Conduct without relation to others cannot be negligent; it becomes negligent only as it gives rise to an appreciable risk of injury to others." See also the celebrated opinion by Judge Cardozo in *Palsqraf* v. *Long Island R. R. Co.,* 248 N. Y. 339, 162 N. E. 99. The same concept is expressed in the above-

cited Restatement, Second, Torts, § 368 with its requirement that the possessor of lands "realizes or should realize (that the condition) involves an unreasonable risk to others accidentally brought into contact with such condition. . ."

It follows from what has been said that appellants may not maintain an action against the Finkbeiners based upon negligence. This brings us to an examination of the other possible basis of liability. In the 1868 English case of *Rylands* v. *Fletcher,* L.R. 1 Ex. 265, aff'd L.R. 3 H.L. 330, the defendant constructed a reservoir on the site of an abandoned mine. Water seeped into the mine and thence into shafts of plaintiff's mine on adjoining property. No negligence was found on the part of defendant, but liability was nevertheless imposed in the Court of Exchequer under a rule formulated in the following terms:

> "We think the true rule of law is that the person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape." *Id.* at 279.

In the House of Lords, Lord Cairns modified the rule somewhat by pointing out that the defendant would not be liable if the activity were a natural use of the land.

If the rule expressed in the Court of Exchequer were applied broadly and literally in the case at bar, a strong argument might be made for imposing liability on the Finkbeiners. Indeed, in a number of early English cases, the doctrine of *Rylands* v. *Fletcher* was used to impose liability in factual situations somewhat similar to that existing in the case at bar. See *Charing Cross Electric Supply Co.* v. *Hydraulic Power Co.,* 3 K. B. 722, 83 L.J.K.B. 1352 (water in high pressure

mains under street flowed out from breaks not caused by negligence of water company and damaged plaintiff's cables); *Snow* v. *Whitehead,* 27 Ch. Div. 588 (water collected in cellar of defendant's house and then found its way into cellar of adjoining house. "Anyone who collects upon his own land water, or anything else, which would not in the natural condition of the land be collected there, ought to keep it in at his peril, and that if it escapes, he is liable for the consequences." *Id.* at 591); *Ballard* v. *Tomlinson,* 29 Ch. Div. 115 (defendant dumped sewage and waste on property which polluted his well and by percolation polluted plaintiff's well on adjoining property).

The principle was not long in finding its way into American courts, the earliest decision being *Ball* v. *Nye,* 99 Mass. 582, where filthy water from defendant's land percolated into plaintiff's well. Another early Massachusetts case, *Shipely* v. *Fifty Associates,* 101 Mass. 251, involved its application to facts somewhat similar to those in the case at bar in that snow and ice slid from defendant's roof onto sidewalk causing plaintiff to fall. The same basis of liability was applied on identical facts in *Hannem* v. *Pence,* 40 Minn. 127, 41 N. W. 557. There are many other American cases where the rule in *Rylands* v. *Fletcher, supra* was used to impose absolute liabilty for the escape of water from defendants' property. See for instance, *Weaver Mercantile* v. *Thurmond,* 68 S. Va. 530, 70 S. E. 126 (defendant's water storage tank burst and damaged plaintiff. "Therefore, if a man brings water upon his premises by artificial means, and collects and keeps it there, he is bound at his peril to see that the water does not escape. . ." 70 S. E. at 127); *Bridgman-Russell Co.* v. *Duluth,* 158 Minn. 509, 197 N. W. 971 (water main broke and damaged plaintiff's property); *Defiance Water Co.* v. *Olinger,* 54 Ohio St. 532, 44 N. E. 238 (standpipe burst and escaping water injured plaintiff in nearby house); *Baltimore Breweries Co.* v. *Ranstead,* 78 Md. 501, 28 A. 273 (water escaped from defendant's storage tank and flooded plaintiff); *Wilson* v. *City of New Bedford,* 108 Mass. 261

(water seeped from water reservoir to adjoining landowner's cellar); *Healey* v. *Citizens Gas & Elec. Co.,* 199 Iowa 82, 201 N. W. 118 (water percolated from defendant's dam and reservoir and flooded plaintiff's land); *Kall* v. *Carruthers,* 59 Cal. App. 555, 211 P. 43 (water from rice grower's land percolated and damaged land of adjoining owner); *Norfolk & W. Ry. Co.* v. *Amicon Fruit Co.,* (4th Cir.) 269 F. 559 (leakage from defendant's pipeline caused water to flow into plaintiff's cellar and injure goods).

After the first rather broad applications of the principle, the English courts began to emphasize its initial limitations, expressed by Lord Cairns in the House of Lords, that the doctrine applied only to a "non-natural" use of the land. A few years later English and Commonwealth cases are illustrative. In *Rickards* v. *Lothian,* A. C. 263 [1913,] 82 P.J.P.V. 42, there was an overflow of a lavatory on the top floor and damage to stock in trade on the lower floor, caused by the malicious act of a third person. In denying liability urged under the rule of *Rylands* v. *Fletcher,* Lord Moulton pointed out that "it is not every use to which land is put that brings into play that principle. It must be some special use, bringing with it increased danger to others, and must not be the ordinary use of the land." *Id.* at 280. See also *Torette House* v. *Berkman,* 62 C.L.R. 637 (Australia).

One of the best illustrations of the more recent attitude of the English courts is *Peters* v. *Prince of Wales Theatre,* 1 *K. B.* 73 [1943], a case involving a sprinkler system, albeit not the same type as involved in the case at bar, but one installed in a theatre to prevent fires. The system was released by a freeze, and water damaged plaintiff's stock and trade on adjoining premises. The trial judge held the defendant liable under the authority of *Rylands* v. *Fletcher,* refusing to accept the analogy of the escape of water brought on premises merely for such domestic purposes as water closets, lavatories, and baths. "It is a system in which there

is potential danger of the escape of an enormous quantity of water."

The Court of King's Bench reversed and in the course of its opinion stated:

> "In the present case, we are concerned with a building, the greater part of which was, at the time of the damage, used as a theatre, where not only must special precautions against fire be taken, but these sprinklers are by the local authority required to be fitted. Having regard therefore to the nature of the building, the installation would appear to be ordinary and usual. . ." *Id.* 76.

The American decisions have been sharply divided in their acceptance of the rule of *Rylands* v. *Fletcher*. See the tabulation of the various jurisdictions in Prosser, Law of Torts, 3rd Ed., 523 *et seq.* But even those jurisdictions which apply it now accept the limitation of "non-natural use", emphasized in the above English cases. Two cases are good illustrations in the context of the present fact situation. In *MrCord Rubber Co.* v. *St. Joseph Water Co.*, 181 Mo. 678, 81 S. W. 189, a water pipe on defendant's premises broke during a freeze and damaged plaintiff's goods. The doctrine of *Rylands* v. *Fletcher* was held inapplicable to these facts:

> "There is a wide difference between a great volume of water collected in a reservoir in dangerous proximity to the premises of another, and water brought into a house through pipes, in the manner usual in all cities, for the ordinary use of the occupants of the house. Whilst water so brought into a house cannot literally be said to have come in in the course of what might be called, in the language above quoted of the Lord Chancellor, 'natural user' of the premises, yet it is brought in by the method universally in use in cities, and is not to be treated as an unnatural gathering of a dangerous agent. The law applicable to the caging of ferocious ani-

mals is not applicable to water brought into a house by the pipes in the usual manner." 81 S. W. at 193.

The trial court in *Shanander* v. *Western Loan & Bldg. Co.,* 103 Cal. App. 2d 507, 229 P. 2d 864, 26 A.L.R. 1039, applied the doctrine of *Rylands* v. *Fletcher* to a case in which a pipe in an upper floor apartment burst and damaged premises below. In reversing, the court quoted 32 Am. Jur. 626-67 as follows: "The rule . . . is not applicable to the act of a landlord in providing his building with artificial means for supplying it with water. Such introduction of water is an ordinary and natural use." 229 P. 2d at 866. It is interesting to note that one of the cases cited in this opinion is the Arkansas decision of *Haizlip* v. *Rosenberg, supra.*

This brings us to a consideration of the rule of *Rylands* v. *Fletcher* in Arkansas. Its history is interesting. See Sharp, *Absolute Liability in Arkansas,* 8 Ark. L. Rev. 83. After express repudiation in the early case of *Southwestern Tel. and Tel. Co.* v. *Beatty,* 63 Ark. 65, 37 S. W. 570, the rule was again considered in a 1922 case, *Constantin Refining Co.* v. *Martin,* 155 Ark. 193, 244 S. W. 37, which is in some respects similar to the case at bar, but presents a far stronger factual situation for the application of absolute liability. Defendant drilled and capped a gas well. Gas passed through a fissure in the earth and escaped through a crater 950 feet away on adjoining property, attracting crowds to watch the escaping gas throw mud and water high into the air. Plaintiff's decedent and four other bystanders were killed in an explosion apparently caused by someone's striking a match to light a cigar. In reversing and dismissing a judgment for the plaintiff, the court found no negligence and then refused to apply *Rylands* v. *Fletcher.* "The doctrine of that case has not been generally accepted in this country, and we think that in its full scope it is directly in conflict with the decisions of this court." *Id.* at 200, 244 S. W. at 39.

In spite of the above language, this court along with many others has applied the doctrine of strict li-

ability by calling certain conduct a nuisance. *Sharp, op. cit. supra*, 89. "The reports are filled with cases where this doctrine has been applied, and it may be confidently asserted that no authority can be produced, holding that negligence is essential to establish a cause of action for injuries of such character." *Czarnecki* v. *Bolen-Darnell Coal Co.*, 91 Ark. 58, 61, 120 S. W. 376, 377. Dean Prosser points out that "there is in fact probably no case applying *Rylands* v. *Fletcher* which is not duplicated in all essential respects by some American decision which proceeds on the theory of nuisance and it is quite evident that under that name the principle is in reality universally accepted." Prosser, Law of Torts, 3rd Ed. 529.

The somewhat confused status of *Rylands* v. *Fletcher* in Arkansas was clarified in 1949 when this court decided *Chapman Chemical Co.* v. *Taylor*, 215 Ark. 630, 222 S. W. 2d 820 and unequivocally adopted the position of the 1939 Restatement of Torts §§ 519, 520. These sections are nothing more than a codification of the principle of *Rylands* v. *Fletcher*, with a limitation to an "ultrahazardous activity" of the defendant, defined as one which "necessarily involved a risk of serious harm to the person, land, or chattels of others which cannot be eliminated by the exercise of utmost care" and "is not of common usage." See full discussion of *Chapman* case in Harper & James, Law of Torts (1956) § 28.27 pp. 1592-93 and by Dean Prosser in his 1955 address to the Arkansas Bar Association on "Recent Developments in Law of Negligence," 9 Ark. L. Rev. 81, 85.

Certain conclusions necessarily follow from the authorities cited above. Prior to 1949 the principle of *Rylands* v. *Fletcher* had been expressly repudiated in Arkansas, even though it may have been applied under the guise of calling certain conduct a nuisance. However, application of the doctrine, completely undiluted, would not help these appellants, because it was never applied to the escape of water from a domestic household water

system. By no stretch of the imagination could the use of a lawn sprinkler be called a "non-natural use" of the land, so as to meet the test applied by Lord Cairns, in modifying *Rylands* v. *Fletcher* in the House of Lords. *A fortiori*, appellants cannot meet the requirements of the 1939 Restatement, Torts §§ 519, 520. Operating a lawn sprinkling system is not an "ultrahazardous activity."

Since appellants have not under the testimony established either negligence on the part of defendants or a case for the application of the rule of absolute liability, the judgment must be affirmed.

Affirmed.

George Rose Smith, J., disqualified.

William ORMAN v. O. E. BISHOP, Supt. of Ark. State Penitentiary

5296 420 S. W. 2d 908

Opinion delivered December 4, 1967

Allan Dishongh, for appellant.

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

CARLETON HARRIS, Chief Justice. Petitioner, William Orman, on February 21, 1964, entered pleas of guilty to five counts of robbery in the Pulaski County Circuit Court (First Division). The court sentenced Orman to a term of twenty-one years on each of the counts, with the sentences to run concurrently. In April, 1967, Orman filed a "petition for a Writ of Habeas Corpus," which we treat as a petition under our Criminal Procedure Rule No. 1. Counsel for petitioner was appointed by the Circuit Court, and a hearing was conducted in May. At the conclusion of the hearing, the court denied the petition, and remanded the petitioner to the custody of the warden of the state penitentiary. From such judgment, appellant (petitioner) brings this appeal.

The petition asserts that appellant was arrested about November 30, 1964, on three charges of robbery, and placed in jail in North Little Rock. It is contended that he was not allowed to contact anyone, nor was he informed of his right to legal counsel, or the right to maintain silence. The petition further alleges that he was threatened and beaten by the police and told that if he did not sign a statement, his wife (who, according to appellant, had also been arrested) would be given "time" for the robberies, and he would never leave jail alive. It is then asserted that he signed an incriminating

statement and was removed to the Pulaski County jail in Little Rock where he subsequently made bond. After three days of freedom, he was again arrested, and two additional charges of robbery were placed against him. It is contended that he was interrogated and threatened by Pulaski County officers. Appellant stated that he entered a plea of not guilty to robbery, but was informed by the court that if he did not plead guilty to the charges, "he would never get out of jail." It is contended that he was sentenced without being properly advised of his rights to legal counsel.

These allegations are somewhat at variance with some of the proof offered at the hearing by Orman. He stated that, at arraignment, he entered a plea of not guilty himself, and did not have an attorney. However, he admitted that he had employed an attorney (Charles Scales), but he said that he employed this attorney simply for the purpose of getting the money returned that the officers had taken from him when he was arrested. He did say that Scales had visited him two or three ifferent times while he was in the county jail, and had told him that he should plead guilty to the robbery charges. The evidence reflected that appellant had been charged, along with two other men, James Martin, and John Carson. Orman testified that the court appointed Scales as attorney for the other two men, but did not appoint an attorney for him. According to his testimony, he was beaten with an iron pipe by an inmate in jail, Scrappy Moore, and was taken to the University Hospital, where he remained for a few hours. Orman said that he was told by one of the inmates of the jail that something would happen to him if he didn't plead guilty, and he decided to enter this plea in order to get away from the jail. "I would rather spend 21 years down there as to be dead." He insisted that he did not enter a plea of guilty to robbery, but did say that he had entered a plea of guilty as an accessory, not knowing that an accessory was equally guilty with the principal. Orman testified that the Circuit Judge said, "If you don't

plead guilty, I will give you 5 twenty-one year sentences."

As far as the alleged beatings by the North Little Rock Police are concerned, appellant is entitled to no relief. Officer J. E. Munns Jr., denied this testimony, stating that not a hand was placed on Orman. Munns testified that appellant stated that he did not want a lawyer, and that the statement Orman made relative to his involvement in the robberies was entirely voluntary on his part. Further, that he had no recollection of Orman's wife being arrested, and, in fact, Orman was permitted to make a phone call to his wife, and she visited him. The officer stated that, though not advising appellant that he could have an attorney, Orman was told that he had a right to remain silent, and that anything he said could be used against him in a court of law. We think the evidence, particularly when we view the inconsistencies in appellant's testimony, preponderates to the effect that he was not mistreated in the North Little Rock jail. *Miranda* v. *Arizona*, 384 U. S. 436, had not been decided at the time, and thus is not pertinent in this case. Likewise, though alleged in the petition, there is no evidence, including his own testimony, that Orman, after being placed in the Pulaski County jail, was mistreated in any respect by the officers.

Charles Scales, Little Rock attorney, testified that Orman, while out on bond, engaged him to secure the return of some money that had been in his possession when he had been arrested. Scales said that he contacted the Prosecuting Attorney, but was told that the state was going to hold the money as evidence in the cases. He testified that at the time Orman appeared before the court for arraignment, appellant was asked if he had a lawyer, and replied, "Yes, Charles Scales." The attorney stated that he was appointed at the time to defend Martin and Carson, and he visited the three of them in jail several times to discuss the charges. From his testimony:

"The best of my recollection is that the matter was set for a jury trial and, lo and behold! then one day I read in the newspaper where Bill Orman had taken 21 years and that was the first time I knew that he intended to come up here and enter a plea of guilty."

The lawyer emphatically denied that he had ever advised appellant to enter such a plea. In fact, it seemed to be the opinion of this witness that there was a good opportunity to have some of the state's evidence held inadmissible. He said that he had planned on defending Orman before the jury.

H. F. Hemphill, Pulaski County jailer, testified that one morning in February, 1964, he was notified that there was a disturbance in one of the cells, and an investigation revealed that a pipe, which had been used as the handle of a water bucket[1] had been used by William B. (Scrappy) Moore in striking Orman. Hemphill testified that Moore said that appellant was bothering "some old man" in the cell with him, and he (Moore) resented it, and after an argument, Moore pulled the handle (pipe) from the wringer, and struck Orman with it.[2]

As heretofore pointed out, we find no merit in the allegations of mistreatment on the part of either the city or county officers, but, relative to the voluntary plea of guilty, which seems to be the principal contention, there is evidence that leaves this particular ques-

[1]The witness stated: "Now, each morning a mop and bucket and wringer is put in the cells for the prisoners to clean up their part themselves, and after they have finished the bucket and wringer is removed. On this particular morning, I was called up there to this disturbance and I found that the handle on the wringer of this bucket was loose from the holder, inasmuch as a bolt had been removed or lost out, and this pipe—I believe probably it was a half-inch pipe—which was used as a handle was easily pulled out, and William B. Moore admitted to me that he took the handle off the wringer and struck Mr. Orman."

[2]According to the witness, as punishment, Moore was placed in solitary confinement.

tion in confusion. We refer to the statement of the trial court itself.

"Now I would like to give my recollection about him coming over. Of course, the record shows that on 1-6-64 in those five cases that I mentioned, Orman and Martin and Carson appeared, and the record shows that Orman was represented by Charles Scales, and on that day I appointed Charles Scales to defend Martin and Carson. There was a plea of not guilty entered, passed to the February setting to be reset. Martin went to the State Hospital, but Orman did not. On 2-3-64 Orman's case was set for a jury trial on July 7, 1964. On 2-21-64 Orman sent word to me, or somebody brought word up here, purportedly from Orman, that Orman wanted to change his plea from not guilty to guilty, and I ordered him brought up, and he was brought before the Court, and on that date he changed his plea in all five cases from not guilty to guilty and received 21 years. I remember when Orman came up here that his bad eye was hanging out on his cheek. One of his arms was pretty well "bunged" up. He had been pretty severely beaten. I think I asked him at the time who beat him, and I don't believe he would tell me. Now, I have got a faint recollection of telling him if he would tell me who beat him up that I would have whoever it was indicted for assault to kill. That is my recollection. I may be just wrong about that, but I think I offered to do that, and he wouldn't tell me. There was some discussion that came up about he didn't think he ought to have 21 years, and I told him if he wasn't guilty then not to plead guilty and we would have a jury trial. That's what I tell them all. I told him if he wanted a jury trial that we would have a trial on each count and if the jury convicted him that I would stack[8] them. I told him if he was not guilty that he should not plead guilty. That is what I tell them all. I am sure I told him the same thing. The upshot of it was that he decided he wanted

[8]Meaning that the judgment of the court would direct that the sentences on the several charges, if appellant were found guilty, would run consecutively, rather than concurrently.

to plead guilty and I gave him 21 years, and I am sure I asked him where his attorney was and why he wasn't present. What he told me, I don't know. I don't know whether he made any explanation of it at all. I don't remember. That is about the best I recall of it. Of course, I didn't send for him. I don't remember the exact words, but I'm sure I asked him where his lawyer was and why he wasn't with him. Do you want to cross-examine me, Mr. Prosecutor or Mr. Dishongh? I will try to make it clearer if I can."

There are three matters mentioned that, we think, call for a reversal. One, the court commented, "I remember when Orman came up here that his bad eye was hanging out on his cheek. One of his arms was pretty well 'bunged' up. He had been pretty severely beaten." We do not know what is meant by the expression, "His bad eye was hanging out on his cheek," but it does appear that Orman had been severely beaten. Bear in mind that, according to his (Orman's) testimony, the beating, though admittedly not inflicted by the officers, influenced him in deciding to plead guilty. The second matter that relates to the plea is the fact that Lawyer Scales was not present. Though Orman insisted that Scales did not represent him in these cases, Scales testified to the contrary, and the court docket reflected that this attorney did represent Orman.[4] Here, the judge's memory was not clear. "I am sure I asked him where his attorney was and why he wasn't present. What he told me, I don't know. I don't know whether he made any explanation of it at all. I don't remember." Normally, of course, when a man is represented by an attorney, that attorney is present when any action is taken in the case. The most noticeable statement in the court's recitation of the facts as he remembered them is, "There was some discussion that came up about he didn't think he ought to have 21 years, and I told him that if he wasn't guilty then not to plead guilty and we

[4]Certainly, the court considered that Orman was represented by Scales, and we think this representation was established by the evidence at the hearing.

would have a jury trial. That is what I tell them all. I told him if he wanted a jury trial that we would have a trial on each count and if the jury convicted him that I would stack them." While, of course, a court should explain to a prisoner, when he is entering a plea of guilty, the nature of the charge, and the penalty that it carries under the statute, no statement should be made that could be construed as influencing the prisoner to enter a plea of guilty. While we do not think the remark was so intended, it could have been interpreted by appellant as a threat. When the three matters herein mentioned, *viz.*, a severely beaten prisoner—without his attorney present—and the statement of the court about "stacking" sentences, are all considered together, we think a question arises as to whether the plea was entered voluntarily. Inasmuch as the judge's testimony relates to this question of fact, and is, as far as the present record is concerned, the most important evidence in the issue here in question (whether the plea of guilty was voluntarily entered), it will be necessary that a different judge conduct a further hearing on remand. That judge then, after hearing the testimony, including that of Judge Kirby, can pass upon the fact questions.

While the court's remarks more or less indicate its findings, we take occasion to call attention to Section (E) of Criminal Procedure Rule No. 1, which, *inter alia,* provides:

"* * * The court shall determine the issues and make written findings of fact and conclusions of law with respect thereto."

This procedure should be followed in all cases heard under Criminal Procedure Rule No. 1.

We would also like to reiterate what was said in *Medley* v. *Stephens, Supt.,* 242 Ark. 215, 412 S. W. 2d 823 (March 27, 1967), which is particularly apropos to the case at hand:

"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. It will at once be recognized that, in subsequent hearings 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*[5]—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.*"[5A]

For the reasons herein set out, the judgment is reversed, and the cause remanded.

CARL W. WIDMER *v.* ROY G. WOOD ET UX

5-4346 421 S. W. 2d 872

Opinion delivered December 4, 1967

[Rehearing denied January 15, 1968.]

[5]and [5A]. Our emphasis.

Carl W. Widmer, pro se.

Hardin, Barton & Jesson, for appellees.

CARLETON HARRIS, Chief Justice. On February 8, 1967, Carl W. Widmer, appellant herein, instituted suit against Roy G. Wood and Helen L. Wood, appellees, asserting that he had purchased certain lands from the appellees on October 19, 1961, and since that date had been the equitable owner of these lands (which were described in a contract of sale filed with the complaint). It was alleged, *inter alia,* that appellees encroached upon the lands by bringing cattle to graze thereon, by making enclosures and other structures, and by cutting and removing numerous trees. Appellant asserted that he had suffered damages in the amount of $60,150.00, and he prayed for treble damages, or a total judgment in the sum of $180,450.00. Appellees thereupon filed a motion to dismiss the complaint, asserting that appellant had previously filed a lawsuit against them, alleging and setting forth the identical matters that appeared in the present complaint; that the court had, on September 13, 1966, entered its judgment dismissing Widmer's complaint for the reason, *inter alia,* that the court was without jurisdiction to adjudicate matters of trespass regarding lands located wholly within another state. The motion contended that the court's judgment had become the law of the case and was *res judicata* to the instant complaint. No proof was ever taken on the motion. A few days later, appellant served a "request for admission of facts" (22 different requests) upon the attorney for appellees. Four days later, appellees filed a "motion to quash," setting out their objections to answering the requested admissions, asserting, *inter*

alia, that same were irrelevant and otherwise improper.[1] These requests were not answered, and on February 21, appellees' motion to dismiss the complaint was granted, the court holding that its judgment of September 13, 1966 (on a complaint filed September 2, 1964), had become the law of the case, and was *res judicata* to the current complaint; the complaint was thereupon dismissed without prejudice. Subsequently, appellant filed a motion to vacate this order of dismissal, and also moved for summary judgment against appellees on the basis that there remained no genuine issue of any material fact to be passed upon. The court denied both motions, and from the judgment so entered, appellant brings this appeal.

For reversal, it is urged that the trial court erred in not granting appellant's motion to vacate such order; further, that the trial court erred in not granting appellant's motion for summary judgment.

As to the first point, appellant is correct. While this cause of action was founded upon the same sales contract which was the basis of the action in the earlier case (complaint filed September 2, 1964),[2] and though the complaint contains many of the same allegations that appeared in the former pleading, the court erred in granting this motion to dismiss. In *Bolton* v. *Mo. Pac. Rd. Co.,* 148 Ark. 319, 229 S. W. 1025, a similar motion was filed, as follows:

"'MOTION TO DISMISS ON GROUND OF FORMER ADJUDICATION.

"'Comes the defendant and moves the court to dismiss the action of the plaintiff herein, because it was a party to a former suit filed in this court in which all

[1]Nearly all of the requests for admissions were similar to those set forth in the earlier case.

[2]The judgment of the Sebastian Circuit Court in this case, styled *Carl W. Widmer* v. *Roy G. Wood, et ux,* was affirmed by this court on September 18, 1967; however, a substitute opinion was handed down affirming the trial court on November 13, 1967.

the matters that are now set up and complained of were in issue, and the court sustained a demurrer to that complaint, which was affirmed by the Supreme Court of this State; and that there are no new matters arising, and that all of the issues and questions have been adjudicated, and the plaintiff is bound thereby.'

"This motion was sustained, and the cause dismissed, and this appeal is prosecuted to reverse that action."

In reversing, this court said:

"The plea of former adjudication is one which, to be available, should be pleaded by answer as a defense. *Adams* v. *Billingsley,* 107 Ark. 38. The answer tendering that plea should set out the facts upon which it is based, and the issue is not properly raised by a motion to dismiss which does not recite the facts upon which the plea is based."

In *Kendrick* v. *Bowden,* 211 Ark. 196, 199 S. W. 2d 740, we said:

"A further argument for reversal is that their plea of *res judicata* should have been sustained. We have copied above the exact language of this alleged plea, as set out in appellants' abstract. We think this so-called plea is wholly insufficient to raise the question of a former adjudication of the same subject matter between the same parties. This court follows the general rule, supported by the weight of authority, 'that one relying on the doctrine of *res judicata* must plead the prior adjudication.' 30 Am. Jur., p. 984, § 255. In *Bolton* v. *Mo. Pac. Rd. Co.,* 148 Ark. 319, 229 S. W. 1025, we said: 'The plea of former adjudication is one which, to be available, should be pleaded by answer as a defense. *Adams* v. *Billingsley,* 107 Ark. 38, 153 S. W. 1105. The answer tendering that plea should set out the facts upon which it is based, and the issue is not properly raised

by a motion to dismiss which does not recite the facts upon which the plea is based.'"

See also *Southern Farmers Assn., Inc.* v. *Wyatt,* 234 Ark. 649, 353 S. W. 2d 531.

We do not, however, agree with appellant that he was entitled to summary judgment. This contention is based on the fact that the requests for admissions were not answered, and appellant therefore contends that they stand admitted. It is true that no answers were filed, but the motion heretofore mentioned constituted written objections.

Because of the court's error in dismissing the complaint on the basis that the prior judgment was *res judicata,* the judgment herein is reversed, and the cause remanded for proceedings not inconsistent with this opinion.

J. D. WALTHOUR ET AL *v.* L. JULIAN ALEXANDER ET AL

5-4335 421 S. W. 2d 613

Opinion delivered December 4, 1967

[Rehearing denied December 18, 1967.]

H. B. Stubblefield, for appellant.

Thomas J. Bonner, for appellee.

George Rose Smith, Justice. This is a zoning dispute. The appellee Alexander owns a triangular piece of property on the southwest corner of the intersection of Van Buren and Club Road in Little Rock. Alexander uses the little building on the property as a pick-up and delivery station for patrons of his laundry business. In 1965 the Board of Zoning Adjustment granted Alexander's application for permission to add 300 square feet to his building, making it about 850 square feet in all. This suit to review the Board's action was brought by the appellants, neighboring landowners who had opposed the issuance of the permit. The chancellor sustained the Board. For reversal the appellants contend that the Board's action was (I) illegal, (II) arbitrary, and (III) barred by limitations.

I. *Illegality.* Apparently the Board reclassified Alexander's property as "F Commercial" back in 1959. The appellants insist that under the governing statute and the Little Rock zoning ordinance (which was marked Exhibit 11 at the trial) the Board had no power to rezone the property and that therefore the permit now in dispute violated a zoning restriction applicable to nonconforming uses. The appellee's answer to this contention is that the zoning ordinance (as well as sev-

eral allied exhibits) was not put in evidence at the trial and so cannot be considered here.

We do not take judicial notice of city ordinances. *Campbell* v. *City of Hot Springs,* 232 Ark. 878, 341 S. W. 2d 225 (1960). Nor can we consider a document that was not received in evidence even though it may have been in the courtroom, as, for example, an exhibit to a pleading. *Wright* v. *Midland Valley R. R.,* 111 Ark. 196, 163 S. W. 1151 (1914); *National Annuity Assn.* v. *McCall,* 103 Ark. 201, 146 S. W. 125, 48 L.R.A. (n.s.) 418 (1912).

Thus the question is, was Exhibit 11 put in evidence at the trial? We have suffered much anxiety in the study of this question, but we cannot conscientiously say that the exhibit was actually introduced. We may explain our conclusion by referring to pertinent parts of the record.

During the examination of the plaintiffs' first two witnesses five exhibits were received in evidence. In each instance the court made a ruling. This excerpt is typical:

> Mr. Stubblefield: Could I have the one that shows both marked as Plaintiffs' Exhibit No. 2 and the second one as Exhibit No. 3?
>
> The Court: Let them be introduced.
>
> (Thereupon, said pictures were marked for identification and received in evidence.)

A few minutes later, after the plaintiffs' fourth witness left the stand, the record reflects the following:

> Mr. Stubblefield: Your Honor, Mr. Bonner and I mentioned before the trial that each of us had some exhibits we would like to have marked for identification, and I believe we said we would let them be

> marked for identification without conceding their relevancy or competency. The reason we are doing it at this time, the witnesses who testified wanted to get away, and he was kind enough to consent we could do that.

Counsel for the plaintiffs then produced and described five pieces of documentary evidence, which were marked for identification as Exhibits 6 through 10. Counsel for the defense then, in the same manner, produced and described eight exhibits—the zoning ordinance and seven pictures—which were marked for identification as Exhibits 11 through 18.

Thereafter the reporter's transcribed record of the trial contains no additional reference to Exhibits 6 through 11. When defense counsel, in questioning his own client, sought to use the picture marked as Exhibit 12 this occurred:

> Mr. Bonner: I hand you here Exhibit No. 12 and ask you to identify that.
>
> A. This is a front view of my building taken from the west side of Kavanaugh Boulevard . . .
>
> Mr. Bonner: Do you want me to place each of these in evidence again? We have had them marked for identification purposes.
>
> Mr. Stubblefield: No, sir.
>
> Mr. Bonner: These will be considered in evidence. That is Exhibit No. 12.

Continuing his direct examination, Bonner successively showed all seven pictures to Alexander, who explained what each one portrayed.

All exhibits except No. 11 are contained in the bound record, which is certified by the reporter and the

chancery clerk. Exhibit 11, which is bulky, was sent up in a separate envelope bearing a certificate by the reporter that it "was introduced during the course of the trial in the above styled cause of action."

Taking the record as a whole, we must conclude that Exhibit 11 was not put in evidence. With respect to the first five exhibits the chancellor made a ruling in every instance: "Let it [them] be introduced." By contrast, Exhibits 6 through 18 were presented in quick succession and marked for identification only, "without," in the words of counsel, "conceding their relevancy or competency." Clearly it was contemplated, as is usually the case with reference to exhibits marked for identification, that a definitive ruling would be made as each exhibit was actually offered in evidence. Exhibit 11 was never so offered. The omission is understandable, for the exhibit was produced in the first instance by defense counsel. There was no reason for him to put the zoning ordinance in evidence, because it was essential only to his adversaries' case—not to that of his own client.

We should point out that Exhibits 12 through 18 stand in a different position. Those pictures were shown to the witness Alexander and commented on by him. In such circumstances a formal ruling by the court was not necessary. *J. W. York & Sons* v *Powell*, 125 Ark. 597 (mem.), 187 S. W. 628 (1916); *School Dist. No.* 68 v. *Allen*, 83 Ark. 491, 104 S. W. 172 (1907). But there was no similar actual use of Exhibit 11 in the examination of any witness. Nor does the reporter's certificate on the envelope containing the ordinance, stating that the exhibit was "introduced," cure the defect. That certificate does not purport to be a transcription of the reporter's notes. The reporter's personal belief that the exhibit was introduced cannot take the place of a ruling by the court.

Counsel for the appellants did not file a reply brief; so we do not know what his answer to the appellee's argument might be. We have not overlooked, however, the possible contention that (*a*) Exhibit 11 was pro-

duced by the appellee, (*b*) he thereby avouched its accuracy, (*c*) the appellants make no objection to the exhibit, and (*d*) therefore it should be considered by this court.

We recognize the force of that reasoning and do not imply that it is unsound. The trouble is that the appellants, in presenting their argument on the issue of illegality, also rely upon Exhibits 6, 7, 8, and 9 in their effort to show that the appellee's pick-up station constitutes a nonconforming use with respect to which structural alterations are prohibited. Exhibits 6 through 9 were, like Exhibit 11, not put in evidence. But, unlike 11, Exhibits 6 through 9 were produced by the appellants and therefore were not avouched by the appellee. Hence even a holding that Exhibit 11 is properly before us would not dispel the uncertainty that confronts us with respect to the true zoning classification of the property in issue.

II. *Arbitrariness.* This and the third point do not call for an extended discussion. The plaintiffs attempted to prove that the proposed addition to the pick-up station would create a traffic hazard at the intersection and would prevent passing motorists on Kavanaugh from seeing the plaintiffs' places of business, with a consequent loss of patronage. The plaintiffs' testimony about the traffic hazard, given by lay witnesses, was more than offset by the testimony of the only expert witness who testified, DeNoble, who appeared for the defense. We can attach no weight to the fact that the enlargement of Alexander's building may obstruct the public's view of the appellants' shops, for, in the absence of proof that the addition is illegal, there is no basis for saying that Alexander is not entitled to use his property in the way that is proposed.

III. *Limitations.* It is argued by the appellants that a petition similar to this one was denied in 1959,

that Alexander took an appeal from that denial, that he took a nonsuit in the circuit court, and that he failed to refile his suit within a year. A sufficient answer to this contention is that a zoning board may entertain successive applications for the same relief, especially when there is a showing of changed conditions. McQuillin, Municipal Corporations, § 25.275 (1965). It appears that Alexander's present application is for permission to construct an addition materially smaller than the one involved in the prior proceeding. That difference may well have been the change in conditions which induced the Board to change its mind.

Affirmed.

HARRIS, C. J., and BYRD, J., dissent and would grant rehearing.

MORRILTON FEDERAL SAVINGS & LOAN ASSN. ET AL *v.* ARKANSAS VALLEY SAVINGS & LOAN ASSN. ET AL

5-4352 420 S. W. 2d 923

Opinion delivered December 4, 1967

Allen Laws Jr., Phillip H. Loh, Lester & Shults, for appellants.

Ben Allen, for appellees.

George Rose Smith, Justice. The appellees applied to the Savings and Loan Association Board for a charter under which they would do business as the Arkansas Valley Savings & Loan Association, in Russellville. The application was opposed by two Russellville banks and by three savings and loan associations—one at Russellville, one at Clarksville, and one at Morrilton. After an extensive hearing, at which much testimony was heard, the Board granted the charter. The circuit court affirmed the Board's decision. Here the appellants insist that the appellees failed to prove four of the statutory conditions to the issuance of a charter.

For convenience we will discuss together the appellants' two principal contentions, which are interwoven. It is argued that the proof fails to show that there is a public need for the new association and that its operation will not unduly harm other financial institutions in the area. Ark. Stat. Ann. § 67-1824 (Repl. 1966). It is conceded that the substantial evidence rule governs our review in a case of this kind. Section 67-1811; *Izard* v. *Arkansas Sav. & Loan Assn. Board,* 239 Ark. 670, 393 S. W. 2d 245 (1965).

We find an abundance of proof to show that the new association is needed. The firm will operate mainly

in Pope and Yell counties. The applicants' testimony forecasts a vigorous economic growth for that part of the state. With the impending navigability of the Arkansas river cheap water transportation is in sight. The huge Dardanelle Reservoir supplies electric power, recreation, and homesites for retired citizens. The section is served by rail and by an interstate highway. Natural gas, electricity, water, and coal are available in liberal quantities, as attractions to new industries.

There is a need for another financial institution. It is not the policy of the Russellville banks to make long-term loans, which are required in the financing of residential subdivisions. Until the present application was filed the existing savings and loan association at Russellville had hardly been energetic in seeking to expand its business. Its advertising budget was small. Its share of the local outstanding loans was materially smaller than the national average for such institutions. There is proof that at times its available lending capital was inadequate. This comparative inactivity may have been due in part to the fact that of its seven directors three were also bank directors and a fourth was a substantial stockholder in a local bank. Moreover, both the savings and loan association at Morrilton and the one at Clarksville have a substantial volume of loans in Russellville despite certain inconveniences, such as the matter of appraisals, in the making of out-of-county loans.

Similar considerations indicate that the Arkansas Valley association will not unduly harm the other financial institutions. In fact, the witness Harold Neal, president of one of the protesting banks, gave his reasons for believing that savings and loan associations do not really compete with banks. There is proof that fears similar to those now expressed by the appellants were voiced when a second bank at Dardanelle was proposed in 1958 or 1959, but it turned out that both the old bank and the new one prospered. On the whole, the record contains more than sufficient proof to sustain the Board's findings upon the first two points.

The protestants' third contention is that the evidence does not show that the character, responsibility, and general fitness of the persons who will serve as directors and officers are such as to warrant belief that the association will have qualified full-time management. Section 67-1824. There is really no serious question about the character, responsibility, and general fitness of the appellees. They testified that a qualified and experienced full-time manager would be employed. We do not read the statute as requiring that the manager be employed before the charter is issued. That step would not ordinarily be practical, for, as in the case at bar, a year or two may elapse between the application for the charter and the commencement of business by the association. Too, the Board could assume that simple self-interest on the part of those investing in the new venture would make it reasonably certain that they would seek competent management.

Fourth, it is said that there is no showing that the Arkansas Valley association has filed satisfactory evidence that its savings accounts will be insured by an appropriate federal agency. Section 67-1831. The statute, however, does not require such proof before the charter is approved. It merely states that the association shall not carry on business until such evidence has been filed. Hence the appellants' present objection is premature.

Affirmed.

UNITED EQUITABLE INSURANCE CO. *v.* WILLIAM G. KARBER

5-4384 421 S. W. 2d 338

Opinion delivered December 4, 1967

Francis T. Donovan, for appellant.

Jones & Stratton, for appellee.

GEORGE ROSE SMITH, Justice. This is an action brought by the appellee to recover hospital expenses of

$433.29 under an insurance policy issued by the appellant. The plaintiff attempted to obtain service of process on the defendant under the Unauthorized Insurers Process Act. Ark. Stat. Ann. §§ 66-2903 to 66-2907 (Repl. 1966). The defendant appeared specially to file a motion to quash the service, on the ground that the plaintiff had not complied with the statute. This appeal is from a judgment finding that the service was good and awarding a default judgment to the plaintiff. The sufficiency of the service is the question at issue.

The complaint, filed on July 1, 1966, alleged that the defendant was an Illinois insurance company. Apparently a summons was served on the Insurance Commissioner, because the record contains a copy of a form letter by which that officer sent a copy of a summons to the defendant on July 15, 1966. The only other pertinent parts of the record, as certified by the clerk of the trial court, are the defendant's motion to quash the service, the judgment appealed from, and the notice of appeal. There is no testimony.

As far as this record shows, the plaintiff did not comply with the statute governing the service of process. That statute requires not only that the summons be served on the Insurance Commissioner but also that the plaintiff's attorney send a copy of the summons to the defendant by registered mail and thereafter file with the clerk of the court (a) the defendant's return receipt for the registered letter and (b) the attorney's affidavit showing compliance with the statute. Section 66-2905. That section goes on to provide that the plaintiff shall not be entitled to judgment by default until thirty days after the filing of the affidavit of compliance.

Here there is no showing that the plaintiff's counsel either gave the defendant the required notice by registered mail or filed the necessary affidavit of compliance with the statute. Thus, on the record before us, the motion to quash the service should have been sustained.

The appellee, in seeking to avoid the consequences of his failure to comply with the statute, makes two suggestions. First, he argues that the defendant waived its present contention by sending a letter to the Insurance Commissioner in which it was stated that the summons had been received and that the defendant would either dispose of the matter with opposing counsel or retain local counsel to handle the case.

There are two flaws in this argument. One, the letter to the Insurance Company was written by a firm of attorneys who are not shown to have been authorized to represent the insurance company. While it is true that an attorney who appears in court is presumed to be authorized to represent his client, *Voss* v. *Arthurs,* 129 Ark. 143, 195 S. W. 680 (1917), his authority in other respects must be proved. See *Bank of Batesville* v. *Maxey,* 76 Ark. 472, 88 S. W. 968 (1905). Here the attorney's letter to the Insurance Commissioner did not amount to the filing of a pleading in the Faulkner circuit court and so did not carry any presumption of authority to represent the defendant.

Two, it is not shown that either the letter in question or several other documents relied upon by the appellee were put in evidence in the court below. Those documents follow the clerk's certification of the record and are authenticated only by a statement of the court reporter that they are correct copies "of the record introduced in open court on the 1st day of May, 1967, in the captioned case, no testimony being presented." There is no showing whatever that the documents were offered in evidence or received in evidence by the trial court. On their face they are plainly inadmissible without having been identified by authenticating testimony. But the reporter states that no testimony was presented. With the record in such a seriously deficient condition we are unwilling to rest our decision upon the assumption that the interloping documents were properly before the trial judge.

The appellee's second contention is that the controlling statute prohibits this defendant from filing its motion to quash service without first having qualified to do business in Arkansas or having filed bond securing the payment of any judgment that may be rendered. Section 66-2907.

We do not so construe the statute when it is read as a whole. Section 66-2905 affirmatively declares that the plaintiff is not entitled to judgment by default until the attorney's affidavit of compliance with the statute has been filed. Section 66-2907 (3) permits the unauthorized insurer to file a motion to quash service on the ground that it has not done any of the acts which the statute enumerates as a basis for the court's jurisdiction. The statute does not affirmatively state that the defendant may file a motion to quash service on the ground that the plaintiff has not complied with the act in his attempt to obtain personal jurisdiction over the defendant.

Thus the statute contains an apparent conflict within itself, in that it requires the affidavit of compliance as a condition to the entry of a default judgment but does not expressly authorize the defendant to file a motion to quash service on the ground that the affidavit of compliance is missing. In this situation we are unwilling to say that the legislature's positive command that the affidavit of compliance be filed is nullified by the statute's failure to mention noncompliance as a basis for quashing service. It is the settled policy of our law to permit a defendant to question the sufficiency of the service of process by entering a special appearance for that purpose only. *Smith Chickeries* v. *Cummings, Judge,* 224 Ark. 743, 276 S. W. 2d 48 (1955); *American Farmers Ins. Co.* v. *Thomason,* 217 Ark. 705, 234 S. W. 2d 37 (1950); Leflar, Conflict of Laws, § 34 (1959). That policy is rooted in fairness and justice. We are not prepared to say that the General Assembly's positive and explicit direction that the affidavit of compliance be filed was nullified by the statute's failure to specify the

absence of that affidavit as a basis for a motion to quash service.

The judgment is reversed and the cause remanded with directions to quash the service of process and to proceed further consistently with this opinion.

E. E. GREGORY ET AL *v.* COURT GORDON ET AL

5-4386 420 S. W. 2d 825

Opinion delivered December 4, 1967

William M. Lee and *George E. Pike,* for appellants.

Coleman, Gantt, Ramsey & *Cox,* for appellees.

PAUL WARD, Justice. This is an action to invalidate the result of an election in Arkansas County which imposed a one mill tax on real and personal property to be used for the maintenance of a public library. The tax issue was submitted at the General Election held on November 8, 1966.

No testimony was introduced before the trial court, and the essential facts presently set out are either undisputed or were stipulated by the parties.

(a) The tax issue was not presented to the voters in Stuttgart because that City had already voted a tax to maintain a municipal library.

(b) A "proper" ballot, as prescribed by the Election Commissioners, should have been printed in this form:

FOR a one mill tax on real and personal property to be used for maintenance of a public county library service or system. (followed by a "box" to be used by the voter to indicate his choice.)

AGAINST (followed by the same words and "box" that follows "FOR" above).

(c) Some of the printed ballots were "proper" and some had no "box" after "AGAINST" and also omitted the word "system". These ballots will be referred to as "defective" ballots.

(d) "Proper" ballots were distributed to all "absentee" voters and to one voting precinct.

(e) "Defective" ballots were distributed to the other twenty-one voting precincts.

(f) The compilation of the votes (under supervision of the trial judge) reflects:

—For the tax	1506,
—Against the tax	1035, and
—Not voting	1540.

On December 9, 1966 Court Gordon and others (residents and property owners of Arkansas County),

appellees, filed a complaint in circuit court against E. E. Gregory et al (Election Commissioners), appellants, alleging in substance that the use of "defective" ballots "operated as an obstruction to the free and intelligent casting of the vote" and created "a doubt as to how the election would have resulted if the ballots had not been defective". The prayer was, in essence, that "the said one mill tax be set aside" as "void and illegal". Appellants entered a general denial.

Following a hearing on the issue raised the trial court entered a judgment, holding: The relief sought by plaintiffs (appellees) is granted; the one mill tax is hereby set aside and held for naught, and; the one mill tax on real and personal property in Arkansas shall not be assessed.

For reversal appellants make two contentions: *One,* the suit was not filed in time; *Two,* the "defective" ballots did not affect "the free and intelligent casting of the vote"

One. It is here contended by appellants that the case must be reversed because appellees failed to comply with Ark. Stat. Ann. § 3-814 (Repl. 1956), but we see no merit in this contention.

The mentioned section, in material parts, reads:

> "Whenever it shall appear by affidavit that an error or omission has occurred . . . in the printing of ballots, the Circuit Court . . . shall, upon the application of any elector, by order, require the County Election Commissioners to immediately correct such error . . ."

It is admitted by appellants that appellees' complaint was filed within the thirty-day period provided by law. The answer filed by appellants, in material part, reads:

> "The defendants deny each and every allegation contained in the complaint of the plaintiffs and the amendments thereto."

As previously stated, no oral testimony was introduced. Consequently it definitely appears from the record that the matter of an "affidavit" was not raised by appellants in the answer or in the facts stipulated by the parties.

This Court has many times held that an objection not raised in the trial court cannot be raised for the first time on appeal. This rule is particularly applicable here. If the matter of an "affidavit" had been raised in the trial court or in the stipulations appellees might have been able to supply the same. This Court does not know, and will not presume, appellees could not have done so.

Two. The other point relied on by appellants is stated as follows:

> "Errors appearing on the face of a part of the ballots . . . were insufficient to effect an obstruction to the free and intelligent casting of the vote or to the ascertainment of the result."

Again, for reasons presently stated, we do not agree.

First, we call attention to the following statutes which are applicable here. They all appear in Ark. Stat. Ann. (Repl. 1956)

> § 3-811
> "All election ballots provided by the County Election Commissioners of any county in this State for any election *shall be alike* . . ." (Emphasis Supplied).

> § 3-822
> "Upon receiving his ballot, the voter *shall* proceed

to mark it by placing an 'X' *in the appropriate* squares . . ." (Emphasis Supplied).

It is not denied that about 95% of the voters in this election were furnished "defective" ballots. Also, the record reflects that there were 3970 votes cast in the Governor's race; that on five other issues the percentage of votes (based on 100% for Governor) ranged from 83% to 96%; and, that on the "tax" issue only 61% voted. The record further reflects that where "proper" ballots were furnished 87% voted on the "tax" issue, but where "defective" ballots were furnished only 60% voted.

In 29 C. J. S., Elections, § 173, page 486, we find this statement:

> "An Election for the submission of a proposition will be invalidated by failure to follow the prescribed form in a matter of substance, as, for example, failure to afford the voter an opportunity unmistakably to vote in the negative on the proposition submitted, and the defect cannot be cured by the statement of a majority of the electors that they voted in favor of the proposition."

At page 487 it is further stated:

> ". . . the test to be applied is whether the ballot used gives the voter as clear an alternative to vote for or against the proposition *as is given by the statutory form.*" (Emphasis ours.)

The real issue before the trial court was whether the use of the "defective" ballots caused, or reasonably may have caused, some voters not to vote or to vote for the "tax". The trial court held this to be the result. We cannot say the trial court erred in so holding.

Affirmed.

JOE SKORCZ AND J. H. HAMLEN & SON, INC. *v.* MARY HOWIE, ADM'X ET AL

5-4358 421 S. W. 2d 874

Opinion delivered December 4, 1967

[Rehearing denied January 15, 1968.]

Wright, Lindsey & Jennings and *Dean R. Morley,* for appellants.

Dale Price and *J. W. Barron Sr.,* for appellees.

PAUL WARD, Justice. This is an action for damages resulting from a collision between a "log truck" and a "gravel truck", where the driver of the gravel truck was killed.

The parties. Appellants are: Joe Skorcz (called Joe) and J. H. Hamlen & Son, Inc. Joe was driving his own log truck. Appellees are: Mary Howie, Adm'x of the estate of Jimmy Dale Hudson, deceased, who was driving the gravel truck, and Silas Kincaid who owned the gravel truck.

The issues. One is whether Joe was an "agent" of Hamlen. The other is a question of negligence, or what caused the collision.

Appellees sued appellants alleging Joe caused the collision, and that he was an agent of Hamlen & Son, Inc. A jury trial resulted in a verdict in favor of appellees on both issues.

Some additional undisputed facts. On January 21, 1966 Joe was driving his truck loaded with logs in a westerly direction toward Little Rock on Highway 40. He was delivering the logs to Hamlen. Joe's truck consisted of two connected units—the tractor and a trailer, joined together by a three or four inch metal pipe which ran from the wheels on the rear end of the trailer to the tractor. The logs on the trailer extended over onto the back portion of the tractor.

On the same day and time the deceased (Hudson) was driving the empty gravel truck (with a trailer) on the same highway in the same direction but to the rear of Joe.

The truck driven by the deceased ran into the rear end of Joe's truck, causing the collision and resulting damage.

On appeal two main issues or questions are raised. One pertains to the status of Joe—was he an independent contractor or was he an agent of Hamlen? Two, is there substantial evidence to support the jury verdict?

One. It is our conclusion that Joe was an independent contractor, and there is no substantial evidence to support a finding he was an "agent" of Hamlen.

Hamlen, engaged in manufacturing wood products, purchased the timber of certain specifications on a certain tract of land. He contracted with Joe to cut, and deliver to his place of business in Little Rock, the timber

for $35 per thousand feet. Joe, who had thirty-five years' experience in this nature of work, used his own mules, tractors, chain saws, loading machine, and trucks. He had three employees, was not financed in any way by Hamlen who did not handle or assist in handling Joe's payroll or records. There is not, and cannot be, any question about Joe being an independent contractor under above stated facts.

Appellees, in attempting to show Joe was removed from the above category and became an agent, rely upon the following facts disclosed by the record. About once a week a representative of Hamlen visited the tract to see if the operation was confined within proper boundary lines; if all trees of proper size were being cut; if stumps were too high, and if usable logs were being left. The record also reveals that Hamlen would tell Joe where to unload the logs when they were delivered at the yard in Little Rock. Appellees also rely on certain testimony tending to show Hamlen might have been able to discharge Joe if he refused to do the things, mentioned above, as directed by Hamlen or his agent, and also on the fact that Hamlen and Joe had no written contract.

We find no merit in any of the above contentions on the part of appellees. In the case of *J. L. Williams & Son, Inc.* v. *Hunter,* 199 Ark. 391, 133 S. W. 2d 892, we find this language:

> "It is common knowledge that hundreds of logging operations throughout the state are constantly handled under contract, both oral and written, which leave to the performing party complete independence in effectuating the purposes of such contract."

In *Pine Woods Lumber Company* v. *Cheatham,* 186 Ark. 1060, 57 S. W. 2d 813, the pertinent facts were similar to those here—where the contractor cut and sawed trees into lengths directed by appellant's foreman, this Court held the trial court was not warranted in submitting

employer-employee question to the jury. See also, to the same effect, *Moore and Chicago Mill & Lumber Company* v. *Phillips,* 197 Ark. 131, 120 S. W. 2d 722, and *Rice* v. *Sheppard,* 205 Ark. 193, 168 S. W. 2d 198.

Two. A closer question is presented with regard to what caused the collision. Appellant presents an excellent and exhaustive brief to show the verdict (of liability by Joe) is "based on demonstrably false evidence and is contrary to the physical facts". We agree with appellants' contention (supported by citations) that substantial evidence is a question of law; that jury verdicts must not be based on conjecture or speculation, and; that, in some instances, physical facts outweigh oral testimony.

Here, it appears, appellant relies heavily on two general grounds. One, the testimony of appellees' witness, James C. Young, must be disregarded and, two, the physical facts show the gravel truck (driven by deceased) ran into the rear of Joe's truck, causing the accident.

Young testified that he was an eyewitness to the accident; that the log truck "seemed to start stopping in the road and logs spilling all over the road and dump truck [gravel truck] coming pretty fast so he tried to swerve, hit his brakes and he couldn't miss it", and that he was certain the logs started coming off the log truck before the dump truck ran into it.

For the purpose of this opinion, and to avoid unnecessary details, we admit that the jury could have very easily disbelieved the above testimony and particularly other of his testimony. He was in a truck traveling east and was something like a half mile away from the accident when it happened. He says he went immediately to the scene of the accident and stayed some forty minutes, but didn't see a policeman who was admittedly there. However, it is established that his truck was there. The jury could have found he was present.

Appellants' main contention however appears to be that the undisputed physical facts show the accident could not have happened like Young said it did. Put another way, appellants contend the physical facts show that the gravel truck must have hit the log truck and caused the accident. This contention is principally based upon the following undisputed facts: (a) the connecting rod (joining the trailer to the tractor) was broken; (b) Joe was severely hurt by the collision, and; (c) the cab on the gravel truck was demolished. The inescapable conclusion is drawn by appellants therefore that the said damages could not have occurred unless the gravel truck hit the log truck while it was traveling, in normal condition, along the road.

For reasons presently stated we are unable to agree with appellants' contention.

(a) The connecting rod on Joe's truck was broken at the point where it had been broken once before, and was re-welded. The jury saw pictures of the broken rod and could have found it was defective. They also could have found that vibration of the heavily loaded truck caused it to break. (b) They could have also found that the severe jolt (causing injury to Joe) was the result of the break in the connecting rod. This rod was bent, and part of it struck the pavement (as shown by pictures). This might have stopped the speed of the truck and thereby caused the logs to plunge forward against the cab in which Joe was seated. It is not denied that the logs extended onto the tractor. (c) Likewise the jury might have reasonably found that (even if the accident happened like Young said it did) the logs remaining on the truck could have caused the damage to the cab of the gravel truck.

We also point out that when the case was tried before the jury model trucks were used to demonstrate how the accident happened—an aid which we do not have. Taking all these things into consideration we are

unwilling to say the jury verdict was not supported by substantial evidence.

Three. The jury fixed the amount of damages as follows: $60,000 for the widow; $1,100 for the estate, and $5,277 for damage to Kincaid's truck.

It is contended by Hamlen that the judgment in favor of the widow is excessive by pointing out that she is only eighteen years old; that she was married in August 1964; that she has no children, and that she is working and living with her parents. Hamlen, of course, will not be liable to pay the judgment. We are therefore in no position, and are unable, to say the verdicts are excessive.

The cause is reversed in part and affirmed in part, and it is remanded for the trial court to enter judgment consistent with this opinion.

HARRIS, C. J., GEORGE ROSE SMITH and BYRD, JJ., dissent as to the affirmance.

ASPHALT MATERIALS CO., INC. *v.* HUGO E. COLEMAN

5-4362 420 S. W. 2d 921

Opinion delivered December 4, 1967

Bridges, Young, Matthews & Davis, for appellant.

John Harris Jones, for appellee.

LYLE BROWN, Justice. This is a workmen's compensation case. Appellee, Hugo E. Coleman, claims temporary total disability as the result of a heart attack on July 12, 1966. His claim was denied by the commission, and that finding was reversed by the trial court. The only issue on appeal is whether there was any substantial evidence of a causal connection between the claimant's work and the heart attack.

For some nine years Coleman, 48 years of age, had been employed by appellant. The company was in the business of asphalting streets, driveways, and parking facilities. In that operation an asphalt finishing machine was used to spread hot asphalt mix. Coleman's

principal job was to stand on a platform at the rear of the mixing machine and keep the valves, which controlled the flow of asphalt, properly adjusted to spread the mix evenly. Immediately in front of his platform were two fire boxes in which the heat was generated to keep the asphalt at about 300 degrees. The asphalt machine had a capacity of seven and one-half tons. Coleman was also classified as a foreman in charge of the spreading crew in the absence of his supervisor. Those responsibilities were not too exacting because his supervisor testified the men in the crew knew what to do and how to do it.

July 12 was a hot summer day, with temperature approximately 100 degrees, and the crew worked that morning asphalting a parking lot. At 12:30 p.m. Coleman took an hour off for lunch and went home in the company's pickup truck. He returned to the job site at approximately 1:30, and at about the time he alighted from the truck he experienced a pain in the chest. He was taken to the hospital and was found to have suffered a heart attack.

It is not contended that Coleman experienced any unusual stress or strain on the job on July 12, or at any other date. Some two weeks prior to that date he left the job, complaining of a pain in the stomach, and did not return to work until July 5.

Three doctors gave medical testimony. One doctor was called by the claimant, and two doctors by the respondent. They were in agreement on a diagnosis of arteriosclerotic heart disease with coronary occlusion and posterior myocardial infarction. The claimant's doctor found a causal connection between the work performed on July 12 and the heart attack; the conclusions of the respondent's doctors were to the opposite effect.

The claimant's doctor listed three factors which he felt established a direct causal relation between the stress of claimant's duties and the onset of the spasm.

They were: (1) emotional factors of supervision; (2) physical stress caused by temperature changes; and (3) chemical irritants from the asphalt. The doctor reasons that "a good number of people who supervise employment of others will tell you that they become aggravated, exasperated, and mad to the point that they get sick sometimes, because they can't get the job done, because the people won't work . . . . I think that is a factor in any supervisory type job; *maybe not in him, I don't know. He may take it well.*" (Emphasis supplied.)

As to physical stress, the doctor emphasized temperature changes. He pointed out that Coleman was working in a temperature of 100 degrees and in close proximity to the fire boxes. As to chemical irritants from the asphalt, the doctor said: "I bring in just this chemical relationship *for thought* because in my own mind I think that that, too, *may* be a factor. (Emphasis supplied.)

On cross-examination claimant's doctor testified that from the standpoint of chemicals, he would place alcohol and nicotine in the same harmful category with chemicals from the asphalt. He advanced his theory that alcohol may be a causative factor in irritating the blood vessel wall, and that nicotine has a "basal spastic effect."

The doctor was asked about a written statement furnished respondent on August 16 in which he said: "His work *may* have precipitated the attack."

"Q. What did you mean by that statement?

"A. Exactly what it said.

"Q. It 'may' have precipitated his attack?

"A. (Affirmative nod.) As far as I am concerned, the man upstairs is the only one that knows."

With reference to alcohol and smoking, Coleman had given his doctor a history of inveterate smoking and of being a "long term user of alcohol." The doctor's case history showed that Coleman had consumed a considerable amount of alcohol over the weekend of July 4.

Opposed to the medical testimony we have just recited were the opinions of two doctors to the effect that there was no causal connection. As is usually found in heart cases before us, there were some inconsistencies brought out on cross-examination, but certainly not enough to destroy the credibility of the testimony of respondent's doctors.

After a careful examination of the record we are unable to say that there was no substantial evidence to support the unanimous conclusions of the commission. In a written opinion the commission laid stress on what they found to be weaknesses in the claimant's medical evidence. This was their prerogative as fact finders. The testimony here recounted justifies those findings. Finally, they found the preponderance of the medical evidence favored the contention of the respondent.

In resolving the issue before us, we are mindful of those cardinal principles so well established as to need no citation of authority: (1) the compensation act is to be construed liberally in favor of the workman; (2) the burden is on the claimant to show causal connection between his heart attack and his employment; and (3) we give the evidence its strongest probative force in favor of the commission's findings because those conclusions carry the weight of a jury verdict.

Reversed and dismissed.

CLINT WALDEN AND CAMPBELL-BELL, INC., *v.*
HAROLD RAY HART AND CLYDE RATHER

5-4368 420 S. W. 2d 868

Opinion delivered December 4, 1967

Pearson & Pearson, for appellants.

Putman, Davis & Bassett and *Shaw, Jones & Shaw,* for appellees.

LYLE BROWN, Justice. This is a tort case arising out of an intersection collision between an ambulance and a passenger car. Appellees, plaintiffs below, occupied the ambulance; they recovered judgment against Clint Walden, appellant, who was driving the passenger car. Campbell-Bell, Inc., owner of the car driven by Walden, intervened to recover property damages from Harold Ray Hart, the ambulance driver. Campbell-Bell was denied recovery. The principal issue on appeal concerns the attack by appellants on the constitutionality of our statute which vests in the chief of police the power to authorize or designate certain ambulances as emergency vehicles.

Harold Ray Hart, owner and operator of the ambulance, was carrying a heart patient from Westville, Oklahoma, to Veterans Hospital in Fayetteville, Arkansas. The vehicle was equipped with the statutory siren and mounted flashing lights. Appellee Rather was riding in the ambulance and seated beside the patient. At the intersection of College Avenue and North Street in Fayetteville, Hart was faced with a red light. Hart was proceeding through the red light, using his siren and flasher signals. Walden entered the intersection at about the same time from North Street, intending to drive across College Avenue. The vehicles collided in the southeast quadrangle of the intersection, Hart's lane of travel. The chief of police of Fayetteville testified he was aware that Hart regularly brought patients to Fayetteville and the chief considered Hart's ambulance an emergency vehicle. He had not been requested to specifically designate it an emergency vehicle but the chief testified he recognized it as such.

Appellants timely challenged the validity of Ark. Stat. Ann. § 75-402(d) (Repl. 1957) which defines authorized emergency vehicles as follows:

"Vehicles of the fire department (Fire Patrol), police vehicles, *and such ambulances and emergency vehicles of municipal departments or public service corporations as are designated or authorized by the (commissioner) or the (chief of police of an incorporated city).*" (Italics supplied.)

The recited provision is a part of the Uniform Motor Vehicle Code. The italicized portion of the act would fall if appellants' contention of unconstitutionality is sustained.

We are aware that an act of the Legislature is presumed constitutional and should be so resolved unless it is clearly incompatible with the constitution; and that any doubt must be resolved in favor of constitutionality. *Hickenbottom* v. *McCain*, 207 Ark. 485, 181 S. W. 2d 226 (1944).

Under our constitutional doctrine of separation of powers the functions of the Legislature must be exercised by it alone. That power cannot be delegated to another authority. Ark. Const. Art. 4. *Oates* v. *Rogers*, 201 Ark. 335, 144 S. W. 2d 457 (1940). Had the Legislature, in delegating the power to the chief of police or state motor vehicle commissioner, afforded reasonable guidelines, we would have a different situation. That is because the Legislature may delegate "the power to determine certain facts, or the happening of a certain contingency, on which the operation of the statute is by its terms made to depend." *State* v. *Davis*, 178 Ark. 153, 10 S. W. 2d 513 (1928). But here the Legislature gave to the named authorities an unbridled discretion and that is fatal to the italicized provision of § 75-402 (d).

The motor vehicle code of the City of Dallas, Texas, contained a provision identical with our § 75-402(d), except that it does not use the word "commissioner." The Texas Supreme Court invalidated that section of the Dallas code insofar as it pertained to the power of

the chief of police. *Walsh* v. *Dallas Ry. & Terminal Co.*, 167 S. W. 2d 1018 (1943). That decision was based on the fact that no standard was set to guide the chief in administering his duties.

Typical of valid legislation in this field is an ordinance enacted by Utica, New York, and discussed in *Rizzo* v. *Douglas*, 201 N. Y. S. 194 (1923). That ordinance made it unlawful to operate a taxicab in Utica without first having secured a license approved by the commissioner of public safety. The court said if the ordinance had stopped at that point, the attack of unconstitutionality "would be of great force." However, the ordinance set up these guidelines for the commissioner:

> "The applicant must satisfy the said commissioner of public safety that he is over eighteen years of age; of good moral character; competent to drive a motor vehicle upon the streets of the city of Utica and has a thorough knowledge of the laws of the state of New York affecting or regulating the operation of motor vehicles, the traffic ordinances of the city of Utica and of this ordinance."

In *California State Automobile Ass'n. Inter-Insurance Bureau* v. *Downey*, 216 P. 2d 882 (1950), the state insurance commissioner suspended appellant's license to write automobile liability insurance in California. There the Supreme Court said:

> "There can be no doubt that it is the law that a valid statute cannot delegate unlimited powers to an administrative officer and that, to be valid, the statute must provide an adequate yardstick for the guidance of the executive or administrative body or officer empowered to execute the law."

There are two situations in which the "guidelines rule" is substantially liberalized: first, when it is difficult to lay down a definite or comprehensive rule; and secondly, when the administrative officer is dealing with

matters involving public morals, health, safety, and general welfare. But a statute or ordinance which "reposes absolute, unregulated or undefined discretion in an administrative body will not be upheld." *City of Florence* v. *George,* 127 S. E. 2d 210 (S. C. 1962). See 12 ALR p. 1435 and 92 ALR p. 400.

Since § 75-402(d) obviously provides no standards for the chief of police or commissioner, appellees point to Ark. Stat. Ann. § 75-725(b) and (c) (Supp. 1967). There it is required that emergency vehicles be equipped with a siren, whistle, or bell, and that certain other emergency vehicles mount on top of the car two alternately flashing red lights. Those are all the special requirements cited us which are imposed on emergency vehicles. To say that those two provisions establish sufficient standards for the licensing of an emergency vehicle is unreasonable. Certainly a competent administrative officer would take those two statutes into consideration in evaluating an application for a permit. But what other factors are to be considered by him? The legislation does not answer that question. That vacuum creates the constitutional defect.

The practical danger created by the absence of legislative standards is exemplified in this case. The chief of police at no time made a check of this ambulance. He was not aware of any affirmative responsibility reposed in him. He merely "considered" Hart's ambulance as an emergency vehicle because (1) his ambulance was equipped with red lights and a siren, and (2) he knew Hart brought patients to Fayetteville hospitals. What about other factors so essential to protect the public from the inherent dangers of an emergency vehicle? For example, consider those essential standards quoted from the *Rizzo* case. Our statutes give no authority to the chief to ascertain any facts about the age of the driver, his character, his competency as a driver, or his knowledge of traffic laws.

Appellees argue that some nineteen other states and numerous municipalities have the same provision

as our § 75-402(d) and that, excepting Texas, its constitutionality has never been attacked. However, a review of many statutes and cases in other jurisdictions reveals that their legislatures have, in numerous instances, supplemented their statutes with additional safeguards that remove the constitutional infirmity found in our situation.

Arkansas adopted the Uniform Motor Vehicle Act, with some modifications, in 1937. Since that time it has been substantially amended by our Legislature to keep abreast of changing conditions. In the pocket part of Uniform—Act, § 1, 11 U. L. A., is found this statement: "The uniform and model acts constituting this volume were declared obsolete or were withdrawn by the National Conference of Commissioners on Uniform State Laws in August 1943." That is understandable because the Uniform Motor Vehicle Code is of 1930 vintage. We point up these facts to show that the original act is not entitled to veneration. Our § 75-402(d) was in the code as first adopted.

In view of a possible retrial we shall briefly consider objections made by appellants to the giving, and refusal to give, certain instructions.

(1) Campbell-Bell asked for two instructions covering its theory that the driver Walden was a gratuitous bailee. Walden regularly drove the corporation's car from work to his home, where he kept it overnight. We have examined those instructions and find them to be confusing and not understandable. See our per curiam order of February 1, 1966, and reproduced inside the front cover of AMI. Had proper instructions been offered on that point we think they should have been given.

(2) The trial court gave AMI 2219, "Present Value—Definition." That term was not used in any instructions, hence the instruction was inappropriate.

(3) Campbell-Bell requested, and was refused, AMI 701, "Agent—Employee—Definition." Since the jury was called upon to decide the scope of Walden's activities as they related to his employer, it would have been proper to give that instruction. AMI 702 and AMI 703 were given.

The effect of our holding that portion of § 75-402(d) which we italicized to be unconstitutional is to place Harold Ray Hart's vehicle in the category of a private ambulance. See *Buck* v. *Ice Delivery Co.*, 29 P. 2d 523 (Ore. 1934).

Reversed and remanded.

DELMERAY JOHNSON *v.* LAVERNE CORINE JOHNSON

5-4360 421 S. W. 2d 605

Opinion delivered December 4, 1967

[Rehearing denied December 18, 1967.]

Roy Finch Jr., for appellant.

Jones & Stratton, for appellee.

JOHN A. FOGLEMAN, Justice. This is an appeal from an order of the chancery court denying appellant's motion to dismiss a divorce action and holding him in contempt of court.

The parties had lived together in Little Rock until early July 1966 when the wife left and went to Faulkner County where she filed the suit on July 12, 1966. She took their children with her and obtained employment in Conway. Appellant was served with summons in Pulaski County and filed an answer and an amended answer. In the latter pleading he admitted appellee's allegation of residence in Faulkner County, denying only the alleged grounds for divorce. Appellant came to Conway where appellee was living on December 11th and the parties lived together as husband and wife in a house she had rented until December 16th when a hearing on her divorce petition had been scheduled. Appellee says that appellant asked her every night when he came home from work if she had called off the divorce action. On

December 16th at 8:45 A.M. she called her attorney, told him they "had gone back together" and asked that the case be dismissed. She said that appellant had asked her to take him back and that she did on his promise to be a husband to her and a father to the children. She asked dismissal of the suit on the basis of this promise. Appellant appeared in court on December 16th and represented that the parties had reconciled and that he had moved to Conway. The court then made a docket entry showing the case dismissed. Appellant testified that he left the courtroom about 11 A.M., went back to the house where he stayed a few minutes, and then went to Little Rock where he called his present attorney[1] about 2 P.M. Thereafter a divorce suit was filed in his behalf in Pulaski County and a summons was served on appellee about 4 P.M. when she returned home from work. Appellant's only explanation for these actions was: "I just got to thinking about it and decided I wasn't happy and decided to contact my attorney."

The chancellor, by order made on December 28th during the same term of court, vacated the December 16th docket entry. He also ordered appellant to show cause on January 6, 1967 why temporary support orders should not be reinstated and why he should not be adjudged in contempt. On that date appellant appeared and filed a motion to vacate the order of December 28th and reinstate that of December 16th, alleging that appellee was not a resident of Faulkner County and that the Pulaski Chancery Court had jurisdiction of the subject matter and the parties. After a hearing on February 10th, the trial court denied the motion to vacate, reduced the amount previously fixed for child support payments, and held appellant in contempt of court. The order provided for a sentence of thirty days in jail and a fine of $100.00, both of which were suspended. Appellant gave notice of appeal from the court's order and

[1]His present attorneys were not representing him in the Faulkner County proceeding at that time. Appellant states that he first tried to contact the attorney who was representing him but was unsuccessful.

stated alternatively that he would ask this court for a writ of prohibition against the trial court from further proceeding in this matter because of jurisdictional questions. Appellant, however, has proceeded by appeal, seeking reversal of the action of the trial court and dismissal of the action. He has not asked for a writ of prohibition here.

The order of the trial court on appellant's motion is not a final judgment and not appealable. For a judgment to be final and appealable, it must in form or effect: terminate the action; operate to divest some right so as to put it beyond the power of the court to place the parties in their former condition after the expiration of the term; dismiss the parties from the court; discharge them from the action; or conclude their rights to the matter in controversy. *City of Batesville* v. *Ball,* 100 Ark. 496, 140 S. W. 712; *Piercy* v. *Baldwin,* 205 Ark. 413, 168 S. W. 2d 1110. This court has consistently followed this rule. In *State to Use of Ashley County* v. *Riley,* 194 Ark. 485, 107 S. W. 2d 548, an order of a trial court requiring a plaintiff to proceed on an amendment to his complaint, rather than on the original complaint, was held not appealable. An order of a circuit court remanding a case to the Workmen's Compensation Commission for further development of facts was held not to be a final or appealable order. *C. H. Nolan Lumber Co.* v. *Manning,* 241 Ark. 422, 407 S. W. 2d 937. An appeal will not lie from an interlocutory order relating only to some question of law or matter of practice in the course of the proceeding, leaving something remaining to be done by the court entering the order or by some court having jurisdiction to entertain the same and proceed further therewith. *City of Batesville* v. *Ball, supra.*

Even if we treat appellant's motion as one to dismiss the action for want of bona fide residence of appellee, as the learned trial judge apparently did, the order is not appealable. *Wicker* v. *Wicker,* 223 Ark. 219, 265 S. W. 2d 6. Furthermore, appellant's position would

not be helped if we treated his appeal as a petition for a writ of prohibition. Where there is a dispute as to domicile in a divorce action, prohibition is not the proper remedy to test the correctness of a denial of a motion to dismiss. *Clement* v. *Williams,* 227 Ark. 199, 297 S. W. 2d 656. Nor is it appropriate in any case where more than one inference might be drawn from the testimony. *Coley* v. *Amsler,* 226 Ark. 492, 290 S. W. 2d 840.

Appellant has also mistaken his remedy on that part of the order holding him in contempt of court. The proper remedy is by certiorari and not appeal. *Ex Parte Butt,* 78 Ark. 262; 93 S. W. 992; *Whorton* v. *Hawkins,* 135 Ark. 507, 205 S. W. 901; *Ex Parte Johnston,* 221 Ark. 77, 251 S. W. 2d 1012.

This order fails to state the facts constituting the contempt as it should. *Ex Parte Davies,* 73 Ark. 358, 84 S. W. 633. This failure does not render the judgment void, but the failure of the alleged contemner to ask that they be recited prevents review on certiorari. *Ex Parte Chastain,* 94 Ark. 558, 127 S. W. 973. Even if we said that these deficiencies were supplied by reason of the fact that the entire record in the case was designated and brought up, there is no basis for relief to appellant. The order itself discloses that the punishment for contempt was suspended. From the record, it does not appear that the suspension was merely a postponement of sentence so it amounts to complete remission in case of criminal contempt such as this. *Stewart* v. *State,* 221 Ark. 496, 254 S. W. 2d 55. Thus, this question is moot.

The appeal is dismissed.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD CO. *v.* ARKANSAS COMMERCE COMMISSION

5-4381 420 S. W. 2d 917

Opinion delivered December 4, 1967

[Rehearing denied December 18, 1967.]

Wright, Lindsey & Jennings, for appellant.

Edward H. Boyett, for appellee.

JOHN A. FOGLEMAN, Justice. Appellant asks that we reverse the trial court's judgment affirming the action of the Arkansas Commerce Commission denying to it authority to discontinue the operation of its agency station at Mansfield.

Notice of discontinuance by the railroad company was filed September 26, 1966. The governing statute in such cases is Act 203 of 1961, appearing as Ark. Stat. Ann. § 73-809 (Supp. 1967), which in pertinent part reads:

> "b. Any railroad operating in this State may file with the Arkansas Commerce Commission a notice of discontinuance, * * * of any of its agency stations together with a statement certified by a proper officer of the railroad to the effect that such agency station had been operating at a financial loss according to standard accounting procedures for not less than one [1] year immediately preceding, or that operating economies would result *consistent with public convenience and necessity;* and such agency station may thereupon be closed or modified ninety [90] days after date of filing of such notice unless a petition for the re-establishment of such discontinued, * * * agency station, signed by at least twenty-five [25] qualified electors residing in the city, town or political subdivision where the same is located, is filed with the Arkansas Commerce Commission within sixty [60] days after date of filing of the notice aforesaid. The Arkansas Commerce Commission is authorized, empowered and required to hear and consider all petitions for the re-establishment of any agency station discontinued, * * * by the railroad under authority of this Act [section], which hearing shall be held within sixty [60] days following filing of petition for re-establishment and following thirty [30] days written notice of such hearing to the railroad and petitioners. In determining whether an agency station should be discontinued, * * * the standard to be employed is whether the railroad has operated the agency station at a financial loss according to standard accounting procedures for not less than one [1] year immediately preceding the filing of the notice of discontinuance, * * * or whether operating

economies would result therefrom." [Emphasis ours]

Sufficient petitions protesting the discontinuance were filed. A hearing was held on October 26, 1966. The order of the Commerce Commission was dated January 17, 1967. The Commission found that appellant had not met its burden of proof and made the following findings:

1. The continued maintenance of an agency station at Mansfield, Arkansas, is required by the public convenience and necessity; that the facilities of the Chicago, Rock Island & Pacific Railroad Company would be inadequate to meet public necessity in the event the station at Mansfield be ordered closed.

2. Operating economies consistent with the public convenience and necessity as provided by Act 203 of the Acts of the Arkansas General Assembly of 1961 will not result from the discontinuance of the agency station at Mansfield, Arkansas.

3. Discontinuance of the agency station at Mansfield, Arkansas, should not be granted at this time. IT IS THEREFORE ORDERED, that the authority to discontinue the operation of an agency station at Mansfield, Arkansas, by the Chicago, Rock Island & Pacific Railroad Company be, and the same is hereby, DENIED.

The scope and extent of our review is outlined in *Fisher* v. *Branscum*, 243 Ark. 516, 420 S. W. 2d 882. Under the rules therein set out, we must determine whether the judgment of the circuit court is clearly against the preponderance of the evidence. In doing so, we accord due deference to the Commission's findings because of its peculiar competence to pass upon the fact questions involved and because of its advantage in seeing and hearing the witnesses. We also keep in mind that the burden is on the appellant to show that the judgment is erroneous.

Appellant's case as to financial loss must fail for two reasons. First, there is no evidence to show whether there was financial loss for one year immediately preceding the notice of discontinuance, *i. e.,* from September 27, 1965 to September 26, 1966. Secondly, there is nothing to show that the accounting procedures used in this case are "standard accounting procedures" in the sense of the Act.

In seeking to show financial loss, appellant offered an exhibit entitled "Chicago, Rock Island and Pacific Railroad Company Statement Showing Revenues and Expenses Assigned to Station at Mansfield, Arkansas, For the Twelve Months Ending June 30, 1966, Including Operating Expenses Charged to Station Based on Cost of System Operation for the Year 1965." It was prepared by Joseph Hyzny as the Chief Cost Research Analyst. This exhibit showed a loss of $6,214.95 for the operation of the Mansfield station. In order to arrive at this figure, the railroad accountants assigned to the station one-half of all revenues from freight forwarded to or received from all other points on the Rock Island lines, all revenues for freight forwarded or received from points on other lines, all passenger revenue receipts, 40% of express receipts and certain miscellaneous revenues. They then deducted certain operating expenses. The total station expenses amounted to $8,028.66, leaving a net station profit of $6.515.93. All these revenues and expenses were for a twelve-month period ending June 30, 1966. The alleged loss figures were obtained by determining the percentage ratio of expenses (other than station) to revenue over the entire system for the year 1965 and allocating this same ratio to the total revenues at Mansfield. By this process, $12.730.88 in indirect expenses were added to the direct expense. Other such computations showed similar losses for the years 1964 and 1965. No explanation is offered as to the reason for allocating only 40% of the express revenues to Mansfield. No receipts or revenues for handling mail are accounted for, although W. C. DeVries, appel-

lant's Superintendent of Station Service, offered an exhibit showing the method of handling United States mail off the passenger trains there and testified that the agent worked the mail. Among the items of indirect expenses allocated over the system were costs of maintaining the rails and right-of-way, the cost of the engineer, conductor, brakeman, fireman, cost of maintaining the locomotives, the cost of salaries, accounting, cost of rate clerks, and attorneys' fees.

There was no evidence of the amount of revenues received for the period between June 30, 1966, and the date of the notice of discontinuance, a period of approximately three months. No system expenses or expense/revenue ratio for twelve months preceding the date of the notice was shown. Clearly, appellant failed to make any showing of financial loss for a period of twelve months *immediately* preceding the filing of the notice. Mr. Hyzny testified that the only records available were up to June 30, 1966, and if there was a volume increase subsequent to that date, *he* had no record of it. The peculiar significance of this deficiency is illustrated by the following:

1. Only 154 carloads were shipped from Mansfield during 1965, but 151 cars had been shipped in 1966 during only 199 working days.

2. The cars of feed received by Williams Feed Company had increased from two in 1964 to three in 1965 and 38 in 1966. Mr. Earl Williams said that their cars received had more than doubled in twelve months.

3. The revenues assigned to the station had increased from $5,470.40 in 1964 to $11,622.86 in 1965 and for the twelve months ending June 30, 1966, amounted to $14,544.59.

4. A proposed cattle feed lot for which a site adjacent to the railroad had been purchased would ship and receive cattle and feed.

If the General Assembly had intended that the financial loss be determined for the preceding fiscal year or the preceding calendar year rather than the preceding twelve-month period, it would have clearly said so rather than using the language it did.

There was no testimony to show that the method used by appellant to determine gain or loss in this instance was according to standard accounting procedures required by Act 203 of 1961. Mr. Hyzny testified only that the exhibit offered by him: "[I]s the standard procedure that we have used many times in presenting our exhibits on station closings in the state of Arkansas." This testimony falls far short of establishing these approaches or methods as "standard accounting procedures." This witness also admitted that the indirect cost percentage was not correct insofar as the station proper at Mansfield was concerned. He also said that under this system, the revenue assigned to Mansfield would have to be around $90,000.00 in order to show a profit.

Appellant also challenges the finding of the Commission that operating economies consistent with the public interest would not result from the closing of the station. It is admitted that the only economy would be the elimination of the direct cost of the station operation. The Commission made specific findings: that the closest agency stations would be at Howe, Oklahoma, a distance of 29 miles, and Booneville, Arkansas, a distance of 25 miles; that patrons who receive shipments would be required to post bond for expeditious unloading of cars delivered to Mansfield pending payment and surrender of bills of lading; that passengers on trains would have to pay fares to conductors on the trains rather than purchase tickets from the station agent; that the operators of the proposed cattle feed lot would be seriously hampered. Evidence adduced by appellant substantiated the first three findings. There was testimony on behalf of the protestants tending to substan-

tiate the fourth finding. Testimony of appellant's witnesses also shows that the two passenger trains stopping at Mansfield (both at night) will be continued; that as long as passengers boarded the train at the station at night, the railroad needed someone there to see that passengers boarding the trains are not bothered; that freight shippers would have to call long distance (at the expense of the railroad) to Booneville for bills of lading, but the bills would be forwarded to the agent by mail, executed by him and returned to the shipper by mail; that railway express would no longer be handled through the railroad station; that passengers on interlined tickets would have to call the agent at Booneville and pick up their tickets, or have them mailed to them if there was time, board the trains at either Howe or Booneville, or purchase tickets at the stations in Little Rock or Memphis; that a lumber company in Mansfield had not been solicited for freight; that commencing in the month of April 1965 there was an increase in carload shipments due to the commencement of shipment of wood chips; that there had been an increase in business over the period of 15 to 18 months that the station agent's work hours had been at night instead of day.

On behalf of protestants, it was further shown: that there was no rail service between Mansfield and Fort Smith, 30 highway miles away; that Mansfield was totally dependent upon the Rock Island for rail service; that Williams Feed Company had increased the number of freight cars delivered to it from 2 to 38 from 1964 to 1966; and that a chamber of commerce had been recently organized for the purpose of inducing industry to come to the Mansfield area.

While there is no doubt that the railroad would effect operating economies by closing the station, we cannot say that the Commission's findings that these economies would not be consistent with public convenience and necessity in keeping with § 73-809 are clearly against the preponderance of the evidence.

It is notable that the indirect operating costs allocated to the Mansfield system would continue and supposedly be allocated to the remaining stations. While appellant argues that the effect of this particular closing on the ratio to be applied to these other stations would be insignificant, it is possible that shifts resulting from a station closing such as this could produce a chain reaction having a "falling domino" effect on station closings. Thus, the importance of the legislative requirement that public convenience and necessity be considered in these matters is emphasized.

The judgment is affirmed.

THELMA JEAN McCUISTON *v.* DONNIE ROLLMAN

5-4376 420 S. W. 2d 925

Opinion delivered December 4, 1967

Thompson & Thompson, for appellant.

Little & Enfield, for appellee.

J. Fred Jones, Justice. In August 1961, Paul C. Rollman died intestate in Benton County, Arkansas, leaving as his sole surviving heirs a daughter who is the appellant here, and a son who is the appellee. The decedent's estate was probated and appellee was appointed personal representative. The listed assets in the probate proceeding consisted of cash in banks, savings bonds, an automobile, a pickup truck, livestock and farm equipment. Distribution was made under a family settlement agreement whereby cash, bonds, and the automobile were distributed to appellant, and the remainder of the designated personal property, of approximately equal appraised value, was distributed to the appellee. A farm consisting of 230 acres was not listed as an asset of the estate, and was not mentioned in the probate proceedings under the family settlement agreement.

In March 1963, approximately ten months after probation of the estate was closed, the appellant, for the recited consideration of One Dollar and other valuable consideration, executed a quitclaim deed transferring to appellee and to his heirs and assigns forever, the described farm land. This deed contained a recitation that the grantor and grantee were the sole and only surviving heirs of Paul C. Rollman. In April 1964, appellee executed, for the recited consideration of One Dollar and other good and valuable consideration, a warranty deed conveying an undivided one-half interest in the land to appellant, this deed contained a clause as follows:

> "It is the *sole and only purpose* and intention of the grantors and the grantee in this deed to affect

the title to the above described land in such manner that the grantors will not have any power to mortgage, sell, or otherwise convey said land or any part thereof without the approval and consent of the grantee.'' (Emphasis supplied).

In August 1966, appellee brought this action alleging that the warranty deed given by him to appellant conveyed no rights in the property to appellant and was without consideration and void. Appellee prayed a declaratory judgment voiding the warranty deed for indefiniteness and for lack of consideration, and prayed that the deed be removed from appellee's title as a cloud thereon.

Appellant answered with a general denial and with counterclaim for the $2,325.00 balance owed on a $2,500.00 loan she made to appellee in June 1962. The chancellor found the warranty deed void and removed it as a cloud on appellee's title, and gave appellant judgment for $2,325.00 against appellee. On her appeal to this court, appellant designated the following two points for reversal:

''1. The Chancellor erred in holding the Warranty Deed from Appellee to Appellant invalid and failing to give effect to it.

''2. The Chancellor erred in decreeing that the entire ownership of the involved property lay with Appellee and based the finding on the Quitclaim Deed from Appellant to Appellee.''

Appellant testified that she executed the quitclaim deed to appellant to keep him out of the Army and not as a part of the property settlement as contended by appellee. The appellee testified that he executed the warranty deed to appellant in order to defeat property rights his wife might have in the property in the event of an anticipated divorce. The avowed purpose of either party in the execution of the deeds finds no sympathy in equity, and neither would have been entitled to in-

voke the assistance of a court of equity in carrying out the avowed purposes in the execution of either deed.

As to the purpose of the quitclaim deed, the evidence is in conflict. This deed is valid on its face and no fraud is evident in connection with its execution. The chancellor was also the probate judge who approved the property settlement agreement, and we are unable to say that his decree that the quitclaim deed transferred good title is against the preponderance of the evidence.

In the case of *Luther* v. *Patman,* 200 Ark. 853, 141 S. W. 2d 42, this court said:

> "We think a restatement of the law found in § 237, 16 American Jurisprudence, at bottom p. 570, is a correct general declaration of the law of the construction of deeds. Said § 237 is as follows:
>
> "The modern and now widely accepted rule to determine the estate conveyed by a deed with inconsistent clauses has for its cardinal principle the proposition that if the intention of the parties is apparent from examination of the deed 'from its four corners' without regard to its technical and formal divisions, it will be given effect even though, in doing so, technical rules of construction will be violated."

The above quotation states the rule long adhered to by this court. See *Osborne* v. *Clarkson, Ex'x,* 237 Ark. 219, 372 S. W. 2d 622; *Carter Oil Co.* v. *Weil,* 209 Ark. 653, 192 S. W. 2d 215.

In applying the above principles to the case at bar, the conclusion is irresistible that the warranty deed in question is void. This deed, on its face, shows that there was no intent to convey title, but the sole and only purpose and intent was to prevent appellee from disposing of the property without appellant's consent.

The appellant contends that the deed was meant to reconvey to her an undivided one-half interest in the property and also served as a first option to purchase appellee's undivided one-half interest if, and when, he should decide to sell. Appellant's contention is totally inconsistent with the plain language of the deed. The testimony of both parties indicates that the sole purpose and intent in the execution of this deed was to do exactly what the deed purports to do, place a cloud on the title of the property described in the deed. We agree with the chancellor that the deed is void for lack of intent to convey any interest in the land and was only meant to place a cloud on appellee's title.

Appellant also contends that even if the warranty deed is void, appellee has failed to show a consideration for the quitclaim deed given by appellant to the appellee. Appellant testified that she executed the quitclaim deed in order to aid appellee in avoiding service in the armed forces and that no money changed hands in connection with the transaction. This deed recited consideration of "one dollar and other valuable consideration to us in hand paid" and the deed is good on its face. No fraud is alleged or proven in connection with the execution of the deed and since the deed was a present grant rather than a promise to be performed in the future, no consideration was necessary to the validity of the deed. (*Ferguson* v. *Haynes,* 224 Ark. 342, 273 S. W. 2d 23; *Cannon* v. *Owens,* 224 Ark. 614, 275 S. W. 2d 445.) The finding of the chancellor that the quitclaim deed is binding as against the appellant is not aganst the preponderance of the evidence.

The question was raised at the trial of this case as to whether the farm real estate was considered as part of the family settlement agreement in the course of the administration of the estate, or whether a deed to the farm was "delivered" to appellee by the deceased prior to his death. This question was rendered moot on both points by the validity of the quitclaim deed, and the in-

validity of the warranty deed. The decree of the chancellor is affirmed.

Affirmed.

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

PAUL WARD, Justice. For reasons hereafter set out, I cannot agree with the majority opinion relative to the portion discussed herein. The material facts will be summarized.

Appellant is a sister to appellee. On March 26, 1963 appellant, for "One Dollar and other valuable consideration" executed to her brother a *Quitclaim Deed* conveying her entire interest in 230 acres of land. The majority hold the consideration sufficient even though appellant testfied she made the conveyance to keep her brother out of the army.

On April 23, 1964 appellee executed and delivered to his sister, by *Warranty Deed, an undivided one-half interest* in the same 230 acres. The expressed considoration in both deeds were exactly the same. The majority holds this Warranty Deed to be void—giving the sister nothing.

The sole reason for the majority holding is based on a "clause" in the Warranty Deed, which clause is copied at page two of the opinion.

The majority cite and rely on three decisions of this Court for holding the Warranty Deed "void". They say, on page four, "This deed, on its face shows that there was no intent to convey title . . ." even though the deed itself contains these words signed by appellee: ". . . do hereby grant, bargain and sell" unto appellant; "We will forever warrant and defend the title . . ."

The cases referred to above and relied on by the majority are no authority to hold the Warranty Deed

absolutely void, but they, and many other cases, are authority for *construing* and *modifying* the deed. To the same effect are: *Brawley* v. *Copeland,* 106 Ark. 256, 153 S. W. 101; *Mason* v. *Jackson,* 194 Ark. 236, 106 S. W. 2d 610; *Jenkins* v. *Ellis,* 111 Ark. 220, 163 S. W. 524; *Jackson* v. *Lady,* 140 Ark. 512, 216 S. W. 505; *Coffelt* v. *Decatur School Dist. No.* 17, 212 Ark. 743, 208 S. W. 2d 1, and *Chicago Rock Island & Pacific Railroad Company* v. *Olsen et al,* 222 Ark. 828, 262 S. W. 2d 882. In the *Jenkins* case, *supra,* and the *Jackson* case, *supra,* (and in many other cases) the rule is clearly stated that deeds are most strongly construed against the *grantor* and in favor of the *grantee.*

The result reached by the majority is, in my judgment, not only judicially unsound but it is illogical and unjust. Illogical, because, if appellee didn't intent to convey anything to his sister, he must have known she could not prevent him from selling his own land. Unjust, because it lets appellee take advantage of his own selfish scheme.

It is, therefore, my opinion that the deed here in question (concededly being executed for sufficient consideration) can be, and should be, *construed*—not held to be *void.*

JOHN A. FOGLEMAN, Justice, dissenting. As I view this case, appellee Rollman invoked the jurisdiction of the chancery court for a declaratory judgment that his voluntary deed of April 23, 1964, to his sister, appellant McCuiston, is void for indefiniteness and for lack of consideration and that she has no interest in the real estate conveyed *by reason of said deed.* He also asked that the deed be removed from his title as a cloud thereon and for general relief.

Appellant filed an answer which constituted a general denial and asked that the complaint be dismissed. Subsequently, she filed an amendment to her answer in

which she admitted execution of the deed but denied that it was vague and meaningless. She further denied that the deed constituted a cloud on plaintiff's title and that there was no consideration for the deed. This pleading contained a counterclaim for money loaned. A judgment, from which no appeal has been taken, was rendered thereon. The prayer in this amendment was that the complaint be dismissed *for want of equity,* and for recovery of the money loaned with a lien upon her brother's "undivided one-half interest."

The chancellor saw and heard the witnesses and made detailed findings of facts. One of these was that the primary, if not the sole, reason for the execution of the deed was to prevent the wife of appellee from acquiring some interest or ownership in the property by reason of then impending marital difficulties between appellee and his wife. He further found that the prime, if not the only, reason for the inclusion of the phrase in question was to make it impossible for his wife, under any circumstances, to acquire some proprietary interest in this tract of land. The chancellor was warranted in finding that these facts were undisputed, or virtually so.

Under these circumstances, I do not feel that the appellee is entitled to any relief in a court of equity, even though appellant was a party to the attempted fraud. In *McClure* v. *McClure,* 220 Ark. 312, 247 S. W. 2d 466, a chancery court's decree, setting aside a deed executed for the purpose of defrauding a husband's creditors on the ground that the wife was a party to the attempted fraud, was reversed. This court said that such a grantor was not permitted to invoke the assistance of equity in setting aside the deed because he did not come into court with clean hands. This court has held that a grantor who was agreeable to perpetrating a fraud on his wife and creditors by execution of a deed was barred by the "clean hands doctrine" from claiming that the deed was intended to be a mortgage. *Marshall* v. *Marshall,* 227 Ark. 582, 300 S. W. 2d 933.

In *Fullerton* v. *Fullerton,* 233 Ark. 656, 348 S. W. 2d 689, a husband brought a suit to cancel a certain deed made by third parties to his former wife during the marriage and to quiet and confirm the title to the real estate thereby conveyed by him. The husband appealed from a decree of the chancery court holding that the land was the sole and separate property of the former wife. Mr. Fullerton contended that he had left money with his wife in order that she could make the payment of the purchase money when the deed was delivered. Mrs. Fullerton claimed that he insisted that the title be put in her name. The only reason she could suggest for this was that he had an ex-wife who he thought might sue him for some back alimony and that he probably thought some little girls, under age, that he had gone with might sue him. The chancellor found that the title was placed in Mrs. Fullerton's name as a gift from the husband, but the husband sought to overturn this finding because of her testimony that the title was placed in her to permit him to defeat the collection of some *potential* judgments. This court said that this testimony could not benefit him because a husband who conveys land to his wife in fraud of creditors is not permitted to invoke the assistance of equity in setting aside the deed since he does not come into equity with clean hands.

I do not see how this court can justify the granting of equitable relief to appellee.

Because of this view, I see no purpose in discussing the effect of the earlier quitclaim deed from appellant to appellee. I agree with the chancellor that this is not really important to the decisive issues in the case. He stated that he mentioned it only as a matter of interest because it came up in the evidence. It is notable that the quitclaim deed is not mentioned in the court's decree, although there is a finding that appellee is the owner of the land. Although I do not feel that this question is actually in issue, there is sufficient evidence

sustaining validity of the quitclaim deed that we could not say that the court's findings were against the preponderance of the evidence. I would reverse and dismiss.

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

MANUEL E. NALL *v.* MRS. VIRGIE C. McDONALD

5-4403 420 S. W. 2d 827

Opinion delivered December 4, 1967

John L. Hughes and *Ben McCray,* for appellant.

James C. Cole and *Bridges, Young & Mathews,* for appellee.

CONLEY BYRD, Justice. Appellant, Manuel E. Nall, appeals from a directed verdict in favor of Mrs. Virgie C. McDonald. The issue is whether there is any substantial evidence to show that Mrs. McDonald was the driver of the automobile that collided head-on with appellant's automobile on his side of the road.

Two witnesses, Jesse Jones and Chester Newman Williams, in addition to Nall himself, testified on behalf of appellant. Nall testified that on his way out of Sheridan, as he crested a hill, he saw a farm tractor pulling piggy-back another farm tractor, headed in the opposite direction; that the tractors had two wheels on and two

off the pavement; and that just as he passed the tractors he saw an automobile, following the tractor, cross to his side of the road. Since he was knocked unconscious, he does not remember anything else that happened at the scene of the accident.

Chester Newman Williams testified that he was driving one tractor and pulling piggy-back the other tractor; that he did not see the collision but heard the impact; and that after parking the tractors he went back to the scene of the accident and found Mr. Nall still in his car and the McDonalds lying side by side in a ditch.

Jesse Jones, a member of the State Police, determined that the McDonald car was traveling behind the tractors; that following the McDonald car were two other vehicles—one being driven by Philander Green and the other being driven by Anderson Thomas; and that according to the debris and physical damages, the Thomas car collided with the Green car, the Green car collided with the McDonald car, and the McDonald car careened across the road into the path of Nall's vehicle.

It will be observed that no witness identfied Mrs. Virgie C. McDonald as being either the owner or the driver of any of the vehicles involved in the collisions. Under these circumstances we hold that the trial court properly directed a verdict in favor of Mrs. McDonald.

Affirmed.

THE SINGER COMPANY, WOOD PRODUCTS DIV., EMPLOYER *v.* JOE JOHNSTON, EMPLOYEE

5-4388 421 S. W. 2d 341

Opinion delivered December 11, 1967

Barrett, Wheatley, Smith & Deacon, for appellant.

Frank Lady, for appellee.

CARLETON HARRIS, Chief Justice. This is a Workmen's Compensation case. Appellee, Joe Johnston, an employee of The Singer Company, Wood Products Division, engaged in common labor, received a compensable injury to the lower back on September 20, 1963. He was paid weekly benefits for temporary total disability from September 21, 1963, through August 7, 1964, and thereafter, was paid an additional sixty-seven and one-half weeks compensation, representing 15% permanent partial disability to the body as a whole. The company took the position that the compensation for the healing period had been paid, and that the 15% permanent partial disability to the body as a whole was a correct rating. Johnston took the position that he was still totally disabled and unable to work, and a hearing was conducted by a referee in March, 1966. In August, 1966, the referee filed an opinion, finding that the healing

period expired on August 7, 1964, with claimant's having a residual disability of 25% to the body as a whole, and directing that Singer pay additional compensation in the total amount of $1,534.95. Claimant appealed to the full commission, and on December 5, 1966, that tribunal found that Johnston had been temporarily totally disabled since September 21, 1963, and that he should return to Dr. Matthew Wood, a Memphis neurosurgeon, for further treatment; that the matter of termination of the healing period and extent of permanent partial disability should be held in abeyance. The company appealed to the Circuit Court, which affirmed the commission, and from the judgment so entered, appellant brings this appeal.

Background of earlier events is accurately set out in the commission's "statement of the case," as follows:

"The record reflects that the claimant sustained a compensable back injury on September 20, 1963, at which time he reported to Dr. Smith's Clinic in Trumann where he was kept in traction for approximately one week. Dr. Smith then referred the claimant to Dr. Matthew W. Wood, a Memphis Neurosurgeon, and Dr. Wood's reports reflect that the claimant reported for evaluation on September 27, 1963, and was admitted to the Baptist Hospital. A pantopaque myelogram was performed which showed a large defect at the L4 level. On October 3, 1963, a large herniated L4 disc was removed on the right. The claimant was subsequently released to convalesce at home. He was seen by Dr. Wood for postoperative visit on November 21, 1963. Again on December 26, 1963, and on the December 26 visit he made complaints of continuing low back pain and was fitted with a lumbosacral support. On January 23, 1964, the claimant returned to Dr. Wood complaining of low back pain and left leg pain, the side opposite the old surgery. He was sent home to return in two months for evaluation. In a report dated April 1, 1964, Dr. Wood stated, 'His present symptomatology on the left I feel

is also related to his injury which caused the herniation on the right. I advised him to re-enter the hospital to have his left sided herniation surgically removed.' Dr. Wood's report of July 3, 1964, reflects that on June 25, 1964, from an objective standpoint the claimant was unchanged. The report of August 4, 1964, reflects that the claimant had complaints in regard to his low back but that he was advised to return to light work which does not involve excessive bending or heavy lifting. The report of September 21, 1964, reflects that the claimant had recovered and his permanent disability in relation to his herniated lumbar disc is 15 per cent."

Of course, we are only concerned with whether there was substantial evidence to support the findings of the commission, and there is no necessity to review all of the testimony. It appears that prior to working for appellant, Johnston had engaged in hard, manual labor for a number of years, and had had no trouble or difficulty with his back, legs, feet, or neck. After Dr. Wood removed the large herniated L-4 disc, Johnston returned to his home. Thereafter, he continued to complain of low back pain in his legs, and he testified that these complaints were due to his injury because of the time lapse between the injury in September, 1963, and June, 1964, when his records first indicated the other complaints. He did find the swelling in the left ankle, but felt that this was due to an arthritic condition, rather than being connected with the injury, "although we didn't prove it." As previously set out (in the commission's statement of the case), in March of 1964, Dr. Wood had advised Johnston to re-enter the hospital to have a herniated disc removed from the left; however, this operation was not performed, and the doctor did not recall the reason therefor. He said that when he last examined Johnston on August 4, 1964, he did not feel that surgery was advisable with relation to the left-sided herniation. Dr. Wood stated however, that "these discs go in and out," and there was a possibility that it would get worse. The evidence reflected that Wood

had directed a letter to The Singer Company in April, 1964, as follows:

"Gentlemen: Mr. Joe W. Johnston returned to the office on March 30, 1964 and since being seen here last has had continued low back and left leg pain. He now has signs of a herniated disc on the left side at L-4. As you know, he had a herniated L-4 disc surgically removed from the right side in October of 1963 and has done quite well from a symptomatic standpoint on the right. His present symptomatology on the left I feel is also related to his injury which caused the herniation on the right. I advised him to re-enter the hospital to have the left sided herniation surgically removed."

The doctor did not recall that the company authorized that Johnston be admitted to the hospital. He did say that, at the time of appellee's last examination, he felt that Johnston could try "light work," but that he should not work at anything that required bending, lifting, or stooping, and if he were required to stand on his feet all day, "that would work against his back." Dr. Wood was of the opinion that appellee did actually experience the pain that he complained of, and he said that the continued low back pain, going down the left leg into the left foot, was in keeping with his earlier findings of a herniated disc condition on the left side. It was his opinion that, if Johnston were still suffering back and leg pains, claimant should be further evaluated by a neurosurgeon.

Following his last visit to Dr. Wood in August, 1964, Johnston subsequently went to Dr. John T. Gray, an orthopedist at Jonesboro for examination. In a report dated March 5, 1966, Dr. Gray stated:

"Examination reveals this patient is ambulatory with slow, guarded gait and uses a cane to protect his weight from the left lower extremity. He moves about,

undressing and dressing with some difficulty—particularly in unlacing his shoes due to limited motion of the lumbar spine. * * *

"Motions of the lumbar spine are limited approximately 50% in all directions. * * *

"He is unable to do heel and toe gait. He is unable to squat and regain the erect posture. He gets on and off the examination table with considerable difficulty and has obvious pain when he rotates to the side or abdomen.

"There is limitation of motion in both hips, particularly in flexion. He can only flex to 90 degrees and complains bitterly of pain upon any attempt to flex beyond this range.* * *

"Multiple x-ray films were made. AP and lateral views of the lumbar spine reveal some calcification of the intervertebral spaces between D9 and 10 and between D10 and 11 with some definite wedging of the 7th dorsal vertebra. There is also flattening of the normal lordotic curve. There is some minimal osteoarthritic lipping of the lower lumbar vertebrae.

"Oblique views of the cervical spine show some encroachment on the spaces between C3 and 4 and C4 and 5 on the right and to a lesser extent, the 2nd and 3rd on the left. The lateral view of the cervical spine shows normal contour of the vertebrae and fairly normal intervertebral spacing. There is some osteoarthritic lipping of the inferior border and the superior border at the 4th interspace."

Dr. Gray concluded that the patient appeared disabled, and he suggested further tests before making a definite recommendation for surgery.

At the request of the referee, Johnston was referred to Dr. Robert Watson, neurosurgeon of Little Rock. Dr. Watson filed a report and also testified by deposition. Though the doctor did not advise re-exploration of

Johnston's back after viewing the myelographic studies made by Dr. Gray, he did indicate that Gray was possibly in a better position to evaluate than one who only reviews the film of the study:

"Now in answer to your question, what Doctor Gray described was something that he saw, a moving action as he did the myelogram, and of course I did not see what he saw when he did the myelogram. At repeated intervals permanent films are made of the dye in the different positions in the back and these are the films that I saw, the permanent record, not what he visualized as the dye moved, but I saw the photographs that he took, and in the photographs that were furnished me I did not see on the left side what you have just read that he saw in the moving picture."

Dr. Watson felt that claimant had a 25% permanent partial disability to the body as a whole, and that any disability beyond that point was without neurological confirmation; however, he said that, in his opinion, on June 6, 1966 (when an examination was conducted), Johnston was not able to perform what is ordinarily referred to as common ordinary labor.[1] The rating given by Dr. Watson was based on physical disability alone, and did not include any emotional factor, nor did the

[1]From Dr. Watson's report:

"On examination, this man moves about as one with very definite low back disability. He carries a cane at all times, and seemingly puts it to good use. All of his movements are made with caution and deliberation and in the examining room, with the cane laid to one side, he still, repeatedly reaches toward a table or chair for some supplemental support. This man professes to be totally unable to walk at all on either his heels or his toes, but he does not have the supportive findings to cause one to feel that he is genuinely unable to do so, and instead, I believe, this so-called inability is a reluctance or fear or limitation of his own thinking rather than to be due to bona fide inability. * * *

"Apparently this man did have an initial injury sometime in 1963, and shortly after that, he did undergo surgery for a lumbar disc lesion, and from the appearance of his x-rays, two spaces were explored. However, despite all of this, his present bona fide neuro-

rating relate in any way to age, education, training or experience of the employee. He found no evidence of disability to the neck or upper extremities. Irrespective of his views relative to permanent disability and his opinion that in time Johnston could improve to the point where he could make a living at some type of common labor, Dr. Watson, when asked, "If you were examining for a company, a firm, or a person, would you recommend that this claimant be hired to do common, ordinary physical labor in the condition that you found him to be in on June 6, 1966?" answered, "No."

We think there was ample testimony to justify the commission in holding that there should be a reevaluation, and in directing further medical treatment, including surgery, if deemed advisable.

Affirmed.

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logical findings do not substantiate the extreme degree of disability that he professes to have. If such a marked degree of bona fide residual disability were actually present, then there be some reflex changes, some sensory changes, and there should be some evidences of muscle atrophy, but none of these are present. Therefore, I believe that a part of this man's present residual disability is of a bona fide character, and that an additional portion of his supposed disability is actually superimposed emotional overlay on the part of the patient. Already this man has applied for and is now receiving 100 per cent permanent residual disability benefits from the Veteran's Administration. Even if this man did have bona fide need for further surgery and if further surgery were carried out, with what the surgeon and others might think were very gratifying results, even so, I doubt that the patient would ever admit to any gratifying degree of improvement. Instead, I believe the man would always profess to still being 'totally and permanently disabled.'"

The doctor felt that Johnston's feelings were genuine: "I believe it is real to him. We might not want to accept it in our own thinking as being real, but I believe that to the man it is."

HOWE LUMBER CO. ET AL *v.* LEON PARNELL

5-4404 421 S. W. 2d 621

Opinion delivered December 11, 1967

Barton, Henry, Thurman, McCaskill & Amsler, for appellants.

Leon Parnell, for appellee.

CARLETON HARRIS, Chief Justice. This is a Workmen's Compensation case. Leon Parnell, appellee herein, was injured on October 4, 1963, while driving a tractor on that date. He was a regular employee of Carey Brothers, this concern being engaged in farming operations. Howe Lumber Company, appellant herein, and hereinafter at times referred to as Howe, operated, *inter alia,* rice farms, and this company had entered into a contract with Carey Brothers whereby the latter

was to combine the rice and haul it to the granary, using Carey Brothers' combines and trucks. Carey was to be paid at the rate of $.18 per bushel of rice delivered to the granary. Under the agreement, Howe furnished a tractor, a rice buggy and a driver to haul the rice from the combine to the truck in order to expedite the unloading of the combine. Earl Hampton, an employee of Howe, who had regularly driven the tractor and rice buggy, did not report for work on the above date, and Mr. Walter Carey directed Parnell to drive the tractor and buggy. B. S. Sullivan, farm manager for Howe, offered to give Carey some rice thrashed by an experimental combine that day. Parnell, after being injured, contended that, although regularly employed by Carey Brothers, he was, on October 4, 1963, an employee of Howe, and entitled to Workmen's Compensation Benefits as a result of the accidental injuries arising out of and in the course of the employment. The claim was heard before a referee, who found that Howe did not employ Parnell; that it exercised no control over him nor his activities in any respect, did not pay him, and did not even know that this particular employee was working. The claim was accordingly denied, and the full commission affirmed this finding on appeal, holding that Parnell was acting within the scope of his employment as an employee of Carey Brothers, but not as an employee of Howe Lumber Company. The Circuit Court of Phillips County reversed, finding that Howe agreed that Parnell could drive the tractor, and, though not paying appellee, had planned to give some additional compensation to Carey Brothers, consisting of the rice which was thrashed by the experimental combine. The court held that Parnell was a "special employee," and entered its judgment to that effect. From such judgment, appellant brings this appeal.

Appellee testified that, on the day of the accident, he went to work that morning for Mr. Walt Carey; that he had been driving a bob truck for Carey for about two weeks, hauling rice to the granary. On the day in

question, the Howe employee who normally drove the grain buggy did not show up, and Mr. Carey asked appellee to drive the buggy. Parnell complied, and was injured while so engaged:

"I was coming from unloading coming back and on the way I was coming across the rice field there and a levee had been cut level where I couldn't see it—when I was coming along there I got right at it I looked and I didn't see it—I hit it—I went up and come back down and hit me behind the seat went off the grain buggy."

Parnell received a ureteral stricture, a permanent injury, which will require a dilatation at least once a month.

Parnell testified that he did not have any conversation with anyone connected with Howe Brothers, and did not overhear any conversation between Carey and any Howe employee. He never did receive any pay from Howe, and was still an employee of Carey. He received the same rate of pay (from Carey) that he had been receiving from this employer prior to October 4. He said that Carey's insurance company paid his doctor and hospital bills, and that Mr. Charles Carey continued to pay him $33.00 a week while he was incapacitated, and before he returned to work.

Mr. Walt Carey testified that the Howe driver for the buggy did not show up on October 4, and he (Carey) told Sullivan that he had a boy who could drive the buggy, and he asked Sullivan if that would be all right. Sullivan answered in the affirmative, and said "that he would put some rice from the experimental combines—he said he would put a little rice from them in our trucks for us * * * to kindly compensate for us furnishing the driver of that tractor." Mr. Carey stated that he was the one who told appellee to drive the tractor, and that Parnell, after being dismissed from the hospital, had been employed by either the witness or his brother (Charles Carey).

B. S. Sullivan, farm manager and employee of Howe for 31 years, testified that Mr. Walt Carey directed Parnell to do the driving in question, and that he (Sullivan) had no conversation with Parnell at all, and, in fact, he would not know appellee if he saw him. He paid nothing to Parnell. According to the witness:

"* * * We didn't have a driver and Walt said I have got a boy I could put on it and when he did I told him that was all right with me because it was to their advantage the more rice they got on that truck and got it to Wabash the more money they made and they put this boy—I never did ask him his name or anything and I said well I have got an experimental combine over there cutting there will be a little bit on the hopper there might be 50 bushel and there might be 80 bushel I said when the day is over when they get through—they were running tests when they get through they will dump it on your truck because you are paying that boy to do something for me* * *."

The general principles relative to the question before us are set forth in Larson's Workmen's Compensation Law (1966), Section 48, Page 710:

"When a general employer lends an employee to a special employer, the special employer becomes liable for workmen's compensation only if

(a) The employee has made a contract of hire, express or implied, with the special employer;

(b) The work being done is essentially that of the special employer; and

(c) The special employer has the right to control the details of the work."

Further, in Section 48.10:

"Although the lent-servant doctrine is a familiar one at common law, and has produced some of the most

one at common law, and has produced some of the most venerated and most intricate cases in the law of master and servant, it is necessary to stress once more that the workmen's compensation lent-employee problem is different in one significant respect: there can be no compensation liability in the absence of a contract of hire between the employee and the borrowing employer. For vicarious liability purposes, the spotlight was entirely on the two employers—what they agreed, how they divided control, how they shared payment, and whose work, as between themselves, was being done. No one paid much attention to the employee or cared whether he had consented to the transfer of his allegiance, since, after all, his rights were not usually as a practical matter involved in the suit. In compensation law, the spotlight must now be turned upon the employee, for the first question of all is: did he make a contract of hire with the special employer? If this question cannot be answered 'yes,' the investigation is closed, and there is no need to go on into tests of relative control and the like."

We are here only concerned with whether there was substantial evidence to support the ruling of the commission. It is apparent that ample proof was offered to support the ruling. In the first place, it is undisputed that no contract of hire was entered into between Howe and Parnell. In fact, Parnell himself testified that he never talked with anybody connected with appellant on the day of the accident, and he drove the Howe tractor because of directions from Mr. Walt Carey. There is also evidence that the work done was essentially for the benefit of Carey Brothers since the combines did not have to be moved to a place where the rice could be loaded on the trucks for delivery to the driver; in other words, the combines could be used continuously in the field, which would enable more rice to be combined, and thus would enable Carey Brothers to receive more money. The matter of a benefit or service to the regular employer was commented upon in our case of *Transport*

Company of Texas v. *Arkansas Fuel Oil Company*, 210 Ark. 862, 198 S. W. 2d 175. There, the question was whether one Powell was an "emergency employee" of the appellant. In reversing the decision of the trial court, which had held that Powell was an emergency employee, this court pointed out that Powell evidently was endeavoring to render a service to his own regular employer when the accident occurred. We said:

"In such cases the general rule seems to be that, where the person rendering assistance to another in an emergency has an interest for his employer in relieving the emergency condition, he does not become an emergency employee of the person to whom he renders such assistance."

It would also appear, from the testimony of the parties, highly doubtful that Howe would have had the right to control the details of the work (which appellant never attempted to do).

Appellee relies principally upon the fact that the extra grain was given to Carey as a matter of, according to appellant, compensating Carey for furnishing the driver for the Howe tractor and buggy; also, the additional fact that Sullivan knew that Parnell was driving the Howe tractor, and gave his consent for that to be done. There is no point in further discussing these particular facts, since we are not holding that as a matter of law, appellee was precluded from recovery. As stated previously, we are only concerned with whether there was substantial evidence to support the findings of the commission. We think it is evident, from what has been said, that such proof was presented.

Accordingly, the judgment of the Phillips County Circuit Court is reversed, and the cause is remanded, with directions to that court to reinstate the order entered by the commission.

ODEAN VARVIL, ADMINISTRATOR *v.* M.F.A. MUTUAL INSURANCE COMPANIES

5-4419 421 S. W. 2d 346

Opinion delivered December 11, 1967

Branch & Adair, for appellant.

Kirsch, Cathey & Brown, for appellee.

GEORGE ROSE SMITH, Justice. At the time of his death last year Howard W. Varvil owned two automobiles. The appellee had issued separate but identical insurance policies upon the two cars, each policy providing a maximum funeral benefit of $1,000. Varvil was killed while riding in what the policies refer to as a non-owned automobile. His funeral expenses amounted to $1,557.43. The appellant, as the administrator of Varvil's estate, brought this action to recover the full amount of the funeral expenses. The trial court, upon stipulated facts, sustained the defendant's contention that its liability was limited to $1,000.

The court was right. The policies contained this provision governing the situation in which the company might otherwise have been doubly liable under policies issued by it to the same person: "5. Other Automobile Insurance In The Company—With respect to any occurrence, accident, death or loss to which this and any other

automobile insurance policy issued to the named insured or spouse by the company also applies, the total limit of the company's liability under all such policies shall not exceed the highest applicable limit of liability or benefit amount under any one such policy."

There is no ambiguity in the paragraph just quoted. To the contrary, its meaning is too clearly stated to be susceptible of any misunderstanding. The appellant cites our decision in *Kansas City Fire & Marine Ins. Co.* v. *Epperson,* 234 Ark. 1100, 356 S. W. 2d 613 (1962), but that case differs significantly from this one in that there the extra premium paid for the insurance upon the second car would, under the insurer's contention, have provided no additional insurance coverage. That is not true here, for these policies explicitly declare that the coverage provided by the policy upon a particular car does not extend to bodily injury sustained by the insured or a relative while occupying another car owned by the insured. Thus the premium paid for the second policy does purchase additional protection.

Counsel cite a number of cases from other jurisdictions, but the only case that we think to be really in point is *Pcsti* v. *Nationwide Mut. Ins. Co.,* 415 Pa. 318, 203 A. 2d 660 (1964). There the policy provided, much as the ones in this case do, that the payment of benefits to any one person "shall discharge all liability of the Company for Family Compensation Insurance to that person under this or any other policy." The court rejected substantially the same argument that is now being made to us, saying:

> Really, Administrator's argument is that because Nationwide agreed to provide a certain amount of benefits for a five dollar premium it cannot assert a clear provision of an agreement the effect of which would be to provide something less than four times the amount of such benefits for twenty dollars. Such an argument does not raise an estoppel. Rather, it

> embodies a request that this Court recast the parties' bargain. Each additional rider and premium brought substantial additional benefits, and it is neither possible under the evidence nor our function under the law to calculate their worth. Hence, Administrator must be held to the bargain struck by the insured when he purchased the additional policies.

We agree with the Pennsylvania court's interpretation of the contract.

Affirmed.

OSCAR MILLER *v.* MRS. JOE TEST, ADM 'X

5-4391 421 S. W. 2d 345

Opinion delivered December 11, 1967

Davis & Mills and *G. Leroy Blankenship,* for appellant.

John W. Murphy, for appellee.

PAUL WARD, Justice. This opinion pertains to Pawn Shop loans. Oscar Miller (appellant), on three separate occasions, procured a small loan from Ed Test, d/b/a Ed's Pawn Loans, and each time turned over to Test personal property as security. Appellant brought this action in circuit court to have the loans declared null and void because of usury. Test died after the trial and the action has been revived against his wife as administratrix (appellee here). There is no dispute as to the material facts.

On January 4, 1965 appellant borrowed $10 and left with Test a pair of binoculars as security. The loan was due February 4, 1965 when appellant was to pay $11 and redeem the binoculars. At the time the loan was made Test gave appellant a Ticket No. 169 describing the security, setting out the dates, and stating that he would not be responsible for "LOSS of any article left in pawn". The Ticket also stated: "Merchandise held for 30 days". It was signed: "Ed's Pawn Loans". The other two transactions here involved were handled in exactly the same way. One was for $8, secured by a set of tools, redeemable in one month for $8.80, and the other one was for $10, secured by a transister radio, redeemable in one month for $11.

In defense of the usury charge Test stated: My usual procedure is to hold all merchandise which is given to me as security for a period of at least 3 days after the 30 days has elapsed, and then sell the property if the loan is not paid. My profit is obtained from selling merchandise left with me by borrowers. On a ten dollar loan, I have a handling and storage charge of one dollar. I do not buy insurance as it is too high but am self insured. The charge of 10% per month on loans does not result in a profit to me because those amounts are used to pay the expenses of storing the merchandise, making bookkeeping entries, and insurance on the property. In order to recover his property, a customer must repay the amount of the loan plus 10% for each month or part

of a month which has elapsed since the loan was made, otherwise, the property is sold. This 10% is not a charge for loaning the money, but is a charge for storage, paper work, and insurance.

The case was tried before the Judge, sitting as a jury, who held the loans were not usurious and dismissed appellant's complaint. The reason given for the holding was that the "charges" were made for storage, insurance, and bookkeeping.

Although the amounts here charged are small and appear to be justifiable, we are unable to say they do not constitute usury when considered in the light of numerous decisions of this Court.

In *Strickler* v. *State Auto Finance Co.,* 220 Ark. 565 (p. 574), 249 S. W. 2d 307, we cited *Joy* v. *Provident Loan Society* (Tex. Civ. App.) 37 S. W. 2d 254, and stated:

> ". . . a pawnbroker's charge represented the lender's *pro rata* cost of doing business, but was labeled 'storage charge'. In holding the charge to be usurious, the court said: 'We are unable to construe the evidence as intending the charges so made to be charges solely and only for special services in the storing of the property pledged' "

In the recent case of *Sosebee* v. *Boswell,* 242 Ark. 396 (p. 400), 414 S. W. 2d 380, it was stated:

> "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)."

In 70 C.J.S. Pawnbrokers, § 5, page 191, there appears this statement:

> "The maximum statutory rate cannot be enlarged by adding, as a subterfuge, store charges for the keeping of the property pawned."

In the case here under consideration it is undisputed that Test charged in excess of 10% interest and that the excess was used to defray overhead expenses of doing business. Consequently the loans were usurious and void. That being true appellant is entitled to recover the items delivered to Test or, if disposed of, the market value thereof.

It follows, therefore, that the case is reversed as to the question of usury and remanded for further proceedings consistent with this opinion.

L. L. JONES *v.* FAYBURN FERGUSON AND PAT SHERLAND

5-4394 421 S. W. 2d 607

Opinion delivered December 11, 1967

L. A. Hardin, for appellant.

Robert M. Smith, for appellees.

PAUL WARD, Justice. Appellant (L. L. Jones) filed a complaint in circuit court against appellees (Fayburn Ferguson and Pat Sherland) to recover damages to his truck, allegedly caused by a fire negligently started by appellees. Appellees answered denying negligence and, by cross-complaint, asked for damages to wheat loaded in the truck.

A jury having been waived, the case was tried by the Judge who refused to find negligence on the part of appellees' negligence in starting the fire. We do not

prosecute his appeal. Appellees did not perfect an appeal.

Summary of Facts. Ferguson was engaged in raising and harvesting wheat, and was assisted by Sherland. He had an agreement with appellant whereby appellant was to furnish him a truck and tractor to haul the harvested wheat from his farm to the Pioneer Grain Corporation. Pursuant to this agreement appellant was to place the truck on the wheat field to be loaded with wheat and then driven (by his employee) to its destination.

On June 11, 1966, the truck was placed on the wheat field about ten a.m. and later filled with wheat. Early that afternoon appellees started a fire to burn off the wheat field, preparatory to planting soybeans. As a result the truck was damaged by the fire.

On appeal it is urged that the trial court erred in failing to find the damage to the truck was caused by appellees' negligence in starting the fire. We do not agree.

The question of negligence is one of fact to be decided by a jury. In this case the Judge sat as a jury and his findings have the same force and effect of a jury verdict on appeal. *Newbern* v. *Morris,* 233 Ark. 938, 349 S. W. 2d 662.

In the case of *Valley Lumber Company* v. *Westmoreland Brothers,* 159 Ark. 484, 252 S. W. 609, this Court said:

> "The general rule in this country, as well as in England, now is that, in the absence of a statute, a private owner of property on whose premises a fire is accidentally started, or who sets out fire on his premises for a lawful purpose, is not liable for the damages caused thereby to the property of another, unless the fire was started, or allowed to spread, through negligence."

It is not contended here that any statute is involved or Ferguson did not have a right to start the fire for the purpose stated. The decisive issue here, therefore, is whether Ferguson (or his agent) was negligent in allowing the fire to spread to and damage appellant's truck. The undisputed evidence in this case, as revealed by the record, is presently summarized.

The truck was parked on the north side of the wheat field on fresh plowed ground and there was a breeze from north to south. Appellees disked the ground around the truck for a width of something like forty feet. Ferguson stated: "There wasn't much wind blowing at the time but it was out of the north and at times a little gusty. I do not know how it caught fire unless it was a spark from the burning wheat field." The field was burned off after the wheat was completely combined for the purpose of planting soy beans and, according to the testimony, the time was getting short for this purpose. When smoke was seen coming from the truck Ferguson, who was in the field, "ran to a ditch and got a bucket of water and was pouring water on tires and wheels on the right side. The fire spread to the other wheels and bed. We could not put out the fire".

AMI 303 defines "ordinary care" as the "care a reasonably careful person would use under circumstances similar to those shown by the evidence in this case".

Thus, the question presented to the trial Judge (sitting as a jury) was: Did appellees use ordinary care under the circumstances in this case? The Judge found in the affirmative, and we are unable to say, as a matter of law, that he erred in so finding.

Affirmed.

HARRIS, C. J. and JONES, J., dissent.

J. L. McENTIRE ET AL *v.* CURTIS ROBINSON

5-4332 421 S. W. 2d 877

Opinion delivered December 11, 1967
[Rehearing denied January 15, 1968.]

Brockman & Brockman, for appellants.

George Howard Jr., for appellee.

LYLE BROWN, Justice. Appellants, J. L., J. C., and W. A. McEntire brought this suit against their adjoining neighbor, appellee Curtis Robinson, to establish the boundary line between the parties. The McEntires claimed title up to a line fixed by the county surveyor; Robinson claimed title by adverse possession up to a fence line. When all the litigants completed their testimony the chancellor ruled that the McEntires' complaint

should be dismissed for their failure to meet the burden of proof. That ruling left the location of the boundary line undetermined. The McEntires assert on appeal that the boundary line issue was squarely raised by the pleadings and proof on the issues was submitted; therefore, say the McEntires, it became the duty of the chancellor to establish the boundary.

The Pleadings. The McEntires alleged record title to the west half of the involved forty-acre tract. Robinson, their neighbor on the east, was charged with encroaching on the McEntires' land by running a north-and-south fence some twenty feet west of the true line. They alleged the fence to have been built within the last few years. They asked the court to fix the boundary as determined by the county surveyor and to order Robinson's fence removed.

Curtis Robinson answered by claiming title to the disputed strip by adverse possession. He asserted that the fence line had been established with the consent and approval of the McEntires and pleaded estoppel. Robinson asked that plaintiffs' complaint "be dismissed for want of equity and for any and all other proper relief."

The Evidence. The McEntires produced two surveyors and six other persons as witnesses. Their testimony was directed to the survey line and their allegation that the fence was not erected by Robinson until 1962. The McEntires testified that the fence was erected without their knowledge or permission.

Curtis Robinson produced seven witnesses. Their testimony centered around these contentions: Robinson lived in a house on his property since 1944; the house was there as far back as 1909 and had since been enlarged north and south; the McEntire survey line ran through the center of the house; a survey was made in 1957 and that line ran some eight steps west of Robinson's house; Robinson built the fence in 1957; the shrubs

on Robinson's side of the fence were first planted in 1944; in 1956 J. L. McEntire and Robinson worked out a line after a survey and the following year the fence was placed on that line; for many years before the fence was erected the parties cultivated up to that line.

The Chancellor's Findings. The formal recorded order contained this single finding: "1. That the plaintiffs' Complaint should be dismissed with prejudice." That statement was followed by formal words of dismissal with prejudice. However, at the conclusion of the trial the chancellor pronounced orally his findings. They were recorded and styled "Court's Ruling." The evidence on both sides was reviewed and the conclusion reached that the testimony was "as opposite as the poles." The chancellor concluded with this statement: "In view of the fact that the present survey divides the house in which the defendant has been living since 1944 and in view of the fact that all of his improvements have been made since he acquired this property and set out trees and one thing and another, I can't see anything other than that the plaintiff has failed to meet the burden of proof and therefore the complaint will be dismissed."

The pleadings clearly placed before the court the respective theories of the adjoining owners with regard to a boundary line. Plaintiffs and defendant certainly understood the respective contentions. There were no objections to the pleadings. Proof was pointedly directed toward each allegation. In that situation it was incumbent on the trial court to fully adjudicate those issues pleaded and litigated.

In *Mandel* v. *Peet, Simms & Co.,* 18 Ark. 236 (1856), the trial court sustained a demurrer to nine pleas in abatement and entered a final judgment. This court held the entry of the judgment to be in error because there remained an issue in the case not affected by the ruling on the demurrer. *Hollis* v. *Moore,* 25 Ark. 105 (1867),

was a suit in trespass. The defendant made three separate pleas of defense. Judgment was entered for the plaintiff without defendant's pleas being resolved. For that error the case was reversed and remanded.

In the last century our own trial courts have evidently been careful to avoid the pitfalls reflected in *Mandel* and *Hollis;* otherwise we assume later citations would have been called to our attention. The rule in those cases is sound because it discourages piecemeal litigation. Particularly when a controversy as to possession of real property is in issue and can be concluded in one action, that should be done. Robinson was required by statute to plead his defenses. Ark. Stat. Ann. § 27-1121 (Repl. 1962). Logically, those defenses should be resolved.

We agree with appellants' first point, namely, that "the issue of the boundary line location was squarely raised by the complaint and answer," and should have been resolved. By their second point, the McEntires ask us to hold that the evidence preponderates in their favor. This we cannot do, for the simple reason that the trial court did not resolve the issues of adverse possession and estoppel.

The cause is reversed and remanded with directions to the trial court to fix the boundary line with such certainty that it can be identified by reference to the decree.

JOHN A. FOGLEMAN, Justice, dissenting. I respectfully dissent. In the first place, the majority is requiring the court to grant appellants relief not sought by them in the trial court. In the second place, this court is saying that a court of equity *must* decide questions raised by a defendant regardless of whether he asks for affirmative relief in the lower court or on appeal. In these respects, the majority's action is novel and, I submit, improper.

Appellants filed a complaint claiming that appellee was guilty of repeated trespasses upon the lands of the former. They alleged that appellee had erected a fence enclosing a portion of their land. They sought to have appellee enjoined from removing stakes, boundary markers and monuments, and from trespassing on the lands in question. Their prayer as to the boundary was as follows:

> "* * * [T]hat defendant be restrained and enjoined from trespassing or coming upon plaintiffs' property and that the boundary line should be established and fixed between the lands of plaintiffs and defendant at the point fixed by Mr. J. H. Shepard, the present County Surveyor of Jefferson County, Arkansas, and also at the marker previously established by using the beginning point on marker established by Mr. Clayton Gould, former County Surveyor of Jefferson County, Arkansas."

There was no prayer for general relief.

Appellee filed an answer questioning the jurisdiction of the court, contending that the action was one in ejectment. The answer also contained a general denial and pleaded adverse possession, laches and estoppel. His prayer was:

> "* * * [T]hat plaintiffs' Complaint be dismissed for want of equity and for any and all other proper relief, including the dissolution of the Restraining Order issued herein."

Thus, the court granted the exact relief sought by appellee. In doing so, I submit that it was supported by a preponderance of the evidence. Appellee did not cross appeal.

Appellants filed a motion for new trial and an amendment to a motion for new trial. In neither did

they ask the court to fix the true boundary. As a matter of fact, no party has at any time asked the court to determine the true boundary.

Just two months ago we denied an appellant relief from the trial court's dismissal of his action to quiet title. That court's dismissal was for want of equity because appellant there failed to meet the burden of proof. See *Corn* v. *Arkansas Warehouse Corporation,* 243 Ark. 130, 419 S. W. 2d 316. The identical argument was there advanced; *i. e.,* that the decree did not decide the issues between the parties. A further point of similarity is appellant's contention that it was incumbent upon the appellee-defendant to plead and prove whatever grounds for relief he might have. We said that the failure of the defendant to do this did not entitle plaintiff to relief in spite of his failure to meet his burden of proof. There, as here, the appellee only defended against the appellant's complaint but did not assert a counterclaim, did not seek any relief against the appellant, and did not appeal. If appellee here is satisfied with the disposition of the case below, I cannot see why we should not be.

In a case where there was a title dispute as between the heirs of a wife and the husband, the trial court accepted the view of the husband that he and his wife owned certain property as tenants in common and awarded one-half to each side. On appeal by the heirs, this court noted that the property was held in a tenancy by the entirety and that appellants had no claim of title. However, the decree was affirmed "as appellee does not appeal, the presumption is that he does not wish to modify or set aside the decree." *Johnson* v. *Austin,* 86 Ark. 446, 111 S. W. 455.

I agree that where there is no prayer for relief, a court should grant relief to a plaintiff where the *only* relief to which he can be entitled is at once apparent

from the allegations of the complaint. *Sannoner* v. *Jacobson & Co.,* 47 Ark. 31, 14 S. W. 458. But where there is a specific prayer for relief and a general prayer for relief, and the evidence does not sustain the complaint or the court should refuse relief on principles of equity, the trial court *may* give to the complainant any relief warranted by the facts *under his general prayer for relief. Cook* v. *Bronaugh,* 13 Ark. 183; *Kelly's Heirs* v. *McGuire,* 15 Ark. 555; *Ross* v. *Davis,* 17 Ark. 113; *Shields* v. *Trammell,* 19 Ark. 51; *Rogers* v. *Brooks,* 30 Ark. 612; *Morgan* v. *Scott-Mayer Comm. Co.,* 185 Ark. 637, 48 S. W. 2d 838; *Grytbak* v. *Grytbak* (on rehearing) 216 Ark. 674, 227 S. W. 2d 633.

The granting of such relief is permissive, not mandatory, unless the relief should follow as a natural consequence of the specific relief sought and granted or it is such as to constitute the only relief which could be granted on the facts stated. But appellants are not entitled to any relief other than the specific relief because they made no prayer for general relief. Even if they were, I do not believe that this court should remand a case to the trial court for the granting of relief when the appellants have never, in any way whatsoever, made their desire for that relief known to the trial court.

The primary object of requiring parties to present all questions and issues to the trial court is to have the lower court pass thereon so that the appellate court may determine whether the action is erroneous. *Jones* v. *Seymour,* 95 Ark. 593, 130 S. W. 560; *Schuman* v. *Mosley,* 220 Ark. 426, 248 S. W. 2d 103. In these cases it was held that a question not presented to the lower court could not be raised as an issue on appeal.

In *Western Union Telegraph Co.* v. *Freeman,* 121 Ark. 124, 180 S. W. 743, this court said that it was its uniform holding that the trial court should not be reversed for errors to which its attention was not called. It was further said that it would be manifestly unfair

to reverse a trial court for error in a ruling it did not make or have an opportunity to make.

In an action to recover land, a plaintiff did not ask for an accounting of rents in his complaint and did not appear to have insisted on it in the trial court. This court, on appeal, affirmed the decree which had ignored the accounting because it was too late to ask that relief here. *Green* v. *Clyde,* 80 Ark. 391, 97 S. W. 437.

In *Bank of Weiner* v. *Jonesboro Trust Co.,* 168 Ark. 859, 271 S. W. 952, the trust company foreclosed a real estate mortgage executed by one Ruegger. The Bank of Weiner was mortgagee in a crop mortgage which was found not to create a lien as to third parties. The bank, a defendant, contended that the foreclosure decree in favor of the trust company was erroneous in ordering a sale of the ungathered crops with the land since the crop mortgage was valid as between the parties to it. They contended that the trust company was only entitled to a judgment against Ruegger for the rents and profits. This court said:

> "It is finally insisted that the court below erred in decreeing a sale of the crop and should have given appellee a decree for the rental value of the land only. In reply to this contention, it may be said that no such issue was raised by the pleadings in the court below; and it may be further said that Ruegger has not appealed, and, as the bank has no lien on the crop, it is in no position to raise the question."

In *Angelletti* v. *Angelletti,* 209 Ark. 991, 193 S. W. 2d 330, this court denied to an appellant just such relief as is asked here. The defendant wife filed an answer and cross complaint with a prayer that the husband's complaint be dismissed, that she be granted a divorce, awarded alimony, 25 feet of a certain lot in Greenwood, court costs and attorney fees and "all other proper re-

lief." She contended on appeal that she was also entitled to an interest in a certain lot in Fort Smith, which the evidence disclosed that the husband owned. This court said:

> "The answer to the appellant's contention is found in the facts: (a) That she did not in her pleadings ask for any such interest to be ascertained and allowed; and (b) at the conclusion of the evidence, when the decree was rendered, she did not make any such claim to the trial court on which to predicate an assignment of error in this court. In short, she is raising this issue in this court, for the first time.
> * * *
> It is thus clear that the appellant never asked the chancery court to award her any interest in the Fort Smith property of the appellee. The appellant did not even mention to the chancery court that she was expecting an interest in the property, and this claimed interest is asserted in this court for the first time. Issues not presented in the trial court cannot be raised for the first time on appeal.
> * * *
> In *Gulley* v. *Budd,* Ark., 189 S. W. 2d 385, 390, decided July 9, 1945, we quoted from *Missouri Pac. R. Co.* v. *J. W. Myers Comm. Co.,* 196 Ark. 976, 120 S. W. 2d 693, as follows: 'This court has frequently held that no issue can be raised in this court which was not raised in the trial court; and since appellant's present contention was not raised in the trial court, as we have herein pointed out, we believe the relief it is now asking on appeal should be denied. *Bolen* v. *Farmers' Bonded Warehouse,* 172 Ark. 975, 291 S. W. 62; *Leonard* v. *Luther,* 185 Ark. 572, 48 S. W. 2d 242; *Banks* v. *Corning Bank & Trust Co.,* 188 Ark. 841, 68 S. W. 2d 452; *Id.,* 292 U. S. 653, 54 S. Ct. 863, 78 L. Ed. 1502; *Illinois Bankers' Life Assurance Co.* v. *Lane,* 189 Ark. 261, 71 S. W. 2d 189.' "

The opinion in *Mason* v. *Gates,* 90 Ark. 241, 119 S. W. 70, is also compelling authority. There, the appellees brought suit to quiet title to certain lots. Appellants, who were defendants, filed an answer and cross complaint asking that certain descriptions be corrected and "that plaintiffs' suit be dismissed for want of equity and for such other and further relief as may be necessary." Appellants, who were intervenors, asked that they be permitted to intervene in the suit, set up their rights and claim to some of the lots, and "make answer to the claim of the plaintiffs in this cause to the end that their rights may be protected and adjudicated." Appellants contended that title to one lot should have been vested and quieted in one of defendants and title to two of the lots quieted in intervenors, all title and claims divested out of appellees, and appellees enjoined from interfering with appellants in the use and occupancy of this property. The trial court had entered a decree dismissing the complaint of appellees. This court said there was no prayer in the pleadings by appellants for the *specific relief* set out in their contention on appeal. Recognizing that the statements of facts and not the prayer for relief constituted the cause of action and that a court *may* grant any relief that the facts thus pleaded and proved would warrant, this court affirmed the lower court. The opinion quoted from *Rogers* v. *Brooks,* 30 Ark. 612, 618, as follows:

> "* * * 'But, although it may from the proofs be apparent that the complainant is entitled to other relief, yet, unless the bill is so framed as to put such facts at issue, the court will not decree such further relief, for it would be decreeing upon an issue not before the court, and to which the proofs could not properly apply, and would tend to surprise the defendant.' "

Mandel v. *Peet, Simms & Company,* 18 Ark. 236, cited by the majority, is no precedent here. It is a law case. The appellant was the defendant below and he had

clearly raised the issue of which the trial court did not dispose before rendering a judgment for the appellee-plaintiff. This error seems obvious. The lack of similarity to this case seems just as obvious to me. The identical distinctions are applicable to *Hollis* v. *Moore,* 25 Ark. 105. I submit that there is no precedent for the action taken by the majority in this case. I further submit that there is no logic in a court's determining whether the statute of limitations has run, or whether a plaintiff is guilty of laches, or whether he is barred from relief by estoppel, when his failure to meet his burden of proof makes the determination unnecessary.

I maintain that we should remain truly an appellate court. As such, we should only be concerned with errors of the trial court and should consistently require that questions be properly raised in a trial court and that that court be given a proper opportunity to act before we give any consideration to them.

I would affirm the decree of the chancery court.

ESTEL STARNES *v.* NAOMI S. ANDRE ET AL

5-4364 421 S. W. 2d 616

Opinion delivered December 11, 1967

Shelby R. Blackmon and *Billy B. Bowe,* for appellant.

Wright, Lindsey & Jennings and *Robert D. Cabe,* for appellees.

JOHN A. FOGLEMAN, Justice. This appeal comes from a probate court judgment setting aside its previous order admitting a certain paper writing to probate as the last will of Lillian Frances Starnes, deceased. Appellant is the surviving spouse and appellees are the surviving heirs at law. The judgment appealed from was rendered upon appellees' petition to contest the probate of the will based on allegations that the will had been revoked by the testatrix. After hearing the evidence, the court made a specific finding that the will was intentionally and effectively revoked by the decedent through her cancellation of it by writing the word "void" at the top of each page of the instrument and by placing cross marks through the provisions of each page.

Appellant urges two points for reversal. They are:

I. The court erred in finding that the will of decedent was intentionally and effectively revoked.

II. The court erred in failing to apply, in the alternative, the doctrine of dependent relative revocation.

To sustain his first point, appellant argues that: (1) the action taken does not constitute an intentional revocation even if done by the testatrix and (2) the preponderance of the evidence does not support the court's finding that it was done by the testatrix with that intention.

Certain facts are undisputed. After the burial of Mrs. Starnes on the afternoon of August 12, 1966, the day after her death, Mr. Starnes, her husband, and Jay C. Calloway, a certified public accountant who had been

serving her professionally since 1942 or 1943, went through her personal papers at the Starnes home. These papers were in a metal box which Mr. Starnes had at his home and brought to the dining room table. The box appeared to have been unlocked. Certain personal papers and letters were put in one pile and the "pertinent" papers in another. Mr. Starnes put those in the latter pile in a letter container similar to a brief case and Calloway advised him that he should take them to his attorney, Mr. Blackmon, whom they had called. No will was found at that time. On Monday, August 15th, Starnes took the papers he had put in the letter carrier to Calloway's office. The four sheets of paper alleged to constitute Mrs. Starnes' holographic will were then found folded inside a small envelope. The writing on these pages was the handwriting of the decedent. On the upper part of each of the first three pages the word "void" was written so that no part of the word touched any of the writing constituting the will. Over the face of each of the four sheets were cross marks commonly called X-marks and sometimes referred to at the hearing as "hatch" marks. On the first three pages there were two or more of these marks and on the fourth page there was a single elongated X-mark virtually as long as the written matter on the page. On the first three pages a few diagonal lines appeared, in addition to those necessary to form the X's. The first three pages were testamentary in nature and signed by Mrs. Starnes. The fourth page seems to have been a memorandum of property belonging to her. Mrs. Starnes had a custom or practice of marking an "X" through the writing on personal records and papers when she was through with them.

The statutory requirements for revocation of a will are set out in Ark. Stat. Ann. § 60-406 (Supp. 1967) which is a section of our probate code. Insofar as pertinent under these circumstances, a will can be revoked only:

> "b. By being burnt, torn, cancelled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself or by another person in his presence and by his direction. If such act is done by any person other than the testator, the direction of the testator and the facts of such injury or destruction must be proved by two witnesses who are not benefited by the revocation of the will."

This provision has been virtually the same since the approval of the Revised Statutes on March 3, 1838. While the parties have cited cases from many jurisdictions as to the requisites for cancellation of a will, we need not go beyond our own statutes and decisions on two appeals involving the same will. *Cook* v. *Jeffett,* 169 Ark. 62, 272 S. W. 873; *Jeffett* v. *Cook,* 175 Ark. 369, 299 S. W. 389. While two wills were involved in those appeals, we are concerned with only the earlier one made by the testatrix in 1917, as that is the one as to which there was an issue as to revocation by cancellation. Certain words in two clauses of that typewritten will were interlined by running a pen or pencil through certain of the words in these clauses in such a way that the typewritten words were not illegible. The court said:

> "* * * [T]hat if the proof warrants the finding that these erasures were made by the testator or by her direction they operate only as a revocation of the parts of the will thus obliterated, * * *."

Since there was no direct evidence as to the custody of the will during the lifetime of testatrix and no direct proof as to who made the erasures or the circumstances under which the same were made, the court remanded the case for a fuller development of the facts without expressing any opinion as to inferences that might be drawn from the circumstances proved. On the second appeal, it was said that the will had been found with the personal effects of the testatrix after her death. The

judgment of the lower court finding the whole will to have been revoked was reversed and the case remanded with instructions to the trial court to enter a judgment to admit the will to probate. This court stated, however, that the testatrix had marked these words out and that the manner of marking or crossing them out plainly showed the intention of the testatrix to revoke her will insofar as these two clauses were concerned. In applying the opinion on the first appeal, this court said that its effect was to hold that if that which is essential to the validity of the whole will is cancelled or obliterated with the intention of revoking it, the whole will is revoked.

The writing of the word "void" on the pages of the will, together with the marks across the pages thereof in the manner and form used by Mrs. Starnes to cancel papers which had served their purpose, would justify the inference that it was done with the intention to revoke the will, if it was done by her.

Testimony was offered by appellant that the word "void" was in the handwriting of the testatrix. Calloway stated that he was familiar with her handwriting and thought that the word "void" was in her handwriting. Appellee Naomi S. Andre, a sister of Mrs. Starnes, stated that the word was definitely in her handwriting. Appellee Mavis Redmond, another sister, said that the word looked like her sister's handwriting. Camilla F. Watson, who had been employed by Mrs. Starnes as a waitress in 1942, had lived in the home of Mrs. Starnes and her first husband and had worked in Mrs. Starnes' liquor store, said that she was familiar with Mrs. Starnes' handwriting and that the word was written by her.

On the other hand, Juanita Henderson, an employee in Mrs. Starnes' liquor store since 1965, said that the word did not look like the handwriting of the latter, but she would not say positively that it was not. Lela Mae Crow said that she had worked in the liquor store for

ten years. She said the word was similar to that appearing on papers Mrs. Starnes had voided but that the "V" did not resemble Mrs. Starnes' work. Appellant's daughter testified that the word did not look like her stepmother's handwriting.

Certain exhibits were offered and identified by various witnesses to illustrate the manner of marking out written matter employed by Mrs. Starnes. Although the authenticity of some of these is questioned by appellees, we feel that the evidence that these exhibits, or at least most of them, are the handiwork of Mrs. Starnes is convincing. There is a striking similarity in the "cancelling" marks on these papers and those on the will pages.

We cannot say that the court's finding that the writing of the word "void" and the making of the marks across her holographic will were done by Mrs. Starnes with the intent to revoke it is clearly against the preponderance of the evidence.

Appellant seeks to discredit support of the court's finding by various attacks on the credibility of the witnesses on behalf of appellees. If there is any merit in any of these contentions, it is not sufficient for reversal of the trial judge who saw and heard the witnesses. Appellant also attacks the basis for the probate judge's finding by offering evidence tending to show that appellees or some of their witnesses might have had access to the will and made the marks found on it. He suggests, without introducing any evidence, that Calloway wanted to be administrator of the estate. Even if this were so, appellees are not helping him to realize that ambition, because they ask that Worthen Bank and Trust Company, the executor named when the will was admitted to probate, be named administrator. Their assault upon the testimony of Camilla Watson is based upon her admissions on cross-examination (1) that, thinking the deceased was making a mistake in planning to marry appellant in 1960, she asked Mrs. Starnes to think it over thoroughly and (2) that, in a pretrial in-

terview by appellant's attorney, she could have said that she would have voided the will if she had had the chance. Although the testimony might justify an inference that this witness was, in effect, a foster daughter of the decedent, she will take nothing if the will has been revoked. Under its terms, she and her husband and children would each receive bequests. Appellant suspects that this witness is engaged in some sort of collusion with appellees from which she would profit, but there is no evidence from which the drawing of such an inference can be justified. The attack on the credibility of the sisters of Mrs. Starnes is based on the apparent benefits to accrue to them by establishing the validity of the will. All these matters must certainly have been considered by the trial court and rejected.

The implications in support of the trial court's judgment, arising from the fact that the document in question was found among Mrs. Starnes' personal effects, are questioned by appellant who seeks to show that appellees might have had access to the will and attempted to cancel it. There can be little doubt that this document came from the metal box containing her personal papers which she kept in a closet in her bedroom. Mrs. Andre stayed in the Starnes home two nights and one day after her sister's death. She said that she only went through the Starnes bedroom to go to the bathroom. She denied knowing where her sister kept valuable papers or that there was any will. Mrs. Redmond also spent two nights there but denied being in the Starnes bedroom, although she admitted that she was not excluded from any part of the house. Mrs. Watson knew where Mrs. Starnes kept valuable papers and was at the house after the funeral. She asked appellant if he wanted her to get a policy out of the box, but he did not, even though he later brought the policies to her. She also denied knowledge of the existence of a will. One of appellant's witnesses testified that she could not tell the difference in the handwriting of Mrs. Starnes, of Mrs. Andre, and of Mrs. Watson. One of appellant's daughters also testified that the handwriting of the

three was similar. Appellant's daughters testified that the sisters had the run of the house, that Mrs. Watson was around the house both before and after the funeral and came to the house to help look for a will on the day after Starnes and Calloway had gone through the contents of the box, at which time she removed some of her daughter's clothing from the Starnes bedroom. Mrs. Andre admitted that appellant's mother saw her in the Starnes bedroom writing on a piece of paper. She claimed that she was writing down the name of a lawyer given her by Mrs. Watson as one that Mrs. Starnes had consulted. Mrs. Andre testified that Mr. Starnes told her he knew nothing about a will but knew that his wife wanted him to have the house and store and that the Watson daughter was to have $500.00.

The questions raised by this testimony have also been resolved against appellant by the trial court. We cannot say that this evidence preponderates. The mere fact that the will appeared, even in its obliterated condition, gives strong support to the court's finding. If Starnes denied knowledge of a will and did not produce one in the first search of papers with Calloway, it is much more likely that one bent on preventing the will taking effect would have destroyed it. On all of these questions of fact, we cannot overlook the failure of appellant to testify. The trial court must also have taken this into consideration in weighing the evidence. 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; *Broomfield* v. *Broomfield,* 242 Ark. 355, 413 S. W. 2d 657. His failure to testify gives rise to the presumption that his statements would have been against his interest. *Cady* v. *Guess,* 197 Ark. 611, 124 S. W. 2d 213.

Appellant also argues that we should reverse the judgment because of failure of the trial court to apply the doctrine of dependent relative revocation. This doctrine is applied to render ineffective a will revocation

made with a present and clear intention of the testator to make a new disposition as a substitute when the new disposition is not made or is ineffective. It seems to be based upon a presumption that a testator, under the circumstances, would prefer the revoked will to intestacy. This contention appears to be based upon the rather nebulous testimony of one witness that in 1965 Mrs. Starnes said she had not had time to go by and sign her will. Another witness stated that in April 1966, Mrs. Starnes said she had her will made out some time ago. Appellant has not indicated any application of this doctrine in Arkansas, nor do we know of any. We cannot find any facts which would justify its application here.

The judgment is affirmed.

JONES and BYRD, JJ., disqualified and not participating.

ROBERT W. SHELTON ET UX *v.* LUSTER C. SMITH ET AL

5-4361 421 S. W. 2d 348

Opinion delivered December 11, 1967

Jones & Stratton, for appellants.

Clark, Clark & Clark, for appellees.

J. FRED JONES, Justice. Appellants purchased a plot of ground on Lake Conway in Faulkner County and placed a house trailer on it. Appellees, as property owners in the same area, filed a complaint in the Faulkner County Chancery Court alleging that appellants are in

violation of restrictive covenants pertaining to the use of the land, and they seek the removal of the trailer and an injunction against its continued use.

The chancellor ordered the removal of the trailer and granted the injunction. On appeal to this court, appellants rely on the following points for reversal:

> "1. The trial court erred in admitting testimony over appellants' objection relating to conversation had between appellees and B. H. George, deceased.
>
> "2. The trial court erred in impressing an implied negative covenant upon lands belonging to appellants."

In their original complaint, the appellees alleged violation of a restrictive covenant in a bill of assurance, and by amendment to the complaint pleaded "reciprocal negative easement" in support of the alleged application of the covenant to the appellants and their land. The findings of the chancellor, as set forth in his letter to the attorneys in announcing his decision and directing the preparation of precedent for decree, indicate that the removal was ordered and injunction granted on proof of the allegations in the original complaint, as well as the amendment to the complaint. We conclude that the findings of the chancellor are not against the preponderance of the evidence, and that the evidence submitted in support of the original complaint is sufficient to sustain the decree.

The facts of this case are as follows: B. H. George and wife owned an 80-acre tract of land consisting of two adjoining forties described as SE¼ of the NE¼ of Section 20, and the SW¼ of the NW¼, section 21 in Township 4 North, Range 13 West in Faulkner County. A considerable portion of this 80-acre tract was taken by the state and inundated by Lake Conway. In 1951, Mr. and Mrs. George filed in the recorder's office a plat and

bill of assurance. The pertinent provisions of the bill of assurance are as follows:

> "KNOW ALL MEN BY THESE PRESENTS: That the undersigned, being the owners of lands located within Faulkner County, Arkansas, as follows:
>
> "SE¼ NE¼ Section 20, and SW¼ NW¼ Section 21, all in T4N, R13W, *which they have subdivided into lots and parcels under the name of B. H. George Subdivision,* creating Lots 1 through 13, in 'Lake View Circle' and Lots 1 through 24 in 'Shore Line Drive' all as shown upon a plan thereof heretofore filed for record in the office of the Circuit Clerk and Recorder for Faulkner County, Arkansas, the same being of record in Plat Book 'A', at page 152, do hereby make and file this Bill of Assurance in respect to said Subdivision, and henceforth it shall be a good and sufficient description of any lot or parcel therein to describe the same by reference to the Plat thereof in any deed, mortgage or other instrument conveying or affecting title to said land.
>
> "The following restrictions affecting building upon and usage of the property which is the subject of this Bill of Assurance shall be in effect for a period of 25 years from and after the date thereof;
>
> "(a) No Trailer, tent, shack, hut or similar shelter or structure shall be placed or erected upon any lot or parcel of land within said subdivision whether the same be intended for temporary use and occupancy or otherwise." (Emphasis supplied).

Subparagraphs (b), (c) and (d) restrict the buildings as to property lines on the lots and parcels, restrict the use to residential purposes and set a minimum construction standard for houses to be erected. Subparagraph (e) provides for sewage disposal and then provides as follows:

> "*There restrictions are for the benefit of the present and future owners of lots within said subdivision and are intended to establish and preserve uniform and desirable building and usage standards and maintain an appearance which will be in keeping with the purposes for which the development of the subdivision is intended.* These restrictions shall be in the nature of covenants and every conveyance of any *lot or parcel* shall be subject thereto. And if any person shall violate or attempt to violate, or shall fail to perform or observe any of the foregoing restrictions, requirements, or conditions, it shall be lawful for any other person or persons owning a lot in said subdivision which is subject to the same restrictions, condition, or requirement in respect to which the violation or attempted violation occurs, to institute appropriate proceedings, either at law or equity, for the violation so done or attempted.
>
> "In Witness Whereof, we have set our hands this 10 day of February, 1951, and caused the execution of this Bill of Assurance to be duly acknowledged that it may be made of record." (Emphasis supplied).

A county road runs east and west through the 80 acre tract, and the main body of Lake Conway, insofar as it relates to the problem here, lies south of the county road. A direct fill was erected along the lake shore across the south end of a low area extending from the county road to Lake Conway, thus forming a small lake extending from the county road to the main body of Lake Conway and separated from the main body of Lake Conway by the dirt fill or dam. This small lake was designated "Minnow Lake" and is included in the plat filed with the bill of assurance.

A street designated "Lake View Circle" was laid out from the county road near the center of the platted

area and extends south along the west side of Minnow Lake and then west along the north shore of Lake Conway, curving back north and intersecting the county road again near the northwest corner of the platted area. Thirteen lots were laid out and platted fronting on Lake View Circle. Another street designated "Shore Line Drive" was laid out from the county road 345 feet east of Lake View Circle. This street extends south along the east side of Minnow Lake and then east along the north shore of Lake Conway, curving back north and intersecting the county road again near the northeast corner of the platted area. Twenty-four lots were laid out and platted fronting on Shore Line Drive. The area platted "Minnow Lake" is approximately 345 feet in width between Lake View Circle and Shore Line Drive and extends in length from the county road south to Lake Conway.

The plat is designated "B. H. George Subdivision," and after filing the plat and bill of assurance, Mr. George sold the numbered lots in the plat to appellees and others. The deeds contain the phrases, "according to the plat," and "subject to all restrictions affecting the property." After appellees purchased their lots, Mr. and Mrs. George sold all of the 80 acre tract, except the lots shown on plat of B. H. George Subdivision and other specifically excepted areas, to Ralph P. Royse and Bernice W. Royse, his wife. The land thus conveyed included the area designated "Minnow Lake," which was included within the plat, but which was not designated as a lot on the plat.

The water level was lowered in Minnow Lake and in May 1967, Mr. and Mrs. Royse sold a part of the area designated on the plat as "Minnow Lake" to the appellants, Mr. and Mrs. Shelton. The deed to the appellants described the land conveyed by metes and bounds and consisted of an irregular area with the east 105 feet fronting on Shore Line Drive (referred to in the deed as a county road), the north 97 feet fronting on Minnow Lake and the south 125 feet fronting on Lake

Conway. Appellants' property is immediately across Shore Line Drive from appellee Smith's lots and fronts the Smith lots on Shore Line Drive. Appellants' property is between the Smith lots on Shore Line Drive and Minnow Lake and Lake Conway. It is also between appellees' lots on Shore Line Drive and appellees' lots on Lake View Circle.

Appellants placed a house trailer on their land and the question presented here is whether appellants' land comes within the restrictions of the covenant contained in the bill of assurance. We are of the opinion that the chancellor was correct in holding that it does.

There is no question at all that the restrictive covenants applied to all the *numbered lots* platted on each side of Minnow Lake. There is no question that Minnow Lake is inside and near the middle of the platted area filed for record as "B. H. George Subdivision." There is no question that appellees purchased their lots subject to the restrictive covenants contained in the bill of assurance and recited in their deeds. We are of the opinion that there is no question that the parcel of land purchased by appellants comes within subparagraph (a) of the bill of assurance providing that

> "No trailer . . . shall be placed or erected upon any lot *or parcel of land* within said subdivision whether the same be intended for temporary use and occupancy or otherwise." (Emphasis supplied).

We conclude that Minnow Lake between the two areas platted into numbered lots within the B. H. George Subdivision was not released from the restrictions of the covenant by lowering the dam and releasing the water from Minnow Lake or by filling it in, and we are of the opinion that appellees were entitled to the enforcement of this covenant in the bill of assurance.

Appellants do not question the rights of B. H. George to place the restrictive covenants on the land in the B. H. George Subdivision, and they do not question

that Mr. George followed the proper procedure in doing so by plat and bill of assurance properly filed. Appellants simply contend that the restrictive covenant in the bill of assurance does not apply to appellants' land.

In the deeds of conveyance of lots to the appellees on both sides of the plot subsequently purchased by appellants, B. H. George referred to the plat filed with the bill of assurance and the restrictions in the use of the property. We conclude that appellants' land was included in the express terms of the covenant and was subject to the restrictions.

In 20 Am. Jur. 2d, Covenants, Conditions, Etc., § 307, p. 871, we find the following statement:

> "The notice of restrictions sufficient to charge a purchaser may be actual notice or notice of facts sufficient to put him on inquiry. For instance, the notice sufficient to charge a purchaser of a lot in a subdivision with knowledge of restrictions imposed in deeds to other lots as part of a general plan, but inadvertently or otherwise omitted from the deeds in his chain of title, may be actual or constructive, including notice of facts which ought to have put him on inquiry, such as the uniform appearance of the area in which the lot is located. Thus, the uniform appearance of a particular tract, and the nature of the buildings thereon, have been considered sufficient to charge a purchaser of a lot in the tract with notice of a general plan of restrictions, or at least sufficient to put him on inquiry as to whether there was a general plan."

The chancellor apparently viewed the land, as well as heard the evidence in this case, and even in the absence of the testimony relating to conversations with B. H. George, we are of the opinion that the chancellor's findings that appellants' land is subject to the restric-

tions contained in the covenant are not against the preponderance of the evidence in this case.

We conclude that appellants' land is a "parcel" of land clearly included within the subdivision and the plat, and since we have decided that the appellants' land is subject to the express restrictions in the bill of assurance, it is unnecessary to consider either the admissibility of B. H. George's testimony or the implied negative covenants—those matters being immaterial to the disposition of the case.

The decree of the chancellor is affirmed.

J. A. BOWMAN ET AL *v.* J. W. GABEL ET AL

5-4373 421 S. W. 2d 898

Opinion delivered December 18, 1967

Lewis D. Jones and *John E. Butt,* for appellants.

David Burleson, for appellees.

CARLETON HARRIS, Chief Justice. An automobile collision occurred in Fayetteville on September 9, 1965, about 6:30 P.M., in the intersection of Vandeventer Street, running north and south, and Adams Street, running east and west. There were no traffic controls or signs at the intersection. A 1962 Chevrolet sedan was being driven south on Vandeventer by James E. Gabel, and Diane Bowman was driving a 1965 Pontiac sedan east on Adams. The Chevrolet was owned by J. W. Gabel, father of the driver, and the Pontiac was owned by the operator and her father, J. A. Bowman. The Bowmans, appellants herein, instituted suit for damages to the Pontiac, and the Gabels, appellees herein, counterclaimed for damages to the Chevrolet, and for personal injuries. Each side contended that the other driver was guilty of negligence which was the proximate cause of the collision. On trial, specific interrogatories were given to the jury, and it returned its verdict, finding that Diane Bowman Bassett[1] was not guilty of any negligence, and that James Gabel was guilty of negligence which proximately caused the collision; a verdict was rendered for the Bowmans in the sum of $1,250.00. Approximately a week later, appellees filed a motion for new trial, and thereafter, the court entered its order finding that the verdict of the jury "is not sustained by a preponderance of the evidence, that the answer, 'No,' of the jury to special interrogatory No. 1 [which referred to whether there was any negligence on the part of Diane Bowman] was against the preponderance of the evidence in this cause; and that by reason thereof the Motion for New Trial herein should be sustained." The verdict of the jury, and the judgment of the court, in accordance therewith, were set aside, and a new trial was granted. From this judgment, ap-

[1]Miss Bowman was married to Mr. Bassett sometime subsequent to the automobile collision.

pellants bring this appeal. For reversal, it is urged that the court applied the wrong rule of law in measuring the adequacy of the jury's verdict, and that, at any rate, the court clearly abused its discretion in granting the new trial for the reason that the evidence clearly preponderated in favor of the appellants.

Appellants first argue that the trial judge invaded the province of the jury, which was charged with passing upon all fact questions, and that, there being substantial evidence to support the verdict, the court was in error in setting same aside. It is further contended that the preponderance of the evidence supports the finding by the jury. Of course, we will not disturb a judgment based upon a jury verdict if there is any substantial evidence to support it (unless the court erred in giving the law). But whether there was any substantial evidence, or even a preponderance of the evidence, is not the test where the court has already set aside a verdict, and that action is appealed to this court. The proper test is stated in the recent case of *Worth James Construction Company* v. *Fulk,* 241 Ark. 444, 409 S. W. 2d 320. There, we said:

"In seeking a reversal counsel for the appellant rely upon our familiar rule that a verdict supported by any substantial evidence will be upheld in this court. That rule does not apply to a case such as this one, where the trial court has set aside the verdict as being against the weight of the testimony. Here the issue, as we have said, is whether the trial judge abused his discretion."

Appellants say:

"In examining the multitude of decisions handed down by the Supreme Court over the years, it is clear that the Court has analyzed the factual situation and that whatever the language used in the particular decision, it has determined whether or not there was any

substantial evidence to support the jury verdict; and if there was any substantial evidence to support the jury verdict, it has left the verdict intact and reversed those trial judges who have tampered with those verdicts."

Several cases are cited, but *none* relate to our reversing the trial court for setting aside a jury verdict. Our rule, enunciated in *James,* is more fully set out, and explained in a case decided in 1916, *Twist* v. *Mullinix,* 126 Ark. 427, 190 S. W. 851. There, after stating that the court had properly instructed the jury, and that there had been evidence to sustain the verdict of the jury, this court, in an opinion by Mr. Justice Wood, proceeded to discuss the question which is at issue in the present litigation, as follows:

"The rule setting forth the respective functions of the jury and the trial court and this court is well expressed in *Richardson* v. *State,* 47 Ark. 562, 567, where we said: 'But the weight of evidence and the credibility of witnesses are to be determined by the jury. It is the duty of the trial court to set aside a verdict which is clearly against the weight of the evidence. But when the case reaches us, the quesiton is no longer whether the evidence preponderates on one side or the other, or whether due credit has been given to the statements of a witness who has testified fully and fairly. But the question is, whether there is a failure of proof on a material point. To order a new trial because we differ in opinion from the circuit judge as to the weight of the testimony, or the truth or falsity of a witness, is to substitute our discretion for his discretion. And in this matter he is supposed to enjoy some advantages over us.'

"And again in *Blackwood* v. *Eads,* 98 Ark. 304-310, where we quoted from *Taylor* v. *Grant Lumber Co.,* 94 Ark. 566, as follows: 'The trial judge still has control of the verdict of the jury after and during the term it was rendered. Because of his training and experience in the weighing of testimony, and of the application of legal

rules to the same, and of his equal opportunities with the jury to weigh the evidence and judge of the credibility of witnesses, he is vested with the power to set aside their verdicts on account of errors committed by them, whereby they have failed in their verdict to do justice and enforce the right of the case under the testimony and instructions of the court. This is a necessary counterbalance to protect litigants against the failure of the administration of the law and justice on account of the inexperience of jurors.'

"In *Blackwood* v. *Eads, supra,* we said further: 'Where there is a decided conflict in the evidence this court will leave the question of determining the preponderance with the trial court, and will not disturb his ruling in either sustaining a motion for a new trial or overruling same. * * *

" 'The witnesses give their testimony under the eye and within the hearing of the trial judge. His opportunities for passing upon the weight of the evidence are far superior to those of this court. Therefore his judgment in ordering a new trial will not be interfered with unless his discretion has been manifestly abused.' * * *

"* * * We cannot approve the doctrine that it is an invasion of province of the jury for the trial court to set aside a verdict which he finds to be against the preponderance of the evidence. On the contrary if he fails to do so, he surrenders his own province, ignores his duty, and by so doing destroys the integrity of the best system that thus far has been devised in this country for the administration of justice. * * *

"* * * Having presided at the trial, and having seen and heard the witnesses testify, they have had the same opportunities as the jury, and hence are vested with the authority to ascertain whether or not the jury's verdict is in accordance with the preponderance of the evidence, and when they have found upon conflicting evidence that

such verdict is, or is not, against the weight of the evidence, such finding will not be set aside unless it is manifest that the court abused its discretion, that is, acted improvidently, arbitrarily, or capriciously in making such finding."

The trial court, in setting aside the present judgment, apparently was greatly influenced by the fact that the jury found appellant, Diane Bowman (Bassett), not guilty of any negligence. This appellant testified that she stopped at the intersection before entering; that a hedge was located on her left, which somewhat obstructed the view, so she "eased out a little bit and I still couldn't see, so I eased out a little bit more and I could see a car about half way down the block." She stated that she was about a foot from the middle of the intersection when she saw the automobile approaching. She continued, "I was just creeping, so it would be just a mile or two an hour, something like that * * * I thought, do I have time enough to go across and I decided, no, so I put my hand on the gear shift to put it in reverse." She said that before she was able to do that, the car, which was traveling 30 or 35 miles an hour, hit her automobile. A young lady in the car with her agreed that she was traveling about "one mile per hour," and this witness testified that the Gabel car was traveling 25 or 30 miles per hour. Gabel testified that as he approached the intersection, he looked to the left and found it clear, looked to the right, but there were shrubs that obstructed the view; however, he did not see any automobile; he then looked back to his left when entering the intersection, and he was hit by the Bowman vehicle. His sister, riding in the car with him, testified that appellant was driving at a "pretty rapid" speed. Photographs taken of the two vehicles reflect that the front end of the Pontiac (Bowman car) was pretty well smashed, and the right hand side of the Chevrolet (Gabel car) was crushed from a point just behind the right head light, the damage extending almost through the back door. A photograph of the front of the Chevrolet

reveals no damage to that portion of appellee's car. This evidence indicates that Mrs. Bassett was mistaken when she said that the Gabel car struck her; rather, it would appear that her automobile did the striking. Of course, even though this be true, the mere fact that one car struck another does not necessarily mean that the driver of the first vehicle was guilty of negligence which was the proximate cause of the collision. It is however a circumstance to be considered. Likewise, the court may have found it difficult to believe that the Gabel car traveled half a block at the speed mentioned by Mrs. Bassett and the witness on her behalf, while appellant's car was traveling only a few feet. Also, he may have considered that she was negligent in attempting to back up, rather than to proceed across the street. Still again, he simply may not have believed appellant's evidence about her speed, which was not uncontradicted. In fact, the Gabel girl testified that Mrs. Bassett was driving at a "pretty rapid speed."

At any rate, as pointed out in *Twist*:

"'The witnesses give their testimony under the eye and within the hearing of the trial judge. His opportunities for passing upon the weight of the evidence are far superior to those of this court. Therefore his judgment in ordering a new trial will not be interfered with unless his discretion has been manifestly abused.' "

In fact, this abuse of discretion is likewise characterized in the same opinion (as heretofore quoted) as acting improvidently, arbitrarily or capriciously. Among other definitions, one's actions are said to be arbitrary if they are unreasonable, determined by no principle, or based upon random or convenient selection or choice, rather than on reason. The word capricious, *inter alia,* means irresponsible and impulsive, or refers to acts committed according to whim or passing fancy. Certainly, we cannot find that the action of the trial

court came within any of these definitions, and it is just as certain that it is not manifest that the court acted arbitrarily in setting aside the verdict.

Affirmed.

Carl WIDMER *v.* GIBBLE OIL COMPANY

5-4423 421 S. W. 2d 886

Opinion delivered December 18, 1967

Carl Widmer, pro se.

Warner, Warner, Ragon & Smith, for appellee.

CARLETON HARRIS, Chief Justice. Appellant, Carl Widmer, brings this appeal from the judgment entered

by the Sebastian County Circuit Court on a credit card account, after an original trial in the Fort Smith Municipal Court from which an adverse judgment was appealed. The Circuit Court tried the case on stipulated facts. It is here contended, first, that service had upon appellant was void on its face, and second, that there was accord and satisfaction. The first point is controlled by our opinion in *Widmer* v. *Price Oil Co. Inc.,* Case No. 4424, which is handed down this day.

Gibble Oil Company instituted a suit on November 23, 1966, asking judgment for $67.80, plus costs and interest, from the appellant. On November 30, 1966, Widmer sent his check to appellee in the amount of $9.01, the check being marked, "Full payment of all accounts to date." Gibble then cashed the check. This is the only factual difference between this case and *Widmer* v. *Price Oil Company,* for in that case, the check sent in a less amount (than that owed) was not cashed. This fact, however, is immaterial. As pointed out in *Price,* there must be a disputed amount involved, and a consent to accept less than that amount in settlement of the whole before there can be an accord and satisfaction. The authorities cited there are controlling here, and one cited case, *Nordlinger* v. *Libow,* 240 N. Y. S. 193, did involve the creditor's cashing a check from the debtor for a lesser amount than was due, and marked, "Full settlement of any and all claims." This holding is in accord with 6 Corbin on Contracts, Section 1277, Page 123, where it is said:

"It is not enough for the debtor merely to write on a voucher or on his check such words as 'in full payment' or 'to balance account,' where there has been no such dispute or antecedent discussion as to give reasonable notice to the creditor that the check is being tendered as full satisfaction."

In addition, we have held that a dispute or controversy about the amount of an account must be made in

good faith, *i. e.*, there must be a *bona fide* dispute. In *Massachusetts Mutual Life Insurance Company* v. *People's Loan and Investment Company,* 191 Ark. 982, this court, quoting 1 C. J. 554, said:

" 'While it is not necessary that the dispute or controversy should be well founded, it is necessary that it should be made in good faith.' "

As stated in *Price,* there is no evidence that Widmer denies that he actually owed the full amount demanded. In fact, it is stipulated that "as of November 23, 1966, the defendant Carl Widmer owed the amount of $67.80 to the Gibble Oil Company as result of credit card purchases made by said defendant from the plaintiff." Further, that "prior to November 30, 1966 [the sending of the check], no communication was exchanged between plaintiff, Gibble Oil Company, and defendant, *Carl Widmer,* in regard to the correctness or validity of said account."

Affirmed.

ARKANSAS STATE HIGHWAY COMMISSION *v.* ARKANSAS REAL ESTATE COMPANY, INC. ET AL

5-4329 421 S. W. 2d 883

Opinion delivered December 18, 1967

John R. Thompson and *Thomas B. Keys,* for appellant.

Moses, McClellan, Arnold, Owen & McDermott and *Howell, Price & Worsham,* for appellees.

GEORGE ROSE SMITH, Justice. The appellant brought this suit to condemn a right-of-way in fee simple for a controlled access highway across the appellees' property—a 77-acre tract near East Roosevelt Road in Little Rock. The jury determined just compensation to be $75,000. For reversal the appellant contends that the court

erred in refusing two requested instructions and in excluding evidence of the selling price of comparable property in the vicinity.

The plaintiff's Instruction No. 4 and the substance of No. 5 should have been given. The landowners offered much testimony to show damages resulting from the new highway's having cut off their access to a railroad and to a sewer line. Instruction No. 4 would have told the jury, substantially in the language of the statute, that political subdivisions and public utilities might use the highway commission's land for certain enumerated purposes (including the laying of sewers and railways) by agreement with the commission, provided that such uses did not interfere with the public use of the property for highway purposes. Ark. Stat. Ann. § 76-544 (Repl. 1957). Counsel for the highway commission were certainly entitled to argue to the jury that the landowner's access to the sewer line and the railroad was not necessarily being irretrievably destroyed.

In defending the court's refusal to give the instruction the appellees merely say that any possible application of the statute was precluded by the highway commission's complaint, which alleged that "this highway should be a controlled access highway facility . . . and therefore, the owners or occupants of abutting and adjoining lands shall have no right of existing, future, or potential common law or statutory rights of access or ingress and egress to, from, or across this facility to or from abutting and adjoining lands." We do not so construe the complaint. All that the quoted language refers to is the landowner's ordinary right to enter and leave a public highway that abuts his property. That right does not exist with respect to a controlled access facility. Ark. Stat. Ann. § 76-2202; *Arkansas State Highway Commn.* v. *Bingham,* 231 Ark. 934, 333 S. W. 2d 728 (1960). It does not follow, however, that the landowner is also denied the benefit of Section 76-544, *supra,* which, like the controlled access statute, was passed by the 1953 legislature. There is no conflict between the two acts.

Requested Instruction No. 5 defined a controlled access highway, in the language of the statute, and went on to say that the highway had been constructed in accordance with certain plans on file with the highway department and that if the commission should in the future change the highway in such a way as to damage the landowners, then the landowners would have a new cause of action. See *Arkansas State Highway Commn.* v. *Wilmans,* 239 Ark. 281, 388 S. W. 2d 916 (1965). We may assume, without deciding, that the appellees are right in contending that the instruction was not perfectly drawn, in that the record did not justify the court in telling the jury unequivocally that the facility has been constructed in accordance with the plans. Nevertheless, in view of the necessity for a new trial, we point out that upon proper proof the commission would be entitled to a correctly worded charge on the point.

Counsel for the commission sought to prove the price for which comparable property in the neighborhood had recently been sold. The court excluded that evidence, stating that an expert witness might consider such sales in forming his opinion about the value of the property being condemned, but, said the court, such evidence had no probative value with respect to the property in dispute and therefore should not be heard by the jury. Although we might on this appeal sustain the court's ruling on the narrow ground that counsel for the commission failed to make an offer of proof that the other property was in fact comparable to the appellees' land, we must consider the point on its merits, simply because it will doubtless recur upon a new trial. The court's position was wrong. Upon a proper showing of comparability such evidence is admissible and should be heard by the jury. *Arkansas State Highway Commn.* v. *Witkowski,* 236 Ark. 66, 364 S. W. 2d 309 (1963); *City of Little Rock* v. *Sawyer,* 228 Ark. 516, 309 S. W. 2d 30 (1958). Indeed, proof of comparable sales is usually considered to be especially trustworthy, for it goes beyond the sphere of mere opinion and shows the values

arrived at by persons having a direct pecuniary interest in the matter.

The only other controverted question that may arise upon a new trial is the appellant's contention that the court erred in permitting the appellees to treat the land as being a single ownership, when in fact it was owned by two different corporations. Owing to the appellant's failure to reproduce the pertinent exhibits, as required by Rule 9 (d), we are unable to say whether the court erred. We may appropriately add, however, that if the landowners are able to demonstrate their right to close certain streets that seem to have been platted but never opened, they may be in a position to insist that the tract be treated as a single ownership.

Reversed.

ARKANSAS STATE BOARD OF PHARMACY *v.* TOY C. HALL ET AL

5-4366 421 S. W. 2d 888

Opinion delivered December 18, 1967

Warren & Bullion, for appellant.

Russell Elrod, for appellees.

Dickey & Dickey and *Spitzberg, Bonner, Mitchell & Hays,* amicus curiae.

GEORGE ROSE SMITH, Justice. This case began as an application by the appellees, two qualified registered pharmacists, for a permit to establish and conduct a new pharmacy at 304 South Maxwell Street in the City of Siloam Springs. The State Board of Pharmacy denied the application on the ground that it did not meet the requirements of the Board's Regulation 36, adopted in 1966. On appeal the circuit court reversed the Board's decision, holding that Paragraph 2 of the regulation—the provision pertinent to this litigation—was invalid as being beyond the authority granted to the Board by the legislature. The correctness of that ruling is the controlling question here.

We quote Paragraph 2 of the regulation:

> 2. In determining whether to issue a registered pharmacy permit for a new pharmacy or for a new location of an existing pharmacy, the Board will determine whether public need and convenience will be served by the granting of the permit at the particular location sought. The Board will not grant a permit where the granting of the permit will not serve the public need or convenience.

We need not narrate at length the facts developed at the hearing before the Board, at which the appellees were not represented by counsel. Their application for a permit was opposed by rival pharmacists in Siloam Springs, whose testimony tended to show that the operation of a pharmacy at the particular location selected by the appellees would eventually create a monopoly.

The threat of a monopoly stems from these facts: Five of the six physicians practicing in Siloam Springs are building a medical center which they will occupy together. They plan to construct, next to the medical center, a fully-equipped pharmacy. The appellees bid for the privilege of running the pharmacy. They will pay a monthly rental of $550 for the small pharmacy building (as compared to the rental of $75 a month formerly paid by the appellee Toy for a drugstore building in the same city).

One of the doctors testified that his group will have no interest in the pharmacy, will make no effort to send patients to the pharmacy, and will have no agreement with the pharmacists for rebates or a share in the profits. Despite the doctors' protestations counsel for the Board argue, and the Board doubtless believed, that the doctors' self-interest, stemming from their ownership of the building and their power to fix the rent, would ultimately result in their channeling so much business to the clinic-connected pharmacy as to give it a decided competitive advantage over the other three pharmacies in the city.

Turning to the pivotal question of law—the validity of Paragraph 2 of Regulation 36—we emphasize at the outset that our sole inquiry is whether the legislature has conferred upon the Board of Pharmacy the power to determine, as a condition to the issuance of a permit, whether the public need and convenience will be served by the operation of a pharmacy at the particular location selected by the applicant. We are not concerned either with the wisdom of the statutes governing the Board or with any questions of medical ethics that might be raised with respect to the proposed medical center and pharmacy.

Our study of the pertinent statutes firmly convinces us that the legislature has not undertaken to delegate to the Board of Pharmacy the power to exercise the

authority embodied in the regulation in question. The various acts pertaining to the Board are compiled as Title 72, Chapter 10, of the Arkansas Statutes Annotated (Repl. 1957).

The Board was created by Act 50 of 1891. That statute authorized the Board to register qualified pharmacists, with or without examination as directed by the act. It was made unlawful for any person not a registered pharmacist to conduct a drugstore, pharmacy, or apothecary shop for the compounding or dispensing of medicines.

Act 72 of 1929 embodied a more comprehensive enumeration of the Board's powers and duties. For the first time the Board was directed to register not only pharmacists but also pharmacies. Section 8 of the act provided that no person should conduct a drug-dispensing pharmacy unless it had been registered with the Board and a permit therefor obtained. Ark. Stat. Ann. § 72-1017. There was, however, no suggestion whatever that the Board was given any discretion in the matter of issuing pharmacy permits to qualified pharmacists. To the contrary, Section 5 of Act 72 (§ 72-1013) declared, "A registered pharmacist shall have a right to conduct a pharmacy." Moreover, Section 9 of the act (§ 72-1018), governing the issuance of pharmacy permits, stated that the Board "shall" issue such permits to persons the Board deems to be qualified to conduct a pharmacy. There is no hint of discretionary authority, other than in the matter of the applicant's qualifications.

Finally, we come to Act 57 of 1955, upon which the Board relies for its delegated authority to approve or disapprove pharmacy applications on the basis of public need and convenience. In point of fact, Act 57 contains not even a line bearing directly upon the issuance of pharmacy permits. The act had as its principal purpose the creation and regulation of a new class of pharmacists, to be known as Practical Druggists. Almost

every section of the act bears upon the licensing and authority of such Practical Druggists. In fact, Section 9 (§ 72-1011.5) recites: "This act is an emergency measure and any person desiring to obtain the benefits hereof and become a licensed "Practical Druggist" must file his or her application with the . . . Board of Pharmacy within ninety days after the effective date of this act . . . or be forever barred."

The Board, in insisting that it has the authority to condition the issuance of pharmacy permits upon a showing of public convenience and necessity similar to that required in the licensing of public utilities, relies upon Section 19 (§ 72-1004.1) of the foregoing Practical Druggist act, which reads as follows:

> The Arkansas State Board of Pharmacy shall have authority to make reasonable rules and regulations, not inconsistent with law, to carry out *the purposes and intentions of this act and the pharmacy laws of this state which said Board deems necessary to preserve and protect the public health.* (Our italics.)

There are two clear-cut answers to the Board's insistence that the language which we have italicized was intended to confer upon the Board a broad, nebulous, and unfettered authority to promulgate any regulations which it deems necessary to preserve and protect the public health.

First, the asserted legislative delegation of rule making authority must be read in context. It is not reasonable to believe that the lawmakers meant to bury deep in a statute governing Practical Druggists a single clause that would invest the Board with far greater powers than those granted by all the other pertinent statutes put together. Secondly, even if the legislature had decided upon a delegation of such unlimited and unbridled power, the language now in question would violate the familiar constitutional principle that in delegat-

ing legislative authority the General Assembly must spell out appropriate standards for the guidance of the administrative body by which the power is to be exercised. *Walden* v. *Hart,* 243 Ark. 650, 420 S. W. 2d 868 (1967).

It is not our province to say whether the legislature *should* invest the Board with the discretion that it sought to draw to itself by the adoption of the regulatory rule now in controversy. Our unavoidable conclusion that the legislature has *not* done so is decisive of the present case.

Affirmed.

HAROLD WILLIAMS ET AL *v.* CECIL KUEHNERT ET AL

5-4412 421 S. W. 2d 896

Opinion delivered December 18, 1967

Martin, Dodds & Kidd, for appellants.

H. B. Stubblefield, Joseph C. Kemp and *Perry V. Whitmore,* for appellees.

PAUL WARD, Justice. This litigation involves Little Rock's zoning law as it relates to a nonconforming usage.

H. W. Roper (appellee) owns a parcel of land at 8704 Oman Road on which he has for many years operated a kindergarten. This property, together with other nearby residential property, was annexed to the City and zoned "A"—one family residence. Roper's property was accepted as a nonconforming usage.

Later, on September 19, 1966, Roper filed an application with the Board of Adjustment asking for permission to make certain additions to the building in order to better accommodate the children. At the same time four property owners appeared in person, with a petition signed by fourteen property owners, and entered a protest. On October 17, 1966 a hearing was had, and the Board of Adjustment granted Roper's application on condition that certain specified driveways, parking areas, curbs, gutters, and sidewalks would be provided.

On November 14, 1966 the protestants (appellants) filed a complaint in circuit court against the Board setting out the facts previously stated and alleging, among other things, that to allow the proposed expansion would depreciate the value of their property because of increased traffic, and that it would prevent the free use of their driveways. The prayer was that the action of the Board "be declared illegal". An answer was filed by the Board, and Roper was allowed to intervene.

A jury was waived and the trial judge, after the introduction of testimony and exhibits, dismissed appellants' complaint.

On appeal, appellants rely on two points for a reversal: One, the Board had no "authority to permit the enlargement of the building", and; Two, no hardship on Roper was shown to justify the action of the Board.

One. We are unable to agree with appellants' contention that the Board had no "authority" to permit Roper to enlarge the kindergarten building.

Ark. Stat. Ann. § 19-2801 (Repl. 1956) [Building and Zoning Regulations,] in part, reads:

> "They (municipal corporations) shall have the power to regulate the erection, construction, reconstruction, alteration and repair of buildings . . . ."

Ark. Stat. Ann. § 19-2829 b (Supp. 1965), in pertinent parts, reads:

> "The board of zoning adjustment shall have the following functions: 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. . . . The board of zoning adjustment may impose conditions in the granting of a variance to insure compliance and to protect adjacent property."

Section 43-22 *Board of Adjustment* [City Zoning Ordinance] contains the following provisions:

> "The board shall have the following powers and it shall be its duty . . . . Permit the location of the following uses in a district from which they are prohibited by this chapter. . . institutions of an *edu-*

cational, religious or philanthropic nature. . . ." (Emphasis ours.)

We think it is clear from the above that the Board of Adjustment is vested with the power and "authority", and perhaps the duty under facts developed, to grant Roper's application.

To sustain their position, appellants rely on the decision in *City of West Helena* v. *Bockman,* 221 Ark. 677, 256 S.W. 2d 40, where appellee (a doctor) was not allowed to expand his clinic located in a residential zoned district. That case, however, is not controlling here because the proposed expansion extended to within eight feet of the property line in violation of a city zoning ordinance. No such issue is involved in this case.

Two. As we understand appellants' arguments here, the contentions are that the judgment of the trial court is not supported by substantial evidence.

It is contended there is no evidence to show a hardship would have been imposed on Roper if the expansion had been denied. We cannot agree. In the first place no such showing is required under section 43-22 quoted previously. Moreover the testimony does show that the addition to the building was required by the Health Department in order for the kindergarten school to continue in operation.

It may be conceded, as was contended by appellants, that the operation of the kindergarten caused a traffic problem in that vicinity, that sometimes the cars blocked the entrances from the street to nearby residences, and that this problem would be aggravated if the enrollment of the school should be increased. However, as previously stated, the Board and the trial court granted Roper's application on certain *conditions.* One condition was that additional parking space be provided. The undisputed testimony is that ample

parking space has been, or will be, provided and that said conditions will hereafter be more favorable to appellants than they were previously.

In view of what we have pointed out above, we hold the judgment of the trial court is supported by substantial evidence and therefore must be affirmed.

LINN GARNER *v.* HIGHLAND SCHOOL DISTRICT NO. 42

5-4420 421 S. W. 2d 895

Opinion delivered December 18, 1967

Shelby C. Ferguson, for appellant.

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

Eugene R. Warren, amicus curiae.

PAUL WARD, Justice. This is an action by a public school teacher against a School District for breach of contract. The pertinent facts are stipulated.

On August 10, 1964, Linn Garner (appellant here) entered into a written contract with Highland School District No. 42 of Sharp County (appellee here) to teach physical education. The contract provides, among other things, that appellant was employed ". . . for a term of 12 months beginning July 1st, 1964 . . ." for

a salary of $425 per month. On May 28, 1965 appellee wrote appellant that "Due to the expanded duty requirements in the athletic department . . . it has become necessary to terminate your contract for the 1964-1965 school year." The letter was received by appellant on June 7, 1965.

A hearing was had before the trial judge sitting, by agreement, as a jury. The judge found that: "Under the terms of the contract . . . the notice of termination given defendant (appellee) to the plaintiff (appellant) was adequate, timely and proper".

It is our conclusion that the holding of the trial court is correct and must be affirmed. Language found in Ark. Stat. Ann. § 80-1304 (Supp. 1967) is plain and controlling. The pertinent part of said section reads:

> "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 . . . ." (Emphasis supplied.)

It is undisputed that appellant was given proper notice "during the period" of his contract of employment as a teacher.

In view of the conclusion above reached it becomes unnecessary to discuss other matters raised on appeal.

Affirmed.

LARRY F. WALKER *v.* KILLOREN ELECTRIC CO.

5-4396 421 S. W. 2d 893

Opinion delivered December 18, 1967

Faubus & Henson, for appellant.

Pearson & Pearson, for appellee.

LYLE BROWN, Justice. Appellant (plaintiff below) brought this action to vacate a judgment rendered in his favor in 1950, at which time he was a minor. The demurrer and motion to dismiss the new action, filed by Killoren Electric Company, a corporation, was sustained.

Larry F. Walker, allegedly four years of age at the time, was injured from the explosion of a dynamite cap in 1948. Appellee, Killoren Electric, was at the time charged with having left the cap on the premises of Larry's grandfather, where some construction work was being performed. Suit was filed in Madison Circuit Court and judgment entered in 1950. Larry's mother brought that suit as next friend and was represented by two firms of attorneys. Judgment was entered for Larry for $2,500 and that amount was paid into the registry of the court.

After attaining majority, Larry Walker brought this suit styled "Complaint at Law to Vacate Judgment." He contends that a settlement was negotiated in 1950 and was the sole basis for the court's judgment; that the judgment was grossly inadequate; that no medical evidence was submitted to the court; and that Larry is entitled to relief under the provisions of Ark. Stat. Ann. §§ 29-117 and 29-506 (Repl. 1962).

Killoren's demurrer alleged that the facts recited in the complaint did not state a cause of action. Additionally, a motion to dismiss was grounded on the assertion that no relief was available under §§ 29-117 and 29-506. The trial court sustained the demurrer and the motion to dismiss.

Walker's appeal raises three points which we will discuss as they are listed.

Point I. The trial court erred in holding that §§ 29-117 *and* 29-506 *afford no relief to Walker.* Section 29-117 provides it is not necessary to reserve in a judgment the right of an infant to contest that judgment within one year after attaining majority. Section 29-506 sets forth eight grounds for setting aside a judgment after the expiration of the term. From an examination of that statute it is apparent that appellant is relying on the last one. "Eighth" preserves the right

of an infant, after attaining majority, to set aside an erroneous judgment *as prescribed in* § 29-117.

The privilege reserved to infants by § 29-117 is restricted to *infant defendants. Woodall* v. *Moore,* 55 Ark. 22, 17 S. W. 268 (1891). Further, this statement from *Woodall* was reiterated in *Selig* v. *Barnett,* 233 Ark. 900, 350 S. W. 2d 176 (1961):

> "When infants by their guardian or next friend go into Court to assert their rights, they proceed under the eye of the court, and are supposed to enjoy its care and protection, and conclusions therein reached are as binding upon them as upon persons *sui juris.*"

Point II. The trial court erred in holding that appellant's motion to vacate did not state a cause of action. It was the court's view that appellant did not state a cause of action under § 29-117. It is evident, from what we have said under Point I, that the ruling was correct.

Point III. The 1950 *judgment for the minor plaintiff was in reality a settlement; there was no judicial investigation of the merits of the claim; in those circumstances relief may be had against the judgment.* When a minor's interest is involved and it affirmatively appears from the judgment that the court merely embodied a settlement in its judgment, that judgment is void on its face. *Kuykendall* v. *Zachary,* 179 Ark. 478, 16 S. W. 2d 590 (1929). In *Kuykendall* the judgment recited that the parties appeared in person and by counsel and announced a settlement. On the strength of that announcement the court entered an "agreed judgment" in the amount of the settlement figure. "It affirmatively appears," says the opinion, ". . . . that the court found only that a settlement of the minor's claim had been made, and a decree was rendered in accordance with this settlement."

Kuykendall does not condemn settlement of a minor's claim; to the contrary, it is said "compromise might in many cases be entirely proper and highly advantageous to the minor." To be raised to the sanctity of a binding judgment it should be determined by the court "as being fair to the minor, and the approval would, of course, imply such investigation on the part of the court as made the fact appear that the minor's interest had not been sacrificed."

A judgment was similarly attacked in *Swindle* v. *Rogers,* 188 Ark. 503, 66 S. W. 2d 630 (1934). Judgment was entered on the same day suit was filed for the minor. Jury was waived, the court considered the complaint, the answer, and heard testimony. Being "well and sufficiently advised" the court entered judgment for the minor. That judgment was here sustained. Significantly, the record showed that testimony was heard, "thus implying that the minor's rights had been protected."

The 1950 judgment here challenged shows on its face the appearance of the parties and counsel, ready for trial. The cause was submitted to the court "upon the complaint of the Plaintiffs, the answer of the Defendant and *the oral and documentary evidence adduced* . . . ." Such words as "settlement" and "compromise" appear at no point in the record.

Affirmed.

CARL WIDMER *v.* PRICE OIL CO., INC.

5-4424 421 S. W. 2d 885

Opinion delivered December 18, 1967

Carl Widmer, pro se.

Warner, Warner, Ragon & Smith, for appellee.

LYLE BROWN, Justice. Carl Widmer brings this appeal from a judgment on a credit card account. The case originated in the Fort Smith Municipal Court. Widmer appealed from judgment there and the circuit court tried the case on stipulated facts. On appeal here Widmer contends (1) that service had upon him was void on its face, and (2) that there was accord and satisfaction.

1. *Widmer's motion to quash service.* His right to raise that point here has been waived. Widmer waived a jury, stipulated the facts based on the disagreement over accord and satisfaction, and asked the court to

"render a decision without trial or further hearings." At no stage of the proceedings did he ask the circuit court to rule on his contention that the service of summons was void. He failed to insist on a ruling, he filed answer, and consented to a trial on the merits. By those actions he waived the motion. *Street* v. *Shull,* 187 Ark. 180, 58 S. W. 2d 932 (1933); *Hill* v. *McClintock,* 175 Ark. 1059, 1 S. W. 2d 564 (1928). Also see 60 CJS Motions, § 42. In the stipulation Widmer "reserves all of his rights and privileges and reasserts that he has never been legally summoned herein." Evidently the quoted insertion was thought to vest in Widmer the right to raise the question on appeal here. Irrespective of that reservation, he did not ask the trial court to rule on the point before submitting the case on the merits.

2. *Appellant's plea of accord and satisfaction.* Price Oil Company alleged Widmer owed a stated amount on account and sued him on November 23, 1966. One week after service of summons, Widmer sent Price a check for approximately one-fifth of the alleged account. The notation, "full payment of all accounts to date," was written on the face of the check. *No controversy between the parties preceded the mailing of the check.* Price did not cash the check, nor was it returned to Widmer. However, Price's course of action conclusively shows that it had no intention of accepting the check as payment. The parties have regularly met in court on the issue of the debt since December 12; that was only 12 days after Widmer mailed the check.

In accord and satisfaction there must be a disputed amount involved and a consent to accept less than the claimed amount in settlement of the whole. *Jewell* v. *General Air Conditioning Corp.,* 226 Ark. 304, 289 S. W. 2d 881 (1956); *McMillan, Adm'r.* v. *Palmer,* 198 Ark. 805, 131 S. W. 2d 943 (1939); *Reynolds* v. *Reynolds,* 55 Ark. 369, 18 S. W. 377 (1892).

In *Nordlinger* v. *Libow,* 240 N.Y.S. 193 (1930), the creditor actually cashed a check marked "full settlement

of any and all claims." The check was for an amount smaller than a debt about which there had been no dispute. There the court held the notation to be a mere nullity. "It is elementary," said the court, "that to establish an accord and satisfaction by the payment of a lesser amount than that claimed to be due there must be a bona fide dispute as to the amount."

Did Widmer's check amount to his disputing the correctness of the claim, or did he think Price would not go to the expense of pressing in court a claim for the difference? The fact is that Widmer's answer does not deny he actually owed the full amount demanded; he merely pleaded accord and satisfaction as a conclusion.

The trial court based its judgment against Widmer on a finding that the creation of the indebtedness claimed by Price was not denied. It was found that the defense was based solely on the formality of sending a check to Price and marking "full payment" thereon. We are unable to say the trial court's finding was erroneous.

Affirmed.

ARKANSAS STATE HIGHWAY COMMISSION *v.*
SELMA PULLEN ET AL

5-4398 421 S. W. 2d 890

Opinion delivered December 18, 1967

John R. Thompson, Thomas B. Keys and *Billy Pease,* for appellant.

Williams & Gardner, for appellees.

JOHN A. FOGLEMAN, Justice. This appeal is from a judgment awarding compensation in an eminent domain case and is based on two alleged errors of the trial court. The first contention is that the court erred in failing to enter a consent judgment The second is that the trial court erred in excluding testimony of an expert witness offered by appellant as to value of the lands remaining.

Appellant states that it had an agreement with five of the seven alleged owners-defendants with reference to the amounts to be recovered by each of them as just compensation for the taking of the right-of-way. It further states that the agreement was incorporated into a precedent for a consent judgment. While the record discloses the objection of appellant's attorney to the court's failure to enter a consent judgment before the commencement of the trial, we find nothing whatever in the record to disclose the content of the proposed judgment, the terms of the agreement, or the parties thereto. There is not even anything to show that there was an agreement between these landowners and appellant. We have only the statement of appellant's attorney that five of the defendants had agreed to accept the amount deposited by appellant as estimated just compensation. This statement was made in the course of his objections to the trial judge. The colloquy between appellant's attorney and the trial judge discloses that a jury trial in this matter was about to commence. The judge indicated that the judgment would be signed after the jury retired. There is nothing to indicate that such a judgment was presented to the trial judge at the time suggested by him. Under these circumstances, we are unable to say that there was any error committed by the trial court.

A. R. Jordan, a witness offered by appellant, stated that he had been familiar with the Pullen lands for about six years before the taking. He possessed adequate professional qualifications as an expert on real estate values in the vicinity of these lands. He stated that he had passed the property two or three times per day since he became familiar with it. Seven months after the tak-

ing he inspected the lands for the first time. His only direct familiarity with the improvements on the property was gained from his observation in passing by the property on the highway and a county road. Between the time of the taking and his inspection of the property, certain improvements had been removed from the property. The witness stated that by investigation he obtained information as to the improvements that had been on the property. While a statement was made by appellant's counsel indicating what the witness would state as to the land values before and after the taking, there is no indication whatever as to the source of his information or as to what information his investigation revealed, except for a statement that he had the advantage of certain maps and plats which were not identified. It should be noted that objection was not addressed to a hypothetical question based on appropriate factual assumptions nor did appellant's attorney offer to ask such a question. While it is not always necessary for an expert on real estate values to have been personally familiar with land and its improvements before the taking of a part thereof by eminent domain, he must establish adequate familiarity with the property before he can express his opinion. *Malvern & Ouachita River RR Co.* v. *Smith,* 181 Ark. 626, 26 S. W. 2d 1107; *Bridgman* v. *Baxter County,* 202 Ark. 15, 148 S. W. 2d 673; *Arkansas State Highway Commission* v. *Johns,* 236 Ark. 585, 367 S. W. 2d 436. An expert witness, as well as a non-expert, may not express an opinion unless it is shown that he has information upon which it may reasonably be based. *Puryear* v. *Puryear,* 192 Ark. 692, 94 S. W. 2d 695. The trial judge has the responsibility for determining, in his discretion, whether such a witness possesses sufficient familiarity with the affected property to make his opinion of values thereof proper as an aid to the jury in awarding just compensation. *Puryear* v. *Puryear, supra; Bridgman* v. *Baxter County, supra; Ball* v. *Independence County,* 214 Ark. 694, 217 S. W. 2d 913. We will not reverse the action of the trial judge in the exercise of his discretion in the matter unless there has been an

abuse thereof, even though we might have decided differently if the case were presented to us in the first instance. *Arkansas Power & Light Co.* v. *Morris,* 221 Ark. 576, 254 S. W. 2d 684; *Arkansas State Highway Commission* v. *Kennedy,* 233 Ark. 844, 349 S. W. 2d 132. We are unable to say that there has been an abuse of the trial judge's discretion in this case.

Appellant urges, however, that the trial judge's ruling was not based on the witness's lack of familiarity with the improvements but on the remoteness of the witness's inspection. Appellees objected to the witness stating his value opinion after appellant had examined him as to his qualifications and familiarity with the property and the manner of arriving at his appraisal values. The trial judge then called a conference in chambers. After a discussion both on and off the record, the trial judge stated that a question had been raised and objection made that, based upon Jordan's entire testimony, he was not competent to give an appraisal as to the value of the property at the time of the taking. The judge then stated that he sustained the objection. It seems clear that the court's ruling was based on the question of sufficiency of the information of the witness, as his professional qualifications seem to be beyond question.

While appellees renewed their previous motion to dismiss this appeal, we find it unnecessary to reconsider that matter in view of the disposition we make of this case.

The judgment is affirmed.

BYRD, J., dissents.

JULIAN HOGAN ET AL *v.* LYNN DAVIS

5-4459 422 S. W. 2d 412

Opinion delivered December 18, 1967

Joe Purcell, Atty. Gen; *Henry Ginger* and *Don Langston,* Asst. Atty. Gens., for appellants.

Robert Shults, for appellee.

J. FRED JONES, Justice. This appeal questions the trial court's interpretation of Ark. Stat. Ann. § 42-404 (Repl. 1964) as it relates to the residential qualifica-

tions of Lynn Davis to serve as Director of the Department of State Police. The statute provides:

> "The Director shall be chosen on account of his qualifications and fitness for the office, shall be of good moral character and *a resident of the State of Arkansas for at least ten years next preceding his appointment.*" (Emphasis supplied.)

On June 30, 1967, in response to a request from the Governor, the Attorney General issued an opinion holding that Mr. Davis did not meet the residential qualifications. The Governor nevertheless appointed Davis as Director on August 1. The Director of Administration, in view of the Attorney General's opinion, refused to approve the payment of Davis' salary.

Davis brought this action for a declaratory judgment finding him to be qualified to hold the office. By intervention the Attorney General sought Davis' ouster by quo warranto proceedings. The trial court held that Davis is legally qualified under the statute. After a careful study of the matter we are forced to the conclusion that the trial court erred in its decision.

The legislature declared in words too plain to be misunderstood that the Director of State Police must have been a resident of the State of Arkansas for at least ten years next preceding his appointment. There can be no doubt about the fact that the lawmakers, in requiring such an extended period of residence within the state, meant to make certain that the person chosen to be Director would be familiar by first-hand observation with the varied and complex problems of law enforcement that confront the State Police Department. No other convincing reason for the ten-year requirement has been brought to our attention.

The question is: Does Davis meet the residential test that the legislature—the final authority in the matter—has seen fit to impose? Upon this question the un-

disputed facts speak so strongly for themselves that hardly any comment by the court is necessary.

Lynn Davis was born in Arkansas in 1933 and lived here until March of 1960. At that time his employer in Texarkana, Arkansas, who was developing a residential subdivision a few miles across the state line in Wake Village, Texas, suggested that to promote the sale of lots Davis should buy a house in the subdivision and move into it with his family. Davis did so. From that time on, over a period of more than seven years, Davis did not make his home in Arkansas until he returned to this state to accept the appointment to the directorship of the State Police in 1967.

In Wake Village, Texas, Davis terminated his employment with his original employer after about a year, but he took another job and continued to live in Wake Village until he sought and obtained a position with the F.B.I. in September of 1961. As a federal agent Davis lived with his family for periods of less than a year in Washington, D. C., in three cities in Illinois, and in Denver. In February, 1964, Davis moved to Rock Springs, Wyoming, where he stayed for about two and a half years. In Wyoming—the first state in which he had resided for more than a year since leaving Texas —Davis expressed his intentions about his residence so emphatically as to leave the matter not seriously open to doubt. On May 13, 1966, Davis qualified to vote in Wyoming by appearing before the registrar and making a written statement under oath that he had been a resident of the state for more than a year and was a qualified elector in the state. He did not actually vote in Wyoming, as he admits he intended to do; for he was transferred to an F.B.I. position in California and remained there until he came back to Arkansas to accept the appointment to the office of Director of the State Police Department.

To sum up, according to the undisputed proof Davis and his family lived outside Arkansas continuously for

more than seven years immediately preceding the appointment now in dispute. During all that time Davis' only real ties with Arkansas lay in the fact that his parents lived here, that he owned a house in Texarkana all along (though not always the same house), and that he intended to return to Arkansas when he could find a job here that would enable him to support his family. During his seven-year absence from the state Davis did not attempt to vote in Arkansas, did not pay poll tax here, did not pay the state income tax that is levied on residents of the state, and, of course, did not actually make his home in Arkansas.

In a case as clear-cut as this one we need not enter upon an extended discussion of the technical distinctions between "residence," which ordinarily means physical presence within the jurisdiction (with, of course, customary absences upon business, vacations, and the like), and "domicile," which differs from mere "residence" by including the subjective intent to maintain one's permanent home in the jurisdiction. The distinction between residence and domicile has been made, for example, in such cases as *Krone* v. *Cooper,* 43 Ark. 547 (1884); *Jarrell* v. *Leeper,* 178 Ark. 6, 9 S. W. 2d 778; *Missouri Pac. R.R.* v. *Lawrence,* 215 Ark. 718, 223 S. W. 2d 823; *Norton* v. *Purkins, Judge,* 203 Ark. 586, 157 S. W. 2d 765; *Harris* v. *Textor,* 235 Ark. 497, 361 S. W. 2d 75; *Husband* v. *Crockett,* 195 Ark. 1031, 115 S. W. 2d 882; *Smith* v. *Union County,* 178 Ark. 540, 11 S. W. 2d 455; *Shelton* v. *Shelton,* 180 Ark. 959, 23 S. W. 2d 629; and other cases far too numerous to mention.

Even if we agreed with the trial court that our statute required only "domicile," still appellee could not prevail. Disregarding his move to Texas which does not constitute a necessary private business absence under Article 19 § 7, his family lived with him for two and one-half years in Wyoming where he declared his intentions as to residence under oath. In order to be a qualified elector in Wyoming, one must have been a resi-

dent of the state for at least one year and of the county in which he proposes to vote for at least sixty days. Article 6, § 2, Constitution of Wyoming; Wyoming Statute, § 22-118.3j. Residence under the Wyoming election statute is defined as that place in which a person's habitation is fixed and to which, whenever he is absent, he has an intention of returning. Wyoming Statute, § 22-118.3k. The last cited subsection of the statute also provides that a person must not be considered to have gained a residence in any county into which he comes for a temporary purpose merely, without the intention of making such county his home. This action of appellee completely negates any vague and indefinite expressions of a desire to return to Arkansas, insofar as determination of place of domicile is concerned.

The point of controlling importance, which cannot possibly be swept under the judicial rug, is that the legislature meant for the Police Director to have actually lived in the state for ten years next preceding his appointment. Lynn Davis lived outside the state for more than seven of those ten years. He is thus not qualified to hold the office.

Reversed and remanded for the entry of a judgment consistent with this opinion.

WARD, J., dissents.

PAUL WARD, Justice, dissenting. Although the issues here raised cannot be easily resolved, I am not in agreement with the result reached by the majority which holds that Davis was neither a *resident* nor a *domiciliary* of Arkansas.

It is necessary therefore to examine the meaning of both of the emphasized words in construing Ark. Stat. Ann. § 42-404 (Repl. 1964).

Residence. This Court's former opinions demonstrate that the word "residence" is subject to construction and that it has a flexible meaning depending upon the circumstances involved. See: *Wheat* v. *Smith,* 50 Ark. 266, 7 S. W. 161; *State* v. *Red Oak Trust & Savings Bank,* 167 Ark. 234, 267 S. W. 566; *Mutual Benefit Health and Accident Association* v. *Kincannon,* 202 Ark. 1128, 155 S. W. 2d 687, and *Cassen* v. *Cassen,* 211 Ark. 582, 201 S. W. 2d 585. Other cases could be cited. The cases also reveal that the words "residence" and "domicile" are sometimes interchangeable, depending on the context in which they are used.

The question to be resolved, therefore, is: Did the legislature mean that Davis must have been actually present in this State for ten years, or that he must have been a "domicile" of this State for ten years? All these matters were properly considered by the trial judge, going to the intent of the legislature.

The majority cite no opinion of this Court, and I know of none, that has ever construed the word "resident" as used in the statute under consideration. The opinion does mention several cases to support it, but, I submit, a close examination reveals that none of them do so.

(a) The *Krone* case pertains to Attachment, and no statute is cited. It does refer to a Missouri opinion as holding "domicile" and "residence" have the same meaning.

(b) The *Jarrel* case also deals with Attachment, citing the *Krone* decision. It does contain these significant statements: "The question of residence is a mixed one of law and fact." The Court, referring to the *Krone* case, said: "The court recognized that the words 'resident' and 'nonresident' as used in our statute relating to attachments, had never been defined by this Court. . ."

(c) The *Missouri Pacific* case dealt with the question of venue under Act No. 314 of 1939. The word used in that Act is "resided".

(d) The *Norton* case construed the same Act of 1939 above mentioned, which used the same word, "resided".

(e) The *Harris* case again construed the word "resided".

(f) The *Husband* case construed the words "usual place of abode" as used in Ark. Stat. Ann. § 27-330 (Repl. 1962).

(g) The *Shelton* case construed the word "resided" as used in Ark. Stat. Ann. § 62-203. Webster describes the word "reside" as remain, stay, be present. The same definition is given by Black's Law Dictionary.

It must be concluded from what is pointed out above that the majority rely on no pertinent decision of this or any other court to sustain its conclusion. If the legislature, in enacting section 42-404, meant that Davis must remain or stay in Arkansas for ten years it would have used the word "reside" as it had done in so many other instances. When it used the word "residence" the legislature, in my opinion, meant Davis must be domiciled in Arkansas for ten years, especially so, being aware of the Arkansas Constitution, Article 19, § 7, which reads:

> "Absence on business of the State or of the United States, or on a visit or on necessary private business, shall not cause a forfeiture of residence once obtained."

However, the majority say Davis was not a domicile of Arkansas. Again, I disagree. It must be conceded, under the undisputed facts in this case, that Davis was

at all times away from Arkansas on business either for the United States or on private business.

In view of what has heretofore been said, I submit there is substantial evidence to support the trial court's finding that the legislature meant for the Director of Police to be a legal resident or domicile of this State. However since the majority hold Davis was not a *domicile* of Arkansas, that issue must now be examined.

Domicile. Was Davis a domiciliary of Arkansas? That question can only be answered in the affirmative when fair consideration is given to our own unchallenged definition of "domicile" and to the undisputed facts in this case.

In the case of *State* v. *Red Oak Trust & Savings Bank,* 167 Ark. 234, 267 S. W. 566, we find this statement:

> "To effect a change of residence or domicile there must be an actual abandonment of the first domicile, coupled with an intention not to return to it, and there must be a new domicile acquired by actual residence in another place or jurisdiction, with the intention of making the last-acquired residence a permanent home."

An examination of the undisputed "facts" in this case is revealing and convincing.

(a) It is not, and cannot be, disputed that Davis was once a domiciliary and legal resident of this State. He was born here in 1933; he married here in 1952; he went to school and taught school in this State; he owned (and still owns) a home here; his parents and grandparents were domiciled here.

(b) We now look to see if Davis did actually (1) abandon his established domicile with the intent not to return, and (2) to acquire a new domicile with the in-

tent to make it a permanent home? Based on the facts presently set out I submit that both questions must be answered in the negative.

(1) Davis and his wife both testified they did not abandon their home or domicile in Arkansas, but, to the contrary, they stated they at all times intended to return. There is no testimony to the contrary, the trial judge so found, and I know of no reason for reversing the holding of the trial judge on that feature of the case.

(2) Did Davis acquire a legal residence, domicile, or permanent home elsewhere? I submit the answer must be "no".

I concede appellant's right to argue, in this connection, that Davis' "actions" speak louder than his "words". In doing so, they must rely on the Texas and the Wyoming incidents to show his "actions". Consequently, it is necessary to examine the record relative to those "incidents".

Texas. In 1960, while Davis was living in his hometown of Texarkana, Arkansas, he took a job to sell houses just across the state line in Texas. He moved there and bought a house at the suggestion of his employer, because he thought it would help to sell more houses. He lived and worked there about one year when he secured a job with the F. B. I. He tried to sell the house when he left but could not find a buyer. Relative to this incident he testified: "When I moved in this house in Wake Village, Texas, I did not have any intention of making this my permanent home. I wanted to get back to Texarkana, Arkansas, as soon as I could." There is no testimony to the contrary, and I submit the trial judge was fully justified in believing Davis.

Wyoming. After Davis was sent by the F. B. I. agency to several other states he was assigned to duty

at Rock Springs, Wyoming. There he *rented* a house where he remained approximately two years. He left there in the summer of 1966, on orders, and went to California where he lived in two different places. Davis' undisputed testimony was that he never intended to make Wyoming his home, but always was trying to get the F. B. I. to send him back to Arkansas. Again, this testimony satisfied the trial judge, and it satisfies me.

Appellants lay great stress on the fact that Davis registered in Wyoming to vote for a friend, to show he intended to make Wyoming his domicile or permanent home. The trial judge did not think, and I do not think any such intention is reasonably deducible. Davis had been a resident of Wyoming for more than a year, and he could have reasonably concluded that this gave him a legal right to vote. Wy. Stat. § 22-133 reads, in pertinent part, as follows:

> "Every citizen of the United States of the age of 21 years and upward who has *resided* in the state one year . . . and who has complied with the registration laws . . . shall be entitled to vote . . . ." (Emphasis ours.)

It is admitted by everyone that Davis had "resided" in Wyoming one year, and therefore had a perfect right to register and to vote. How anyone can conclude, from that incident, Davis did, or could have meant to, abandon his domicile in Arkansas is beyond my comprehension.

CARL WIDMER *v.* APCO OIL CORPORATION

5-4422 421 S. W. 2d 888

Opinion delivered December 18, 1967

Carl Widmer, pro se.

Warner, Warner, Ragon & Smith, for appellee.

CONLEY BYRD, Justice. The issues in this appeal by appellant, Carl Widmer, against appellee, Apco Oil Corporation, are identical, except for names of parties and amounts, with those in *Carl Widmer* v. *Gibble Oil Company,* 243 Ark. 735, 421 S. W. 2d 886, decided this date. The case is affirmed for the reasons therein stated.

GENE BRYAN KENNEDY *v.* HELEN OVITA KENNEDY

5-4405 421 S. W. 2d 611

Opinion delivered December 18, 1967

Hout, Thaxton & Hout, for appellant.

Ward & Mooney, for appellee.

CONLEY BYRD, Justice. Appellant, Gene Bryan Kennedy, questions the authority of the chancellor, before entry of a final divorce decree, to reopen the case to permit the wife, Helen Ovita Kennedy, to introduce certified copies of deeds to the real property jointly owned by the parties.

The record shows that at the beginning of the hearing appellant refused to stipulate that the real property was jointly owned, but that he did stipulate to a description of the property. After the close of the hearing the chancellor found that the wife was entitled to a divorce and that no effort had been made to show how the title to the real estate was held. He concluded that he would have to assume that the title was in appellant, entitling the wife to one-third for life. The chancellor hesitated to order a sale of the property for purposes of making a division. Hoping that counsel could work out a division, he gave them until a day certain to do so, with the understanding that if a division had not been worked out by that time, he would take the matter in his own hands and make a distribution.

Before the day certain the wife filed a motion to reopen the case to introduce certified copies of deeds showing the joint ownership of certain real property involved. The chancellor granted the motion, held a hearing and incorporated into the final decree a sale and distribution in accordance with the title as shown by the deeds.

Appellant either mistakes the chancellor's oral statement dictated into the record after the first hearing as a final decree or misunderstands the nature of a Bill of Review. As to the latter, its function is to permit the chancellor, under certain limited circumstances, to review and reverse a final decree already entered of rec-

ord. A Bill of Review has no application to the discretion vested in a chancellor to reopen a case before the entry of final decree upon the record. *Turner* v. *Tapscott*, 30 Ark. 312 (1875); *Tollett* v. *Knod*, 210 Ark. 785, 197 S. W. 2d 744 (1946); *McCullough* v. *Leftwich*, 232 Ark. 99, 334 S. W. 2d 707 (1960).

Nor can we find any merit to appellant's contention that the chancellor abused his discretion in reopening the case.

Affirmed.

JOHN NORMAN HARKEY, COMMISSIONER *v.* KAY L. MATTHEWS, CHANCELLOR

5-4451 422 S. W. 2d 410

Opinion delivered December 18, 1967
[Rehearing denied January 29, 1968]

Allan W. Horne, for petitioner.

Garner & Parker, for respondent.

CONLEY BYRD, Justice. The Insurance Commissioner for the State of Arkansas by this proceeding seeks a

writ to prohibit Kay L. Matthews, Pulaski Chancery Judge, from proceeding on a petition for injunction filed in his court by Savings Guaranty Corporation, an insurance company licensed under the laws of Arkansas. We deny the petition for failure to abstract the record in accordance with our Rule 9(d).

Rule 9(d) provides that the abstract should consist of an impartial condensation, without comment, of such parts of the pleadings, proceedings, facts, documents, etc. as are necessary to an understanding of all questions presented.

The petitioner's abstract of the record is as follows:

"The grounds for the petition and the facts on which the petition are based are set out in the petition for Writ of Prohibition and may be briefly summarized as follows: On August 9, 1967, the Commissioner held a hearing relative to Savings Guaranty Corporation. At the conclusion of the hearing the Commissioner ordered that the Certificate of Authority of Savings as to a certain part of its business should be suspended but that the formal entry of the order should be withheld for a period of two weeks or such additional time as may be necessary. The Commissioner retained jurisdiction for such further orders as may be necessary in the premises. On August 22, 1967, Savings filed in the Chancery Court of Pulaski County, Arkansas a pleading entitled Petition for Injunction wherein Savings prayed for an order prohibiting and enjoining the Commissioner from entering the above-mentioned order on hearing. On the same date, without notice or hearing, a temporary order was entered in accordance with the Petition for Injunction. On August 25, 1967, Savings filed a pleading entitled 'Petition for Citation for Contempt,' alleging that the Commissioner had issued his finding of fact and order in violation of the Chancery Court's temporary order and prayed that the Commissioner be held in contempt of court. On August 23, 1967, the Commissioner filed a motion to dismiss the Petition for Injunction

for lack of jurisdiction, and an answer to the Petition for Citation for Contempt. On September 7, 1967, after a hearing held on August 28, 1967, the Chancery Court entered an order holding that it had jurisdiction of the Petition for Injunction, denying the Petition for Citation for Contempt, and ordered that the effectiveness of the Commissioner's order be held in abeyance pending a final hearing on the Petition for Injunction. As we understand the respondent's position, it is conceded that the Chancery Court does not have jurisdiction to enjoin the Commissioner after he has entered his order, it being necessary to follow the statutory procedure provided for appeals from the Commissioner's order. Thus, the single issue before this Court is whether the Chancery Court has jurisdiction to enjoin or prohibit the Commissioner from entering such order."

The only indication in the abstracts and briefs of either petitioner or respondent showing the enjoined conduct was in respondent's statement of his case. That was that the "Certificate of Authority as to the surety business of Savings Guaranty Corporation with Arkansas Loan & Thrift Corporation is hereby suspended" but that "the Insurance Commissioner will withhold formal entry of this Order for two weeks, or such additional time as may be necessary."

We have consistently held that for the writ of prohibition to issue, it must appear that the trial court proposes to act in a matter not within its jurisdiction and that petitioner has no other remedy to prevent the usurpation of jurisdiction, *Harris Distributors, Inc.* v. *Marlin, Judge,* 220 Ark. 621, 249 S. W. 2d 3 (1952).

Our cases also recognize that equity has jurisdiction to restrain acts of public officers or agencies which are ultra vires and beyond the scope of their authority, *Jensen* v. *Radio Broadcasting Co., Inc.,* 208 Ark. 517, 186 S. W. 2d 931 (1945). Of course, if the matter at issue before the Commissioner is one which he is given

authority to regulate, then the Chancery Court would have no jurisdiction, but unfortunately we are unable from the record as abstracted to make a determination either way on the matter. In this situation we must deny the petition.

Denied.

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

PAUL WARD, Justice, dissenting. The majority opinion contains this sentence: "We deny the petition for failure to abstract the record in accordance with Rule 9(d)." It then proceeds to state the provisions of that rule.

The above rule has no application in this kind of a proceeding. Applicable in a prohibition proceeding before this Court is Rule number 16 which we applied less than ten days ago in the case of *Phillip Carroll* v. *Phil Stratton* No. 4530 where we issued a temporary writ of prohibition on a petition without any briefs or abstract of the record. There, we not only granted a temporary writ but we specifically told the petitioner to proceed under Rule 16. This Rule, in material parts, reads:

> PETITIONS FOR PROHIBITION, CERTIORARI, ETC.
>
> "In cases in which the jurisdiction of this court is in fact appellate although in form original, such as petitions for writs of prohibition or certiorari, the pleadings with their exhibits are treated as the record, and the pleader is required to file only the original typewritten copy . . ."

The majority opinion also states that the only indication "showing the enjoined conduct" was the order of the Commissioner. That this statement is wholly unfounded is revealed by a casual reading of the Commissioner's petition filed in this Court, and his brief. Also,

pursuant to said Rule 16, we can consider the entire record which was filed here together with the petition.

From the above sources it can be easily ascertained that the Commissioner makes it abundantly clear that he was, when stopped by the Respondent, proceeding under Ark. Stat. Ann. § 66-2126 (Repl. 1966) which says he "shall act in a quasi-judicial capacity", and under the succeeding section which says that when he makes an order or refuses to "grant or hold a hearing after demand" an appeal "shall be granted as a matter of right to the *Circuit Court*. . ." (Emphasis added.)

In view of the above this Court should not only *consider* the petition on its merits but should also grant it, based on the following statement appearing in the majority opinion: ". . . if the matter at issue before the Commissioner is one which he is given authority to regulate, then the Chancery Court would have no jurisdiction. . ."

It appears that the only reason for the Respondent's action in this case was that the affected Insurance Company might suffer a financial loss if the Commissioner performed the duties imposed on him by the statutes. If such procedure is sanctioned by this Court the Arkansas Insurance Code [enacted to protect the people] might as well be repealed, because any insurance company that *should* be investigated will necessarily suffer a financial loss when its deficiency is exposed.

HARRIS, C. J. and JONES, J., join in this dissent.

PLASTICS RESEARCH & DEVELOPMENT CORP. *v.* BILL NORMAN ET AL

5-4308 422 S. W. 2d 121

Opinion delivered December 18, 1967
[Rehearing denied January 22, 1968]

Shaw, Jones & Shaw and *Bethell & Pearce,* for appellant.

Hardin, Barton, Hardin & Jesson, for appellees.

CONLEY BYRD, Justice. This litigation between appellant, Plastics Research & Development Corporation, and appellees, Bill Norman and Rebel Manufacturing

Company, Inc., arises out of the manufacture and sale of a plastic fishing lure called "Rebel." At issue is (1) whether Bill Norman breached his employment contract with Plastics Research calling for 4 per cent of the net profits of their lure department, (2) the method of calculating the net profits for the lure department as distinguished from the net profits of appellant's whole operation, and (3) whether Bill Norman and Rebel Manufacturing are guilty of unfair competition in the marketing of an identical lure.

Bill Norman commenced the litigation by filing cause No. 3773 based on his contract of employment with Plastics Research, which provided in part:

> "* * * 2. Employee will receive a base salary of $800.00 per month for the year November 1, 1964 through November 1, 1965. In addition thereto Employer agrees to pay to Employee, as a bonus 4% of the net profits of the Lure Department for the fiscal year November 1, 1964, ending November 1, 1965."

He prayed for an accounting of the net profits of the lure department and for a judgment for 4 per cent thereof. Appellant pleaded that Norman had breached his employment contract by incorporating "Rebel Manufacturing Company, Inc." on October 25, 1965, before his employment ended, and that Norman had solicited appellant's sales representatives to withhold orders to appellant until Rebel Manufacturing got into production of an identical lure. Prayer was that Norman take nothing on his complaint and that he be enjoined from using any information acquired while employed by appellant in the manufacture, promotion or sale of fishing lures. It was also asked that Norman be enjoined from engaging directly or indirectly in the manufacture of lures using the name "Rebel" or "Rebel Minnow."

Subsequently appellant filed cause No. 3858 against both Norman and Rebel Manufacturing, alleging unfair

competition and praying that Norman and Rebel Manufacturing be restrained from manufacturing a fishing lure similar to the "Rebel" lure, from using the name "Rebel" and from representing that appellant was in financial trouble, that Norman be directed to turn over to appellant any molds made from appellant's materials, and for damages.

The two causes were consolidated for trial. In cause No. 3858 the trial court found no unfair competition but did enjoin Norman from making statements to the effect that appellant was in such bad financial shape that it could not make delivery of goods. In cause No. 3773 the trial court found no breach of the employment contract by Norman and calculated the net income of the lure department to be $367,231.64, resulting in a judgment in Norman's favor of $14,689.26 for his bonus.

The record shows that Norman was in the fishing lure manufacturing business on his own, to some extent, at the time of his employment by appellant in the spring of 1963. Norman's first pay check from appellant was for $300 before deductions. By August 1964 his salary, by written agreement, had been increased to $15,000, and for the year ending October 31, 1965, he had a base contract for $800 per month plus 4% of the net profits of the lure department. Sales of the "Rebel" lure had climbed from nothing, at the time Norman was employed, to $893,884.50 for the year ending October 31, 1965. Appellant fired Norman on November 5, 1965.

A dispute between Norman and appellant about the net profits of the lure department had arisen before his discharge. Counsel was retained by Norman by October 18, 1965, and appellant was so notified on that date by Norman's counsel. Prior to June 20, 1965, statements showing sales and costs of purchases had been furnished to Norman, but because of labor problems between appellant and its employees no statements were furnished thereafter.

With reference to Norman's alleged breach of the employment contract, the record shows that he caused "Rebel Manufacturing Company, Inc." to be incorporated on October 25, 1965, six days before the termination of his employment contract. Prior to October 31 Norman had discussed with other employees the possibility of going into a competitive business. Furthermore, there was testimony by appellant's sales representatives that around November 1, 1965, Norman had solicited them to hold their orders until he could get into production.

The trial court found that Norman's conduct amounted to nothing more than a mere planning for employment upon the termination of his employment contract. The finding is amply supported by the record and is in accord with our prior cases. In *Hamilton Depositors Corp.* v. *Browne,* 199 Ark. 953, 136 S. W. 2d 1031 (1940), we recognized that merely organizing a corporation during employment to carry on a rival business after expiration of the term of employment did not amount to a breach of an employment contract. One is entitled to seek other employment before he is on the street.

The net profits of the lure department present the most difficult issue in this litigation. Obviously "net profit" means that which is left after payment of necessary expenses. The dispute here is complicated by appellant's departmentalized accounting and the allocation of indirect expenses among its several departments. The departmentalized accounting and intercompany charges were explained by Loren Janes, appellant's accountant, in this manner:

"Q. Now, take for instance, as I understand it, your plant is departmentalized?

A. Yes.

Q. Now mention has been previously made about charges to various departments. You have

also outside customers do you not, such as Norge and so forth?

A. Yes.

Q. Are they charged on the same basis as your departments?

A. No

Q. What is the difference?

A. It is a compromise difference, but essentially it is half the profit potential or 10% less is just what it about amounts to. Exactly what it amounts to, in fact, the in the Lure Department for instance. [sic]

Q. I don't understand that. Exactly what do you mean?

A. In the case of Norge, we would take a job, we would take a mold to run in our press, we would charge them at $8.00 per hour per thousand pieces plus material at cost, or reasonably therefor.

Q. What did this $8.00 encompass?

A. This covers everything including profit for the Production Department.

Q. Now, assume that the same item was manufactured for the Lure Department.

A. You would charge it at $7.20 per hour."

Janes testified that when a payroll was written, he directly allocated charges in labor hire, labor production, labor tooling, or labor overhead; and that when a person worked in a department his labor cost was directly charged to that department, but with overhead labor, the cost was spread according to an allocation agreed upon between the department heads, including Norman.

With reference to supplies and expenses, Janes testified that they were allocated each month on the basis of each department's outside sales as a percentage of the company's total outside sales. Thus, if the lure department sold 50 per cent of the sales of the whole company, the production department 30 per cent and the tooling department 20 per cent, these supplies would be charged on the basis of 50 per cent of the cost, say, of printing checks, to the lure department, 30 per cent to the production department and 20 per cent to the tooling department.

The records kept monthly by Janes show many discrepancies between the monthly allocations and the final allocations. For instance, the total "Direct Labor" shown on the monthly books was $84,441.51, whereas the total calculated by appellant after Norman was fired was $98,005.18. No explanation is given for the nearly $14,000 difference. The cost of purchases, as shown by the monthly books, was $148,039.70, but appellant's final calculation showed this figure to be $280,023.02.

The discrepancy in the figures involving cost of purchases was demonstrated in the following manner. Janes showed that for the eight months ending June 30, 1965, sales totaled $707,992.47 and purchases totaled $180,019.09, being a cost-to-sales ratio of 24.3 per cent. Sales on September 30 totaled $849,863.87 and purchases to the same date totaled $206,016.55, being a ratio of 24.2 per cent. Sales on October 31 totaled $893,884.50, but purchases had climbed to $280,023.02, for a cost-to-sales ratio of 31.3 per cent. By subtracting the September 30 total sales of $849,863.87 from the October 31 total of $893,884.50, and the total cost of purchases as of September 30 ($206,016.55) from the October 31 total ($280,023.02), we find that while sales increased only by $44,020.63 for October, the cost of purchases increased by $74,006.47. With respect to the October purchases, Janes testified (as abstracted by appellant):

> "*I have testified that the figures were kept monthly on each department.* I have a breakdown on the cost allocated to the lure department including outside purchases for October, 1965. That figure is $12,676.62. I am a dime off in my reconciliation, the outside invoices total $4,229.86. That's outside purchases as evidenced by invoices. The lure molding charge for the production department to the lure department for the month of October was $5,816.00 even. The lure metalizing charge for metalizing the lures for the month of October was $2,694.57. There was an audit adjustment and I have got the adjustment in a box, but there was an additional $63.91 minus due to an audit adjustment. I didn't have the time last night to actually track it down. So we actually reduced the purchases by $63.91 and that should total with the 10-cent error that should total to $12,676.62. That is the figure that is reflected on the monthly financial statement of the lure department. With reference to Plaintiff's Exhibit 15 that does not reflect all the outside purchases for the lure department. It could not because there is only $3,000.00 here and we entered $4,000.00. It could not, they have missed something." (Emphasis supplied.)

The general ledger kept by Janes also showed an inventory for October 31 of $153,889.66 and a $44,049.82 adjustment which Janes stated was due to defective lures removed from inventory and placed in a warehouse. While Janes was sure of the inventory loss because of defects, yet both he and Mr. Perrin, appellant's president, testified that everything shippable from the lures placed in the warehouse had been shipped by October 31.

Many other unexplained discrepancies appear in appellant's calculation of income for the lure department. For instance, Janes testified that costs of supplies and expenses were allocated monthly. By the monthly records the total of the costs allocated to the

lure department was $4,560.60, but in appellant's subsequent tabulation of income for the lure department $9,178.30 had been allocated for these costs. In the matter of executive salary allocation, there was included in the lure department's charges for 1965 the sum of $5,600 paid to Norman in 1965 as the bonus on his 1964 contract.

Furthermore, in connection with the net profits issue the record shows a number of accounting exhibits, which were referred to by the witnesses sometimes by exhibit number and sometimes as "that statement." None of the exhibits was abstracted, even though it would not have been impracticable to do so.

Under this state of the record, we are unable to say that the trial court's finding of net income, substantially upon the basis of appellant's general ledger, is not supported by the evidence. Because of the many discrepancies, he could very well have disregarded the allocations of indirect expenses made by appellant's accountants following Norman's dismissal.

On the issue of unfair competition, the record is clear that the "Rebel" lure was copied from the "Rapalla" lure, a balsam wood product from Finland. The difference is that the "Rebel" lure is made of plastic and has some other refinements, such as floating depth and the manner and location of the hook attachments. There is no doubt that Norman's minnow is a copy of the appellant's. Furthermore, the testimony was that appellant had expended in excess of $100,000 advertising its minnow as the "Rebel Minnow" and the "Amazing Rebel Minnow." Norman advertised his minnow as the "Reb-1" and as the "Amazing Minnow." He used the same series number to identify the size of his minnows as did appellant.

Norman's right to copy appellant's "Rebel" minnow is guaranteed to him by the federal patent laws, see

Sears, Roebuck & Co. v. *Stiffel Co.,* 376 U. S. 225 (1964). However, this does not mean that he can poach on appellant's advertising in such manner as to palm off his product as that of appellant. Nor is it necessary for appellant to prove actual deception of customers before he is entitled to an injunction where that is the natural and probable result of Norman's conduct, *Robert Reiss & Co.* v. *Herman B. Reiss, Inc.,* 63 N. Y. S. 2d 786 (1946).

Exhibit J-1, Norman's "Amazing Minnow," is packaged in a blue and white box similar to that of appellant's "Rebel" (Exhibit J-2). Where appellant has the word "Rebel" printed in white on the blue background with the Confederate flag in the top of the letter "R," Norman has two crossed Confederate flags in similar red and white on the blue background. On the white portion of the box Norman has in red the words "Amazing Minnow." Appellant, on the white portion of its box, has in red an outline of its lure. On the white ends of the boxes both exhibits have either stamped or printed thereon "103 Blue." Thus it is seen that confusion is the natural and probable result of Norman's conduct in the packaging of his product.

Consequently we hold that the trial court, in addition to its action with reference to appellant's financial condition, should have enjoined Norman and Rebel Manufacturing Company, Inc., from using the words "rebel," "Reb-1" or "amazing" in connection with the marketing of its minnows. This includes also the word "Rebel" in the Rebel Manufacturing Company, Inc. Nor do we think it was permissible for Norman to use the same series number to designate the color and sizes of his minnows—there is a considerable difference between the use of "9" and "99'r" in the case of *James Heddon's Sons* v. *Millsite Steel & Wire Works,* (6 Cir., 1942) 128 F. 2d 6, and the exact duplication of the series here.

Appellant asked for damages but the abstract fails to show any damages to have been sustained. Therefore its claim for damages is denied.

The bonus judgment is affirmed. We are reversing and remanding this cause with directions to enter an injunction restraining Norman's and Rebel Manufacturing Company's unfair competition in accordance with this opinion.

RAYMOND REED ET AL *v.* FRANK MCGIBBONEY ET AL

5-4298 422 S. W. 2d 115

Opinion delivered December 18, 1967
[Rehearing denied January 22, 1968]

Hodges, Hodges & Hodges and *John Burris,* for appellants.

Lightle & Tedder, for appellees.

CONLEY BYRD, Justice. Appellants Raymond Reed, the driver, and Ray Whitkamp, the owner of an automobile involved in a head-on collison near Cabot, Arkansas, which injured appellees Mr. and Mrs. Frank McGibboney, their daughter Sheila and Mrs. McGibboney's sister, Jackie L. Hamilton, on August 23, 1965, appeal from judgments totaling $47,100, raising numerous issues.

Ray Whitkamp, Lee Huckabee, Henry Schaechtel and Alvin Slayton were members of the Southern Farmers Association Cooperative. On August 23, 1965, at the suggestion of the local manager of the Co-op, they attended an open house of the Southern Farmers Association in Little Rock with Raymond Reed. They drove from Pocahontas in Whitkamp's car, with Reed driving at Whitkamp's request. On the return trip, at a point on highway 67 six-tenths of a mile south

of the Cabot city limits, Reed drove over a rise in the highway and found that a car ahead had stopped to make a left turn off the highway. Two cars were stacked up behind the left-turning vehicle and a third car immediately in front of Reed, driven by Richard Thompson, pulled to the right shoulder to avoid colliding with the stacked up vehicles. When Reed was unable to stop before colliding with the vehicles ahead, he pulled to his left in an effort to pass the stacked vehicles and turn into a driveway off the left side of the highway. In so doing, he collided with a vehicle driven in the opposite direction by Frank McGibboney, in which the other appellees were passengers. The collision occurred at a point some two to twelve feet off the paved portion of the highway.

Frank McGibboney received cuts and contusions. His pregnant wife received, in addition to cuts and contusions, a comminuted tibial plateau fracture of the knee and fractures of the second and third metacarpals (the bones immediately between the knuckles and the wrist) of the right hand.

Sheila McGibboney had a minor concussion and several cuts, contusions and bruises which resulted in a two-inch scar on her head near the hairline.

Jackie Hamilton received multiple lacerations of the face and nose, requiring over 200 sutures. She was bleeding so profusely at the scene of the accident that she was blinded with her own blood and thought she was going to die because of the blood coming from her throat. Her facial scars are permanent and will persist even with plastic surgery.

The jury awarded $1,350 to Frank McGibboney, $750 to his daughter Sheila, $15,000 to his wife, and $30,000 to Jackie L. Hamilton.

Appellants' first contention is that the trial court erred in admitting color photographs, made by Dr.

Hayes, of Jackie Hamilton's condition when she arrived at the hospital. Even though the trial court found the photographs to be inflamatory, we do not think he committed reversible error in permitting them to be introduced and exhibited to the jury. In *Russell* v. *Coffman,* 237 Ark. 778, 376 S. W. 2d 269 (1964), we pointed out that the admission of photographs is ordinarily within the trial court's discretion, particularly when the picture is an aid to making the testimony of the witnesses more easily understood. We think our reasoning there is sound, for if a Thomas Gray, a William Shakespeare or an Edgar Allan Poe had witnessed the accident, their descriptions of it would as aptly and inflammatorily have described Jackie Hamilton's condition as do the pictures in this record. And while appellants would agree that the eloquence of a Gray, a Shakespeare or a Poe would not help their cause, we do not believe that they would argue that their word description would not be legitimate or proper to go to the jury. Consequently we do not find the pictures, which show what words would have described, to have been improperly admitted. The pictures certainly demonstrated that Jackie Hamilton was not puffing when she said she feared for her life.

On the day following the collision Herman West, accompanied by appellees' attorney, made photographs of the scene of the accident. At the trial, both he and State Trooper Lyndell Holcomb were permitted, over objection, to identify on the photographs the point of impact of the two vehicles. While such identification may not be technically proper, under the record here we are unable to see how the matter constitutes reversible error. It was not disputed that Reed pulled into the left lane or that the collision occurred off the paved portion of the highway. Reed testified that he did not see the McGibboney vehicle coming from the north until he pulled to the left, and unequivocally stated that he knew he was going to have a wreck there anyway if he could not get off. He expected to hit someone and pulled to the left because in his opinion that was the best thing

to do. The testimony of witnesses West and Holcomb was to matters ordinarily stipulated in a trial of this kind, and we find that any error of the trial court in connection with the point of impact is harmless error.

Appellants complain of the testimony of Drs. Hayes and McKenzie about the possible aftermath of the injuries to Jackie Hamilton and Mrs. McGibboney. Dr. Hayes' testimony concerned the effect that facial scars such as Jackie's could have upon young girls of her age. The doctor testified that he could not predict what would happen in an individual case—that he had seen young girls become sort of recluses and others who did not give any external evidence of psychological maladjustment. His testimony was that it might affect her in the future. Dr. McKenzie testified that there was a possibility of Mrs. McGibboney's developing an arthritic change in her knee because of the fracture of the cartilage and the inability to get a complete anatomical reduction of the surface of the lateral joint space.

We agree with the trial court that Dr. Hayes' medical opinion about the psychological effect in general of such scars upon young girls was properly admissible. We also agree with the trial court that Dr. McKenzie's statement was proper, since his other testimony showed that Mrs. McGibboney had already developed some arthritic changes in her right ankle from injuries received in a prior accident. *Great Republic Life Ins. Co.* v. *Lankford*, 198 Ark. 166, 127 S. W. 2d 811 (1939)

On the issue of joint enterprise, the proof shows that the Co-op members were traveling in Whitkamp's car, driven by Reed, for the common purpose of attending a Southern Farmers Association open house. Mr. Whitkamp asked Reed to drive his automobile. Whitkamp stated that he could have asked him to stop the car and taken control himself at any time. Upon this evidence plaintiffs offered the joint enterprise instruction (A.M.I. 712). Appellants' objections to the instruction were as follows:

"MR. HODGES: We submit, in behalf of the defendants, that there is no evidence of joint enterprise in this case; that if there is any evidence of any sort to go to the jury, which we deny, it is rather evidence of agency relationship and should be corrected and defined to them in those terms rather than joint enterprise.

THE COURT: This is an objection which you are stating to plaintiffs' requested instruction No. 3?

MR. HODGES: Yes, sir.

THE COURT: It has to do with joint enterprise and the Court is giving said requested instruction as it is requested and the objection thereto is overruled.

MR. HODGES: Note our exceptions to the Court's ruling."

Appellant argues here that the joint enterprise instruction was erroneous and that the trial court should have submitted to the jury the instruction on agency (A.M.I. 705). In accordance with *Woodard* v. *Holliday,* 235 Ark. 744, 361 S. W. 2d 744 (1962), we hold that there was a sufficient showing of a community of interest and of equal right to share in the control and operation of the vehicle to warrant the submission to the jury of Whitkamp's vicarious liability upon either the theory of joint enterprise, or the theory of agency, or both. However, we point out that appellants did not offer an instruction on agency and they are not now in a position to complain of the trial court's action in not instructing the jury that they could in the alternative have found an agency relationship instead of a joint enterprise.

The alleged error of the trial court in failing to instruct the jury with reference to the imputed negligence of McGibboney to his passengers is without merit, since the jury specifically found upon an interrogatory that McGibboney was not negligent.

On the rule of the road instruction (A.M.I. 901[B]) the trial court instructed the jury that "When the driver sees danger ahead, or it is reasonably apparent if he is keeping a proper lookout, then he is required to use ordinary care to have his vehicle under control . . ." Since the evidence shows that McGibboney, as he proceeded along the highway, saw the vehicle waiting to make the left turn and the two or three vehicles stacked up behind it, appellants argue that the rule of the road instruction (A.M.I. 901[B]) should have included the phrase "or if he is warned of approaching imminent danger." We hold this contention to be without merit. To hold otherwise would place the court in the position of saying that every motorist when passing a vehicle waiting to make a left turn is warned of approaching imminent danger. This we are not willing to do.

Appellants' contention that the trial court erred in instructing on speed, following too closely, and overtaking and passing is not supported by the evidence. Reed admits that, at the speed at which he was traveling, he could not stop in time to avoid colliding with the vehicle in front of him; and that to avoid that collision he pulled to the left to pass the stacked up vehicles with the intention of turning into a driveway on the left or west side of the highway.

We can find no evidence in the record to support appellants' contention that the trial court should have instructed the jury on the duty and care of a passenger (A.M.I. 910).

In applying the rule on the duty and care of a passenger, we must keep in mind that before there is any substantial evidence to submit the issue to the jury, it must be shown that the passenger's conduct was a negligent act or omission and that in the production of the injury, it operated as a proximate cause or one of the proximate causes and not merely as a condition.

Furthermore, one is not negligent in assuming, until the contrary is or reasonably should be apparent, that every other person will use ordinary care and obey the law.

In the oncoming lane of traffic facing McGibboney was a vehicle signaling a left turn across his lane of traffic, and two more vehicles stacked up behind the waiting left turn vehicle. That situation, of itself, created no duty upon the passengers or guests in McGibboney's vehicle to warn him of imminent danger.

If we should assume that the failure of the passengers to see the movement of appellants' vehicle into their traffic lane was a negligent act or omission, we are then met with the issue of causation. The facts show that appellants were traveling north at approximately 60 miles per hour (or 88 feet per second) and that the McGibboney vehicle was proceeding in the opposite direction at the same approximate speed. Because of the rise in the road the two vehicles were not visible to each other for any great distance. Reed did not see McGibboney until he got in McGibboney's lane of travel. McGibboney estimates the distance from his vehicle to Reed's when Reed came into his lane as 75 yards. Both drivers place the distance at which they could first have seen each other at much less than a quarter of a mile. Therefore, if the passengers upon the point of first visibility had warned McGibboney, "Watch out, that car is apt to come over in our lane," it will be observed that, on the basis of 120 words of speech per minute, the collision could have already occurred before the warning had been completed—for the closing distance between the two cars was at the rate of 176 feet per second. What we have demonstrated here is that, in this head-on collision, the thing happened so fast that it would be pure speculation for the jury to find that the passengers' failure to warn the driver was a proximate cause of their injuries. Our law does not permit the jury so to speculate.

If appellants' contention about the due care instruction be on the basis that the passengers' injuries would not have been as great if they had been using ordinary care for their own safety, they are again met with a lack of proof. There is nothing in the record but speculation to show that the injuries would have been minimized had the passengers been keeping the lookout which appellants would now desire.

Nor do we find the verdicts in favor of Mrs. McGibboney and Miss Hamilton to be excessive.

The point which disturbs us most is the trial judge's modification of Arkansas Model Instructions 204 and 206 over the objection of both parties. The instruction as requested, being a modification of A.M.I. 206, states:

> "As a defense to the claims of Frank McGibboney, . . . and Jackie L. Hamilton, it is contended by the defendants that Frank McGibboney was guilty of negligence which was a proximate cause of his own damages, *and that his negligence was chargeable to the other plaintiffs.*"

The trial court struck the above paragraph and substituted the following:

> "As a defense to the claims of plaintiffs defendants plead contributory negligence on the part of plaintiffs' driver."

The Arkansas Model Instructions were adopted by a per curiam order of this court on April 19, 1965—the order is copied inside the front cover of the book—and since that time appeals to this court involving automobile cases have been materially reduced. The committee on model instructions has worded each instruction so that it may be read in conjunction with all other instructions without the necessity of any definitions other than those included therein. However, we must note that the instruction here was not offered by appellants in

the exact form set out in the book, but that it had added thereto the italicized words with reference to the imputed liability of the passengers in the McGibboney vehicle. Since there was no testimony to warrant an instruction on imputed negligence of the passengers in the McGibboney vehicle, the trial court did not err in refusing to give it as requested. Furthermore, the record shows that, in his oral statement of the case to the jury, the trial court stated the issues in the almost identical language of A.M.I. 206, and that an interrogatory was submitted to the jury upon the "negligence" of McGibboney. Under these circumstances, although we would have preferred the exact language of A.M.I. 206, we are unable to say that the use of the phrase "contributory negligence" amounted to a reversible error.

Affirmed.

HARRIS, C. J. and BROWN, J., dissent.

LYLE BROWN, Justice, dissenting. I would reverse as to the judgment favoring Jackie L. Hamilton. Four gruesome colored pictures, taken shortly after the accident and when she was unconscious, were admitted in evidence. Substantial portions of her face were caked with blood. Two of the four exhibits are identical. All four pictures are very similar. The trial judge admitted the exhibits were inflammatory but ruled they were not prejudicial. They were shown to the jury on a projector.

The trial court concededly had wide latitude in determining the admissibility of the pictures. Had it admitted *one* and rejected the others we might well have a different situation. But the four inflammatory pictures of such striking similarity served no legitimate purpose, the inescapable result being that fuel was added to the flame of sympathy, and prejudice was certain to follow.

It is my decided view that the trial court abused its discretion.

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

PAUL D. BOWSHER *v.* TOM F. DIGBY, JUDGE

5-4393 422 S. W. 2d 671

Opinion delivered January 8, 1968

Harry E. McDermott Jr., for petitioner.

Darrell Dover, for respondent.

CARLETON HARRIS, Chief Justice. This litigation relates to the constitutionality of Act 101 of the Arkansas General Assembly of 1963 (Ark. Stat. Ann. § 27-2501 through 27-2506 [Repl. 1962]). Rector-Phillips-Morse, Inc., hereinafter called Rector, instituted suit in the Pulaski County Circuit Court (3rd Division) against Paul D. Bowsher, petitioner herein, asserting that it was a licensed real estate broker, engaged in the business, *inter alia,* of selling land belonging to others for a commission. The complaint alleged that Bowsher, a resident of the state of Ohio, was the owner of certain lands lying in Pulaski and Perry Counties, and that Bowsher

had authorized the plaintiff to sell this land, and had agreed that if an offer were obtained for an option to purchase at a price not less than $100,000.00, petitioner would accept the offer, and grant the option "provided that the option would not be for more than six (6) months and further provided that defendant would receive at least $3,500.00 consideration for the granting of the option to be his whether or not the option was exercised."

The complaint further asserts that the plaintiff obtained an offer in compliance with these requirements, and submitted same to petitioner, but that he refused to accept the offer, and had since conveyed the property to a third party, thereby breaching his agreement with Rector. The prayer sought a judgment in the amount of $10,000.00, or whatever amount the proof might reflect it entitled to under its contract. A copy of the complaint and summons was sent by the sheriff of Pulaski County to Bowsher in Ohio by way of certified mail in compliance with the statute, heretofore mentioned. Thereafter, Bowsher appeared specially for the purpose of challenging the jurisdiction of the court of his person under the service of said summons, and he prayed that the service be quashed. Rector filed its response, contending that the court had personal jurisdiction under the statute here in question, because of Bowsher's ownership of the real estate. Subsequently, Bowsher replied, contending that the application of the statute was unconstitutional under the due process and equal protection clauses of the state and federal constitutions, it being his position that the mere ownership of land was not sufficient to give a court jurisdiction of a cause of action allegedly arising out of that ownership, without there being other contacts, or business transactions, within the state. On hearing, the court overruled Bowsher's motion, and directed him to plead further. Thereafter, Bowsher filed his petition for writ of prohibition wherein we are requested to probibit the Pulaski Circuit Court from proceeding further in this cause. The question, therefore,

which confronts us is whether, under the facts set out in the complaint, the Pulaski Circuit Court has personal jurisdiction of the non-resident defendant.

The pertinent portion of Section 27-2502 provides as follows:

"1. A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a (cause of action) (claim for relief) arising from the person's

(a) transacting any business in this State;

(b) contracting to supply services or things in this State;

(c) causing tortious injury by an act or omission in this State;

(d) causing tortious injury in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct in this State or derives substantial revenue from goods consumed or services used in this State;

(e) having an interest in, using, or possessing real property in this state; or

(f) contracting to insure any person, property, or risk located within this State at the time of contracting.

2. When jurisdiction over a person is based solely upon this section, only a (cause of action) (claim for relief) arising from acts enumerated in this section may be asserted against him."

The instant action is not based in any wise upon a theory of jurisdiction arising from Subsection (a), but respondent relies entirely on Subsection (e). We agree that prior to the passage of Act 101 of 1963, known as the long-arm statute, the court would not have had any jurisdiction over the petitioner under the ground herein

asserted; it would have been necessary to establish that the petitioner was doing business in the state of Arkansas. Petitioner's argument is that the constitution guarantees immunity from a suit in a foreign state unless the non-resident has established minimal contacts within the state, and the ownership of land, standing alone, is not sufficient to grant jurisdiction.

Apparently, at least three other states, Illinois, Wisconsin, and Pennsylvania, have passed long-arm statutes which bear a provision comparable to our own Subsection (e), though it appears that the Pennsylvania statute covers only actions for physical injuries arising from the property. Our own statute is quite similar to that of Illinois. One case has been reported. Petitioner says:

"There have been no reported cases in any state, including these three states, where a Court has held that the bare ownership of real estate is sufficient to give Court jurisdiction."

It is contended that the Illinois case of *Porter* v. *Nahas,* 182 N. E. 2d 915 (1962), cited by respondent, is not in point because of the difference in the facts. There, the owner of a Chicago apartment building sued former tenants to recover damages alleged to have been occasioned by the tenants' use of the apartment in violation of the terms of the lease. Personal service was had on the defendants in New York. The defendants appeared specially, and moved to quash the service of summons, and the trial court upheld the defendants' position, and granted the motion. On appeal, the Appellate Court of Illinois, First District, Second Division, reversed the trial court, stating:

"* * * We think that the cause of action comes within Sec. 17 (1) (c) which embraces all causes of action arising from 'the ownership, use, or possession of any real estate situated in this State.'[1] The complaint

[1]It will be noted that this language, though not identical in wording with our Subsection (e), has the same meaning and effect.

alleges that the defendants were in 'possession' of an apartment on the first floor of plaintiff's building in Chicago for four years under the terms of a two-year lease, which was renewed for an additional two years, that on its termination defendants surrendered possession of the apartment in badly damaged condition in violation of their express obligation under the lease to return the premises in as good condition as received, and that plaintiff has the right to recover the damages thereby suffered and attorney's fees.

"It is to be noted that the requirements for jurisdiction are in the disjunctive. Section 17 (1) (c) applies if any one or more of the three grounds for jurisdiction exists, namely, 'ownership,' 'use' or 'possession.' A tenant under a lease of real estate is in possession and using the real estate."

Here, though petitioner has not lived in this state (which, appellant says, distinguishes the instant case from *Porter*), he does own real property within the boundaries of Arkansas, and it seems logical to presume that he has paid real estate taxes, and, as pointed out in the brief for respondent, undoubtedly looked to Arkansas law and our courts for the protection of his interest in this property. Quite a lengthy article appears in Volume 73, Harvard Law Review (1959-60), on "The Due Process Clause and Personal Jurisdiction." Included in this article is a short discussion which is pertinent to the instant case, and which is found at Pages 947-48, as follows:

"The ownership, use, or possession of real property has, in a few states, been treated by statute as a sufficient basis of jurisdiction in personam for certain actions related to the property. Decisions under such a statute have been reported only in Pennsylvania,[1A] where the statutory provision covers only actions for physical injuries arising from the property. The Penn-

[1A] *Porter* v. *Nahas*, *supra*, was decided subsequent to the publication of this article.

sylvania law is thus nothing more than a limited single-act tort statute. Presenting more constitutional difficulty is a statute like that of Illinois, which allows the property right to be a sufficient basis of jurisdiction for any action related to the property. Such a generalized provision would, however, also appear to be constitutional, even in the extreme situation in which a non-resident owner and another non-resident contract outside the state with respect to the property, because of the state's recognized interest in the title to land within its borders in addition to the defendant's substantial relationship with the state."

While the validity of the Illinois statute has not been before the United States Supreme Court, that court has furnished guidelines to be followed in the constitutional exercise of personal jurisdiction over non-residents. We refer to the cases, *inter alia,* of *International Shoe Co.* v. *Washington,* 326 U. S. 310 (1945), and *McGee* v. *International Life Ins. Co.,* 355 U. S. 220 (1957)[2]. In *International Shoe,* it was held that a course of activity, consisting merely of the solicitation of business by salesmen, admittedly less than the doing of business in Washington, was sufficient to enable that state to subject the foreign corporation to personal jurisdiction based on constructive service. The court said that "due process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "

In *McGee* v. *International Life Insurance Company, supra,* a resident of California was issued a policy of insurance by a foreign insurer. Upon his death, the ben-

[2]In *Hanson* v. *Dencka,* 357 U. S. 235 (1958), the court held that a Florida state court lacked *in personam* jurisdiction over a foreign trust company, because sufficient contacts were not established by the evidence.

eficiary was successful in a suit in California against the defendant, a Texas insurance company (which had assumed the obligation of the original insurance company). The company was not served in California, and the jurisdiction of the California court was based on a state statute subjecting foreign corporations to suit in that state on insurance contracts with residents of California, even though such companies could not be served with process within the borders of the state. A judgment was obtained, and subsequently, the beneficiary instituted suit on the California judgment in a Texas state court, but was denied relief on the ground that the California judgment was void under the Fourteenth Amendment because of lack of service upon the company within California. The Court of Civil Appeals of Texas affirmed, but the United States Supreme Court reversed the decision, holding that the service had been sufficient for the purpose of the due process clause, and that the beneficiary's suit had been based upon a contract which had substantial connection with California.

Let us now turn to our own court decisions. In *American Farmers Insurance Company of Phoenix, Arizona* v. *Thomason, Guardian,* 217 Ark. 705, 235 S. W. 2d 37, Dr. Robert A. Leflar, Distinguished Professor of Law (at that time an Associate Justice of this court), mentioned that, following the holding in *International Shoe,* a statute, Act 347 of 1947, Ark. Stat. Ann. § 27-340 (1947), providing for service in Arkansas on this theory was enacted by the General Assembly. This court passed upon this statute in the case of *Rodgers* v. *Howard, Judge,* 215 Ark. 43, 219 S. W. 2d 240, holding that Act 347 was not intended to change the rule concerning the breaking of the journey of interstate shipments as announced in earlier cases. Less than three months later, this court, in *Chapman Chemical Company* v. *Taylor, et al,* 215 Ark. 630, 222 S. W. 2d 820, held that service on the appellant, a foreign corporation under the provisions of Act 347, was valid. Some confusion resulted, it appearing that possibly the two cases were somewhat

in conflict, and in *Aldridge* v. *Marco Chemical Company,* 234 Ark. 1080, 356 S. W. 2d 615, we held service good on Marco Chemical Company, a foreign corporation by virtue of service under Act 347, and, as to any conflict between *Rodgers* and *Chapman,* added:

"* * * While we think the facts in this case are distinguishable from the facts in the *Rodgers* case, we do not predicate, nor base this opinion, upon that premise. Actually, we are of the view that the *Chapman* case, in effect, overruled the *Rodgers* case, though it did not specifically so state. Therefore, as a matter of removing all doubt, we explicitly state that the *Rodgers* case can no longer be relied upon as authority for foreign corporations to evade the jurisdiction of our courts in factual situations similar to the one at bar."

It is thus clear that this court has taken the liberal view.

Appellant asserts that Act 101 is discriminatory as between residents and non-residents, and is therefore unconstitutional. In his brief, he states:

"* * * This alleged cause of action is transitory against a resident. It can be brought in any county in which the defendant resides or can be found. However under this new long-arm statute the bare ownership of land in any county gives any other county in the state jurisdiction. Thus this suit could have been brought in any county in Arkansas."

Appellant then cites the case of *Forsgren* v. *Gillioz,* 110 F. Supp. 647, an action based on contract, wherein Judge Miller stated that a construction of Act 347 of the General Assembly of 1947 (heretofore discussed), which would render it applicable to contract actions would be unconstitutional because it would discriminate

between residents and non-residents as to venue.[3] Of course, this holding by the learned federal judge related only to our earlier act, and, in fact, was rendered ten years before the passage of Act 101. Subsection (E) of Section 1 of Act 101 sets forth a method for the forum to comply with any objection as to venue which a non-resident might have, by providing that when the court finds that in the interest of substantial justice the action should be heard in another forum, the court may stay or dismiss the action in whole or in part on any conditions that may be just. In the instant litigation, it would appear that the action was commenced in the logical county, for it was brought in Pulaski County, where a part of the land in question is located.[4] While the site of the action is not controlled by Ark. Stat. Ann. § 27-609 (Repl. 1962), since it is not an action for the recovery or partition of real property, for an injury to real property, or for the sale of such property under a mortgage, lien, or other encumbrance, the cause *is* based on a purported transaction arising out of the ownership of real estate partly located in Pulaski County. It may be that petitioner will be somewhat inconvenienced by having to defend an action at any place other than his home county in Ohio, but it would not appear that he will be any more inconvenienced by being made a defendant in Pulaski County than if he were made a defendant in any other county in the state. As Justice

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[3]The court held that, as to personal injury and personal property damage actions, the act was constitutional, since it provided substantially the same venue provisions to non-residents as are applied to residents. This decision was rendered in March, 1953, and in November, 1953, our court, in *Hot Springs School Dist. No. 6* v. *Surface Combustion Corp.*, 222 Ark. 591, 261 S. W. 2d 769, held that Act 347 (Sections 2 and 3) applies to actions on contact in certain instances.

[4]It also appears that Rector-Phillips-Morse, Inc., has its place of business in Little Rock, Pulaski County. This fact is mentioned in respondent's brief, and is not disputed by petitioner. However, the pleadings do not, apparently through oversight, reflect this particular fact, and it is accordingly not considered in reaching our conclusions.

Oliver Wendell Holmes stated in his dissent in *Power Manufacturing Co.* v. *Saunders,* 274 U. S. 490 (1927):

"In order to enter into most of the relations of life people have to give up some of their constitutional rights. If a man makes a contract he gives up the constitutional right that previously he had to be free from the hamper that he puts upon himself.* * *

"* * * A foreign corporation merely doing business in the state and having its works elsewhere will be more or less inconvenienced by being sued anywhere away from its headquarters, but the difference to it between one county and another is likely to be less than it will be to a corporation having its headquarters in the state."

Petitioner also asserts that the subsection here in question is unconstitutional under the Declaration of Rights, Article 2 of the Constitution of Arkansas, asserting that that subsection is in conflict with Sections 2, 3 and 8. Section 2 provides that all men are created equally free and independent, and have certain inherent rights, among these being the acquirement, possession and protection of property. Section 3 states that all persons are equal before the law, and Section 8 deals with criminal charges (not involved in this litigation). We find no merit in this contention.

Summarizing, petitioner owns real estate in this state. He depends upon the laws and courts of Arkansas for protection of this property and his rights therein. He allegedly entered into a contract relating to this particular property.[5] Arkansas has an interest in providing an effective means of redress for its residents against persons or corporations outside the state who allegedly have violated a contract relating to this realty.

[5]The question of whether the ownership of real property in this state is sufficient to confer personal jurisdiction in an action not related to any transaction concerning such real estate is not at issue in this cause.

Many times, necessary witnesses will be found in the locality of the party alleging a breach. While there may be inconvenience to petitioner in defending the suit in this state, there would be as much inconvenience to respondent in bringing the action in Ohio.

Writ denied.

FOGLEMAN, J., not participating.

FARMERS COOPERATIVE ASSOCIATION, INC., v. PERRY PHILLIPS

5-4434 422 S. W. 2d 418

Opinion delivered January 8, 1968

Crouch, Blair & Cypert, for appellant.

Little, Enfield & Lawrence, for appellee.

GEORGE ROSE SMITH, Justice. On February 25, 1964, the parties to this suit executed a written contract under which Phillips was to grow broilers for the Co-op during the remainder of the calendar year 1964. Phillips brought this action upon the theory that the Co-op had violated the contract by failing to supply him with a batch of 40,000 baby chicks in early October. Phillips asserted that he was unable to obtain chicks elsewhere until December, so that he lost the profits he would have made upon one batch of chickens. Other facts are stated in our opinion on the first appeal and need not be repeated here. *Farmers Cooperative Assn.* v. *Phillips,* 241 Ark. 28, 405 S. W. 2d 939 (1966). The second trial resulted in a verdict and judgment for Phillips in the sum of $1,442.80.

For reversal the Co-op first argues that it was entitled to a directed verdict, on the twofold ground that there was no substantial evidence that it had breached the contract and that Phillips failed to adduce competent proof of the amount of his damages.

There are two answers to this contention. First, our prior opinion became the law of the case and is controlling upon this appeal even though we should now think it to have been erroneous (which we do not imply). *United States Annuity & Life Ins. Co.* v. *Peak,* 129 Ark. 43, 195 S. W. 392, 1 A. L. R. 1259 (1917). In that opinion we held that the complaint stated a cause of action, which necessarily means that the Co-op was under an implied obligation to furnish chicks in October. Hence the jury could find that its failure to do so was a breach of the agreement. On the matter of damages, Phillips testified that he would have received about $1,-

800 for the missing batch of chickens and that his only expense would have been a monthly electric bill of from $25 to $30. That detailing of his expenses supplies the proof that was absent on the first appeal. Upon the issue of Phillips' duty to mitigate his damages we need only point out that the burden of proof was upon the Co-op, whose evidence at most raised a jury question about Phillips's ability to obtain chicks elsewhere. *Williams* v. *Hildebrand,* 220 Ark. 202, 247 S. W. 2d 356 (1952).

Secondly, the Co-op moved for a directed verdict at the close of the plaintiff's case, but it did not renew the motion when it completed its own proof. In that situation the asserted error was waived. *Granite Mountain Rest Home* v. *Schwarz,* 236 Ark. 46, 364 S. W. 2d 306 (1963).

Next, it is argued that the court should have allowed the Co-op to prove that under the custom prevailing in the trade a grower such as Phillips was not bound by a contract like the one in issue. That proof was rightly excluded. A custom may be shown to explain an ambiguity, but it cannot be invoked to defeat the express terms of the contract. *Batton* v. *Jones,* 167 Ark. 478, 268 S. W. 857 (1925). Obviously a party to what appears to be a binding contract cannot be permitted to show that by custom other parties to similar contracts have considered them to be of no binding force.

Much the same reasoning applies to the Co-op's final contention, that the court erred in refusing its offer to prove that it was not uncommon for a supplier of baby chicks to go for as much as twelve weeks without being able to furnish chicks to its growers. That testimony was not relevant. By the law of the case the Co-op was bound to supply Phillips with baby chicks. Proof that other suppliers had at times been unable to perform their contracts would not justify the jury in concluding that in this case the Co-op should be excused

from doing what it had agreed to do, to Phillips's damage.

Affirmed.

THOMAS JOHNSON JR. *v.* STATE OF ARKANSAS

5327 422 S. W. 2d 417

Opinion delivered January 8, 1968

James D. Storey, for petitioner.

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

LYLE BROWN, Justice. The petitioner, Thomas Johnson Jr., is serving a ten-year term in a federal penitentiary, having been convicted in January 1966. At the time of that conviction there were several felony charges pending against him in the Pulaski County Circuit Court. He filed a pleading in the circuit court on May 6, 1966, asking that he be given a trial on the charges there pending. No action has been taken on his petition and Johnson asks here that the trial court be directed

to dismiss the charges and remove the detainer filed against him with the federal authorities.

Under the authority of *Pellegrini* v. *Wolfe, Judge,* 225 Ark. 459, 283 S. W. 2d 162 (1955), petitioner is entitled to relief. Two full terms of the Pulaski Circuit Court have elapsed since petitioner made his request for a trial. During that period the prosecuting attorney did not see fit to institute proceedings calculated to effect Johnson's return for trial. The State's right to prosecute has expired.

Respondent urges that Johnson's petition to the trial court was not a petition for trial. The handwritten petition was headed "Motion for writ of Habeas Corpus Ad Prosequendum." Technically, he should have petitioned for a writ of *procedendo ad judicium.* Given a literal interpretation, the title of his motion indicated that he was asking for a writ to issue to remove him to Pulaski County so he could be prosecuted. Furthermore, in the text of his motion, he asked that a writ be issued "granting him an immediate transfer to Little Rock, Ark., for the purpose of a fair and speedy trial." The intent of the petition is clear.

The petition is granted. Johnson is entitled to a dismissal of the charges and a recall of the detainer filed with federal authorities, all arising from cases numbered 63718, 63719, 64268, 64308, and 64471.

GEORGEA BLACK MCKINLEY *v.* HARLAN H. HOLLEMAN ET AL

5-4429 422 S. W. 2d 665

Opinion delivered January 8, 1967

George E. Pike, for appellant.

McKnight & Blackburn, for appellees.

J. FRED JONES, Justice. The appellant, Georgea Black McKinley, owned a large tract of land in Jefferson County and in February 1964 sold it to M & H Farms, Inc. for $850,000.00. The sum of $150,000.00 on the purchase price was paid in cash. A note was executed for the balance of the purchase price in the amount of $700,000.00, a deed was executed and delivered and a lien was retained in the deed to secure the payment of the balance of the purchase price according to the terms of the note, as follows:

"On or before the first day of March 1965, 1966, 1967, 1968, 1969, the sum of Fourteen Thousand and No/100 Dollars ($14,000.00), being interest on the principal sum of $700,000.00 purchase money indebtedness computed at the rate of 2%; On or before the first day of March of the year 1970, the sum of 2% of the principal indebtedness, together with interest on the unpaid principal computed at the rate of 5½% per annum, and on or before the first day of March of the years 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988 and 1989, a like sum of 2% of the principal indebtedness plus interest as shall have accrued from the last balance of principal indebtedness computed at the rate of 5½% per annum, with the remaining indebtedness and accrued interest becoming due and payable on or before the first day of March, 1990. All installments of principal and/or interest not paid when due shall bear interest after due date at the rate of 10% per annum, the entire debt becoming due and payable at once in the event default continues for a period of sixty days. It is expressly stipulated and agreed that the amounts payable above have been stipulated based upon the present cost of living index as generally published in the Federal Reserve Bulletin issued by the Federal Board of Governors of the Federal Reserve System of Washington, and commonly known as the Bureau of Labor Statistics Index of Consumer Prices, and at the time of payment of any amount of principal herein named, the seller shall increase the installment payment by the same percentage as the cost of living index has increased from the date of delivery of the deed until payment of the installment of principal. This procedure shall be continued throughout the term used for collection of the installment payments. In the event the cost of living index decreases, the installment payments shall be binding in a lesser amount; this agreement being binding

upon the parties hereto, their administrators, heirs and assigns.

"This note is payable on or before due date with interest computed on the deferred balances until date of payment."

In May 1965, M & H Farms, Inc. entered into a contract to sell the land to Jack Osborn et al for more than twice the amount M & H paid for it. M & H Farms, Inc. was subsequently dissolved and the assets, including title to the land purchased from Mrs. McKinley, were vested in appellees as stockholders in M & H Farms, Inc. At the closing of the sale to Osborn et al, appellees attempted to pay the entire balance of the note to Mrs. McKinley and a dispute arose between Mrs. McKinley and appellees as to the terms of the promissory note. It was appellees' contention that $700,000.00 plus accrued interest was the balance owed, and Mrs. McKinley contended that an additional sum of $47,402.59, representing the increase in the consumer price index, figured on the entire balance of the $700,000.00, was due in addition to the $700,000.00 balance on the note.

By agreement of the parties, this $47,402.59 was paid into an escrow account subject to disposition under court decree following judicial construction of the provision of the note, and by agreement, the sale to Osborn et al was completed. In construing the provisions of the note, the chancellor found as follows:

"[T]hat the Cost of Living Index provision contained in the Offer and Acceptance, Installment Promissory Note, and Warranty Deed was not intended to apply to the pre-payment of the entire purchase price nor would it have been applicable until the first day of March, 1970, the date the installment payments were to commence; that the Cost of Living Index provision was not intended to provide an increase or decrease in the total pur-

chase price of the property but was intended to provide only the method of payment of the installment principal payments coming due in March of the year 1970 and thereafter; that since the provision is not applicable under the facts of the case no ruling is necessary concerning the validity of the Cost of Living Index provision as contained in the instruments; that the escrow fund held by the First National Bank of DeWitt, Arkansas, under the Escrow Agreement, should be delivered by the bank to the Plaintiffs; and that the parties to this litigation should pay their own expenses."

The chancellor held that the promissory note had been paid in full and directed the First National Bank of DeWitt, as escrow agent, to pay the escrow account to appellees. On her appeal to this court Mrs. McKinley relies on the following points for reversal:

"The court erred in the ruling that the cost of living index provision contained in the offer and acceptance, installment promissory note and warranty deed was not intended to apply to the prepayment of the entire purchase price.

"The court erred in the ruling that the cost of living index provision was not intended to provide an increase or decrease in the total purchase price of the property, but was intended to provide only the method of payment of the installment principal payments coming due in March, 1970 and thereafter.

"The court erred in the ruling that under the facts of this case the cost of living index provision is not applicable as contained in the instruments."

The question presented in this case is clearly one of interpretation of the meaning of the language used in the offer and acceptance contract as carried forward in the provisions of the promissory note and deed of conveyance. We are of the opinion that the language

used is susceptible of no other logical interpretation than that given to it by the chancellor, and that the decree of the chancellor should be affirmed.

This property was under a five year lease when it was sold to M & H Farms, Inc. and the lease was assigned to M & H. The note is clear that only interest at 2% of the $700,000.00 principal indebtedness and amounting to $14,000.00 per annum, was to be paid for the first five years. The note is also clear that beginning on or before March 1, 1970, the payments of 2% were to continue but were to be applied on, and credited to, the *principal indebtedness* instead of interest, and the interest rate was to increase from 2% to 5½% per annum on the unpaid balance. There is no question that the principal indebtedness, at all times referred to, was $700,000.00.

The amount of payment on principal which was to begin on or before March 1, 1970, was not only designed to produce a steady annual receipt of payment on principal for a period of twenty years, but was designed to produce payments that would have the same purchasing power that $14,000.00 had at the inception of the transaction. In an attempt to accomplish this purpose, the note provided as follows:

> "The seller shall increase the *installment payment* by the same percentage as the cost of living index has increased from the date of delivery of the deed until payment of the *installment of principal.* This procedure shall be continued throughout the *term used* for collection of the *installment payments.* In the event the cost of living index decreases, the *installment payments* shall be binding in a lesser amount." (Emphasis supplied.)

It is obvious, that except for possible changes in the consumer price index, the annual payments on principal at 2% of the principal indebtedness would have remained constant at $14,000.00 each year for the twenty

year period from 1970 until 1990 when the balance of $420,000.00 with interest at 5½% on that amount for one year, would have become due and payable. In the event, however, that the consumer price index should change or fluctuate during the twenty year period the payments on principal were being made, the annual payments on principal would not have remained constant at 2% of the principal indebtedness of $700,000.00. In the event of change in the consumer price index, the percentage of such change would be added to, or subtracted from, the 2% or $14,000.00 annual payments on the principal indebtedness, thereby insuring that the comparatively small payments on the principal over the years would at all times have the same purchasing power as $14,000.00 had when the note was executed. The 5½% interest rate on the remaining balance remained the same throughout, and is not involved here.

It is difficult to imagine how the parties could have set out their intentions any plainer than was done in this note. *Installment payments* are referred to throughout. There are only two items making up the "installments payments." (1) The 2% of the principal indebtedness amounting to $14,000.00 each year unless increased or decreased by a change in the consumer price index. (2) The interest as shall have accrued from the last balance of principal indebtedness computed at the rate of 5½%. It would, therefore, appear that the installment payments of 2% of the principal indebtedness amounting to $14,000.00 annually, would be all the parties could have had in mind as being subject to change by the consumer price index when this note was executed.

The substance of all the oral testimony is to the effect that Mr. McKinley, now deceased, was concerned about, and attempted to insure, the same purchasing power of the installments over the term of the note, as 2% of $700,000.00 had when the note was executed. The 5½% interest rate was based on the balance each year after the principal payment was deducted and the prin-

cipal payment each year was based on 2% of the principal indebtedness ($700,000.00), plus or minus the percentage of the rise or fall in the consumer price index.

Appellant insists that she and Mr. McKinley anticipated, and had discussed the possibility, that the sale of this land might bring in over a million dollars. Had the note been paid according to its terms over the entire period of twenty years, the sale of this land would have brought in well over one million dollars. The interest for 1970 alone would have amounted to $38,500.00, and assuming that no change had occurred in the consumer price index that would have affected the $14,000.00 paid each year in reduction of principal, the interest alone for the year 1990 would have amounted to $23,100.00. So it is readily seen that interest alone over the full term of the note might have amounted to over a half million dollars.

There is no question that the appellees had a right to pay the full principal indebtedness at any time, and this they did before the first installment on the principal indebtedness came due.

The decree of the chancellor is affirmed.

BYRD, J., disqualified and not participating.

J. M. (SAM) SOWARDS *v.* MAVIS SOWARDS

5-4421 422 S. W. 2d 693

Opinion delivered January 8, 1968

Shaver, Tackett & Jones; By *Nicholas H. Patton,* for appellant.

Don Steel, for appellee.

J. FRED JONES, Justice. This appeal is from a Howard County Chancery Court decree in which the appellee, Mrs. Sowards, was granted an absolute divorce on her complaint alleging personal indignities against Mr. Sowards. Mr. Sowards relies on the following points for reversal:

> "The evidence is not sufficient to support the Court's awarding a divorce upon the grounds of personal indignities.

> "If the testimony of the Plaintiff is deemed sufficient to set forth personal indignities there is no other testimony to corroborate the testimony of the Plaintiff."

Appellant and appellee were married in 1947 and one daughter was born as a result of the marriage. At the time of the trial appellant was sixty-two years of age, appellee was forty-five, and the daughter was seventeen. The record in this case is fairly clear that if appellant and appellee ever had any real affection for each other, it gradually turned into mere tolerance which has finally broken down into contempt under the accumulated weight of small indignities which real affection would have survived. As appellant and appellee drifted apart, appellee and the daughter became closer and appellant felt more and more left out and ignored by both of them. When the appellant was unable to purchase with money and gifts the affections of his wife and daughter, he could not conceal hurt feelings and resentment and attempted to alleviate his frustrations by demanding from the appellee and the daughter more than he was willing, or knew how, to give.

After the complaint was filed by appellee, the record indicates that appellant indicated a desire for a reconciliation and that everyone, including the attorneys as well as the chancellor, encouraged a reconciliation. But the appellant went about effecting a reconciliation by laying down specific ground rules for the appellee and their daughter to follow in order to effect a reconciliation, when all of the time, appellee was the one who wanted the divorce and appellant was the one who wanted the reconciliation. The appellee simply required that appellant "change his attitude," but neither the appellant nor the appellee agreed to make any changes—except in each other, and neither recognized the need for any change in themselves. So the chancellor was obviously right in concluding that appellant and appellee would not live together again.

We now come to the question of whether or not appellee proved such indignities as would entitle her to a divorce. Although the appellant and appellee had occupied separate bedrooms for about seventeen years, the insurmountable difficulties that both parties appear willing to recognize seem to have originated from a family lawsuit between the appellant and his brothers and sisters over property, some year or so prior to their separation in July 1966. Appellee testified that appellant demanded that she testify as a witness for him in that lawsuit, even though she felt that appellant was wrong. The appellant testified that he only wanted the appellee present in the court room with him since his brothers and sisters had their spouses present, and that he was hurt, disappointed and humiliated that she refused to go with him to court.

Appellee and the daughter testified, and appellant admitted, that he had on two occasions threatened to leave home and abandon the appellee and the daughter, if the daughter did not start showing more affection for him. Appellee and the daughter both testified that while they would be watching television programs in the den of their home, appellant would change the channel or station even though he had an additional television set in his bedroom. Both appellee and the daughter testified that appellant remarked late one evening that it was about time for the appellee and the daughter to start roaming around (referring to appellee playing bridge and the daughter going on dates). Appellee and the daughter both testified that appellant objected to appellee receiving telephone calls from her friends.

Perhaps appellant's general attitude is best evidenced by his demands as a condition in effecting a reconciliation after the separation. Mrs. Wilson's testimony corroborates that of appellee, that during the course of Mrs. Wilson's efforts, at appellant's request, to help effect a reconciliation between appellant and appellee, the appellant announced that he would be the

master of the house, that he would quit playing dominoes, but that appellee's bridge playing would be limited to one night each week. Mrs. Wilson's exact testimony on this point is as follows:

> "He said 'I'll tell you what I'll do, Duchess. If you and Kay come home I'll quit playing dominoes and you are to play bridge once a week and stay off the telephone.' He said this gossiping and playing bridge, gossiping over the telephone and all that had to stop. . . . He would be master of the house."

The appellee testified that after the lawsuit appellant had with his brothers and sisters, he demanded that she and the daughter have nothing whatever to do with his relatives and forbade them even speaking to his relatives; that at the time of separation, on July 4, 1966, when she and the daughter returned from a 4th of July weekend at Camp Albert, appellant had gone to Texas leaving a very sarcastic note indicating that he had finally carried out his previous threats of deserting them. Appellee testified that appellant slept a lot during the day and became furious when awakened for any reason at all; that the appellant had developed a strong hatred for anyone who disagreed with him, including his own people, and would talk about his hatred for people all the time. Appellee testified that she had to be very careful about what subject she brought up to keep appellant from flying into a rage at the mention of the name of someone he did not like; that he liked no one and hated everybody. Appellee testified that because of appellant's actions she had become very nervous and her health had become impaired; that since their separation her condition had improved. Most of this testimony was corroborated by the daughter.

The record reveals much as to the personalities and temperaments of the parties to this divorce action. The record also indicates that the chancellor was personally acquainted with the appellant and the appellee in this

case. In any event, the chancellor was in a position to observe the demeanor of the parties and the witnesses as they testified, and was in a better position to weigh and evaluate the testimony and therefore in a better position than we are to determine what does or does not constitute such indignities between these particular parties in this particular case as to render the marriage between them intolerable to one of them.

Although we are not unmindful of the fact that chancery cases are tried *de novo* on appeal, we will not disturb the findings of the chancellor unless they are against the preponderance of the evidence. (*Greer* v. *Greer,* 193 Ark. 301, 99 S. W. 2d 248; *Fitzgerald* v. *Fitzgerald,* 227 Ark. 1063, 303 S. W. 2d 577.) On reviewing the evidence, we are also in accord with a quote from *Snyder* v. *Snyder,* 233 Ark. 188, 343 S. W. 2d 420, which states:

> "This case affords a classic application of the well organized statement that the Judge, seeing the witnesses, is in a better position to decide the credibility than is an appellate court, which merely sees the words on the page."

In *Ham* v. *Ham,* 224 Ark. 228, 272 S. W. 2d 446, we said:

> "In a genuinely contested case the corroborating proof may be relatively slight, since the purpose of this requirement is to prevent collusion." (Citing *Morgan* v. *Morgan,* 202 Ark. 76, 148 S. W. 2d 1078.)

It is not necessary that the testimony of the complaining spouse be corroborated on every element or essential in a divorce suit. Nor is it necessary that the person to whom the divorce is granted on the grounds of indignities be wholly blameless. (*Coffey* v. *Coffey,* 223 Ark. 607, 267 S. W. 2d 499; *Haley* v. *Haley,* 44 Ark. 429.)

We conclude that the chancellor's decree is not clearly against the preponderance of the evidence in this case and should be affirmed.

Affirmed.

BROWN, J., not participating.

ALICE M. TUCKER AND CARLOS L. TUCKER *v.* JOHN T. HASKINS

5-4296 422 S. W. 2d 696

Opinion delivered January 8, 1968
[Rehearing denied February 5, 1968]

Eugene C. Fitzhugh, for appellants.

H. B. Stubblefield, for appellee.

J. FRED JONES, Justice. In February 1965, John T. Haskins, a practicing attorney, together with his secretary, Barbara Campbell, and one Bill Stamper, formed a corporation named "Arkansas Products & Equipment, Inc." The authorized capital stock of the corporation was one million shares, having a par value of ten cents

(10c) each. Haskins subscribed to ten thousand shares, Stamper subscribed to ten thousand shares, and Campbell subscribed to one share.

Haskins testified that Campbell and Stamper waived their subscriptions when the articles were issued; this is admitted by Campbell but denied by Stamper. In any event, the only stock issued consisted of ten thousand shares issued to Haskins for which, according to his testimony, he paid $1,000.00 in cash and $1,000.00 in service. Haskins went into the wholesale rug and carpet business as a one-man corporation with himself as attorney and sole owner and with Stamper as general manager.

In April 1966, Haskins entered into a contract with Carlos L. Tucker and his mother, Alice M. Tucker, to sell all of the outstanding stock in the corporation to the Tuckers for $4,765.83 to be paid in equal monthly payments of $150.00 each. Haskins agreed to continue on as corporate attorney on a contingent fee basis of $100.00 per month. A substitute stock certificate for the ten thousand shares was issued to the Tuckers, they took over the assets and assumed the liabilities of the corporation. Among the liabilities assumed were several thousands of dollars in debts personally guaranteed by Haskins. The Tuckers personally assumed this indebtedness by separate guaranty agreements. Apparently when the creditors of the corporation started demanding payment of the accounts guaranteed by the Tuckers, Mr. and Mrs. Tucker refused to pay Haskins or the creditors and attempted to repudiate the entire transaction. Haskins filed suit in chancery for specific performance and the creditors of the corporation intervened as party plaintiffs on their guaranty agreements. Trial resulted in a decree in favor of Haskins and the intervenors against the Tuckers, and the Tuckers have appealed from that decree.

The entire record consisting of 321 pages is designated by appellants on appeal, but only the oral testi-

mony at the trial is abstracted in their brief. The record includes 40 pages of supplement in the form of deposition, some eight pages of amended complaint, four pages of answer and counterclaim, two pages of amendment to counterclaim, numerous exhibits including the contracts between the parties and letters of repudiation, a number of interventions and five pages of the decree appealed from, none of which were abstracted by the appellants.

We appreciate the expense involved in preparing records for appeal to this court and we do not like to dismiss appeals without reaching the merits. We are forced to take such action, however, when the appellant fails to abstract such portions of the record that will enable us to understand the questions presented for decision. There are seven individual members of this court who must form separate individual opinions on the merits of each case before us on appeal. This can only be accomplished by separate and independent inquiry into the facts submitted and by separate inquiry into the law applicable to the facts in each case. The litigants, as well as the trial court and practicing attorneys, are entitled to the separate and independent consideration by each member of this court of the questions presented on appeal, but the volume of work on this court does not permit each of the seven members the time that would be required to gleen the facts and issues in a case on appeal from a single, and usually disorganized, transcript of the record from a trial court. That is the reason for multiple copies of briefs on appeal and that is the reason for appellate procedure Rule 9 (d).

The first sentence in Rule 9 (d) is as follows:

"The appellant's abstract or abridgment of the record should consist of an impartial condensation, without comment or emphasis, of only such material parts of the pleadings, facts, documents, and other matters in the record as are necessary to an under-

standing of all questions presented to this court for decision."

Appellants have abstracted none of the record except a part of the testimony. Without examination of the original transcript it is impossible for us to determine, with any degree of confidence, exactly what is involved in this case, and as we have said many times before, we are unable to consider this appeal on its merits since appellants have failed to comply with Rule 9 (d). (*Vire* v. *Vire,* 236 Ark. 740, 368 S. W. 2d 265; *Love* v. *State Farm Mutual Auto. Ins. Co.,* 241 Ark. 161, 407 S. W. 2d 118; *Allen* v. *Overturf,* 236 Ark. 387, 366 S. W. 2d 189; *Routen* v. *Van Duyse,* 240 Ark. 825, 402 S. W. 2d 411; *Walden* v. *Mendleson,* 240 Ark. 1019, 403 S. W. 2d 745; *Holt* v. *Moody,* 234 Ark. 245, 352 S. W. 2d 87; *Anderson* v. *Stallings,* 234 Ark. 680, 354 S. W. 2d 21.)

The decree of the chancellor is affirmed.

JOHN ALLEN THORNTON *v.* STATE OF ARKANSAS

5310 422 S. W. 2d 852

Opinion delivered January 8, 1968
[Rehearing denied February 12, 1968]

Terral, Rawlings, Matthews & Purtle, for appellant.

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

CONLEY BYRD, Justice. Upon a plea of guilty, appellant John Allen Thornton was sentenced to three years in the penitentiary for burglary and three years in the penitentiary for grand larceny, both sentences to run concurrently. In this appeal he relies upon the following points:

I

That the court erred in sentencing the appellant to more than the minimum sentence upon the plea of guilty.

II

That his sentence should have been suspended because the alleged co-defendant entered a guilty plea and received a suspended sentence.

III

That the appellant did not understand he was entering a guilty plea nor the consequence thereof.

The record shows that appellant, together with Charles Clifford Durden, was charged with the crimes of burglary and grand larceny in that on December 17, 1966, he feloniously entered the building of Standard Furniture Company and carried away therefrom property in the aggregate value of more than $35. By another information he was charged with the crimes of burglary and grand larceny in that on January 14, 1967, he feloniously entered the building of the Brandon Furniture Company and carried away therefrom property in the aggregate value of more than $35. On April 3 he appeared in court with his attorney and pleaded not guilty. On July 19 he appeared in court with the same attorney, changed his plea to guilty and received the two concurrent three-year sentences.

Ark. Stat. Ann. § 41-1003 (Repl. 1964) sets the penalty for burglary at not less than 2 nor more than 21 years. Ark. Stat. Ann. § 41-3907 (Repl. 1964) sets the penalty for grand larceny at not less than 1 nor more than 21 years. Ark. Stat. Ann. § 43-1222 (Repl. 1964) provides that a court may permit withdrawal of a guilty plea at any time before judgment. Ark. Stat. Ann. § § 43-2324 (Repl. 1964), -2326 and -2331 (Supp. 1967) provide for suspended sentences. It is within the discretion of the trial court to fix sentences within the limits prescribed by law, to suspend sentences and to permit withdrawal of a guilty plea at any time before judgment. There is nothing in the record to show any abuse of this discretion by the trial court.

Actually the record does not show that the co-defendant, Charles Clifford Durden, received a sentence different from that given appellant, but even if it did it would still be a matter within the discretion of the trial court to give different sentences to different persons charged with the same offense.

Nor is appellant's third point supported by the record. Until the contrary is shown, we will assume that a person who appears in court with an attorney of his choice has ample opportunity to understand when he has entered a plea of guilty and the consequences thereof.

Affirmed.

ARKANSAS STATE HIGHWAY COMMISSION *v.* FRANK M. HAMBUCHEN ET UX

5-4372 422 S. W. 2d 688

Opinion delivered January 15, 1968

John R. Thompson, Billy Pease, Louis A. Dodrill, for appellant.

Guy H. Jones and *Clark & Clark,* for appellees.

GEORGE ROSE SMITH, Justice. This is a condemnation suit in which the Highway Commission is taking 3.18 acres out of an 8.7-acre tract owned by the appellees. At the trial the condemnor's theory, supported by the testimony of its expert witnesses, was that the con-

struction of the proposed highway would enhance the value of the uncondemned portion of the Hambuchens' tract to such an extent that they would actually benefit by the taking. The jury rejected that theory, fixing the landowners' just compensation at $30,000. The Commission urges two points for reversal.

First, it is contended that the court erred in refusing to allow the Commission to introduce an option contract, which had expired before the date of trial, by which Humble Oil & Refining Company had paid $400 to the Hambuchens for an option to purchase the 8.7 acres for $85,000. The agreement was executed on May 20, 1966, which was less than three weeks before this condemnation action was filed. It is evident that the parties anticipated the condemnation, for the contract provided that if any part of the premises had been condemned before the sale was consummated, the Hambuchens would assign to Humble the right to receive any condemnation award that might be made.

We find it necessary to explain at what stage of the trial the condemnor sought to introduce the option agreement. The landowners, having the burden of proof on the issue of value, rested their case after having produced only two witnesses. Both were experts in appraising real estate. One testified that the value of the tract before the taking was $85,750 and that the value of the remainder after the taking was $43,650. The other put the before and after values at $85,300 and $43,000.

The Commission opened its defence by calling Hambuchen himself as its initial witness. Counsel first elicited the information that Hambuchen had paid $16,000 for the 8.7-acre tract, acquiring it by three separate purchases made in 1955, 1961, and 1962. Counsel then offered the Humble option contract, which Hambuchen and his wife admittedly had signed. Upon objection the court ruled that the contract was not admissible, for the reason that Humble had allowed it to expire before the date of trial.

The Commission's attorneys readily concede that ordinarily offers to purchase are not admissible. As we pointed out in *Hinton* v. *Bryant*, 232 Ark. 688, 339 S. W. 2d 621 (1960), isolated offers to purchase are mere hearsay declarations of third persons, not made under oath and not subject to coss-examination.

Here, however, the Commission insists that the option contract was admissible to prove its theory that the condemnation and highway construction actually benefited the landowners. We are not certain that we fully understand the appellant's argument. To avoid any possibility of misstatement we quote the essential language in its brief:

> Obviously, the appellant's purpose in calling Mr. Hambuchen as its witness was to put evidence before the jury of enhancement to the remainder of the appellees' land after condemnation. The option which the Hambuchens had given to Humble Oil Company was a vital part of this proof. The enhancement would have been very obvious to the jury had they known of the option. Mr. Hambuchen had purchased land a few years prior to the condemnation proceedings for a total amount of $16,000.00 which could now be sold to Humble Oil Company for $85,000.00, a difference of $69,000.00. An investment of $16,000.00 for a total of 11 years with a net return of $69,000.00 is a tidy profit indeed. The fact that the Arkansas State Highway Department is constructing an Interstate Highway near Mr. Hambuchen's land has made him $69,000.00 richer, yet the trial court ruled that it would be prejudicial to introduce such testimony....
>
> Appellant should have been allowed to elicit testimony from Mr. Hambuchen about the option which he had entered into with Humble Oil Company for $85,000.00. Such testimony is admissible in an eminent domain proceeding as an admission against interest....

> It can easily be seen how inflated offers could be conjured up by a landowner who wanted to inflate the value of his land in a condemnation proceeding. But a bona fide offer of a substantial amount by a substantial corporation could hardly be falsified, and in this case the existence of the option was admitted by the landowner and a copy introduced of record. The exclusion of evidence as to the option . . . constituted reversible error and was highly prejudicial to the appellant's theory of enhancement.

There are two patent defects in counsel's train of reasoning. One, the option agreement, standing alone, had no tendency to prove that the enhanced value of the land was attributable to the proposed construction of the highway. The only two preceding witnesses had said that the construction actually damaged the Hambuchens by more than $40,000. The Commission's expert witnesses had not yet taken the stand. We fail to see how the jury could have inferred from the naked option contract that the enhanced value was attributable to the interstate highway.

Two, counsel's entire argument plainly rests on the assumption that the jury were entitled to conclude from the contract that *Humble* valued the land at $85,000. Why else would counsel say that "a bona fide offer of a substantial amount by a substantial corporation [there is no proof to that effect] could hardly be falsified"? Yet, as we have already seen, the contract was not competent proof of Humble's evaluation of the land, being neither under oath nor subject to cross-examination.

We are not convinced by the suggestion that the option agreement was admissible as a declaration by the Hambuchens against their interest. That might be true if they were contending that the 8.7 acres were worth substantially more than $85,000. In that event it would doubtless be proper for the Commission to prove that they had shown their willingness to sell for a much smaller figure. For instance, in *Hersey* v. *Merrimack*

County Mut. Fire Ins. Co., 27 N. H. 149 (1853), the owner contended that an insured dwelling house had been worth $600. The court rightly permitted the defending insurance company to prove that shortly before the house burned down the plaintiff had offered to sell it for $250. That offer, when laid beside the plaintiff's trial testimony, was clearly a declaration against his pecuniary interest. There is, however, no parallel in the case at bar, for Hambuchen expressed no opinion about the value of his land before the taking, and his witnesses gave substantially the same figure as that contained in the option.

The Commission's second point for reversal is that the court erred in instructing the jury that the Commission had the burden of proving that the highway had enhanced the value of the property remaining after the taking and that the benefits were of a special and peculiar nature, not shared by the general public. We have so held; so there was no error. *Martin* v. *Raulston,* 239 Ark. 769, 394 S. W. 2d 133 (1965).

Affirmed.

BYRD, J., dissents.

CITY OF EUREKA SPRINGS, ARKANSAS *v.* BRUCE BRIGHTMAN ET AL

5-4443 422 S. W. 2d 681

Opinion delivered January 15, 1968

Oliver L. Adams Jr., for appellant.

M. D. Anglin, for appellees.

PAUL WARD, Justice. This appeal calls for a determination of the force and effect of a municipal Resolution invoking certain provisions of the Housing Authorities Act. Set out below is a summary of the pertinent background facts which are not in dispute.

On March 31, 1966, the Commissioners of Eureka Springs adopted Resolution No. 94 declaring the *need* for a Housing Authority in the City. On May 18, 1967 the City published the Resolution in a local newspaper. On June 15, 1967 a petition, signed by the required number of electors, calling for a referendum on the Resolution was presented to the clerk. The City clerk refused to file the petition on the ground that it was not timely filed as required by Amendment 7 of the Arkansas Constitution—*i. e.* "within thirty days after the passage of such a measure by a municipal council." On August 7, 1967 the petitioners (by proper pleadings) asked the Circuit Court to compel the City Commissioners to call an election. The Circuit Court held that Resolution 94 was general and permanent in nature, that it should be considered as an "Ordinance" which required publication before final enactment, and that an election must be called. The City now prosecutes this appeal.

For a reversal the City (appellant) relies on only one point:

> "The only issue on appeal is one of law, *i.* e. whether or not Resolution 94 as passed by the City Com-

missioners of Eureka Springs, Arkansas, was a Resolution, or, in fact, an Ordinance?''

For reasons hereafter stated, it is our conclusion that the holding of the trial court must be affirmed.

Among other things Amendment No. 7 provides:

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

* * *

''Fifteen percent of the legal voters of any municipality . . . may order the referendum . . . upon any local *measures.*'' (Emph. supplied.)

* * *

''In municipalities . . . the time for filing an initiative petition shall be fixed . . . for a *referendum* petition at not less than thirty days . . . of the passage of such *measure* . . . .'' (Emph. supplied.)

''The word '*Measure*' as used herein includes . . . *resolution . . . or enactment of any character.*'' (Emph. supplied.)

Ark. Stat. Ann. § 19-2404 (Repl. 1956)—being § 1, Act 36 of 1949—in parts pertinent here, reads:

''. . . all by-laws or ordinances of a general or permanent nature . . . shall be published in some newspaper of general circulation in the corporation.''

It is our opinion that Resolution 94 was of both a general and a permanent nature. It is general in that it necessarily affected all the people of the City. It was certainly permanent in that it would be effective until repealed. In the case of *City of El Dorado* v. *Citizen's Light and Power Company,* 158 Ark. 550, 250 S. W. 882,

this Court discussed ordinances of a "general or permanent nature" and made the following statement:

> "Of course all ordinances enacted by city councils are not permanent in the sense that they cannot be repealed, but those which endure until repealed are deemed to be permanent . . . ."

It is our judgment, in view of what has been pointed out above that Resolution 94 was in fact an ordinance which had to be published and that the referendum petition in this case was timely filed.

Affirmed.

JACK R. BELL, SR. *v.* THE STATE OF ARKANSAS

5315 422 S. W. 2d 668

Opinion delivered January 15, 1968

Willis L. Plant, for appellant.

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

LYLE BROWN, Justice. This is a Rule 1 case. Appellant, Jack R. Bell, Sr., was convicted in April 1966, of first degree murder. There was no appeal. His present petition for release alleges certain constitutional rights to have been violated. That petition was denied and Bell appeals.

In 1964 Bell, while on parole from the Arkansas penitentiary, went to Florida. A parole violation warrant was issued for his return. He was taken into custody in Florida and waived extradition to Arkansas as a parole violator. At that time Bell was also under suspicion of having committed a murder in Monroe County, Arkansas. However, that suspicion was not revealed to Bell at the time of his apprehension in Florida. Shortly after the return trip to Arkansas began, Bell, without being questioned or coached by the officers, revealed to them that he had committed the homicide but explained it was in self-defense. Because of that admission he was returned to the jail in Monroe County rather than to the penitentiary. Other pertinent facts will be related as we list and discuss the points here raised by appellant.

1. Appellant contends that the officers should not have permitted him to make the oral confession on the return trip without first advising him of his constitutional rights; that the confession made was used against him in the trial of the case. First, we point out that the *Miranda* warnings are not applicable. *Miranda* v. *Arizona,* 384 U. S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966). Bell's trial was begun before June 13, 1966, the effective date of the *Miranda* warning requirements. Second, it is undisputed that Bell volunteered the information that he committed a homicide. In the Rule 1 hearing one of the returning officers so testified. Bell corroborated the officer in these words: "I voluntarily told them and it was not a killing, it was justified homicide." His was a spontaneous admission, as was the situation in *Bivens* v. *State,* 242 Ark. 362, 413 S. W. 2d 653 (1967).

2. It is next asserted that "the legal rights of the appellant were violated by officers Davidson and Belcher, when they took him into custody in Florida, well knowing that he would face a murder charge, by not advising him of that fact and his rights as to extradition."

When Bell waived extradition as a parole violator no murder charge was pending against him. In fact he was not so charged until some four months after his return. At the time of his extradition it is true he was suspected of having committed a homicide but that fact is of no aid to appellant. As respects interstate extraditions (as contrasted with international extraditions) a defendant can be tried for a crime other than that for which he was extradited. *Lascelles* v. *Georgia,* 148 U. S. 537, 13 S. Ct. 687 (1892), cited with approval in *Frisbie* v. *Collins,* 342 U. S. 519, 72 S. Ct. 509 (1952). See *Elmore* v. *State,* 45 Ark. 243 (1885).

3. Appellant was prosecuted under an Information filed by the prosecuting attorney in lieu of a grand jury indictment. The constitutionality of that procedure is

questioned but the point is without merit. *Coleman* v. *State*, 242 Ark. 751, 415 S. W. 2d 549 (1967).

4. This point is that "the court erred in not obtaining witnesses for the appellant, who would have testified the deceased had no money, eliminating the motive for the robbery." At the Rule 1 hearing, Bell testified that at the trial he asked of the court and the sheriff that certain witnesses (whom he does not now name) be brought into court to testify in his behalf and they were not produced. That was all the evidence to support the contention. The trial court found no merit in the contention. Judge Waggoner presided both at the trial and at the Rule 1 hearing. Mr. Plant was Bell's court-appointed counsel at both hearings. Had there been any truth-in-fact in the allegation those officers would have been aware of it. Bell was free to call either or both as witnesses, along with the sheriff. The failure to produce an available witness who assertedly had knowledge of Bell's communication creates a presumption that the testimony, if produced, would be unfavorable. *Watts* v. *State,* 222 Ark. 427, 261 S. W. 2d 402 (1953).

The proper procedure for obtaining witnesses is to obtain subpoenas. Their issuance is routine and a matter of record. Bell produced no such instruments at the hearing. Since Bell and the deceased traveled through several states immediately prior to the homicide it could well be that most, if not all, of his desired witnesses were beyond the immediate jurisdiction of the court. If Bell in fact requested witnesses, when did he make the request? Was it timely? We cannot tell from the record. The burden was on Bell, not only to show that he requested witnesses, but that it was done in the manner provided by law, that the request was timely made, and that the witnesses were amenable to subpoena. His proof is wholly lacking.

5. Bell's final contention is that the court erred in not bringing him to trial at an earlier date. Under Ark.

Stat. Ann. § 43-1708 (Repl. 1964), he was entitled to be brought to trial before the end of the second term after the charge was filed. When an accused is incarcerated the State has the burden of showing the failure to bring him to trial within the statutory period was due to lack of time to try the case or was delayed at the request of the prisoner. *Beckwith* v. *State,* 238 Ark. 196, 379 S. W. 2d 19 (1964). The record shows he was in court on April 29, 1966, entered a plea of not guilty and agreed to the case being passed. He was thereafter tried on the fourth day of the next term. His plea and agreement to pass were in the second term following the filing of the charge. The record refutes Bell's final point.

Affirmed.

GEORGE SIEBERT ET UX *v.* JOSEPHINE BENSON, NEXT FRIEND OF MARK EDWARD GANN

5-4348 422 S. W. 2d 683

Opinion delivered January 15, 1968

William I. Purifoy and *C. T. Bennett,* for appellants.

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

LYLE BROWN, Justice. We are here concerned with the custody of a four-year-old boy, Mark Edward Gann. The Sieberts, appellants here, obtained an interlocutory order of adoption. Mark's mother (who had abandoned the child at birth) entered her appearance in that proceeding and gave her consent. However, Josephine Benson, appellee, with whom Mark had resided continuously since birth, was not a party to the proceeding. A few weeks after the adoption Mrs. Benson intervened in the probate court proceedings in protest. At the same time she filed a petition for a writ of habeas corpus in the Chancery Court to regain immediate custody of Mark. Hon. Gene Bradley, as judge of the Probate Court and as judge of the Chancery Court, consolidated Mrs. Benson's intervention and petition for writ of habeas corpus for trial purposes. The interlocutory order of adoption was set aside on jurisdictional grounds. Mrs. Benson was awarded custody of the child in the habeas corpus proceedings. The Sieberts have appealed from both orders.

Mark was born to Margaret Gann on January 13, 1963. She had been separated from her husband for the previous five years, although they lived in rather close proximity in Sharp County. During the latter stages of

her pregnancy Margaret became ill, apparently from lack of medical attention. Mrs. Josephine Benson, who lived a few miles from Margaret, learned of Margaret's condition and went to her aid. Mrs. Benson regularly received a government pension as a war widow; she received monthly payments from the sale of a farm; and she owned a home located on twenty-five acres on which she gardened and raised a modest amount of stock. Mrs. Benson obtained for Margaret immediate and competent medical attention at Imboden and Mark was born there in a medical clinic. All expenses were paid by Mrs. Benson.

Margaret related to Mrs. Benson that the child was illegitimate; that she had the burden of two other children; and that she would not be able to properly care for the new baby. In her sense of gratitude to Mrs. Benson, who was without children at home, Margaret insisted that Mrs. Benson take the child as her own. She accepted the child and took it to her home on the day it was born. As soon as Margaret was able to travel she left for California and has since resided there. Mrs. Benson has once visited Margaret, taking Mark with her. The two women have corresponded intermittently since Mark's birth.

Mrs. Benson has a married daughter residing in Memphis. In traveling from Sharp County to Memphis to visit her daughter, Mrs. Benson would travel through Jonesboro. There the Sieberts operated a nursery. On a return trip from Memphis late in October 1966, Mrs. Benson stopped at the nursery and purchased some fruit trees. Mr. Siebert was attracted to Mark and gave him a soda. The foursome—Mr. and Mrs. Siebert, Mrs. Benson, and Mark—had a visit of some two hours. The Sieberts have six children, all girls. Their ultramodern home is located at the nursery. In the course of the visit Mrs. Benson related Mark's history. There was conversation about the possibility of the Sieberts adopting Mark. The Sieberts testified Mrs. Benson was agreeable; Mrs. Benson denied it. She did agree that Mark could

spend the night with the Sieberts. Mrs. Benson continued to her home in Sharp County and stayed overnight. There she picked up a pony trailer and returned for Mark. They proceeded to Memphis to get the child's pony.

The next day Mr. and Mrs. Siebert, after talking with their attorney, proceeded to Sharp County. There they obtained the name and address of Mark's mother in California. A waiver and entry of appearance was mailed her. When executed and returned, the instrument was to be filed in adoption proceedings in the Probate Court of Craighead County. Instead of returning the instrument to Sieberts' attorney, Margaret Gann wrote Mrs. Benson that some parties in Jonesboro were trying to adopt Mark.

When an immediate reply was not received by the Sieberts, they contacted Margaret by telephone in California. As a result of that conversation Mr. Siebert wired her the funds to fly to Memphis. There the Sieberts met her and brought her to Jonesboro by automobile. She was agreeable to the adoption and executed the entry of appearance. That was November 3, 1966. On that same day Mrs. Benson and Mark were enroute from Memphis to their home in Sharp County. As soon as Margaret Gann agreed to the adoption, Siebert scurried to Sharp County, expecting to find Mark and return him to Jonesboro, Craighead County, where the adoption petition was to be filed the next day.

Mr. Siebert met Mrs. Benson and her foster child on the highway near Hoxie, Lawrence County, and hailed them. Siebert explained that they were having a children's party at the school that night; that he would like very much to take Mark to the party; that Mark could spend the night with the Sieberts and they would return him to Mrs. Benson the next day. He did not mention the adoption proceedings. Nor did he relate that Mark's mother had been flown in from California. It

was under those circumstances that Mrs. Benson permitted Mark to return with Siebert.

When Mrs. Benson completed her journey home, she found the letter Margaret Gann had written her from California, advising that someone in Jonesboro was trying to adopt the child. Mrs. Benson immediately set out for Jonesboro to get Mark. She first went to the school and found there was no party; she called the sheriff but she had no papers and he could be of no help; she rushed to the Siebert home; admittance was refused her; she forced a locked door, along with the doorframe, and entered; an altercation ensued; the sheriff was called; Mrs. Benson was advised that Mark's mother had signed adoption papers and that she had best go home. To that request she conformed. It was past midnight.

Mrs. Benson returned to Jonesboro the next day. She interviewed the sheriff, an attorney, and a Catholic priest, all without success. While she was so engaged, the parties to the adoption were on their way to Blytheville, some fifty miles away, to present the adoption papers to the probate judge. The adoption was granted. Mrs. Benson had no knowledge of those proceedings.

Except for the Sieberts-Benson conversation about adoption, the facts we have thus far digested from a voluminous record may be said to be uncontroverted. The other pertinent facts relate to (1) Mrs. Benson's execution, in the afternoon of November 4, of a "settlement" document which purported to give her consent to the adoption; and (2) the alleged unfitness of Mrs. Benson as the custodian of the child. Those matters are highly controverted. Some twenty witnesses testified and it is apparent that a number of them had opinionated feelings.

(1) *Mrs. Benson's Execution of the "Settlement" Document.* Her interviews with others having proved

fruitless, Mrs. Benson went to the office of Siebert's attorney, who had returned from the trip to Blytheville. There she reiterated her protest about the child being taken away from her. The attorney apprised her of the interlocutory order, showed her Margaret Gann's signature on the waiver, and advised her that in his opinion she could not regain possession of the child. Mrs. Benson explained her expenditures on the mother during and preceding Mark's birth and indicated that she should be reimbursed. After conferring by telephone with Siebert, the attorney gave Mrs. Benson a check for $500. The attorney says she broached the subject of money; Mrs. Benson says the attorney suggested it. She executed an affidavit acknowledging receipt of the money and stated that she consented to the adoption which had already been granted.

The two witnesses disagree as to the purpose of Mrs. Benson's trip to the attorney's office.[1] The attorney says it was primarily to obtain reimbursement. "She was obviously moved and she cried some while in my office." However, he quoted her as saying she thought the adoption was the best for Mark. Then, so he says, she broached the subject of reimbursement. The substance of Mrs. Benson's extended testimony in that regard is that she had been completely frustrated in two hectic days of fruitless efforts; that she was exhausted, crying, and "so upset I couldn't read" the affidavit; and that she would not have signed it except for the attorney's assuring her that the adoption was completed and legal. (When Mrs. Benson filed her petitions she authorized her attorney to return the $500.)

In his oral opinion the trial judge stated that he accepted Mrs. Benson's explanation "as to why she received the money." It should be added that a consent to adoption may, under proper circumstances, be with-

[1]That attorney withdrew from further participation as the Sieberts' attorney, presumably because he was to become a key witness in the resistance of Mrs. Benson's intervention.

drawn before the final order. *Martin* v. *Ford,* 224 Ark. 993, 277 S. W. 2d 842 (1955).

(2) *The Fitness of Mrs. Benson to Have Custody of the Child.* The Sieberts produced testimony that on at least three occasions Mrs. Benson initiated suggestions of adoption. Those statements were allegedly made to the Sieberts, Bob DePriest, and Mrs. Honeycutt (Mark's grandmother). Mrs. Benson denied having made any such suggestions. Mrs. Honeycutt's testimony drips with prejudice. Mr. DePriest stated that the child was permitted to spend a few days in his home; at the end of three days Mrs. Benson came after him; adoption was discussed and Mrs. Benson declared she could not give up the boy.

Mrs. Honeycutt and Mrs. Gresike (Mrs. Honeycutt's employer) charged Mrs. Benson with the use of vulgarity and with "boarding men friends." Each also testified as to an occasion when Mrs. Benson appeared to be under the influence of drugs or alcohol. Another testified as to Mrs. Benson's irregularity in church attendance. Another witness from the Bureau of Vital Statistics produced records to show that Mrs. Benson had attempted to obtain a birth certificate for Mark and listed herself as the mother of the child.

Mrs. Benson called three neighbors as witnesses. They described her as a hard worker, a good housekeeper, attentive to Mark's needs, and of good behavior. It was testified that different men did, at various times, work for, and board with, Mrs. Benson. The neighbors saw no acts of misconduct.

The trial court described the attack on Mrs. Benson's character as being based on "more or less innuendo." The court commented on the absence of any testimony to show that Mark "was ever exposed to any immoral matters."

So much for the facts. The trial consumed several days and a four-hundred page transcript was accumulated. We have recited only those facts which are considered essential to an understanding and resolution of the issues. We now turn to particular rulings of the trial court, the three points advanced for reversal, and to a brief comment on one point raised by appellee.

1. The Sieberts contend the trial court should not have set aside the interlocutory order of adoption on jurisdictional grounds. The petition was filed November 4, 1966, and the order was entered on the same day. The probate judge held that on the date the petition was granted (a) the trial court had no jurisdiction over the presumptive father, Franklin Gann, Jr., and (b) Mrs. Benson, who stood in loco parentis to the child, was not made a party, nor did she enter her appearance and give consent.

Ark. Stat. Ann. § 56-103 (1947) requires the petition for adoption to state the name of the person having custody of the one to be adopted. Mrs. Benson had physical custody of Mark from the day of his birth until the day before the petition for adoption was filed. That fact was well known to the Sieberts. They did not disclose it to the court. They gained possession of the child through concealment of a vital fact, namely that it was being obtained for the purpose of instituting adoption proceedings the following day. We hold that Mrs. Benson's custody should have been revealed to the court and that she was entitled to notice. This court has held that one having custody of a child is so entitled. *Miller* v. *Younger,* 222 Ark. 663, 262 S. W. 2d 146 (1953). Although Mrs. Benson surrendered possession temporarily and under a concealment of fact, equity dictates that the manner of gaining possession should not sever her custody.

When the child was born, Margaret Gann had for seven years been the lawful wife of Franklin Gann. It

is true they had been separated for some five years, living, however, in close proximity. The trial court found that the fact of separation did not destroy the strong legal presumption that Gann fathered this child. *Thomas* v. *Barnett,* 228 Ark. 658, 310 S. W. 2d 248 (1958). No competent proof of non-access appears in the record.

True it is that the interlocutory order of adoption recites that the child is illegitimate. However, the marriage status of Margaret and Franklin Gann was not made known to the court until the second hearing.

Summarizing, the trial court found that as of the date of the interlocutory order, Mrs. Benson stood in loco parentis, and that Gann was in law presumed to be the father of the child, making them necessary parties to the suit; and that their absence from the suit voided his jurisdiction. Since we conclude that Mrs. Benson was a necessary party to the proceedings, we do not reach the propriety of the ruling with respect to the presumptive father.

2. Appellants contend the chancery court erred in assuming jurisdiction of the habeas corpus proceeding. At the time Mrs. Benson applied for the writ of habeas corpus, the adoption proceedings were pending in the probate court and that forum, say appellants, could have afforded Mrs. Benson adequate relief.

A collateral attack upon an order of adoption, made by petition for writ of habeas corpus, is permissible. It is available to one in interest who was not made a party to the adoption proceedings. However, in the habeas corpus proceeding, the only appropriate inquiry is whether the probate court had jurisdiction to enter the order of adoption. *Hughes* v. *Cain,* 210 Ark. 476, 196 S. W. 2d 758 (1946).

Mrs. Benson had a clear right, by habeas corpus proceeding, to go into chancery court and seek to regain

custody of the child which had been spirited away from her possession. The proceeding in probate was primarily one concerning *adoption.* It may well be that the probate court, in setting aside the adoption proceedings, *might* have eventually awarded some type of custody to Mrs. Benson. Yet the proceeding most certain to give her immediate custody of the child was habeas corpus. It is an extraordinary writ which demands the child be forthwith produced. The hearing is given priority. The identical procedure was followed in *A.* v. *B.*, 217 Ark. 844, 233 S. W. 2d 629 (1950).

3. Appellants contend that the award of custody to Mrs. Benson was contrary to the greater weight of the evidence; that the court has placed the child in custody of one totally unfit to be so entrusted; and that the record clearly shows the best interest of the child would be served by placing him in the custody of Mr. and Mrs. Siebert.

While it is axiomatic in custody cases that the welfare of the child is of prime importance, there are other considerations. Of one of those conditions, Justice Eakin had this to say in *Verser* v. *Ford,* 37 Ark. 27 (1881):

> "It is one of the cardinal principles of nature and of law that, as against strangers, the father, however poor and humble, if able to support the child in his own style of life, and of good moral character, cannot, without the most shocking injustice, be deprived of the privilege by any one whatever, however brilliant the advantage he may offer. It is not enough to consider the interests of the child alone."

As a foster mother, Mrs. Benson is in the category of being the only parent Mark Edward Gann has ever known; the Sieberts are in the category of strangers. The mutual love that exists between Mrs. Benson and Mark is not questioned. To the contrary, the record is

replete with evidence of their mutual devotion and constant companionship. Mrs. Benson called up sufficient physical strength to bodily knock in a locked door and its facing, which stood between her and the child she had nurtured from birth. Only love could have given her that extra strength.

Is Mrs. Benson morally fit to have the custody of Mark? The trial court answered that question in the affirmative. We are unable to say that he abused his discretion. As recited, the evidence was highly conflicting. Some twenty witnesses testified and it is apparent that some of the key witnesses had preconceived opinions. In cases so fiercely contested the vantage point of the chancellor becomes all the more apparent. In no situation could the personal observations and judgment of the trial court be more valuable.

Appellee questions the right of the Sieberts to appeal from an order setting aside an interlocutory decree of adoption. Ark. Stat. Ann. § 56-111 (1947) is cited. The answer is that the Sieberts did not appeal from an interlocutory order but from a final order of January 12, 1967. That order was a final decree denying the prayer for adoption on the ground of lack of jurisdiction.

Affirmed.

MIDWEST BUS LINES, INC., T. O. TYLER AND LARRY COOPER *v.* JEFF WILLIAMS AND LOLA WILLIAMS

5-4363 422 S. W. 2d 869

Opinion delivered January 15, 1968

S. Hubert Mayes and *Barber, Henry, Thurman, McCaskill & Amsler*, for appellants.

George J. Cambiano, for appellees.

JOHN A. FOGLEMAN, Justice. These appeals by three codefendants are from adverse judgments in favor of appellees for alleged personal injuries sustained in a motor vehicle collision. At the time of the incident out of which the action arose, appellees, husband and wife, were passengers on a bus of appellant Midwest Bus Lines, Inc., driven by appellant T. O. Tyler. A collision, on the night of December 17, 1966, between the bus and an automobile owned and operated by appellant Larry Cooper gave rise to the litigation.

Appellees' cause of action against Midwest was based on allegations that Tyler was driving at such a high rate of speed that he was unable to swerve the bus in order to avoid the collision; that he was not keeping a proper lookout; and that he failed to slow down, stop or swerve to avoid the impact. Their allegations as to Cooper were that he drove his vehicle into the proper lane for the bus which was proceeding in the opposite direction from that Cooper was traveling and that he failed to regain control of his vehicle and bring it back into its proper lane. Each of appellees sought recovery for physical pain and suffering and mental anguish, permanent partial disability, and past and future medical expenses.

Cooper denied the allegations of negligence as to him and alleged that any injuries suffered by appellees were caused by negligence of Tyler. Tyler and Midwest denied all allegations of appellees, but alleged that any injuries suffered by appellees were caused by the negligence of Cooper. They asserted that this consisted of his driving at an excessive rate of speed across the center line of the highway into the lane where the bus was properly proceeding and his failure to keep his vehicle under control, to keep a proper lookout, and to yield the right-of-way to the bus. They asked judgment against Cooper in the amount of any recovery against

them, and Midwest cross complained, seeking recovery for damages to the bus. Cooper denied liability to the bus company and asked judgment over against the company for indemnity or contribution.

The case was submitted to a jury upon interrogatories. Responses of the jury showed that it found Cooper guilty, and Tyler not guilty, of negligence which was a proximate cause of the occurrence. It found Tyler guilty of failure to use the highest degree of care for the safety of appellees. It allocated responsibility for appellees' injuries—60% to Cooper and 40% to Tyler. It found the damages of appellee Jeff Williams to be $20,000, those of appellee Lola Williams to be $30,000, and those of the bus company to be $534.67.

Appellants Tyler and Midwest moved for an order directing that judgment be entered upon the verdict or that the special verdicts be set aside. Their motion was based upon contentions that responsibility for the occurrence should not have been apportioned by the jury and that appellees' complaint should be dismissed as to them upon the jury's findings, or, in the alternative, that they should have judgment against Cooper for any sums assessed against them in favor of the appellees. They also asked, alternatively, that the verdicts be set aside for inconsistency.

Cooper likewise moved for entry of judgment or the setting aside of the jury verdicts for inconsistency. He contended that judgment aganst him should be limited to 60% of the damages to the other parties.

The judgment entered allowed recovery of $12,000 from Cooper and $18,000 from Tyler and Midwest by Lola Williams. It awarded Jeff Williams $8,000 from Tyler and Midwest and $12,000 from Cooper. It provided that Midwest have full recovery from Cooper for the damages to its bus.

Midwest and Tyler appealed from the judgments against them. Cooper appealed only from the adverse judgments in favor of the Williamses. Tyler and Midwest rely upon five points for reversal. Cooper asserts four. We will discuss those necessary to our decision on these appeals, together with any which may be pertinent on the retrial ordered.

The first ground for reversal urged by Tyler and Midwest is the failure of the trial judge to direct a verdict in their favor. The evidence showed that Cooper was driving a Chevrolet automobile east on Highway No. 64 and that the bus was going west when they collided on a sharp "S" curve on a steep hill about six miles west of Ozark. There is actually a series of three sharp curves in close succession. After the collision, skid marks, debris and dirt were found over an area covering five or six feet on the pavement, centered about two feet north of the center line, with pieces scattered over the line. The Chevrolet, a total loss, was found 192 feet east of the debris in the highway, severely damaged on the left side from front to rear. The bus sustained damage to the left front and left side. The damage to the left front extended from a point about six inches to one foot left of the front headlight to the left corner and that to the left side extended from this corner three or four feet toward the rear of the bus. There were a white center line and double yellow lines extending the entire distance of the curve and hill. Skid or "scuff" marks on the pavement extended a distance of 12 feet from the south lane across the center line into the westbound lane where the debris was lying. There were no other skid marks. The curve in the direction in which the bus was traveling was to its left. For eastbound traffic there is a fairly "steep" curve to the right just before the point where this collision occurred. The investigating officer testified that scuff marks are generally caused by rear wheels of a vehicle and result from a cutting of its wheels while it is proceeding around a curve at a high rate of speed so as to cause the vehicle to slide.

The bus was found by the officer 50 feet from the debris but the driver had pulled the bus up and backed it off the highway before his arrival.

Jeff Williams testified that he was watching traffic as he sat in the second seat back of the driver. His wife was asleep in the seat beside him. While he estimated the speed of the bus to be between 70 and 75 miles per hour at the time of the collision, his estimate was based entirely on the fact that the driver "had his motor revved up." He did not know what gear the bus was in or whether it was going uphill or downhill or traveling on a level or straight stretch. After he saw the lights of the approaching car through the bus windshield, the collision happened so quickly he did not have time to do anything or say anything to his wife or even to brace himself. He knew that either the bus or the car was over too far, but he couldn't tell which. He further testified that for a time before the collision, he could not see the terrain or telephone poles out the window. Earlier he had been able to see "passing lights" along the way and the bus was passing them pretty fast. He had no way of knowing how fast the car was coming, but he said that it was at a high rate of speed and its headlights "came up there pretty quick." After he felt a bump and heard a noise, he saw Tyler wrestling with the wheel trying to get the bus stopped. There is some uncertainty whether his estimate of the distance required to stop the bus after the collision was 30, 40 or 50 feet, or 30, 40 or 50 steps. He could only see the back of the head and shoulders of the driver before the impact, but Tyler was looking out the front of the bus and his head was straight ahead. He could only guess that a lookout was being kept ahead because the driver followed the road from Morrilton to this point past Ozark.

Since these appellants offered evidence after their original motion for a directed verdict was overruled, we must give consideration to any such evidence as may be favorable to appellees in determining whether a verdict

should have been directed at the conclusion of all the evidence. *Ft. Smith Cotton Oil Co.* v. *Swift,* 197 Ark. 594, 124 S. W. 2d 1. In addition to the testimony of Tyler, these appellants offered that of two passengers on the bus as to the cause of the collision. These witnesses located the bus in its proper lane at all times. One of them was sitting on the front seat with a clear view of the road ahead. He testified that the speed of the bus could not have been over 50 miles per hour and that the Cooper vehicle was only 50 or 60 feet ahead and two or three feet over the center line when he observed it. It appeared to him at first that the Cooper car would get back. He further stated that the lapse of time from the time he saw the car until the impact was "very, very fast, a couple of seconds." He said there wasn't really enough time for the driver to do anything but the driver did try to get out of the way the last second. The other passenger said that the bus was going uphill at a speed which could not have been over 50 miles per hour.

Tyler estimated his speed at 40 to 45 miles per hour and that of the Cooper car at 80. Cooper estimated his own speed at 45 miles per hour coming downhill and that of the bus at 60. Cooper first saw the bus when it was 8 or 10 car lengths from him just prior to going into a curve. He said that when he first saw the bus, it looked as if the driver was setting himself up for the curve, cutting over to his left some. Cooper thought that his own car was pretty close to the center line, but did not feel that it was across it. He stated that "apparently the bus was over the center line."

Appellees' contention that the evidence presented a jury question is founded entirely upon the basis that the evidence as to speed of the bus was controverted. The necessity for so confining their argument is obvious, because reasonable minds could not have come to any conclusion except that the Cooper car was at least across the center line when it came into the vision of the bus driver so suddenly and at such a short distance away

that Tyler was helpless to do anything to avoid the collision. A directed verdict in favor of Midwest should have been granted, since whether the bus was going 45 miles per hour or 70 miles per hour, its speed could not have been a proximate cause of appellees' injuries. According to the testimony most favorable to appellees, the vehicles became visible to each other at a distance of approximately 100 feet. Assuming that Tyler saw the dangerous situation at the first possible moment, he would still not have had sufficient time to avoid the collision, or even to react, as the vehicles were approaching each other at a speed of at least 132 feet per second. Thus the testimony of Jeff Williams as to speed would not afford a sufficient basis to support a jury verdict against these appellants for failure to exercise that degree of care with which they are charged. It is clear that a verdict should have been directed in favor of Midwest for the reason that reasonable minds could only conclude that there was no breach of the duty to exercise the highest degree of care. Where, as here, reasonable minds can only come to one conclusion, we have no alternative to a reversal of the lower court on this point. *Kansas City Southern Ry. Co.* v. *Bull,* 120 Ark. 43, 179 S. W. 172; *Huffman Wholesale Supply Co.* v. *Terry,* 240 Ark. 399, 399 S. W. 2d 658. Since the case has been fully developed in this respect, it will be dismissed as to Tyler and Midwest, so we need not consider other points raised by them.

We also find it necessary to reverse the trial court on appellant Cooper's contention that the court erred in instructing the jury to consider future medical expenses, future loss of earnings, and permanent disability as elements of damages to appellees. The only evidence relating to any of these elements was the testimony of Dr. Thomas H. Hickey, who examined and treated appellees and testified in their behalf. While Dr. Hickey stated that he thought Mr. Williams had a permanent disability resulting from this accident, he repeatedly and persistently stated that he would prefer

that a greater period of time elapse before he was called upon to state an opinion as to the extent of this disability. After stating his estimate, based upon the time that had elapsed, he stated that this percentage might change as time passed. He was unable to tell how long Mr. Williams would require treatment. On cross-examination he agreed that it was really too early to base an accurate medical opinion as to any permanent partial disability and that whatever opinion he stated would be a sort of qualified medical guess.

With reference to Mrs. Williams, the doctor stated that in his experience a cervical sprain injury, suffered by Mrs. Williams, would be fairly permanent if healing did not occur by 9 to 12 months. (The trial was approximately three months after the collision.) He also stated that a greater period of time should elapse before an evaluation of her disability was made. He said that he would prefer for the healing period to end in order to give an accurate medical opinion as to the possibility of her permanent disability and that there was a possibility that she would not have any. On cross-examination he stated that his evaluation was a medical guess on his part.

Finally, on cross-examination, these questions and answers were propounded and given:

"Q. Now, in order to properly evaluate their condition, particularly with reference to a medical certainty, don't you feel professionally that you need additional time?

A. I do.

Q. And is it not true, Doctor, that any evaluation which you now make in the absence of the opportunity for additional treatment and examination is pure speculation?

A. It is speculative."

In *Missouri Pacific Transp. Co.* v. *Kinney,* 199 Ark. 512, 135 S. W. 2d 56, this court said of these elements of damage:

> "Before such a recovery can be allowed, the permanency of the injury must be made to appear from the evidence with reasonable certainty and that future pain and suffering are inevitable and if they appear to be only probable or uncertain they cannot be taken into the estimate."

The court also quoted from the opinion in *St. Louis, I. M. & S. Ry. Co.* v. *Bird,* 106 Ark. 177, 153 S. W. 104, as to the propriety of the jury's considering such elements upon evidence of this nature. A part of this quotation is:

> "The experts on behalf of appellee did not testify that, in their opinion, the injury to Wharton Bird was permanent. It was a matter of speculation with them as to whether it was permanent or not. This being true, it must also have been only a matter of conjecture with the jury. But to fulfill the requirements of the law there must be affirmative testimony to the effect that the injury was permanent before the jury would be authorized to find that such was the fact; and the court should not allow the permanency of the injury to be considered as an element of damage, where the witnesses themselves are uncertain as to whether there would be any permanent injury, and where the nature of the injury, per se, does not show that the injury was permanent."

If there is any difference in the medical testimony here and that in the *Kinney* case, the testimony there may have been less speculative. The testimony here falls far short of establishing these elements of damage to the extent required, particularly in view of the fact that both appellees were said by the physician to have had virtually identical symptoms prior to the collision.

We are unable to even estimate to what extent the jury considered these elements in their liberal assessment of damages, so the case will have to be remanded for retrial as to Cooper's liability.

In view of this disposition, we need only mention one other point relied upon by appellant Cooper, since there is a possibility that the identical situation might arise. Cooper contends that the trial court erred in admitting testimony by him that he forfeited bond on a traffic violation charge arising out of this occurrence in violation of Ark. Stat. Ann. § 75-1011 (Supp. 1965). The testimony given, however, was not strictly responsive to a question asked Cooper on cross-examination. In answering a proper question as to whether he pleaded guilty to driving his car over the center line, Cooper responded: "Yes. I forfeited bond." A plea of guilty to the charge would have been a declaration against interest, and interrogation of Cooper about it was permissible. *Harbor* v. *Campbell,* 235 Ark. 492, 360 S. W. 2d 758. Objection made, on behalf of Cooper, to the question was properly overruled. The court was not called upon by this appellant to make any ruling upon the voluntary answer given by appellant, to give any admonition to the jury, or to do anything at all, so no error was committed by the trial court. Furthermore, appellant cannot complain of errors which he himself committed. *Wallace* v. *Collins,* 5 Ark. 41, 39 Am. Dec. 359; *Sithen* v. *Murphy,* 12 S. W. 497 (Ark. 1889); *Scott* v. *McCraw, Perkins & Webber Co.,* 119 Ark. 133, 177 S. W. 901; *Rinehart & Gore* v. *Rowland,* 139 Ark. 90, 213 S. W. 17; *Withem* v. *State,* 175 Ark. 453, 299 S. W. 739; *Jones* v. *State,* 204 Ark. 61, 161 S. W. 2d 173; *Burton* v. *State,* 204 Ark. 548, 163 S. W. 2d 160.

Reversed and dismissed as to Tyler and Midwest Bus Company. Reversed and remanded as to Larry Cooper.

SENATOR VIRGIL T. FLETCHER *v.* KELLY BRYANT,
SECRETARY OF STATE
LYTLE CLAREMONT BABER ET AL, INTERVENORS

5-4367 422 S. W. 2d 698

Opinion delivered January 15, 1968

Warren & Bullion, for petitioner.

Joe Purcell, Attorney General; *William R. Hass* and *Henry Ginger,* Asst. Atty. Gens., for respondent.

Owens, McHaney & McHaney, for intervenors.

JOHN A. FOGLEMAN, Justice. This is an original proceeding under Amendment No. 7 of the Constitution of Arkansas in which the petitioner, Virgil T. Fletcher, questions the sufficiency of a petition to refer Act 306 of 1967, entitled "The Arkansas Dairy Industry Stabilization Act." Petitioner asserts four separate points upon which he relies. We will discuss these in the order in which he raises them. Since three of the four points relate to the sufficiency of the ballot title contained on the petition and approved by the Attorney General, we deem it advisable that the title be set out here. It is as follows:

BALLOT TITLE

An Act creating the Arkansas Dairy Commission consisting of five members appointed by the Gov-

ernor, prescribing their qualifications, compensation, and terms of office; authorizing the employment of an Executive Director, attorney, and other employees; authorizing the Commission generally to supervise, investigate, and regulate the entire dairy industry engaged in processing, manufacturing, storing, distributing, and selling milk products (including fluid milk) and frozen dairy products, except health regulations, and to require certain processors to pay to the Commission equalizing charges as therein determined; requiring each dairy-farmer processor, processor, wholesale and retail distributor, retailer, and institution to obtain a license from the Commission for each place of business and pay a license fee; requiring licensees to maintain records and make reports; authorizing and, in certain classes of sales (including sales to consumers), requiring the Commission to establish minimum prices for sales of milk products (including fluid milk) and frozen dairy products in distribution marketing areas, after prescribed investigations, hearings, considerations, and requirements; requiring processors and distributors to file the uniform wholesale price at which certain products, the minimum price for which is not established by the Commission, will be sold by each such licensee; prohibiting the sale of milk products (including fluid milk), frozen dairy products, and other frozen products below established minimum prices or at variance from filed prices; providing for rules of practice, public hearings and procedures, public notice, and judicial review relating to quasi-legislative and adjudicatory functions of the Commission, including issuance, denial, or suspension of licenses; authorizing action to enjoin violations; providing for assessments against processors and certain other licensees based on sales and in an amount not to exceed five cents per hundredweight on all milk or milk equivalent; providing that all license fees, assessments penalties and other monies received by

the Commission be paid into a revolving fund to be used for the administration and enforcement of the Act, no expense to be a charge against State funds; the same being Act 306 of 1967.

In determining the sufficiency of this ballot title, we will keep in mind that we give a liberal construction and interpretation of the requirements of Amendment 7 in order to secure its purposes to reserve to the people the right to adopt, reject, approve or disapprove legislation. *Coleman* v. *Sherrill,* 189 Ark. 843, 75 S. W. 2d 248; *Armstrong* v. *Sturch,* 235 Ark. 571, 361 S. W. 2d 77. Actions of electors in seeking to exercise this right must not be thwarted by strict or technical construction. *Reeves* v. *Smith,* 190 Ark. 213, 78 S. W. 2d 72; *Cochran* v. *Black,* 240 Ark. 393, 400 S. W. 2d 280. For this reason, substantial compliance with the requirements of the amendment is sufficient. *Blocker* v. *Sewell,* 189 Ark. 924, 75 S. W. 2d 658.

We must also remember that a ballot title is sufficient if it identifies the proposed act and fairly alleges the general purpose thereof, and it need not be so elaborate as to set forth details of the act. *Coleman* v. *Sherrill,* 189 Ark. 843, 75 S. W. 2d 248; *Walton* v. *McDonald,* 192 Ark. 1155, 97 S. W. 2d 81; *House* v. *Brazil,* 196 Ark. 602, 119 S. W. 2d 397. The rule of liberal construction applies to determination of sufficiency of the ballot title. *Sturdy* v. *Hall,* 204 Ark. 785, 164 S. W. 2d 884.

Some significance must be given to the fact that the Attorney General has approved it, pursuant to Ark. Stat. Ann. § 2-208 (Repl. 1956). In considering the weight to be given to the approval of the Attorney General on the ballot title, it is to be noted that neither Amendment No. 7 nor enabling legislation thereunder [Act No. 2 of the Extraordinary Session of 1911 and Act No. 195 of 1943] makes any specific mention of the

ballot title as a part of a referendum petition.[1] On the other hand, a ballot title is specifically required to be a part of an initiative petition. Considerable distinction can be made in the emphasis on the ballot title on a newly proposed legislative measure and that on one which has been adopted by the General Assembly. On a referendum petition the voters are asked to reject a measure officially adopted and published as an act of the legislative branch. The petition, to be sufficient, must adequately identify the act in question. On an initiative petition the voters have no way to be informed except by the publication of the proposed measure which usually would take place sometime later than the publication of acts of the General Assembly. The courts of other states have spoken of the presumptions arising from the approval of ballot titles by those charged with that responsibility. We quote from the opinion in *Say* v. *Baker*, 137 Colo. 155, 322 P. 2d 317, as follows:

> "The action of the statutory board empowered to fix the ballot title and submission clause is presumptively valid, and those who contend to the contrary must show wherein the assigned title does not meet the statutory requirement. No such showing is made in the instant case.
>
> In a carefully considered opinion written for a unanimous court, the Supreme Court of California had occasion to consider a title fixed by the attorney general pursuant to a statute, and expressed this principle in clear language as follows:
>
> 'In approaching the question as to whether the title so prepared is a proper one all legitimate presumptions should be indulged in favor of the propriety

[1]We do not overlook the announcement of the court in *Shepard* v. *McDonald*, 188 Ark. 124, 64 S.W. 2d 559, that the ballot title submitted on a referendum petition must be considered as part and parcel thereof. Dictum in *Washburn* v. *Hall*, 225 Ark. 868, 286 S.W. 2d 494, also gives rise to an inference that this is so.

of the attorney-general's actions. Only in a clear case should a title so prepared be held insufficient. Stated another way, if reasonable minds may differ as to the sufficiency of the title, the title should be held to be sufficient. These rules of construction are in accord with the fundamental concept that provisions relating to the initiative should be liberally construed to permit, if possible, the exercise by the electors of this most important privilege.' *Epperson* v. *Jordan,* 12 Cal. 2d 61, 82 P. 2d 445, 448.

From this principle it further follows, as the Oregon court remarked in *Wieder* v. *Hoss,* 143 Or. 122, 21 P. 2d 780, 781, that:

'The mere fact that after an appeal has been taken and we have had the benefit of the additional labor bestowed upon the ballot title by counsel we may be able to write a better ballot title than the one prepared by the Attorney General constitutes no reason for discarding his title. The purpose of the appeal is not to secure for the bill the best possible ballot title, but to eliminate one that is "insufficient or unfair," if it should develop that the one submitted by the Attorney General is of that kind.' "

There is a clear implication that the General Assembly intended that presumptions as to sufficiency of a ballot title approved by the Attorney General favor the sponsors of a referendum petition inasmuch as the act (Ark. Stat. Ann. § 2-208, adopted in 1943) specifically provides for relief to them, but not to opponents, by petition to this court.

With these principles in mind, we now proceed to separate statement and discussion of points urged by petitioner.

POINT I.

The petition was fallacious and void in that it falsely advised the prospective signer that Act 306 *became a law on March* 13, 1967.

Section 17 of the Act provides that it shall become effective July 1, 1967, and expire June 30, 1969. The referendum petition, in describing the act, contained the following language:

> "We, the undersigned, legal voters of the State of Arkansas, respectively order, by this, our petition, that Act 306 of the General Assembly of the State of Arkansas, which became a law on March 13, 1967, * * *."

Petitioner contends that there is no legal justification for the statement that the act became a law on March 13, 1967, so that the inclusion of this language must necessarily have been for the purpose of confusing and deceiving prospective signers. In support of his argument, petitioner relies on language in decisions of this court wherein the effective date of acts not containing an emergency clause was in question. In the opinions in some of these cases there is language stating that the particular act did not become a law until ninety days after adjournment of the session of the General Assembly during which it was enacted. Perhaps a more accurate statement would have been that the particular act did not go into effect or become operative as a law until ninety days after the adjournment of the legislature, as was said in most of these decisions. See, *e. g., Arkansas Tax Commission, State ex rel.* v. *Moore,* 103 Ark. 48, 145 S. W. 199; *Gaster* v. *Dermott-Collins Road Improvement District,* 156 Ark. 507, 248 S. W. 2; *School District No.* 41 v. Pope County Board of Education, 177 Ark. 982, 8 S. W. 2d 501; *State* v. *Davis,* 178 Ark. 692, 11 S. W. 2d 479; *Dulaney* v. *Continental Life Ins. Co.,* 185 Ark. 517, 47 S. W. 2d 1082; *Gentry* v. *Harrison,* 194 Ark. 916, 110 S. W. 2d 497; *Steele* v. *Gann,* 197 Ark. 480, 123 S. W. 2d 520, 120, A. L. R. 754; *Fulkerson* v. *Refunding Board,* 201 Ark. 957, 147 S. W. 2d 980; *Schuman* v. *Walthour,* 204 Ark. 634, 163 S. W. 2d 517; *Barber* v. *State,* 206 Ark. 187, 174 S. W. 2d 545; *Knowles* v. *Vick Chemical Co.,* 240 Ark. 125, 398 S. W. 2d 204.

This language is justified in view of the fact that Amendment No. 7 provides that where a separate "emergency" section of a measure receives the required vote "in favor of the measure going into *immediate operation,* such emergency measure shall become effective without delay." Other language in this section provides that the filing of a referendum petition against one or more parts of an act "shall not delay the remainder from becoming *operative.*" It is also provided that: "Any measure referred to the people by referendum petition shall remain in *abeyance* until such vote is taken." [Emphasis ours] Thus, it will be seen that the question is not whether the act is a law, but whether it is operative or effective as such.

The form of a petition for referendum is prescribed by Ark. Stat. Ann. § 2-204 (Repl. 1956) (Section 2 of Act 2 of the Extraordinary Session of 1911). This section sets out a form which is not mandatory but which must be substantially followed. See, also, § 2-207. The portion of the form for describing the measure to be referred reads: "* * * ..... Act No. ..... of the General Assembly of the State of Arkansas, approved on the ..... day of ....., 19....., entitled 'An Act ..... * * *'" Thus, it is obvious that the general form was prepared so as to be appropriate under the usual circumstances when the measure has been approved by the Governor. This measure was not approved by the Governor, however, and became law without his signature. The purpose of specifying the act number and date is to aid in identification of the measure of which referral is sought. *Westbrook* v. *McDonald,* 184 Ark. 740, 43 S. W. 2d 356. In order to properly identify the measure, it then became necessary that there be substituted for the date of approval whatever date most nearly corresponded with the date of approval under the usual circumstances when the measure has been that on which the measure became a law without the Governor's signature. Under our Constitution it could be said that it became a law, in this sense, on March 13, 1967. Article 6, § 15, provides, in pertinent part:

> "If any bill shall not be returned by the Governor within five days, Sunday excepted, after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the General Assembly, by their adjournment, prevent its return, in which case it shall become a law, unless he shall file the same, with his objections, in the office of the Secretary of State and give notice thereof by public proclamation within twenty days after such adjournment."

The challenged statement on the petition is not clearly erroneous, but, even if it were, this court has held that errors in giving the act number and date of approval cannot be misleading when an exact copy of the act appeared upon the petition, as is the case here. *Westbrook* v. *McDonald,* 184 Ark. 740, 43 S. W. 2d 356.

POINT II.

The ballot title is defective and insufficient in that it omits any reference to that portion of the act which requires the Commission to prohibit discounts, rebates, and allowances.

The ballot title is quite lengthy, as is the act. Petitioner argues that the title omits the "very heart" of the act and alleges that the fundamental and basic reason underlying the passage of the act was the prevention of rebates, secret discounts and allowances and cloaks and devises to shield and hide rebates. This court has indicated that a ballot title of unusual length might be objectionable. *Leigh* v. *Hall,* 232 Ark. 558, 339 S. W. 2d 104. The title should state the purposes of the act as concisely as possible. *Reynolds* v. *Hall,* 222 Ark. 478, 261 S. W. 2d 405. A complete abstract of the act to be referred would be impracticable. *Coleman* v. *Sherrill,* 189 Ark. 843, 75 S. W. 2d 248; *Leigh* v. *Hall, supra.* Neither an abstract nor a synopsis is required. *Sturdy* v. *Hall,* 204 Ark. 785, 164 S. W. 2d 884. In addition to identification of the measure, the only requirements are

that the title be intelligible, honest and without misleading amplification, omission or fallacy and without partisan coloring. *Newton* v. *Hall,* 196 Ark. 929, 120 S. W. 2d 364; *Bailey* v. *Hall,* 198 Ark. 815, 131 S. W. 2d 635; *Sturdy* v. *Hall, supra; Washburn* v. *Hall,* 225 Ark. 868, 286 S. W. 2d 494.

Petitioner claims that Section 10 of Act 306 is not covered by the title and calls attention to the fact that 13 practices are prohibited as cloaks or devices to shield and hide rebates, discounts and allowances. If this is the "very heart" of the act, it seems strange that the prohibition of rebates, discounts and allowances is nowhere mentioned in either the title of the act or the title of the section. The title of the act is:

ACT 306

> AN ACT to Create an Arkansas Dairy Commission for the Purpose of Stabilizing the Arkansas Dairy Industry; to Provide for Staffing the Commission and to Relate its General Powers and Authority to Make Investigations, Inspections, and to Require Licenses; to Establish Minimum Prices for Sales of Milk Products and Frozen Dairy Products; to Authorize the Commission to Prohibit the Sale of Milk Products and Frozen Dairy Products Below Minimum Prices or at Variance with Filed Prices and to Relate the Quasi-Legislative and Adjudicatory Functions of the Commission; and for Other Purposes.

The title of Section 10 is:

> PROHIBITION AGAINST SALES OF MILK PRODUCTS, FROZEN DAIRY PRODUCTS, AND OTHER FROZEN PRODUCTS BELOW MINIMUM PRICES OR AT VARIANCE FROM FILED PRICES

The 13 practices which petitioner says are prohibited are listed under Subsection B of Section 10, the opening paragraphs of which are:

B. PROHIBITION OR REGULATION OF OTHER ACTIVITIES IN CONTRAVENTION OF PRICING REQUIREMENTS

The use or attempted use of any method, device or transaction intended to accomplish, or having the effect of accomplishing, the sale or attempted sale or the purchase or attempted purchase of milk products and frozen dairy products at less than the minimum prices established by the Commission pursuant to this Act for sales of such milk products and frozen dairy products, or which is designed to circumvent the price requirements of the Commission (including those provided for in Section 9 of this Act), or which has the effect of substantially undermining the effectiveness of such pricing requirements, shall be prohibited or regulated by the Commission, whether such method, device or transaction applies directly to the milk product or frozen dairy product sold or purchased, or is used in connection with the sale or handling of any other product, commodity, article, or service.

The Commission shall, subject to the requirements of the preceding paragraphs, prohibit or regulate each of the following practices, which said practices are listed herein solely for the purpose of illustrating the broad scope of the Commission's authority under this Section. Such listing is not intended to be an exclusive enumeration of those practices, methods, devices, schemes, arrangements and activities which the Commission is authorized to prohibit or regulate: [Here follows a list of 16 separate topics.]

Subparagraphs (14) (15) and (16) do not prohibit any practice but rather provide for various situations in the absence of established minimum prices. Among these are provisions for granting of certain limited discounts or allowances. Other sections of the act permit or require certain discounts. Sections 8 G. and 8 H. (9) (b).

Even in those subparagraphs of Section 10 B., listing prohibited practices, the Commission to be established under the act could authorize discounts and allowances. See Section 10 B. (1).

It seems clear from a reading of the act that any prohibition against rebates, discounts and allowances is intended to prevent evasion of minimum prices established by the Arkansas Dairy Commission. The statement in the ballot title with reference to the general subject of minimum prices seems to be sufficient.

POINT III.

The ballot title is defective and insufficient and is drafted in a partisan manner in that it informs the voter of a license fee requirement without stating the insignificant amount thereof.

Petitioner contends that the title is insufficient in that it advises that each dairy farmer, processor, wholesale distributor, retailer or institution must apply to the Commission for a license, but fails to state that the fee is only $1.00. Again we note that the legislative title likewise makes no reference to the amount of the license fee. It is not required that the ballot title set forth every detail of the act. If it were so, the requirement of publication of the measure might well be omitted. *Coleman* v. *Sherrill,* 189 Ark. 843, 75 S. W. 2d 248. Actually, the license fee is limited to $1.00 only for licensees who perform only one licensed function or have only one place of business. A license is required for each function and each place of business. Furthermore, the license fee would be paid annually. The act would also permit the payment of not to exceed $500.00 per day by the licensee for each day his license would otherwise be suspended by action of the Commission. The $1.00 fee would only open the door for the processor who was licensed and the licensee who sold products not processed within the State because they would then become subject to an assessment by the Commission for

whatever amount was necessary to obtain funds and reserves for administration and enforcement, not to exceed five cents per hundredweight on all milk and milk equivalent. The already lengthy ballot title would be considerably extended if these explanations were made.

In *Coleman* v. *Sherrill,* 189 Ark. 843, 75 S. W. 2d 248, it was held that a ballot title describing a proposed initiated act as one to fix the salaries and expenses of county officers, to fix the manner in which such compensation and salaries should be paid, to reduce the cost of county government, and for other purposes, was sufficient. Among the matters dealt with in that proposal which could not be ascertained from the title were:

1. Provision for creation of the new office of custodian of county buildings at a salary of $50.00 per month.

2. Separation of the offices of sheriff and collector so that they would be held by two persons rather than one.

3. The sheriff would be on a fee and not a salary basis, and the county, in addition, would be required to furnish him with bedding, clothing, medicine and medical treatment for prisoners.

4. The collector would be allowed penalties and fees on delinquent taxes, in addition to his salary.

These matters were treated as details not necessary to be stated.

We find the ballot title sufficient without specification of the amount of license fees provided therein.

POINT IV.

The ballot title is defective and insufficient in that it omits to inform the voter that the act expired by its own terms in two years from the effective date.

Here again, it is significant that the fact that the act would expire by its own terms on June 30, 1969, unless re-enacted by the General Assembly, is not remotely referred to in either the title of the act or the title of the section so providing. The section title is only "EFFECTIVE DATE." While it is not necessary that the title of a legislative act be as full as that of an initiated act or the ballot title for a referendum, it seems that the careful draftsmen of the bill which became Act No. 306 emphasized the items which were important. This omission seems particularly relevant in view of the fact that the act is prefaced by a complete "Table of Contents" with page references to all sections and subsections listed by their respective titles. Similar omissions from titles of legislative acts have been considered in states whose constitutions require that the subject of a legislative enactment be stated in its title. These decisions are persuasive because the purpose of the adoption of the constitutional provisions was to prevent enactment of laws under false and misleading titles which would conceal from legislators or the people the true nature of a proposed law or of particular provisions therein. 50 Am. Jur. 145, Statutes, § 166; 82 C. J. S. 350, Statutes, § 212. The omission of any reference to an emergency clause making an act effective immediately has been held not to make the title insufficient. *Hill* v. *Taylor,* 264 Ky. 708, 95 S. W. 2d 566. The language of the Kentucky court seems appropriate here in view of the fact that the emphasis of our decisions is on the treatment of the general subject matter in a ballot title. That court said:

> "(a) Section 51 of the Constitution restricts legislative enactments to one subject which 'shall be expressed in the title.' Appellants rely upon the construction, often declared, that the title of an act must fairly and reasonably indicate its substance so as to impart notice of what it proposes to deal with. The time an enactment becomes operative as a law is not a part of the subject-matter. It is not neces-

sary, therefore, under the Constitution that the title of an act should contain a statement to the effect that it is an emergency measure, or that the enactment is emergent. While the specific question is res integra with us, the validity could well be sustained upon numerous cases to the effect that details of an act need not be recited in the title. *Talbott* v. *Laffoon,* 257 Ky. 773, 79 S. W. (2) 244. Where the question has been specifically passed upon, the uniform holding, so far as we are aware, has been that there need be no reference in the title of an act. 59 C. J. 808; *Dinneen* v. *Rider,* 152 Med. 343, 136 A. 754; *State* v. *Smith,* 49 S. D. 106, 206 N. W. 233; *Wheelon* v. *South Dakota Land Settlement Board,* 43 S. D. 551, 181 N. W. 359, 14 A. L. R. 1145; *State* v. *Howell,* 106 Wash. 542, 181 P. 37; *People* v. *Sterling Refining Co.,* 86 Cal. App. 558, 261 P. 1080."

In *Dinneen* v. *Rider,* cited in the *Hill* case, the Maryland court said that the time an act became effective was not its subject matter. In the *Wheelon* and *Smith* cases, the South Dakota court said that the time at which an act is to go into effect is no part of its subject. In the *Howell* case it was held by the Washington court that a statement of the time when an act takes effect does not change, or have any reference to, either the scope or object of an act.

The time when an act *might* go out of effect seems no more essential to a statement of the general subject of the act or its scope than the time it goes into effect. The actual provision which petitioner contends should be referred to in the title is that the act shall expire June 30, 1969, *unless re-enacted by the next regular session of the General Assembly.* Thus, the act may be temporary or permanent, depending upon the action of the next regular session of the General Assembly. Of course, any act of the legislative branch might be rendered ineffective by amendment or repeal at any sub-

sequent session, general or special. The only difference is that positive action would then be required, while this act could become ineffective by mere inaction. It is interesting to recall that the original, temporary Arkansas Retail Sales Act was made "permanent," insofar as a legislative act can be permanent, by repealing the section which provided: "This act will expire by limitation July 1, 1939." Act 306 of 1967 could be made "permanent" by this same expedient in a legislative session in 1968 or the first half of 1969 without re-enactment of the entire act. While this possibility is not determinative here, it does demonstrate that "effective dates" are not essential to sufficient ballot titles.

CONCLUSION

We find that Act 306 is adequately identified and its general purposes are fairly stated. A liberal construction requires that we not thwart the right of the voters to approve or disapprove a measure because of deficiencies of the nature of those asserted by petitioner where the ballot title has been approved by the Attorney General.

The petition is denied.

George Rose Smith and Brown, JJ., dissent.

George Rose Smith, Justice, dissenting. The majority, in following out-of-state decisions with respect to the weight to be given to the Attorney General's approval of the ballot title, have attached more importance to that officer's approval than we have given to it in the past or, in my judgment, we should now give to it. The requirement that state-wide petitions be submitted to the Attorney General for approval is merely a statutory device intended to be of assistance to the sponsors of the petition. The Constitution contains no such provision. Instead, Amendment 7 declares that the sufficiency of state-wide petitions shall be decided in the first instance by the Secretary of State, subject to review by this court. I do not think we ought to diminish our own constitutional responsibility by giving some sort of

prima facie verity to the Attorney General's approval of the ballot title. Our decision should rest on the merits alone, without regard to the Attorney General's conclusion.

In my opinion the ballot title now in controversy is fatally defective in failing to inform the voter that the act is a temporary measure that will expire in two years unless re-enacted by the legislature. Beyond question that is the strongest single point in favor of the act. We all know from experience that both the legislature and the electorate are more inclined to favor temporary measures, as tentative experiments in governmental regulation, than they are to favor similar statutes of a permanent nature. It cannot be doubted that many voters might be willing to try this venture in the touchy area of price control merely as a laboratory test, while those same voters would be wholly opposed to the measure as a permanent innovation. I cannot agree with the majority's view that the opponents of the act have discharged their obligation to draft an impartial ballot title when it is plainly apparent that they have suppressed any reference to the most important single fact in favor of the statute.

It seems hardly necessary to comment upon the court's reliance upon cases having to do with the effective date of initiated or referred measures. Such cases have no real bearing upon the present question. Whether an act goes into effect upon its approval by the governor or ninety days after the legislative adjournment is not apt to affect any voter's approval or disapproval of the measure. No comparable statement can be made about the inherently vital distinction between temporary and permanent legislation.

Brown, J., joins in this dissent.

BILLY RAY HOBBS AND HAROLD ANDERSON *v.* STATE OF ARKANSAS

5307 422 S. W. 2d 849

Opinion delivered January 15, 1968
[Rehearing denied February 12, 1968]

Larry R. McCord, for appellants.

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

J. Fred Jones, Justice. Billy Ray Hobbs and Harold Anderson were charged on information filed by the prosecuting attorney and were found guilty by a jury in the Sebastian County Circuit Court of the crimes of kidnapping and assault with intent to rob one Claud Knight. They were sentenced to five years in the penitentiary on the assault charges and to fifteen years on the kidnapping charges and they have appealed relying on the following points for reversal:

> "The trial court erred in refusing to grant the appellants' Petition for a severance.
>
> "The trial court erred in denying the appellants' Motion for a new trial on the ground that the verdict and judgment were contrary to the law and evidence in this case.
>
> "The trial court erred in overruling appellants' objections to cross-examination of appellant Billy Ray Hobbs as to alleged particular wrongful acts.
>
> "The trial court abused its discretion in refusing to reopen the case on behalf of appellants after the jury had been instructed but before they had retired to commence their deliberations."

The facts, under the testimony produced by the state, are briefly these: About 8:00 p.m. on March 15, 1967, Claud Knight left the 400 Bar in Fort Smith where he had been drinking some beer. When he left the bar, he encountered the appellants just outside the bar and they followed him down the street. Knight became suspicious of the appellants and went into McCartney's Cafe to avoid them. The appellants also went into the cafe and when Knight left the cafe, appellants followed him and forced him into an automobile by brandishing a pistol and by pushing and shoving him into the automobile. Anderson drove the automobile across the Arkansas River bridge toward Oklahoma, while Hobbs sat

in the back seat with Knight. While the automobile was on the bridge, Knight was trying to get out of the automobile and Hobbs severely beat Knight knocking out one or two of his teeth. Appellants took Knight into a wooded area on the Oklahoma side of the Arkansas River, robbed him of his money, glasses, pocket knife and watch, and then drove off and left him. Knight made his way to a beer tavern on the highway where the constable of Sequoyah County was called and the constable drove Knight to the police station in Fort Smith. While Knight was being questioned at the police station, the appellants were brought to the station as suspects in connection with a filling station hold up and Knight readily recognized and identified them as the ones who had kidnapped, assaulted and robbed him.

The officers found Knight's glasses and driver's license in a station wagon described by Knight, and claimed by the father of appellant Anderson. They also found a pistol under the porch at Hobbs' home, and also found one of Hobbs' shirts bearing human blood stains in Hobbs' house where he lived with his mother.

Hobbs testified at the trial in his own defense. He admitted that he and Anderson took Knight into Oklahoma, but contended that it was at Knight's request. He testified that Knight and one Frank Gibson were in company with a woman by the name of Romana Gilliam; that Knight offered to purchase some beer for the appellants if they would drive Knight, Gibson and the Gilliam woman over into Oklahoma; that the beer tavern in Oklahoma was closed and that by prearrangement, the appellants drove onto a side road and walked away from the automobile leaving Knight and Gibson in the automobile with the Gilliam woman; that somehow Gibson obtained possession of Knight's billfold and that when Knight attempted to retrieve his billfold from Gibson, a fight ensued between Knight and Gibson; that Gibson knocked Knight down into the ditch, and that he and Anderson helped Knight to his feet but that when Knight started to get back into the automobile,

he was shoved back into the ditch and they drove back to Fort Smith leaving Knight in the ditch. Hobbs explained that the pistol found under his front porch belonged to Gibson and that he had been unable to locate Gibson or the Gilliam woman as witnesses.

As to the first point urged by the appellants, Ark. Stat. Ann. § 43-1802 (Repl. 1964) provides that when two or more defendants are jointly indicted "* * * for a felony less than capital, defendants may be tried jointly or separately, in the discretion of the trial court." The appellants have shown no abuse of discretion in the trial court's refusal to grant appellants' petition for severance in this case.

We find appellants' second point without merit. The jury evidently believed Knight's version of what took place on the night of March 15, and we hold that the evidence was amply sufficient to sustain the convictions.

As to the third point, the appellant, Hobbs, was asked on cross-examination if he and Anderson had not robbed Roy Williams at a filling station after they had robbed Knight. The defense counsel objected to the question and the court admonished the jury as follows:

> "This witness is on cross-examination and while he is not on trial for any other robbery the prosecution has the right to ask him questions going to his credibility as a witness so you may better pass upon his credibility simply as a witness. Whether you believe him or disbelieve him on the story that he's told and the merits of the case for which he's being tried. Objections overruled.
>
> * * *
>
> "The jury will understand now that this witness is not on trial for robbery of these other acts that he is being questioned on. The court permitting these questions to be asked simply to go to his credibility as a witness."

With this admonition, the trial court did not err in overruling appellants' objections to this line of questioning on cross-examination. This same point was very recently before us on another appeal from the Sebastian County Circuit Court in the case of *Wright* v. *State,* 243 Ark. 221, 419 S. W. 2d 320, and in that case we said:

> "There are numerous decisions by this Court holding, in effect, that when a defendant takes the witness stand (as he did here) he is subject to the same rules of evidence and impeachment as other witnesses on cross-examination to test his credibility. *Jordan* v. *State,* 141 Ark. 504, 217 S. W. 788; *Kyles* v. *State,* 143 Ark. 419, 222 S. W. 458; *Hays* v. *State,* 219 Ark. 301, 241 S. W. 2d 266, and *Edens* v. *State,* 235 Ark. 178, 359 S. W. 2d 432."

We hold that the trial court did not err in overruling appellants' objections under point number three.

We find no merit in the fourth point relied on by appellants. After the case was fully tried and the State and appellants had rested, and after the jury had received its instructions, the court directed the jury to retire and consider its verdict. At this point appellants' counsel requested the court to reopen the case for the introduction of testimony of a witness, who apparently had just been procured by appellant Anderson's father and brought into the court room for the purpose of offering testimony to corroborate appellant Hobbs' testimony, that Knight, Gibson and the Gilliam woman got into the automobile with the appellants. The court refused to reopen the case for the introduction of this additional testimony. Appellants' counsel objected to the court's refusal and the objection was carried forward into appellants' motion for a new trial where it is asserted that the testimony the witness would have given constituted newly discovered evidence.

The reopening of a case for the taking of further testimony after the testimony on both sides has been

concluded and the cause has been submitted to the jury, is a matter within the sound discretion of the trial court, and this court will not reverse the ruling of the trial court unless it appears that the trial court, in making such ruling, has abused its discretion. *Whittaker* v. *State,* 173 Ark. 1172, 294 S. W. 397. We find no such abuse of discretion in the case at bar. Furthermore, the appellants did not exercise any degree of diligence at all in the production of the proffered evidence at the trial. No subpoena had been issued for the witness or served on him, and the record is silent as to how long the proposed witness had been in the court room. Appellants' own counsel had not even been advised of the name of the witness and had only been advised that appellant Anderson's father had walked ten miles to get the witness. Certainly a subpoena could have been obtained for this witness and the sheriff sent on his way to serve it in less time than it took appellant's father to walk ten miles, had appellants advised their counsel that the presence of the witness was desired. Before the defense rested, the witness could have been called to testify if in the court room, or a motion for recess or continuance made if he was not, had appellants and their counsel deemed the testimony of the witness important to their case.

Finding no error in the trial of these cases, the judgments of the trial court are affirmed.

Affirmed.

MRS. ROBERT L. ROGERS II ET AL *v.* STATE FARM INSURANCE COMPANY

5-4397 422 S. W. 2d 677

Opinion delivered January 15, 1968

Howell, Price & Worsham, for appellants.

Rose, Meek, House, Nash & Williamson, for appellee.

J. FRED JONES, Justice. This appeal presents a rather unique question and tests the elasticity of coverage under an omnibus clause in an insurance policy.

The facts are these: After dark on January 4, 1963, a Mr. Brown's automobile stalled while he was driving east on Highway 270, east of Hot Springs. A Mr. Blocker was driving his pickup truck in the same direction and came upon Brown and his stalled automobile. Brown flagged the Blocker pickup to a halt, and at Brown's request, Blocker agreed to assist Brown in removing the stalled automobile from the blacktop pavement to

the shoulder of the highway. Brown steered his own automobile and Blocker drove his pickup in pushing the Brown vehicle from the rear. Blocker had pushed the Brown vehicle about fifteen feet and both vehicles had stopped about three feet off the pavement. Within a few moments after Blocker had stopped pushing the Brown vehicle,[1] a Mr. Moppin, driving his own automobile in the same direction as Blocker and Brown, veered to his left away from the Blocker and Brown vehicles and collided head-on with a station wagon occupied by Mr. and Mrs. Rogers and being driven west on the north side of the highway by Mrs. Rogers. Neither the Brown automobile nor the Blocker pickup were actually involved in the collision.

Mr. and Mrs. Rogers filed suits for personal injuries against Blocker, Brown and Moppin. Blocker and Moppin filed answers but Brown did not. Mr. and Mrs. Rogers dismissed their complaints against Moppin and Blocker without prejudice, and took default judgments against Brown for $10,000.00 in favor of Mr. Rogers, and for $2,000.00 in favor of Mrs. Rogers.

Mr. and Mrs. Rogers were unable to collect the amounts of the judgments against Brown, so on February 14, 1966, they filed separate complaints against the appellee, State Farm Insurance Company, alleging that State Farm had issued a liability insurance policy to Blocker; that Brown was an insured under the policy issued to Blocker, and that State Farm owed the amount of the judgments obtained against Brown. State Farm answered denying coverage for Brown under its policy to Blocker and denied that Brown had given notice of any claim made, or complaint filed, against him as was

[1]It was stipulated that Mike Thomas and Allen Lee would testify that both vehicles were off the pavement and that Blocker would testify that he had ceased pushing the Brown automobile, and that both vehicles were off the pavement; Mr. Rogers testified that the two vehicles were partially on and partially off the highway and "barely moving."

required of an insured under the provision of the insurance contract with Blocker.

The trial court, sitting as a jury, found that Brown was not an insured under the provisions of the policy issued to Blocker; that Brown did not comply with the notice provision in Blocker's policy, and that State Farm did not waive the provision in the policy requiring notice. Judgment was rendered for State Farm and on appeal to this court, Mr. and Mrs. Rogers rely on the following point for reversal:

> "Frank Brown being covered under the omnibus clause of a policy issued by appellee to Chester Blocker, and appellee having received sufficient notice and waiving the policy conditions as to formal notice, this cause should be reversed and judgment entered for appellants against appellee."

State Farm had issued an insurance policy to Blocker on his pickup truck agreeing "to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages * * * caused by accident arising out of the ownership, maintenance or use, including loading or unloading, of the owned automobile."

Appellants contend that Brown was an insured under the provision of Blocker's policy which provides:

> " 'Insured' includes
>
> (1). The named insured and,
>
> * * *
>
> (4). *Any other person while using the owned automobile,* provided the operation and the actual use of such automobile are with the permission of the named insured or such spouse and are within the scope of such permission. . . ." (Emphasis supplied).

So the question presented to the trial court was whether Brown was *using* the Blocker pickup and was

included as an insured under this provision of Blocker's policy, and was thus obligated to pay, on behalf of Brown, such sums as Brown was legally obligated to pay as damages caused by an accident arising out of the "ownership, maintenance or *use* . . ." of Blocker's pickup. The question before us on appeal is whether there is any substantial evidence to sustain the trial court in holding that Brown was not such insured.

Brown's legal obligation to pay is only evidenced by default judgments against him and the basis for his liability is obscured by the judgments, but having concluded that the trial court was correct in holding that Brown was not an insured under the policy issued to Blocker, we do not reach the lack of notice and waiver found by the trial court and we do not consider the argument of appellee on the question of liability on judgment without actual trial.

It is obvious to us that Blocker was using his own pickup truck in pushing Brown's automobile when the collision occurred, and that Brown was not using the Blocker vehicle within the meaning of the insurance policy issued to Blocker on the pickup.

American Fire & Casualty Co. v. *All-State Insurance Co.,* 214 F. 2d 523, cited by appellant, is readily distinguishable from the case before us. In the *American Fire* case, the insured had separate liability policies on his Chrysler automobile and his Jeep. He was driving the Chrysler and towing his Jeep behind his Chrysler when he crossed the center line of the highway with both vehicles and collided with another automobile. The liability carrier on the Chrysler settled all claims and sued for contribution from the liability carrier on the Jeep. The effect of the court's holding was that under the terms of the policy on the Jeep, it was not necessary that the Jeep be operated on its own motor power in order for the insurance carrier to be liable under the policy.

Appellants candidly admit that "research has found only one case involving the pushing of one car by another, and it fails to cover the present case. . . ." We have reached the same results in our own research.

We recognize the distinction between the construction to be placed on an omnibus clause extending the coverage of an insurance policy and an exclusionary clause limiting or excluding coverage under a policy. We also recognize the modern trend to broaden coverage under omnibus clauses of insurance contracts, (*Industrial Indemnity Co.* v. *Continental Casualty Co.*, 375 F. 2d 183) but liberal construction should not extend coverage under an omnibus clause, or restrict it under an exclusionary clause, beyond the plain words and obvious intent and meaning of the words used in the contract.

We apply the same reasoning in the case at bar as the court applied in the case of *Great American Indem. Co. of New York* v. *Saltzman*, 213 F. 2d 743, where the word "use" in connection with the use of an aircraft was being considered in interpreting an exclusionary clause in a liability insurance policy, and the court said:

> "Of course if the term 'use' is construed to embrace all its possible meanings and ramifications, practically every activity of mankind would amount to the 'use' of something. However, the term must be considered with regard to the setting in which it is employed. * * *
>
> The court is convinced that the term 'use' as employed in the exclusionary clauses was intended to mean and does mean the ordinary use or employment of the property or aircraft."

This same reasoning was again employed in *Maryland Casualty Co.* v. *Turner*, 235 Ark. 718, 361 S. W. 2d 646, where another exclusionary clause was involved, and in addition to employing the quote from the Saltzman case, *supra*, this court said:

> "The word 'Use' is, to some extent, employed by insurance companies as a substitute for the phrase 'care, custody, and control,' in exemption clauses in liability policies.
>
> "Therefore, approaching the construction of the phrase with common sense and practicality, we make use of the following quotations from *Great American Indemnity Co. of N. Y.* v. *Saltzman,* 213 F. 2d 743, which was a federal case applying Arkansas law."

The phrase "while using" must be read in context with the remainder of the omnibus clause in determining whether or not Brown was an insured under the policy issued on Blocker's truck in the case at bar. If Brown was *using* the Blocker vehicle, he was included as an insured while so *using* the Blocker vehicle provided that the *operation* and *actual use* was with Blocker's permission and (such operation and actual use) was within the scope of such permission.

In the case of *Wiebel* v. *American Farmers Mutual Ins. Co.*, 140 A. 2d 712, Wiebel had used his automobile to push his neighbor's automobile backwards from a driveway to the highway. The bumpers became engaged just before the car was pushed onto the highway pavement and Wiebel and the neighbor pushed the automobile onto the pavement by hand. An automobile traveling on the highway collided with the neighbor's car. The question was whether Wiebel's insurance carrier was obligated to defend under a policy clause requiring a defense where the suit arises out of "the ownership, maintenance or use of the automobile." In holding that defense was not required, the court said:

> "Automobile insurance contracts protect against liability for accidents arising out of the 'use' of vehicles but they cannot be held to protect against liability for accidents where the use of the automobile was not connected with the accident or the crea-

tion of a condition that caused the accident but merely with an unfinished project."

In the case of *Southern California Petroleum Corp.* v. *Royal Indemnity Co.,* 369 P. 2d 407, coverage under an omnibus clause of an independent contractor's liability policy was being considered, and in that case the court said:

> "It has been held that one employing an independent contractor may be using the vehicle of such independent contractor when such employer exercises supervisory control, at some time, over the vehicles or the movement thereof. The decisions recognize use as going beyond actual mechanical operation of the vehicle and 'as encompassing the broader concept of employing or putting the vehicle to one's service by an act which assumes at any time—with the consent of the owner or his agent—the supervisory control or guidance of its movements.' *Woodrich Construction Co.* v. *Indemnity Ins. Co. of North America,* 252 Minn. 86, 89 N. W. 2d 412. See, also, *Persellin* v. *State Automobile Ins. Ass'n.,* 75 N. D. 716, 722, 32 N. W. 2d 644, 647; *Hardware Mut. Cas. Co.* v. *Mitnick,* 180 Md. 604, 26 A. 2d 393; *Liberty Mut. Ins. Co.* v. *Steenberg Const. Co.,* 8 Cir., 225 F. 2d 294. But, absent the exercise of any supervisory control over the vehicle of an independent contractor, the one employing such independent contractor is not a person 'using' such vehicle within the meaning of the omnibus clause, when the actual use thereof is by the named insured or its employees."

The record is not clear whether the Blocker truck was actually engaged in pushing the Brown automobile at the time of the collision or not, but be that as it may, there is no evidence at all that Brown was directing or supervising the operation. We can reach no other conclusion from the language used in the omnibus clause of Blocker's policy, than that *operation* and *actual use*

of the Blocker vehicle by Brown was intended before coverage would extend to Brown and that Brown was not *using* Blocker's vehicle within the scope of Blocker's permission for the operation or actual use of the vehicle by Brown, or within the scope and intentions of the omnibus clause in Blocker's policy.

Applying the common sense approach in the case at bar, if Brown was *using* Blocker's pickup truck to the extent of liability coverage as an insured within the meaning of the omnibus clause in Blocker's insurance contract, we can see no end to coverage or limits to which it could be extended by the liberal interpretation of the phrase "while using." Under such construction, Brown might well have been an insured under Blocker's policy had Blocker been hauling a sack of feed for Brown at Brown's request. In such event, Blocker's insurance carrier would be obligated to pay a default judgment against Brown, who might somehow be made a party defendant in a suit for damages growing out of the negligent operation of Blocker's truck by Blocker alone, but while hauling the sack of feed as an accommodation to Brown.

We do not perceive this to be the intent or effect of the omnibus clause in Blocker's insurance policy. The findings of the trial court are supported by substantial evidence in this case, and the judgment of the trial court is affirmed.

Affirmed.

FOGLEMAN, J., not participating.

ALVIN BELL, DIRECTOR ET AL *v.* MARTHA L. ADAMS

5-4435 422 S. W. 2d 691

Opinion delivered January 15, 1968

Ted R. Christy; Joe Purcell, Attorney General; *William R. Hass,* Asst. Atty. General, for appellants.

Fletcher Long, for appellee.

CONLEY BYRD, Justice. Appellants Alvin Bell, Theo Money, John Cage and Walter L. Hinton, Jr., director and board members of the Arkansas Alcohol Beverage Control, appeal from a chancery court decision holding invalid Act 352 of 1939 because a majority of the Senate did not vote in its favor as required by Ark. Const. art. 5 § 22. The only point on appeal is that the chancery court did not have jurisdiction of the subject matter.

In her petition for declaratory judgment appellee, Martha L. Adams, stated that her request to move the location of her liquor permit from the city of Forrest City to a place outside thereof had been denied solely because of the prohibition against the location of liquor stores outside city limits contained in Act 352 of 1939. She alleged the act was invalid because the Senate Journal showed that a majority of the Senate did not vote

for its passage as required by art. 5 § 22 of the Constitution when the vote of Hon. Paul Gutensohn—whom we held to be neither a de jure nor a de facto senator in *Matthews* v. *Bailey,* 198 Ark. 830, 131 S. W. 2d 425 (1939)—was not counted. Appellants' response, in addition to the admission and denial of certain facts, affirmatively prayed for a determination of the constitutional validity of the act. This matter was presented to the chancellor upon stipulated facts and the authenticated copies of the Senate Journal. Thus the jurisdictional issue here raised was not presented to the trial court.

We have consistently held that where a defendant has answered and not reserved any objection to the court's jurisdiction on the ground that there is an adequate remedy at law, he can not raise the issue for the first time on appeal. See *Reid* v. *Karoley,* 232 Ark. 261, 337 S. W. 2d 648 (1960), and *Taylor* v. *Bank of Mulberry,* 177 Ark. 1091, 9 S. W. 2d 578 (1928).

While the sale of intoxicating liquor has been held a mere privilege subject to the exercise of the police power, *Gipson* v. *Morley, Comm'r of Revenues,* 217 Ark. 560, 233 S. W. 2d 79 (1950), it does not follow that a permit validly issued or subject to issue is not entitled to the protection of a court of equity. To hold that the location at which one can exercise such a privilege is not an economic right, as distinguished from a mere political right (see *Catlett* v. *Republican Party* 242 Ark. 283, 413 S. W 2d 651 [1967]), for purposes of equity jurisdiction would require us to ignore the practical fact that the sale of liquor is a remunerative business.

Furthermore, it appears that exhaustion of administrative remedies through the Board under Ark. Stat. Ann. §§ 48-1313 to -1316 (Repl. 1964) would have been futile because of the prohibition in Act 352 against such location. Under such circumstances it is often recognized that the failure to exhaust such remedies is not a prerequisite to judicial relief. See 2 Am. Jur. 2d Admin-

istrative Law § 605. However, we do not reach the issue here since it was not raised in the trial court.

Affirmed.

HARRIS, C. J., dissents.

CARLETON HARRIS, Chief Justice, dissenting. Ark. Stat. Ann. § 48-1314 (Repl. 1964) provides that any applicant or licensee, who feels aggrieved by an order of refusal issued by the Director, "may appeal from such order or decision to the Alcoholic Beverage Control Board by filing a notice of appeal with the said board." Section 48-1316 sets out that the licensee, "if dissatisfied with the decision of the board, may appeal to the Circuit Court of Pulaski County."

There is nothing in the record to reflect that Mrs. Adams has filed any notice of appeal with the Alcoholic Beverage Control Board, and this litigation has wound up in the Chancery Court, instead of the court provided by statute (Circuit Court of Pulaski County). In other words, appellee had an adequate remedy at law.

As early as November 9, 1914, this court pointed out in the case of *Wade* v. *Horner,* 115 Ark. 250, 170 S. W. 1005, that the sale of intoxicating liquors is not a matter of right, protected by constitutional guarantees, but is only a privilege, and the General Assembly, in legalizing same, "may impose such restrictions as it deems appropriate." This case was quoted, and the holding reiterated, in *Gipson* v. *Morley, Commissioner of Revenues* (1950), 217 Ark. 560, 233 S. W. 2d 79.

The General Assembly saw fit to enact the statutes heretofore mentioned, and I think statutory procedure should be followed.

I therefore respectfully dissent.

JOE MALLETT ET AL *v.* SARA BRANNON ET AL

5-4439 423 S. W. 2d 880

Opinion delivered January 22, 1968
[Rehearing denied March 4, 1968]

Douglas Bradley, for appellants.

Gordon & Gordon, for appellees.

CARLETON HARRIS, Chief Justice. On March 22, 1966, Mrs. Sara Brannon, age 30, appellee herein, was operating a 1956 Chevrolet automobile, which was owned

by her husband, Earnest Dean Brannon, within the city limits of Morrilton. Occupying the vehicle with appellee were her three small children. Mrs. Brannon was traveling west on Highway 64, and she stopped her automobile at the intersection of Cherokee Street. According to her subsequent testimony, it was her intention to turn left, and she signaled such a turn with her blinker light. Joe Mallett, driver of a Save-A-Stop, Inc., tractor and trailer unit, was likewise traveling west behind Mrs. Brannon, and struck the rear of the Brannon vehicle. Appellee received personal injuries, and thereafter, she instituted suit for damages purportedly suffered. Her husband, individually, and as father and next friend of the minor children, likewise joined in the complaint, seeking recovery for the damage to his automobile, the loss of companionship and consortium of his wife, recovery for the injuries to the children, and judgment for the medical, hospital, and other bills allegedly occasioned by the collision. On trial, the jury returned a verdict for Mrs. Brannon in the amount of $30,000.00, and found for Mr. Brannon in the amount of $2,000.00. The $2,000.00 judgment was paid, but Mallett and Save-A-Stop have appealed from the judgment entered against them for the benefit of Mrs. Brannon. For reversal, six points are relied upon, but under the view that we take, there is no necessity to discuss all of these contentions.

The proof on the part of appellee reflected that she was on her way to her mother's home somewhere in the neighborhood of 5:00 o'clock P.M. She stated that she traveled west on Highway 64 with the intention of turning left into Cherokee Street, and that she turned on the blinker at the intersection for the purpose of allowing eastbound traffic to clear before making her turn. While waiting, she was struck by the vehicle driven by Mr. Mallett. Appellants readily admit the negligence of Joe Mallett, which is imputed to appellant, Save-A-Stop; however, appellants point out that such an admission is not intended to absolve the appellee of negligence, and it is contended that she was likewise guilty of negligence.

It is urged that the court erred in permitting the testimony of A. A. Davis, who operates a grocery and furniture business on Highway 64. Mr. Davis, whose store is about a half block from the intersection, testified that he heard the crash, and he immediately went outside, and noticed that the left blinker light on the Brannon automobile was blinking. Appellant argues that since Mr. Davis did not see the collision, this testimony should not have been allowed. Appellant argues that the fact that the light was on after the collision was not proof that it was on before the collision, and that this testimony permitted the jury to speculate that the light was on. We are not impressed by this argument. The testimony by Davis was to the effect that he *immediately* ran out of his store upon hearing the crash, and noticed the blinking light. We think this was a circumstance that the jury was entitled to consider in reaching its conclusions.

It is asserted that the court erred in permitting Dr. T. H. Hickey of Morrilton to express an opinion based on, according to appellant, a deficient hypothetical question. The question was rather lengthy, and was based on the testimony presented by appellee and her witnesses. In propounding same, counsel for appellee asked the doctor to assume that the weight of the tractor-trailer which struck appellee's car was approximately 12,000 pounds; that the empty weight of the trailer was approximately 10,000 pounds, but carrying a load of approximately 2,000 to 2,500 pounds, and that the blow pushed the vehicle of Mrs. Brannon (who had her foot on the brake) approximately 73 feet. Her immediate symptoms of injuries were then described and Dr. Hickey was asked if he could state whether or not, with a reasonable degree of certainty, that this collision was a competent producing cause of Mrs. Brannon's pain and disability. Counsel for appellants objected on the basis of the fact that there was no evidence as to the speed of the tractor, the doctor having stated that weight and

speed produce force. Of course, there would be a difference in the result where a vehicle traveling 20 miles an hour struck an object, and where one traveling 60 miles an hour struck the same object, though it was undoubtedly appellee's idea that the distance an object travels after being hit (the distance being disputed) is itself an indication of the force (and therefore, indirectly, the speed) of the blow. There being no testimony as to speed, that factor could not properly be used in propounding the hypothetical question, but this does not mean that such a question could not be asked. In *Missouri-Pacific Railroad Company* v. *Hampton,* 195 Ark. 335, 112 S. W. 2d 428, this court, quoting earlier Arkansas cases, said:

" In taking the opinion of experts, either party may assume as proved all facts which the evidence tends to prove. The party desiring opinion evidence from experts may elicit such opinion upon the whole evidence or any part thereof, and it is not necessary that the facts stated, as established by the evidence, should be uncontroverted. Either party may state the facts which he claims the evidence shows, and the question will not be defective if there be any evidence tending to prove such facts."

Further, quoting yet another case, the court added:

"In propounding a hypothetical question to an expert witness, the data upon which it is based need not cover all of the facts which have been proved in the case. The party offering the testimony may select such facts as he conceives to have been proved, and predicate his hypothetical question thereon."

It was also stated:

" * * * Besides, if appellants' counsel thought there were any facts omitted from the question which were essential to forming a conclusion, his remedy is to put those additional facts before the witness on cross-examination."

Here, no cross-examination relative to the basis of the answer given by the doctor was conducted; in fact, there was no cross-examination concerning the hypothetical question at all. We find no merit in this contention.

Appellants' primary point for reversal is the assertion that the court erred in denying appellants' motion to require a further medical examination of Mrs. Brannon. The factual background giving rise to this point is as follows:

Appellee's medical witness was Dr. Hickey, who, on February 20, directed a letter to counsel for appellee which states:

"To Whom It May Concern:

Re: Mrs. Sarah Brannon

This patient was seen at St. Anthony's Hospital on March 22, 1966. She complained of some pain and soreness in the region of her neck and head, with some pain and discomfort in the region of the anterior chest wall. According to the history from the patient, she had just been in an automobile accident in which the car she was driving was struck from behind and knocked some distance. She remained at St. Anthony's Hospital and was dismissed on April 3, 1966. The pain and soreness in the region of the cervical spine, dorsal spine and anterior chest wall, and the headaches became more severe. She has had almost continual pain in this region since this accident. X-rays were negative for fracture or dislocation. She has been treated with analgesics, sedatives, muscular relaxing drugs, and ACTH, and with a cervical collar. It is my opinion that this patient will have approximately 10% to 15% permanent partial disability in the region of the cervical spine as a result of this accident."

Copy of this letter was turned over to counsel for appellants. Appellants had previously requested an ex-

amination of Mrs. Brannon by Dr. J. J. Magie, a Morrilton physician, and she voluntarily submitted to an examination by this doctor on February 27. Magie's report was submitted to counsel on March 1, and the portion pertinent to this point reads as follows:

"Upon examination of the sensory system there was noted to be complete anesthesia to sharp pin point sticks of the skin involving in an area involving the left upper extremity, left haemothorax, left neck and left face. The patient is unable to distinguish between dull and sharp pin points in these areas. There appears to be loss of position sense of the sensory system involving the left upper extremity. There seems to be some weakness of trapezius power on the left. The bulk of the muscle appears to be intact as there is no atrophy. The power hand grip is negative. Abduction and adduction of the fingers were normal. Extension and reflexion of the forearm were normal but seem to be weak. The muscle bulk and tone appear to be normal. The reflexes of the upper extremity tricepts, bicepts and brachoradialis were normal. The occumen were positive on the right side. The lower extremities appear to be intact.

"It is thought that this patient contains quite bizarre neurological findings that are difficult to evaluate. It is suggested that this patient be examined by a neurologist for completion of diagnosis. It does appear that this patient has suffered some cervical neck injury. This is demonstrated by weakness of the left upper extremity, weakness of trapezius function and loss of ability to completely flex the neck."[1]

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[1]With reference to neurological findings, Dr. Magie, at the trial, testified:

"Well, this was what was quite interesting with this woman, and this woman presents a picture of having, and she states that she has in her history, some loss of anasethia of the left hand; and when I checked her for sensory sensation, this woman has loss —it's subjectively shown—that she has loss of sensation of the left upper arm, the upper half of the left thorax and of the face. She has a positive Hoffman sign of the right hand, which probably means nothing really. This is—Can I give my interpretation of this?

This was appellants' first information concerning any nerve damage, and a motion was filed asking that Mrs. Brannon submit to further medical examination under the rules of discovery. A copy of Dr. Magie's findings was attached to the motion. The court, on March 6, denied this motion.

Mrs. Brannon, *inter alia,* testified as to a loss of feeling in her left shoulder and left arm, and Dr. Hickey also testified to these facts on his direct examination. The doctor admitted on cross-examination that he had not mentioned in his letter of February 20 (heretofore set out) any loss of feeling, but stated that, in the letter, he was just giving a "summary" of his findings. Dr. Hickey agreed that a neurologist would be more likely to find nerve damage than the normal practitioner. The doctor had stated on direct examination that he had sent Mrs. Brannon to see Dr. John Adametz, a neurosurgeon of Little Rock, testifying that he made this appointment for appellee as a matter of determining that she had no brain damage. There is no report from Dr. Adametz in the record, nor did he testify at the trial,

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"This is quite a bizarre finding—I'm sorry—One other thing is that this woman has loss of positional sense of the left upper arm, and what I mean by that is that I can bend her fingers like this and have her close her eyes and ask her which position her finger is in, and she can't tell me whether it's straight or whether it's flexed. And these findings—loss of sensation of the chest—the skin covering the chest—the arm and the face and the positive Hoffman and loss of positional sense is quite a bizarre array of symptoms, and it's hard to explain these symptoms, or these signs on the basis of her injury."

Q. "Doctor, you might tell me what you mean by bizarre?"

A. "Well, it doesn't fit completely."

Q. "All right. In lay language then I assume then—or can I assume that you are saying you cannot relate these complaints to a history of whip lash?"

A. "That's right. * * *

"The left side of the neck, the left arm, and the left thoracic cage is supplied by the sensory nerves from the cervical spine—here. The left face is supplied by a cranial nerve, which has nothing to do with the cervical nerves in the neck. This is why this thing seems quiet bizarre, how this woman with a neck injury could have involvement of the left face, loss of sensation to touch and pain over the left side of her face. This is why, to me, it just doesn't fit. I couldn't explain it."

and appellants obtained the first knowledge of appellee's visit to this neurosurgeon during Dr. Hickey's testimony.

Appellants argue that they had no way of knowing, when selecting Dr. Magie, that an examination by a neurologist was desirable, since the doctor had been selected before they received the report from Dr. Hickey, and —what is more important—nothing is mentioned in the Hickey report that they received concerning nerve damage.

We think there is merit in appellants' contention; of course, as stated in *Reed* v. *Marley*, 230 Ark. 135, 321 S. W. 2d 193, the statute, Ark. Stat. Ann. § 28-357 (a) (Repl. 1962), does not give an absolute right to a defendant to have the complaining party examined by a physician of its choice, but does authorize such an examination "for good cause shown."

We think good cause was shown. These alleged injuries certainly were important, and could have influenced the jury in determining the amount of damages to be awarded. There was no reason for appellants to suspect that an evaluation by a neurologist was necessary until after they received the report from Dr. Magie. There was no request for a continuance of the case and there was no reason why the granting of the motion would necessarily delay the disposition of the litigation, but the most important fact is that the suggestion for the further examination came, not from appellants, but from Dr. Magie, who stated that "this patient contains quite bizarre neurological findings that are difficult to evaluate, and suggest that Mrs. Brannon should be examined by a neurologist for a completion of diagnosis." Of course, there was no opportunity to take the deposition of Dr. Adametz, since appellants were not aware of the fact that he had made an examination.

We think there was an abuse of discretion in not granting this motion.

It is contended that there was no substantial evidence to justify the question of permanent injury being submitted to the jury. We disagree, but inasmuch as this judgment is being reversed, and the cause remanded for another trial, we see no need to discuss the point.

It is asserted that the judgment was excessive, and this point, of course, is no longer involved, and one other alleged error is presented, but it is not likely to again occur on a second trial.

For the error herein set out, the judgment is reversed, and the cause remanded.

AMERICAN INSURERS LIFE INSURANCE COMPANY ET AL *v.* J. E. REGENOLD

5-4297 423 S. W. 2d 551

Opinion delivered January 22, 1968
[Rehearing denied February 26, 1968]

Patten & Brown & E. J. Butler, for appellants.

E. J. Bell and *Oscar Fendler,* for appellee.

George Rose Smith, Justice. In 1960 the appellee's father, E. M. Regenold, lent $17,892.23 to the principal appellant, American Insurers Life Insurance Company, to enable that company to avert the foreclosure of a mortgage upon 4,495 acres of farm land owned by American Insurers in Mississippi. The elder Regenold gratuitously assigned the contract to his son, who brought this suit to enforce a provision in the contract by which the lender was to receive, in addition to interest at the rate of 6% per annum, one-half of the net proceeds accruing from the ultimate sale of the Mississippi lands. The defendants, American Insurers and several of its officers, attacked the validity of the provision in question on the ground that it made the loan agreement usurious. The chancellor rejected that defense and awarded the plaintiff a judgment for $110,538.96, with interest bringing the total to $127,-702.47. The pivotal issue here is that of usury.

Except for a dispute about the value of the Mississippi lands when the contract was made, there is hardly any real conflict in the testimony. From a record of almost 2,000 pages we winnow the pertinent facts.

Noble Gill organized American Insurers Life Insurance Company in 1958 and was originally the sole contributor of its capital assets. At Gill's death in 1960 the company was insolvent, at least in the sense of being unable to meet its current obligations. A foreclosure proceeding was pending against the Mississippi land—the corporation's principal asset. The comparatively small sum of $17,892.23 was needed to pay delinquent items then due upon mortgage indebtednesses totaling $262,519.89.

It is fairly inferable that Gill, as president of the company, had not kept his fellow officers and directors fully informed about the Mississippi foreclosure suit. We may suppose that Gill had some plan for averting the foreclosure, but his death leaves that matter in a state of uncertainty.

Gill died on June 12, 1960. One of the appellants, Walter H. Patton, was elected to succeed him as president of the company. A few days later Patton and another director, J. E. Stevenson, Jr., were both in Mississippi. Stevenson, Gill's brother-in-law, was an Arkansas real estate dealer with whom the lands had been listed for sale at an asking price of $350,000. He testified that it was not until June 23 that he learned that a public foreclosure sale was scheduled to take place on June 25. He and Patton began desperate efforts to find some last-minute means of averting the sale.

The two men telephoned E. M. Regenold, a close friend who was president of a bank in Blytheville, Arkansas. After much discussion Regenold agreed to lend American Insurers the needed $17,892.23, with the debt to be evidenced by a promissory note bearing interest at 6% per annum. As security for the note American Insurers agreed (a) to assign to Regenold the net proceeds of an insurance policy on Gill's life, (b) to assign to Regenold the rents from part of the Mississippi lands, (c) to give Regenold a note for $10,000, to be

executed by Stevenson, and (d) to give Regenold a "commission" of half the net proceeds of the sale of the Mississippi land, after the payment of the mortgage indebtedness and expenses of sale. On the basis of the telephone conversations Regenold sent a cashier's check to Patton and Stevenson, which reached them only minutes before the foreclosure sale would have been held. Regenold's attorney promptly drafted a resolution embodying the terms of the loan contract, which the directors of American Insurers adopted on June 30. The corporation also executed its note for $17,892.23, which was actually paid within a few months from the Mississippi rents. In 1963 American Insurers, which was then in liquidation, sold the Mississippi lands for $567,131.25. After the payment of the debts against the land and of the sum of $133,804.38 as a compromise settlement with tenants who had an option to purchase the land themselves, there remained the net proceeds of sale upon which the chancellor based his decree in favor of the appellee.

At the outset we disallow the appellee's contention that the transaction was a "joint venture" rather than a simple loan of money. We find no resemblance between the contract, as described by Regenold's own attorney, and a joint venture or partnership agreement. Regenold took no risk in the sense of advancing money that might be lost if the supposed venture proved a failure. Regenold simply lent the sum of $17,892.23 upon security so sound that the principal debt was actually repaid before December 1, 1960. Both Patton's contemporaneous letter to Regenold, outlining the terms of the contract, and the corporate resolution prepared by Regenold's lawyer, referred to the advance of funds as a loan. It is true that Patton's letter described Regenold's share of the net proceeds of sale as a "commission," and that the corporate resolution recited that the payment was to be made "in consideration of services rendered and assistance given to this corporation by the said F. M. Regenold in connection with the sale of certain lands owned by this corporation" in Mis-

sissippi. There is no contention whatever by the appellee that his father was entitled to a commission for helping to sell the Mississippi property, because E. M. Regenold was not a licensed real estate broker either in Arkansas or in Mississippi and hence could not legally have contracted for a broker's commission in either state. The undisputed truth is that Regenold's sole contribution to the transaction was a loan of money, leaving no sound basis for the argument that some sort of joint venture existed.

We come, then, to the pivotal issue of usury. Contracts by which the lender acquires a right to a speculative profit in place of or in addition to a fixed rate of interest ordinarily present an issue of fact on the question of usury. Needless to say, if the lender bargains for the possibility of a profit in addition to the highest permissible rate of interest, the transaction is usurious. *Sosebee* v. *Boswell,* 242 Ark. 396, 414 S. W. 2d 380 (1967). At the other extreme, there is ordinarily no basis for a finding of usury when the one who advances the money takes the risk of losing both principal and interest if the venture fails. See Williston, Contracts, § 1692 (Rev. Ed. 1938); *Andrews* v. *Andrews,* 170 Minn. 175, 212 N. W. 408, 51 A. L. R. 542 (1927).

With respect to the particular fact situation now before us, which falls between the two extremes just mentioned, we approve—with special emphasis on the final sentence—the following paragraph from the Restatement of Contracts, § 527 (1932):

"Usury laws do not forbid the taking of business chances in the employment of money. A creditor who takes the chance of losing all or part of the sum to which he would be entitled if he bargained for the return of his money with the highest permissible rate of interest is allowed to contract for greater profit. On the other hand it is not permissible to use this form of contract as a device for obtaining usurious profit. If the prob-

ability of the occurrence of the contingency on which diminished payment is promised is remote, or if the diminution should the contingency occur is slight as compared with the possible profit to be obtained if the contingency does not occur, the transaction is presumably usurious."

Regenold exacted from the debtor a contract by which both the principal and interest of the loan were amply secured. At most Regenold gave up the difference between interest at 6% upon a note due in six months and interest at 10% upon the same note—a sum amounting to about $350. (Under Mississippi law the maximum interest rate would have been 8%, but the appellee does not argue that the result under the Mississippi decisions would be more favorable to him than that under Arkansas law.) By contrast, Regenold's probable profit would be so decidedly disproportionate to the pittance he gave up as to bring the case within the Restatement's declaration that the contract is "presumably usurious."

We do not agree with the appellee's insistence that there is "no evidence of any kind" as to the market value of the Mississippi lands on June 25, 1960—the date of the oral agreement. To the contrary there is an abundance of proof indicating that Regenold's expected profit would far exceed the trivial additional interest he might lawfully have demanded. The total mortgage debt against the lands was $262,519.89. Stevenson, who had the lands listed for sale at $350,000, unquestionably assured Regenold that the profit clause in the agreement would result in a substantial return. Before the loan was paid in November, Patton sent Regenold a statement (appearing as Exhibit 32) in which he estimated the debtor's equity to be $100,000. Within less than 65 days after the loan was made American Insurers rejected an offer of $325,000 for the property. Regenold was apparently anxious for the company to accept that offer and expressed his willingness to advance an additional $53,000 to consummate the transaction. In December of 1960 the tenants on the land were given an option to

purchase it for $350,000. Finally, less than three years after Regenold made the loan the land was actually sold for $567,131.25. On the proof as a whole we are forced to conclude that Regenold, while taking no substantial risk of losing either the principal or the interest of the loan, demanded in addition a reasonably certain profit so completely in excess of legal interest as to constitute usury. The chancellor was in error in not so holding.

Reversed.

FOGLEMAN, J., disqualified.

GLENN F. WALTHER *v.* DAVID C. McDONALD Jr.

5-4379 422 S. W. 2d 854

Opinion delivered January 22, 1968

Leon Catlett and *Glenn F. Walther,* for appellant.

Arnold & Arnold and *Abner McGehee,* for appellee.

PAUL WARD, Justice. The issue presented here for decision is whether Glenn F. Walther (appellant) is legally a member of the Arkansas Public Service Commission. Set out below are some of the undisputed background facts which explain how the issue reaches this Court.

> The Legislature convened in regular session on Monday, January 9, 1967. On that day Dan D. Stephens was a duly appointed, qualified and acting member of the said Commission.
>
> On January 14, 1967, the term for which Stephens was appointed expired, but pursuant to Ark. Stat. Ann. § 73-101 (Repl. 1957) he continued to hold office "until his successor was appointed and qualified."
>
> On February 9, 1967 the Senate went into the Committee of the Whole, and then into Executive Session, at which time appellant was appointed to succeed Stephens for a term to expire on February 14, 1973. Shortly thereafter (but on the same day) the Governor sent to the Senate the appointment of Jerry Thomasson to the same position on the Commission.
>
> On February 10, 1967 (Friday) the Senate passed a resolution (No. 16) reaffirming its action on the previous day.
>
> On the following Monday (February 13, 1967) the Senate resumed its deliberations (in Executive Session) of appointments by the Governor which began on February 9, and the appointment of Jerry Thomasson by the Governor was rejected because the position had already been filled by the appointment of appellant.

On February 24, 1967, David C. McDonald Jr., a resident, citizen and taxpayer filed a complaint in the Pulaski County Chancery Court, against appellant, the State Auditor, and the State Treasurer, asking the court to declare appellant's appointment illegal and void, and to enjoin the state officers from paying his salary. The complaint alleged, among other things, that the appointment of appellant was illegal and void under the provisions of Ark. Stat. Ann. § 6-601 *et seq.* and § 7-201 *et seq.* (Repl. 1956).

On February 27, 1967 the state officers filed a general denial and on the following day appellant filed an answer denying all material allegations in the complaint and further alleging that his appointment was "in conformity with the rules and customs of the Senate, the Statutes of the State of Arkansas and the Constitution of the State of Arkansas, and that he is now serving as a legally appointed member of the Public Service Commission since the 10th day of February, 1967." He also asked that the complaint be dismissed for want of equity.

A trial was had on the issues joined on a stipulation of facts and the oral testimony of one member of the Senate. At the conclusion, the trial judge issued an exhaustive Memorandum Opinion from which we quote the following portions:

> "The Arkansas Senate, in adopting Resolution No. 16, seemingly acted (according to the undisputed arguments of all parties) under the authority of Act 417 of 1947, Acts of Arkansas. Therefore, the first question considered by the Court in reaching its conclusion in this case is the applicability of this act to these circumstances. * * *
>
> "Because it is the conclusion of the Court that 417 is not applicable to the facts of this case, it is not necessary to consider the other points of argument presented by the parties."

The trial court then, in its decree, found "that the purported appointment of the defendant, Glenn F. Walther, by the Arkansas Senate, as a member of the Public Service Commission is illegal and void," and restrained him "from acting or purporting to act" as a member of the Commission—also restraining the other defendants from paying his salary.

We agree with the trial court's interpretation of the decisive issue presented in this case, and also agree with its determination of that issue.

On appeal, and in response to the one vital issue found by the trial court, appellant states:

> Act 417 of 1947, Section 1 [Ark. Stat. Ann. § 6-601 (Repl. 1956)] applies to all Boards and Commissions, specifically including the Public Service Commission.

We are unable to agree with the interpretation appellant gives to the above statute. There are several reasons why we conclude this statute deals only with Honorary Boards and Commissions, and does not include the Public Service Commission. We note here that appellant does not, and cannot reasonably, contend that the Public Service Commission is an Honorary Commission.

(a) The title of said Act 417 contains this clause: "For regulation of sessions of Honorary Boards and Commissions." In *Stewart* v. *Shaver,* 207 Ark. 847 (p. 849), 183 S. W. 2d 299, this Court said:

> "Result is that we must deal with an act wherein the title (which, of course, is not controlling, but may be looked to in ascertaining intent) * * *."

In the early case of *Reynolds* v. *Holland,* 35 Ark. 56 (p. 60) the Court said: "The title of this act affords the clue to its intention." Our research reveals that this

case (on the point stated) has been cited with approval in more than 10 decisions of this Court, including the case of *Pruitt* v. *Sebastian County Coal & Mining Co.*, 215 Ark. 673, 222 S. W. 2d 50. It is true that we have said that the language in the act must be considered, and, when clear, it is controlling.

(b) We now look at some of the language in Act 417. Section 2 says the "board or commission shall meet in regular session at least once during each bimonthly period;" that the board shall notify the Governor who shall be eligible to attend and sit with the Commission; Section 3 provides that any member of the board who shall be absent from two successive regular meetings shall be subject to removal. Considering the above language, it would be unreasonable to say it was meant to apply to the Public Service Commission.

Appellant, in this connection, argues that if the legislature had intended for Act 417 to apply only to honorary boards, it would have obviously amended Act 1 of 1943, but we find no merit in such argument. Said Act 1 abolished all boards and commissions charged with "charitable, penal or correctional institutions and institutions of higher learning of the State of Arkansas as now established", and created sixteen other boards of nature. It is common knowledge of which we take judicial notice that since 1943 many honorary boards and commissions have been established which are in no way related to, or of the nature of, the ones mentioned above, and which may be subject to the provisions of Act 417.

Ark. Stat. Ann. § 73-101 (Repl. 1957) specifically deals with the appointments to the Arkansas Public Service Commission, and is applicable in this case. It provides, among other things, that the Governor shall appoint the commissioners—subject to approval of the Senate; that the terms will expire on January 14 of each year, and that: "Each commissioner shall hold office during the term for which he was appointed and *until*

his successor is appointed and qualified''. (Emph. supplied.)

In view of what we have heretofore said, we conclude that appellant's appointment by the Senate was a nullity and that the decree of the trial court must be, and it is hereby, affirmed.

FOGLEMAN and BYRD, JJ., dissent.

CONLEY BYRD, Justice, dissenting. The majority's construction of Act 417 of 1947 to apply only to honorary boards and commissions ignores the practicalities of our form of government. By our constitution the legislature in a sixty-day session (with certain exceptions) is expected to appropriate money for the operation of the various state agencies, boards and departments and to provide the policy limits within which they are to operate. Almost every incoming governor seeks some type of reform legislation, and it appears to me that before a representative or senator is called upon to vote for the expenditure of money or the revamping of legislation he should be entitled to know who will be the appointees in the various departments, boards and commissions—*i. e.*, who is going to handle the money to be appropriated and administer the laws to be passed. Thus, under the construction placed upon Act 417 by the senate and appellant, the legislature could force the governor to get his administrative house in order before the legislature got down to any serious business.

Under the majority's decision the governor can nullify the senate's right of confirmation of many appointees by the simple expedient of waiting until after the expiration of the 60-day session of the legislature before making his appointments.

Therefore I dissent from the majority's construction of the Act because it does violence to both the plain language of the Act and the underlying practical reasons for its passage.

I also concur in the reasons stated by Justice Fogleman.

FOGLEMAN, J., concurs in this dissent.

John A. Fogleman, Justice, dissenting. The reasons given by the majority for sustaining the action of the trial court fail to take into consideration many previous decisions of this court and utilize others only for "proof-text" quotations without considering the background on which those decisions are based. I submit that Act 417 of 1947 is a complete, understandable, unambiguous statute and that its language speaks clearly for itself. In order to demonstrate, it becomes necessary to reproduce the full text of the act (omitting the severability clause), now appearing as Ark. Stat. Ann. §§ 6-601, 6-602, 6-603 (Repl. 1957).

> SECTION 1. Within twenty days after the convening of the General Assembly in regular session, the Governor shall submit to the Senate for confirmation the names of such board or commission members and appointees as are by law required to be confirmed by the Senate. Provided, however, that the names of appointees to fill vacancies which occur after the first twenty days of the session of the General Assembly, but prior to the adjournment thereof, shall be submitted within five days from the date of each such vacancy. In the event of rejection by the Senate of an appointee whose name has been so submitted, the Governor shall, within ten days after receipt of written notice from the Secretary of the Senate of such rejection, submit the name of another appointee to fill such vacancy. In the event the Governor should, within the time herein required, fail to appoint, or fail to submit to the Senate for confirmation, the name of any appointee, the office shall be vacant, and the Senate shall proceed to fill the vacancy by an appointee of its own choice.

SECTION 2. Each such board or commission shall meet in regular session at least once during each bimonthly period, and shall meet in special session as often as its business may require. Except in those instances when such boards or commissions have under consideration privileged information concerning individuals, all meetings shall be open to the public.

The chairman, or secretary, of each such board or commission shall, in writing and not less than forty-eight hours in advance thereof, notify the Governor of each regular or special session, and the Governor, or a representative designated by him, shall be eligible to attend all such meetings, and to sit with such board or commission when privileged information is being considered; and the said secretary shall, within five days after each such meeting, furnish the Governor with a certified copy of the minutes thereof. Provided, however, the Governor may waive the time of notice herein required as it relates to special meetings.

SECTION 3. Any board or commission member who shall be absent from two successive regular meetings shall be subject to removal from such board or commission in the event he shall fail to present to the Governor a satisfactory excuse for such absence; and in that event, such unexcused absence shall constitute sufficient cause for removal.

Not one single word in the text of this act indicates that it relates only to "honorary" boards or commissions,[1]

[1]There is no clear definition of just what these are. Section 7-201 (Act 1 of 1943) mentions certain boards therein designated as honorary. What common understanding would encompass within the limitations of "honorary" boards and commissions is doubtful. It has been suggested that "honorary" boards and commissions are those whose members only receive a per diem instead of a salary. This does not fit the definition of "honorary" as given in Black's Law Dictionary.

nor is the word "honorary" mentioned anywhere. Especially is this obvious when § 1, the section in question, is considered.[2]

The first principle of statutory construction brushed aside by the majority is that the title of an act is no part of the act itself. *Laprairie* v. *City of Hot Springs,* 124 Ark. 346, 187 S. W. 442; *Special School District No.* 33 v. *Howard,* 124 Ark. 475, 187 S. W. 444; *McLeod* v. *Purnell,* 164 Ark. 596, 262 S. W. 682; *Glover* v. *Henry,* 231 Ark. 111, 328 S. W. 2d 382.

The conclusion reached by the majority then, is contrary to many of our decisions, holding that the title of an act is not controlling in its construction. *Special School Dist. No.* 33 v. *Howard,* 124 Ark. 475, 187 S. W. 444; *State* v. *White,* 170 Ark. 880, 281 S. W. 678; *City of Conway* v. *Summers,* 176 Ark. 796, 4 S .W. 2d 19; *Graves* v. *Burns,* 194 Ark. 177, 106 S. W. 2d 602; *Glover* v. *Henry,* 231 Ark. 111, 328 S. W. 2d 382; *Berry* v. *Gordon,* 237 Ark. 547, 376 S. W. 2d 279. As aptly put by Professor Robert M. Anderson, when the enacted portion of an act is clear and unambiguous, the orthodox view is that the search for meaning is at an end. "Drafting A Legislative Act In Arkansas," 2 Ark. L. Rev. 382, 386. I submit that the act in question clearly shows that it is intended to apply to all those board and commission members as are by law required to be confirmed by the Senate. Diligent search and examination reveals no doubt, or reason for doubt, whatever as to the application of the act. It is only when an examination of an act itself reveals doubt as to the legislative intent, because of ambiguities in its language, that the courts look to the title as an aid to construction. *Western Union Telegraph Co.* v. *State,* 82 Ark. 302, 101 S. W. 745; *Payne* v. *State,* 124 Ark. 20, 186 S. W. 612; *Laprairie* v. *City of Hot Springs,* 124 Ark. 346, 187 S. W. 442; *McLeod* v. *Purnell,* 164 Ark. 596, 262 S. W. 682; *Roscoe* v. *Water & Sewer Imp. Dist. No.* 3, 216 Ark. 109, 224

[2]Appellee admits that § 1, read in isolation, appears to be applicable generally.

S. W. 2d 356. This is the first instance I have found in the Arkansas cases wherein this court looked to a portion of an act's title to *find* a doubt or ambiguity and then *resolved* the doubt by looking to the same portion of the title. It is clear that this must be the case because the second clause of the title is the only place where application to honorary boards and commissions is suggested. It is *only* where the meaning of the lawmakers is in doubt that the language of the title of a statute has any force in interpretation of its meaning. *State* v. *White,* 170 Ark. 880, 281 S. W. 678; *City of Conway* v. *Summers,* 176 Ark. 796, 4 S. W. 2d 19; *Graves* v. *Burns,* 194 Ark. 177, 106 S. W. 2d 602. See, also, 2 Ark. L. Rev. 382, 386, Anderson. The legislature and courts of Arkansas have not been hamstrung by any limitation on subject matter by titles of acts since the adoption of the Constitution of 1874. *Laprairie* v. *City of Hot Springs, supra.* There is no good reason for the court to impose such a limitation now.

The next cardinal rule of statutory construction bypassed by the majority is that the title of an act cannot limit its application or that of a section thereof. *Drainage Dist. No.* 18 v. *McMeen,* 183 Ark. 984, 39 S. W. 2d 713. To say that Act 417 applies only to "honorary" commissions is to limit the application of the language of the act itself, particularly Section 1 which clearly applies to such board and commission members as are by law required to be confirmed by the Senate.

There is still another important rule of statutory construction ignored by the majority. When the title of an act is *repugnant* to its subject matter, the title *cannot be considered* in determining the legislative intention if the act itself is unambiguous. *Huff* v. *Udey,* 173 Ark. 464, 292 S. W. 693; *Matthews* v. *Byrd,* 187 Ark. 458, 60 S. W. 2d 909. Professor Anderson (2 Ark. L. Rev. 382, 385) makes its very clear that a title may not be employed to restrict the plain meaning of the purview, or enacted portion, and states that it is equally clear

that the purview will control in the event of a patent inconsistency.

Some examples of cases in which this court has refused to permit the title of an act to control its construction or limit its scope are:

Special School District No. 33 v. *Howard,* 124 Ark. 475, 187 S. W. 444, where the title of the act indicated that it was to repeal a previous act, but a perusal of the text disclosed that the act's application was limited to one county.[3]

Drainage District No. 18 v. *McMeen,* 183 Ark. 984, 39 S. W. 2d 713, where the title indicated that the act authorized the funding of bonded indebtedness of levee or drainage districts and the reassessment of benefits in such districts, but the section conferring authority to reassess benefits was held not to be limited to those districts proposing to refund indebtedness.

Matthews v. *Byrd,* 187 Ark. 458, 60 S. W. 2d 909, where the title was "An Act To Fix Compensation Of County Officers" but the text included two sections dispensing with the requirement of publication of delinquent tax lists.

Huff v. *Udey.* 173 Ark. 464, 292 S. W. 693, where the title of a stock law indicated that it applied to certain portions of Pulaski County north of the Arkansas River, while the language of the text included other portions of the county.[3]

Berry v. *Gordon,* 237 Ark. 547, 376 S. W. 2d 279, where an act entitled "An Act To Make An Appropriation To Defray Expenses In Connection With Public Relations Activities Of Certain Constitutional Officers Of The Executive Department Of The State Of Arkan-

[3]These cases were decided before the constitutional prohibition against local and special legislation was adopted.

sas'' was held to authorize reimbursement for public relations expenditures of the Speaker of the House of Representatives, even though he was neither a constitutional officer nor a member of the executive department.

The lower court and the majority here have accepted as valid appellee's argument that reading of Sections 2 and 3 of Act 417 makes it clear that the General Assembly could not have intended that any part of the act apply to anything except ''honorary'' commissions. His argument is that it is unthinkable that a commission such as the Public Service Commission be required to notify the Governor of each regular or special session, or that he be authorized to remove a member who should be absent from two successive regular meetings.[4] The distinctions offered to support this contention are that the Public Service Commission holds hearings lasting several days, that its powers and duties are many and varied, and that its members are paid substantial salaries. By contrast, it is said that the members of an ''honorary'' commission are not paid a salary but receive a per diem only, and that responsibilities are less, requiring fewer meetings. It seems logical, rather than illogical, to me that one being paid a ''full-time'' salary for a full-time job having great responsibilities should be held to no less rigid requirements than one serving for the honor and having less important responsibilities. The removal provided for is certainly not mandatory but discretionary, as the defaulting member may present a satisfactory excuse to the Governor. The highest magistracy of the judicial department of government should not construe an act upon any assumption that the chief magistrate of the executive department would exercise authority under it arbitrarily and capriciously. In applying the test of logic, it seems more significant that the Governor have notice of sessions of an agency

[4]It is interesting to note that this provision has been changed so that three successive regular meetings must be missed instead of only two in order to create a vacancy and to eliminate part of the penalty for participation in unauthorized closed meetings. The Governor's discretionary power of removal for absence remains the same. Act 66 of 1961.

with the responsibilities of the Public Service Commission than that he have knowledge of sessions of commissions with much more limited powers and duties. It is also at least as important that he be given the benefit of having his representative present when an agency regulating public utilities affecting the lives of all our citizens goes under the cloak of privileged meetings as it is that he have this opportunity in the event of such meetings by agencies with a narrower scope. The propriety of these privileges should be emphasized since the commission may conduct its hearings anywhere in the state. Ark. Stat. Ann. § 73-104 (Repl. 1957). I feel that the construction making the act applicable to all commissions whose members must be confirmed by the Senate is much more logical than that of appellee, the trial court, and the majority. But even if I did not, I agree with appellee when he says: "The short answer is that the Courts may not frustrate the legislative will because it is 'illogical,' or because it evinces a policy decision with which they disagree."

We should also consider and respect the fact that the General Assembly has by its action construed the act in a manner contrary to the majority opinion. While this may not be controlling on us, it should certainly be persuasive. If an earlier act is ambiguous, subsequent action by the legislative branch indicative of its intent or meaning is entitled to great weight when the courts are called upon to interpret the prior law. *Arnold* v. *City of Jonesboro,* 227 Ark. 832, 302 S.W. 2d 91. See, also, *United States* v. *Bowling,* 256 U. S. 484, 41 S. Ct. 561, 65 L. Ed. 1054 (1921); *California School Township* v. *Kellogg,* 109 Ind. App. 117, 33 N. E. 2d 363 (1941); *Stanford* v. *Butler*, 142 Tex. 692, 181 S. W. 2d 269 (1944); *Chatlos* v. *McGoldrick,* 302 N. Y. 380, 98 N. E. 2d 567 (1951); 2 Sutherland Statutory Construction, 3d. Ed., § 5110.

If the title of the act were properly to be considered, it is significant that its first clause relates to the "Manner in which Certain Appointees of the Governor Shall be submitted to the Senate for Confirmation," while its second purports only to be "For Regulations of *Ses-*

sions of Honorary Boards and Commissions and for other Purposes." [Emphasis mine] Thus, even the title does not indicate an intent to limit the effect of Section 1 to "honorary" boards and commissions. The obvious legislative intention of Section 1 is to minimize gubernatorial evasion of the requirement of senatorial confirmation of appointees by utilization of incumbent holdovers and interim appointments.

I submit that this court has, in this decision, inappropriately and in disregard of the separation of powers, imposed its own sense of propriety upon the General Assembly, an equally independent coordinate department of government. The wisdom, advisability, expediency, propriety, and necessity of particular legislation are matters solely for consideration of the legislative department and are not for judicial determination. *Ward* v. *Bailey,* 198 Ark. 27, 127 S. W. 2d 272; *Albright* v. *Karston,* 206 Ark. 307, 176 S. W. 2d 421; *Reed* v. *Hundley,* 208 Ark. 924, 188 S. W. 2d 117; *Fugett* v. *State,* 208 Ark. 979, 188 S. W. 2d 641; *Cook* v. *Arkansas Missouri Power Corp.,* 209 Ark. 750, 192 S. W. 2d 210; *Longstreth* v. *Cook,* 215 Ark. 72, 220 S. W. 2d 433; *Beaumont* v. *Faubus,* 239 Ark. 801, 394 S. W. 2d 478.

I submit that the cases cited by the majority as authority for their application of the act's title do not in anywise transgress the rules of construction set out above. *Reynolds* v. *Holland,* 35 Ark. 56, found the title to be the clue to the legislative intention of the act there under consideration when its text, literally construed, would have failed in the legislative purpose to establish a county boundary line and would have made the act unconstitutional. There was no indication that the title to every act furnished the clue to its intention. In *Pruitt* v. *Sebastian County Coal & Mining Co.,* 215 Ark. 673, 222 S. W. 2d 50, the court referred to the titles of certain acts only to reinforce its conclusion that there was nothing in any of the three acts to support a contention that by implication they amended or repealed previous acts fixing a county line. In *Stewart* v. *Shaver,* 207 Ark.

847, 183 S. W. 2d 299, also, the title was used as a bulwark for the conclusion that the act in question applied only to primary elections because the title and the first 11 sections of an act dealt with primary elections, the 12th imposed penalties, and the 14th was the emergency clause, while the 13th, in addition to stating a severance clause, stated that the act should apply to all general and special elections. The court found that Section 13 only applied to general and special primary elections. While the court's conclusion there seems to have been clearly indicated by the language of the act itself, the most that can be said is that resort was had to the title to resolve an ambiguity in the text of the act. In both the *Pruitt* and *Stewart* cases, the court said that the title was not controlling.

Because I differ with the majority on the point on which they affirm the chancellor, and because I would reverse the decree, it is necessary that I state my reasons for rejecting other arguments advanced in support of this holding. The obvious purpose of the General Assembly was to minimize gubernatorial bypassing of the requirement of senate confirmation of appointments by hold-over service and interim appointments.

1. It is said that the Senate's appointment could be of no effect because (1) a vacancy must exist before the act is applicable, and (2) Ark. Stat. Ann. § 73-101 vests the power of appointment in the Governor. The lower court says that the act provides for three classifications or conditions under which the Senate may appoint:

(a) to fill vacancies existing prior to convening of regular sessions not filled by the Governor within 20 days after the convening of the General Assembly;

(b) to fill vacancies occurring after the first 20 days of the session but prior to adjournment if Governor fails to submit the name of a nominee to the Senate

for confirmation within five days from the date of vacancy;

(c) where an appointee has been rejected and the Governor has failed to submit the name of another within 10 days after receipt of notice from the Secretary of the Senate. The appellee contends that the whole premise of this scheme is the existence of a vacancy and that no vacancy existed because the incumbent held over.

The complete answer is that the first sentence of Section 1 does not mention or relate to a vacancy in any way. The proviso in the second sentence relates to vacancies, as does the third sentence. The fourth sentence then, declares a vacancy to exist upon failure of the Governor to act within the allotted time. It would be an absurdity to declare a vacancy in an office already vacant. The lower court's construction would render this fourth sentence a meaningless and useless appendage. The only construction of the act which would make all its words meaningful would require that:

(a) Within 20 days after convening of the General Assembly, the Governor must submit the names of all board and commission members whose confirmation by the Senate is required.[5] (This would cover not only all vacancies in office, but all replacements for those whose terms had expired.)

(b) The Governor must submit to the Senate the names of proposed appointees to fill vacancies[6] which occur after the first 20 days of a regular session but prior to adjournment thereof within five days from the date of the vacancy.

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[5]Act 235 of 1967 clearly recognizes that there have been gubernatorial appointments where Senate confirmations were not required.

[6]This is clearly a vacancy by death, resignation or removal, as defined in *Justice* v. *Campbell*, 241 Ark. 802, 410 S. W. 2d 601, or as provided by statute.

(c) In the event of Senate rejection of an appointee whose name was submitted within five days after a vacancy, the Governor shall submit another within 10 days.

In the event the Governor shall fail to submit the name of an appointee for confirmation within the applicable time limit, then the office becomes vacant, and the Senate may appoint.[7]

2. Appellee contends that the resolution by which Walther was appointed by the Senate was invalid because it was not read three different times without suspension of the rules. He contends that this is required by Article V, § 22. This section states that every *bill* must be read at length on three different days in each house, unless the rules are suspended by two-thirds of the house. It is clear from reading other sections of our constitution that the scope of the term "bills" is limited to proposals for legislative acts and that the "reading" requirement is not intended to apply to resolutions. Article V, § 21 requires that no *law* be passed except by *bill*. Article V, § 29 prohibits the withdrawal of money from the treasury except in pursuance of specific appropriation by *law* and requires that the purpose of the appropriation be distinctly stated in the *bill*. Section 41 prohibits the incurring of expense by either house except by *bill* passed by both houses and approved by the Governor. Article VI, § 15 covers the veto power and speaks of a *bill* being presented to the Governor for his approval and of its becoming *law* if not returned in time or if it should be passed over his veto. Article VI, § 16 specifically treats concurrent resolutions, requiring gubernatorial approval of those in which the concurrence of both houses is required, and provides for pass-

[7]Under both this construction and that of the chancellor, the Governor would have to submit the name of a proposed appointee to fill a vacancy occurring on the 20th day on that same day. While this might not seem logical, we are only to choose a logical construction when an act or provision is capable of more than one construction.

age over the Governor's disapproval "according to the rules and limitations prescribed in the case of a *bill.*" [Emphasis mine] It seems clear that the framers of the constitution recognized the difference between a bill and a resolution and, therefore, would have specifically mentioned resolutions in connection with any constitutional requirements they intended to impose for action thereon. For the fields of legislation and constitutional law, Black's Law Dictionary gives this definition of "bill":

> The word means a draft of an act of the legislature before it becomes a law; a proposed or projected law. A draft of an act presented to the legislature, but not enacted.

3. Another argument against the validity of the appointment advanced by appellee is that the vote was not taken viva voce and entered upon the journal as required by Article V, § 14 of the Arkansas Constitution. *Viva voce* means "with the living voice;" by word of mouth or orally. Webster's New International Dictionary, 2d & 3d Editions; Random House, Unabridged Dictionary of the English Language; 92 C. J. S. 1020. According to Black's Law Dictionary: "As descriptive of a species of voting, it signifies voting by speech or outcry, as distinguished from voting by a written or printed ballot." It has been held that there are three methods of making an appointment by viva voce vote. They are:

1. by calling the roll with each member naming his choice;

2. by placing candidates in nomination and then calling the roll of members;

3. by naming a candidate by resolution and the members orally voting for it.

See, *In re Brearton,* 44 Misc. Rep. 247, 89 NYS 893 (1904), where the court held that a statute requiring that appointments by a city council be by viva voce vote

was complied with by actions taken by both the second and third methods, one of which was utilized at one meeting and the other at a subsequent meeting of the council. We must presume that the vote on Senate Resolution No. 16 was by viva voce vote, even though the journal does not specifically say so. It is a well recognized rule that the courts must presume that constitutional procedural requirements have been followed by our General Assembly unless the legislative journals themselves show to the contrary. *Huff* v. *Udey,* 173 Ark. 464, 292 S. W. 693; *Davis* v. *Road Improvement Dist. No.* 7, 162 Ark. 98, 257 S. W. 724; *Ewing* v. *McGehee,* 169 Ark. 448, 275 S. W. 766.

The direction that the vote be entered on the journals does not require more than a declaration of the result and is complied with by the showing in the Senate Journal that the resolution was adopted. Had the framers of our constitution intended, as appellee contends, that the yeas and nays be recorded in the journal, they would have said so in those words, as they did in Article V, §§ 12 and 22.

4. The trial judge indicated that no vacancy existed in the position at the time of the senatorial appointment. I disagree. The clear provision of Section 1 of the act is to declare a vacancy to exist when the Governor fails to submit the name of his nominee within the time allotted. The legislature's power to say when an office is vacant can only be limited by specific constitutional provision. *State* v. *Lansing,* 46 Neb. 514, 64 N. W. 1104, 35 LRA 124 (1895); *State* v. *Christensen,* 84 Utah 185, 35 P. 2d 775 (1934). See, also, 67 C. J. S., Officers, § 50b; 42 Am. Jur., Public Officers, § 132. This power is particularly appropriate when the office is one which was created by the General Assembly. *Townley* v. *Hartsfield,* 113 Ark. 253, 168 S. W. 140. The case of *Justice* v. *Campbell,* 241 Ark. 802, 410 S. W. 2d 601, relied upon by appellee, has no application because this court had previously said that in the sense of the constitutional provision (Amendment 29) relating to the filling of va-

cancies in elective offices, a vacancy only existed when there was no incumbent. This specific constitutional provision then prevented the General Assembly from declaring a vacancy to exist otherwise. There is no such constitutional restriction here.

5. Finally, it is contended that appellant's appointment was invalid because Section 1 of Act 417 (Ark. Stat. Ann. § 6-601) is an unconstitutional encroachment on the executive branch in violation of Article 4, §§ 1 and 2 of the Constitution. This argument is based upon the contention that there is an inherent power to appoint in the executive branch of the government, and that the act violates the separation of powers provided for by those constitutional provisions. Whatever may be the rule in other states, this contention is without merit in Arkansas. The matter was settled in *Cox* v. *State,* 72 Ark. 94, 78 S. W. 756, where there was an appeal from a judgment of ouster in a *quo warranto* proceeding. The office involved was the "State Capitol Commission" created by the General Assembly to carry into effect the purposes of Act 146 of 1903. The members of this commission were appointed in a joint session of the Senate and House of Representatives, pursuant to the act. The Governor ignored the act and appointed five commissioners to carry out the purposes of the act upon the identical contention made by the appellee here. This court said:

> "*First as to the power of the legislature to make appointments to office.* In the United States the general power to appoint officers is not inherent in the executive or in any other branch of the government. It is a prerogative of the people, to be exercised by them or that department of the state to which it has been confided by the constitution. The legislature has, we think, power to make appointments to office unless its powers in that respect are restricted by the constitution, either expressly or by implication. *Hovey* v. *State,* 119 Ind. 386, 21 N. E. 890; *People* v. *Hurlbut,* 24 Mich. 64, 9 Am.

Rep. 103; *State* v. *George,* 22 Oregon 142, 29 Pac. 356, 29 Am. St. Rep. 586; *People* v. *Freeman,* 80 Cal. 233, 22 Pac. 173, 13 Am. St. Rep. 122, and extended and full discussion found in note; Cooley, Const. Lim. (6th Ed.) 104-133; 23 Am. & Eng. Enc. Law (2d Ed.) 340.

"Now, an examination of our constitution will show that it not only contains no general or express prohibition against the exercise of the appointing power by the legislature, but it affirmatively shows that it was the intention of the framers of the constitution to permit the legislature to exercise such power to a limited extent. This is shown by the provision to the effect that if in an election for governor, secretary of state, treasurer, auditor or attorney general, two or more candidates for either of said offices shall receive an equal number of votes, then one of those persons receiving the highest votes 'shall be chosen by the joint vote of both houses of the General Assembly.' Art. 6, § 3, Const. 1874. It is shown also by the section which declares that 'whenever an officer, civil or military, shall be appointed by the joint or concurrent vote of both houses, or by the separate vote of either house of the General Assembly, the vote shall be taken *viva voce*, and entered on the journals.' Art. 5, § 14. The contention that this section refers only to the officers of the General Assembly, such as clerks, pages and others necessary to discharge the duties of that body, does not seem to be borne out by the language used. Why should it speak of the appointment of officers, 'civil or military,' if that was the meaning? We do not recall any military officer attached to the legislature, or to either of its branches, and we think that the language used is too broad to justify the construction contended for. It is, of course, not usual to have vacancies in office filled by appointment made by the General Assembly, and under our constitution there are many offices which could not be filled in that way. But, though not the usual method, the language of the constitution above quoted shows that the

framers of that instrument intended that it might be done in some cases not otherwise provided for, and this is not the only instance in which such power has been exercised by the legislature. It is well known that the last legislature made provision for digesting the statutes of the state, and appointed both a digester and an examiner to do the work required. The act by which these appointments were made by the legislature was approved by the governor, who thus inferentially approved the contention that the legislature has in some cases power to make appointments, and that a statute which attempts to confer this power is not necessarily unconstitutional and void on that account. Acts of 1903, p. 414. We are, then, of the opinion from the language of the constitution itself that the legislature may to some extent, in cases not otherwise provided for, exercise the appointing power. It is also plain, we think, that the governor has not inherent power, by virtue of his position as chief executive of the state, to make these appointments. If he has such power, it must be because the constitution has conferred it upon him, and thus, inferentially at least, forbidden the legislature to make them.

"The next question, then, is *whether the power to appoint commissioners to serve on a board such as the one created by this act has been conferred upon the governor by the constitution in such a way as to prohibit the legislature from making the appointments.* There are only two sections of the constitution quoted by counsel for appellants as conferring this power upon the governor. One of these is as follows: 'When any office, from any cause, may become vacant, and no mode is provided by the constitution and laws for filling such vacancy, the governor shall have the power to fill the same by granting a commission, which shall expire when the person elected to fill said office at the next general election shall be duly qualified.' Art. 6, § 23. The other section quoted is one of the amendments to the constitution, and is in the following language, to-wit: 'The

governor shall, in case a vacancy occurs in any state, district, county or township office in the state, either by death, resignation or otherwise, fill the same by appointment, to be in force until the next general election.' Both of these provisions, by their terms, plainly refer to elective offices—to those state, county, township and other offices the incumbents of which are selected by election at regular intervals. This is shown by the fact that each of those sections limits the term of the appointee of the governor appointed under them to the time when the person elected to the office at the next general election shall qualify and assume the duties of the office, thus making it plain that they refer to elective offices.''

The above case has been cited in subsequent cases, some of which are relied upon by appellees. None of these cases limit the application of the doctrine set out in that opinion, but recognize it as correct. In *Davis* v. *Wilson,* 183 Ark. 271, 35 S. W. 2d 1020, the *Cox* case is referred to as establishing the fact that the Governor has no inherent power of appointment, and that none was vested in him by constitutional provisions limited to elective officers only.

In *Oates* v. *Rogers,* 201 Ark. 335, 144 S. W. 2d 457 (relied upon by appellee), the question was constitutionality of a statute purporting to create the separate office of collector in Pulaski County and attempting to place the power of appointment of a collector in certain members of the judiciary. The statute was held unconstitutional, not because of any inherent power of appointment by the Governor, but because of violation of the doctrine of separation of powers by the attempted imposition upon the judiciary of duties not belonging to the judicial department and for the further reason that the term of office provided for was in excess of constitutional limits. In that case, the court clearly recognized the validity of the doctrine in *Cox* v. *State, supra,* when it said:

"We need not speculate what the situation would have been if the General Assembly had named a collector, or had undertaken to delegate this authority to a person or group of persons not of the judiciary. *Cox* v. *State,* 72 Ark. 94, 78 S. W. 756, 105 Am. St. Rep. 17, is authority for the proposition that the Governor has no inherent power by virtue of his office or of Const. art. 6, Sec. 23, to appoint certain commissioners, and that the Legislature has power to make appointments to office unless its powers in that respect are restricted by the Constitution, either expressly or by implication."

We do not find this same limitation upon the legislative branch because a state's constitution is not an enabling act nor a grant of enumerated powers, and the legislature may rightfully exercise the power of the people, subject only to limitations and restrictions fixed by the constitutions of the United States and of the state. *St. Louis I. M. & S. Ry. Co.* v. *State,* 99 Ark. 1, 136 S. W. 938. *Cox* v. *State, supra,* was cited in *Fulkerson* v. *Refunding Board,* 201 Ark. 957, 147 S. W. 2d 980, as authority for the statement that the General Assembly has the power to name the persons, whether officials or not, who shall execute the laws it may pass.

Appellee also relies upon *Howell* v. *Howell,* 213 Ark. 298, 208 S. W. 2d 22, but that opinion is not authority for their contention. It was clearly said that the limitation in the *Cox* case had no application there because the vacancy in the office of chancellor was to be filled by the Governor under the authority of the constitution, chancellors being state officers under the constitution. See Amendment No. 29.

It is well known that the General Assembly has, in numerous instances, named commissioners of improvement districts upon creating such districts. See, *e. g.,* Act 569 of 1923; Act 19 of 1893; Road Acts of 1919. This court has approved this practice as being within the power of the General Assembly. *Biggs* v. *Stout,* 168 Ark.

809, 271 S. W. 458; *Reitzammer* v. *Desha Road Improvement Dist. No.* 2, 139 Ark. 168, 213 S. W. 773; *Campbell* v. *Beaver Bayou Drainage Dist.*, 215 Ark. 187, 219 S. W. 2d 934. The insertion of Art. V, § 14 of the Constitution of 1874, governing the method of voting on appointments by the General Assembly, or either house thereof, is positive proof that it was contemplated that appointments would be made by the legislative branch.

In conclusion, I humbly submit that we should give due regard to the statement contained in *Walker* v. *Allred*, 179 Ark. 1104, 20 S. W. 2d 116, where an attempt was made to limit the application of an act by a statement in its title, where we said:

> "* * * It is a well-settled rule of law that where the will of the Legislature is clearly expressed, the court should adhere to the literal expression of the enactment without regard to consequences, and every construction derived from a consideration of its reason and spirit should be discarded, for it is dangerous to interpret a statute contrary to its express words where it is not obvious that the makers meant something different from what they have said. *Bennett* v. *Worthington*, 24 Ark. 487; *M. L. R. R. Co.* v. *Adams*, 46 Ark. 159; *Ry. Co.* v. *B'Shears*, 59 Ark. 243, 27 S. W. 2."

I would reverse the decree of the lower court and hold the appointment of appellant valid.

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

CLYDE CAMPBELL UNIVERSITY SHOP AND DON HAMBRICK *v.* CAMPBELL-BELL, INC., D/B/A UNIVERSITY SHOP

5-4387 422 S. W. 2d 875

Opinion delivered January 22, 1968

E. J. Bell and *James W. Gallman,* for appellant.

Murphy & Burch, for appellee.

PAUL WARD, Justice. Involved in this litigation is the use of a trade-name. The issue and the pertinent facts involved are sufficiently stated in the pleading which are now summarized.

The *Complaint,* filed on September 21, 1966, by appellee—Campbell-Bell, Inc. d/b/a University Shop, in essence states:

a. It is a domestic corporation doing business in Fayetteville for the past six years under the name of "University Shop", situated at 643 Dickson St.—on the University Campus—selling men's clothes.

b. Appellant—Clyde Campbell University Shop—is a non-resident corporation doing a similar business in Fayetteville under the name of "Clyde Campbell University Shop", situated at 613 Dickson St.—on the University Campus. It began doing business on August 15, 1966.

c. Appellant adopted and used its name "with the intent and for the purpose of defrauding the plaintiff and appropriating for their own use and benefit the goodwill of plaintiff's business and to delude and deceive the plaintiff's customers and the public in general into the belief that the business of the defendants was in fact a new location or extension of plaintiff's business". In the alternative, if appellant did not so intend, their actions caused the same result.

d. Because of the manner and length of time in which appellee has conducted and advertised its business under the name of "University Shop" that name has acquired an exclusive identification with appellee's business, and has acquired a "secondary" name and meaning. As a result of appellant's actions and the similarity of the *two* names, the public and customers of appellee have been misled to the damage of appellee's profits and business.

e. Wherefore plaintiff (appellee) prays that appellant be enjoined and restrained from using the name "University Shop" or "Clyde Campbell University Shop".

Appellants' *answer,* filed October 7, 1966, is set out below in material parts.

a. Denies they intended to, or did, infringe on any alleged rights of appellee.

b. Appellant operates under its corporate name chosen long before doing business in Fayetteville; it operates four other shops under said name at different places (in Texas); "University Shop", as the designation of a store, is prevalent over the country and such use denotes the location of said shop near a university; appellant has scrupulously avoided any advertising or act that might lead to confusion of the public as to the separate identities of appellant and appellee.

After a full hearing, at which several witnesses for both sides gave oral testimony and numerous exhibits pertaining principally to newspaper advertisements were introduced the trial court, on February 1, 1967, entered a decree enjoining appellant "from using the term 'University Shop' in their trade-name, advertising, telephone listings, signs or other designations pertaining to . . . its place of business located in the City of Fayetteville".

At the close of all the testimony the trial court made exhaustive findings of fact and conclusions of law covering seventeen pages in the transcript. Believing it will tend to abbreviate references to the testimony introduced and the various issues raised, we hereafter refer briefly to portions of said findings.

a. The basic underlying note of the infringement —on trade-name cases—is that it simply is not basically a fair thing; it just isn't right for a business man to engage in business under a name which is so nearly similar to the name used by another business man that the general public is likely to be confused or misled.

b. The first question is, does the proof in this case show such a similarity of names as to cause confusion of identities?

c. The next question is whether the name of appellee is of such nature that it should be protected. This calls for a distinction between the theory of *secondary meaning* and *generic terms.* Sometimes even generic words may acquire a *secondary* meaning.

d. Another question then is whether the term "University Shop" or the single word "University" has a *secondary* meaning under the facts in this case. If the facts so show, "then the right to relief is well established".

e. After detailing essential parts of the testimony the court states: "I think there is ample evidence to show that defendants were put on notice; that they were knowingly opening up a business which might well lead to this very thing . . . . The preponderance of evidence shows appellee is entitled to the relief sought."

f. The defendant is enjoined from the use of the word "University" in any part in any or all parts of its business operation in Fayetteville. This means, as a practical matter, that it may no longer use the total term "University Shop".

A careful examination of the record leads us to conclude that the findings of the trial court are supported by the weight of the testimony, and that the conclusion reached must be affirmed. The weight of the testimony fully establishes: Appellee began business at its present location on Dickson Street, under the name "University Shop", six years before this suit was filed; During this period the name (in Old English) has been used in advertising; Appellant, being aware of the above facts and having been warned by appellee of the similarity of

names established its store on the same street and very close to the location of appellee; Appellant used the same old English style of lettering in its advertisements; Because of these similarities there was an actual confusion in the delivery of mail and the payment of bills; Exhibits of newspaper advertisements show a striking similarity in lettering and form.

Some of the general rules applicable to this situation were quoted in *Liberty Cash Groceries, Inc.* v. *Adkins,* 190 Ark. 911, 82 S. W. 2d 28, as follows:

> " 'An infringement on a trade name is such a colorable imitation of the name that the general public, in the exercise of reasonable care, might think that it is the name of the one first appropriating it. Where such a similarity occurs, it tends to divert trade from a business rival who has previously adopted its name and operates as a fraud which may be restrained by injunction, although the prior user may not have an exclusive right to the use of the name.' "

Appellant ably contends that "University" is a word commonly used by the general public and cannot, therefore, be exclusively appropriated by anyone as a trade-name. It must be conceded that, ordinarily, such contention has merit. However, our decisions and others hold that, under some circumstances, such a common word can acquire a "secondary" meaning which entitles it to a protection as a trade name. It was so held in the *Adkins* case, *supra.*

In the cited case appellee established retail grocery stores in the vicinity of Little Rock and North Little Rock, under the trade-name "Liberty Home Stores". —Five years later appellant announced its intention to establish and operate a grocery store on West Capitol Avenue in Little Rock under the trade-name of "Liberty Cash Groceries, Inc.". Appellee sought to enjoin appellant, and was sustained by the trial court. On appeal,

this Court, in affirming the trial court, made certain statements which are copied below:

> Appellant's contention for reversal is that the use by appellant of the word 'Liberty' as a part of his trade-name is not descriptively similar to appellee's trade-name, and that the word 'Liberty' is a common word of general use, and appellees have no legal right to its exclusive use. Our case of *Fine* v. *Lockwood,* 179 Ark. 222, 14 S. W. (2) 1109, is cited by appellant as decisive of the contention urged. We can not agree that the case cited controls the case under consideration. There appellant had not operated a store under his trade-name prior to the institution of the suit in that trade territory. . .
>
> Here the testimony reflects, and the chancellor so found, that appellees had operated their respective grocery stores in the vicinity of Little Rock and North Little Rock for some five or six years under the trade name of 'Liberty Home Stores', and that the trade name of 'Liberty Home Stores' had thereby acquired a distinctive secondary meaning in the trade territory in the vicinity of Little Rock and North Little Rock''.

Based on the facts involved, and considering the findings of the trial court, we are unable to distinguish the *Adkins* case from the one here presented.

Appellant, for a reversal, rely on *Fine* v. *Lockwood,* 179 Ark. 222, 14 S. W. 2d 1109, and *Save-A-Stop, Inc.;* v. *Save-A-Stop, Inc.,* 230 Ark. 319, 322 S. W. 2d 454 The *Fine* case was distinguished, as above noted, in the Adkins case. The other case is clearly distinguishable on the ground (as noted in the case) that both parties were engaged in the wholesale business as opposed to retail.

Affirmed.

ARKANSAS STATE HIGHWAY COMMISSION
v. TOMMY LEWIS ET AL

5-4268 422 S. W. 2d 866

Opinion delivered January 22, 1968

John R. Thompson and *Joe T. Gunter,* for appellant.

Guy H. Jones and *Clark, Clark & Clark,* for appellees.

LYLE BROWN, Justice. Mr. and Mrs. Tommy Lewis, appellees, own a 320-acre tract of land which abuts the industrial park of Conway, Arkansas, on two sides. Seventy-nine acres of that tract were condemned by appel-

lee, Arkansas State Highway Commission, for the construction of Interstate Highway No. 40. I-40 runs approximately north and south through the entire acreage. The landowners were awarded a substantial verdict but the amount is not here questioned. The Commission seeks a reversal because of five alleged procedural errors. Those points will be numbered, italicized, and discussed in sequence.

1. *The trial court erred in refusing to strike the testimony of appellees' expert witness, C. V. Barnes, relating to damages to* 95 *acres of appellees' land east of Interstate* 40. Appellees' land prior to the taking consisted of an integral tract. The taking resulted in a division of the single tract into three parcels. In the northwest corner, adjacent to the Conway Industrial Park, is 6.6 acres left isolated from the balance. To the southwest, and adjoining the park area, is a tract of approximately 143 acres. On the east side of Interstate 40 is a tract consisting of 95 acres. Barnes testified that the latter tract was "severed" by the highway; that its division had destroyed that tract's value for industrial use; railroad and other utility service would no longer be available for that tract; that its highest and best use was reduced to agricultural purposes. The change in the "use" classification, according to Barnes, resulted in a considerable reduction in market value of the 95-acre tract.

The highway department objected to the testimony on the ground that Barnes was testifying to an element of "special damages" and those damages had not been pleaded. Insofar as damages are concerned, an answer is not required in eminent domain proceedings unless the landowner expects to claim special damages. *Railway* v. *Hunt,* 51 Ark. 330, 11 S. W. 418 (1888).

When the integrity of an individual tract as a unit is diminished by partial taking it is fundamental that the diminution is a proper element for consideration in ascertaining just compensation. It is commonly

referred to as "severance damages." *United States* v. 26.81 *Acres of Land,* 244 F. Supp. 831 (1965). The partial taking of an integral unit would logically put a condemnor on notice that an injury to the whole may well be contemplated. *Railway* v. *Hunt, supra.* It is a guide commonly used by appraisers in determining "before and after values." *Young* v. *Arkansas State Highway Comm'n.,* 242 Ark. 812, 415 S. W. 2d 575 (1967).

We conclude that where the condemnation involves the partial taking of an integral unit of land the diminution in value of the residual is not to be classified as "special damages."

The Highway Commission cites one authority to support its theory. That is *Bradley* v. *Keith,* 229 Ark. 326, 315 S. W. 2d 13 (1958). Both Bradley and Keith claimed title to the same tract of condemned property. At a preliminary hearing, with all parties present, the value of the land was stipulated. The money was placed in the court registry to be held subject to a determination of ownership. The cause was placed on the regular docket. Only Bradley filed a pleading. Keith did not appear for a hearing of the matter on its merits. The court ruled that Keith was entitled to reimbursement for the cost of his tax deed and Bradley was awarded the balance. Keith later persuaded the court to set aside the judgment for unavoidable casualty. This court held that in an eminent domain proceeding in which two parties are contesting for the title to the condemned property, it is necessary that both parties set forth their contentions in the form of a timely answer. An excerpt from American Jurisprudence was cited merely to show that there are some exceptions to the general rule that a landowner is not required to file an answer in a condemnation proceeding.

II. *The trial court erred in refusing to grant appellant a continuance of one week on the basis of surprise.* Appellant moved for a continuance of one week on the ground that it was surprised by the "special dam-

ages'' testimony of C. V. Barnes. We know of no reason why appellants should not have logically anticipated Barnes' testimony and have prepared itself to rebut it. Moreover, the trial court did stop the trial and recess from Monday until the following Wednesday. When the trial resumed, appellant produced three appraisers. Part of the testimony of each of those appraisers was in refutation of Barnes' evidence of diminution in value of the 95-acre tract.

III. *It was error to allow the landowners to amend their answer after the trial began and in refusing appellant's motion for a continuance to respond to appellees' amended pleadings.* These salient facts are fatal to appellant's contentions:

1. The amended answer is not abstracted; appellant's brief does not even give a transcript page-reference to the amendment; it is not indexed in the transcript.

2. Appellant's motion for a continuance is not abstracted; if any proof was offered in support of the motion it is buried in a transcript consisting of 674 pages; it is not listed in the transcript index.

This court has on innumerable occasions cited the importance of compliance with Rule 9 (d) pertaining to the necessity of abstracting the record. As the work of the court continues to rise in volume, the need for abstracting the one record (transcript) that is filed here increases in significance. Point III will not be considered.

IV. *The trial court erred in overruling appellant's motion for a mistrial.* No such motion is abstracted. An argument consisting of one sentence appears in appellant's brief. The argument makes no transcript reference.

V. *On motion of appellant, the trial court should have disqualified himself and quashed the jury panel.*

Again, no such motion is abstracted. Six pages of appellant's brief are devoted to argument on the point. Neither the abstract nor the argument contains a single reference to any testimony in support of the point. The contention must meet the same fate as Points III and IV.

MARTHA FOUNTAIN, ADM'X *v.* CHICAGO, R. I. & P. RY. ET AL

5-4410 422 S. W. 2d 878

Opinion delivered January 22, 1968

James C. Call, for appellant.

Wright, Lindsey & Jennings and *William R. Overton,* for appellees.

LYLE BROWN, Justice. This is a wrongful death case brought by appellant, Martha Fountain, Administratrix

of the Estate of Johnnie O. Thompson, deceased. Appellees, Chicago, Rock Island & Pacific Railway Company, and its employee, successfully moved to strike all claims for pecuniary benefits and mental anguish. Thompson was survived by his mother and several brothers and sisters. The principal ruling of the trial court here attacked is that the death of the mother, which shortly followed the fatal accident to her son, extinguished any possible recovery for mental anguish.

Johnnie O. Thompson, 54 and single, was employed by Magnet Cove Barium Corporation. While unloading ore from a Rock Island car, he was struck by a metal crank attached to the car and alleged to be defective. The injury proved fatal. Suit was brought by the administratrix. The elements of damage alleged were: (1) pecuniary benefits for Thompson's dependent mother and sister, ages 87 and 62 years, who lived in his household; (2) mental anguish suffered by the mother and sister, as well as other brothers and sisters not members of his household; and (3) expenditures by the estate.

The defendants moved to strike those elements of recovery described in (1) and (2) and alleged: (a) at the time of Thompson's death, his mother was the only "heir and next of kin" within the meaning of the wrongful death statute; (b) that shortly after the fatal accident and before suit was filed, the mother died and her cause of action abated; (c) that Thompson did not stand in loco parentis to the mother and sister of his household; and (d) that the brothers and sisters were not entitled to recover for mental anguish. The trial court sustained the motion to strike and left only the claim for the benefit of the estate to be litigated.

First, we dispose of the contention of the administratrix that pecuniary loss to, and mental anguish of, the mother are proper elements of recovery. Those rights abated with the death of the mother. *Jenkins,*

Admr. v. *Midland Valley R. R.,* 134 Ark. 1, 203 S. W. 1 (1918).

We next consider that point of the administratrix which, in substance, asks us to overrule, in part, *Peugh* v. *Oliger, Admx.,* 233 Ark. 281, 345 S. W. 2d 610 (1961). With reference to recovery for mental anguish, *Peugh* holds recovery to be limited to the enumerated relatives who are *also heirs at law.*

Decisions from other jurisdictions are of no aid because their statutes allowing mental anguish are distinctly different from our Act 255 of 1957 (Ark. Stat. Ann. §§ 27-906-10 [Repl. 1962]). The significant difference is that, for the most part, other statutes list the relatives in classes, with the priority of each class established. We do point out that our Act 255 was originally drafted by a committee of the Arkansas Bar Association and was adopted with some modification by the Legislature. There was available to that committee the statutes of those states which then allowed recovery for mental anguish. Nevertheless, the bar committee elected to place the beneficiaries in a single group. That fact is of some significance in determining legislative intent.

In analyzing Act 255 we find these three points persuasive:

(1) The Legislature listed all beneficiaries in a single group, specifying no priority of one beneficiary over the other;

(2) The interpretation in *Peugh* v. *Oliger* does not allow all the named beneficiaries to recover for their mental anguish. That decision did treat a foster daughter as an *heir at law* for purposes of the mental anguish statute and permit her to recover. But in placing that daughter in the category of *next of kin* this court reversed a modest recovery for mental anguish awarded to a sister of the deceased. It was held that *both* could not recover. Mrs. Drake, the 71-year-old surviving sis-

ter of the deceased, according to the evidence, was so distraught that she required constant attention for a considerable time after the accident which was fatal to her only living sister. They had been close neighbors for forty years and saw each other almost daily. When they moved a short distance apart they saw each other weekly and talked on the telephone. The foster daughter had been married since 1934 and for several years immediately prior to her foster mother's death the foster daughter lived 165 miles distant. We have no quarrel with the allowance to the foster daughter, although that recovery was permitted by a novel construction of the statute. However, we think an interpretation of Act 255 which would deny recovery to Mrs. Drake is contrary to the intent of the Legislature. Her mental anguish could well have been as great, or greater, than that of the foster daughter.

The evidentiary situation just recited, as between Mrs. Drake and the foster daughter, leads us to a conclusion so well stated in 18 Ark. L. R. 166 (1964): "This provision has been narrowly construed by the Arkansas Supreme Court, however, so as to effectively prevent recovery for mental suffering in some cases. As a result, the mental anguish provision of the statute loses much of its vitality . . . . A more liberal approach to the wording of the statute would be consistent with the expressions of the legislature."

(3) Finally, we are persuaded by the reasoning in the dissenting opinion in *Peugh* and we hereby adopt that opinion by reference.

Reversed and remanded.

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

JOHN A. FOGLEMAN, Justice, dissenting. While strong arguments can be, and were, advanced that the decision in *Peugh* v. *Oliger,* 233 Ark. 281, 345 S. W. 2d 610, was not correct, I dissent from the action of the ma-

jority because I do not believe that previous decisions construing a statute should be so lightly overruled. The *Peugh* decision was made in March of 1961. The General Assembly has met in three regular sessions since that time without changing Act 255 of 1957 [Ark. Stat. Ann. §§ 27-906—27-910 (Repl. 1962)], the statute allowing recovery for mental anguish in wrongful death cases. The construction of that statute by this court became a part of the law. In *Merchants' Transfer & Warehouse Co.* v. *Gates,* 180 Ark. 96, 21 S. W. 2d 406, this court said:

> "When the court construed the Act of 1927 in question, such construction became as much a part of the statute as if written in it."

Perhaps we can still have the necessary certainty, stability and predictability in our law without being shackled by an inflexible adherence to the doctrine of stare decisis. But I submit that when a statute meant one thing yesterday, it should not mean something else today. The overruling of this statutory construction seems to me to be a vehicle of injustice rather than justice. Who can say how many claims for mental anguish now recoverable under today's definition have become barred by the statute of limitations while this case has been pending? How many hundreds of claimants have been advised by their attorneys that they had no claim for damages for mental anguish in wrongful death cases since March 1961? How many dozens of times have circuit judges directed verdicts of non-liability for mental anguish damages or refused to submit mental anguish as an element of damages in cases tried before them since the decision in the *Peugh* case? There should be enough certainty and predictability of judicial action that litigants, attorneys and judges can act with a reasonable degree of assurance that they can rely on clear precedent. The alternative would clog our judicial system with an insurmountable burden. For example, a litigant could only be sure he is barred from a recovery by

pursuing a case to the court of last resort, an attorney could only indulge in rank speculation in advising a client and a trial judge might well resort to a system of *ad hoc* decisions applying the law as he might feel it ought to be in any particular case on any particular day.

Nothing has changed since March 20, 1961, the date of the prior decision, except the personnel of the court.

I repeat, we, as well as any trial court, or any litigant, should be bound by a definition of terms this court has given to the words of a statute, particularly when the law-making branch of the government has not attempted to correct or change that definition. Since the construction in *Peugh* v. *Oliger, supra,* became as much a part of the statute as if written into it, this court has acted legislatively in changing the meaning of its words.

I would affirm the judgment of the lower court.

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

CARL WIDMER *v.* STATE OF ARKANSAS

5295 422 S. W. 2d 881

Opinion delivered January 22, 1968

Carl Widmer, petitioner, *pro se.*

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

John A. Fogleman, Justice. This is a petition for certiorari for review of the contempt conviction of Carl Widmer in the Sebastian Circuit Court. Petitioner apparently has been one of the most prolific litigants in that court and has appealed numerous decisions thereof to this court. Mr. Widmer has elected to exercise his right to plead and present his own cases, saying that he cannot afford to employ an attorney. His conviction of contempt arises out of an irritating and indiscreet habit of filing a motion asking the trial court to vacate virtually every decision adverse to petitioner which is embodied in an order or judgment. This practice persisted until the trial judge wrote a letter to petitioner on April 24, 1967. The reference title of the letter was: *Carl Widmer* v. *Modern Ford Tractor Sales, et al,* Sebastian Circuit No. 4776. With that letter, the judge returned to petitioner such a motion and stated his refusal to hear

it. In the letter the judge reminded petitioner of previous admonitions by the court against his habit of filing these motions without regard to merit. Not only did the judge repeat previous directions to Widmer to desist from frivolous pleadings, but he emphatically reiterated that he did not want another of the motions he described as frivolous, unmerited and provocative. The judge specifically pointed out that his caveat included any motions by whatever title seeking to have the court revoke or ignore a former order. An express warning was given that petitioner would make himself subject to summary punishment for contempt for imposing on opposing counsel, the clerk, and the court and interfering with its business. Not only did the trial judge post this letter, but he gave the same warning to petitioner in chambers on the day the letter was dictated but before it was mailed.

In spite of this, petitioner filed just such a motion in the case of *Carl Widmer* v. *Otis S. Tole,* No. 4726, on May 5, 1967, seeking to have vacated an order of dismissal and praying a summary judgment for petitioner. On May 12, 1967, according to a certified copy of the court's docket, petitioner was adjudged guilty of contempt of court and fined $50.00. Widmer paid the fine under protest in order to avoid incarceration for nonpayment.

Respondent questions the right of petitioner to a review of the proceedings because of his failure to include in the record a formal judgment. In all cases of criminal contempt there should be a judgment reciting a finding of the facts constituting the contempt. *Davies* v. *State,* 73 Ark. 358, 84 S. W. 633; *Meeks* v. *State,* 80 Ark. 579, 98 S. W. 378. Failure of the court to set forth the facts in its judgment does not void the proceedings, however, so the alleged contemnor must ask the court to so recite the facts or, in case of the court's refusal, bring the facts into the record by bill of exceptions. *Ex parte Chastain,* 94 Ark. 558, 127 S. W. 973. The respondent has very graciously and in keeping with the sense of

justice and fair play characteristic of the eminent trial judge, supplied all deficiencies by filing a complete transcript of the record and proceedings relating to petitioner's conviction. Consequently, we must review the record to determine the propriety of the trial court's action.

Petitioner has listed four points relied on by him for the granting of the writ. We deem it necessary to consider only the second one which is:

> "Filing of motions or repeated motions in civil cases do not constitute contempt of court, so long as they do not contain any matter reflecting upon the integrity of the Court and are presented in a respectful manner."

Respondent urges that petitioner's conduct was an attempt to resist, disobey, evade and prevent the execution of a lawfully entered pretrial order; an abuse of legal process tending to obstruct or impede the administration of justice; and an open flouting and flagrant disobedience of the trial court's orders. The record reveals no direct evidence of these assertions except for a review of many such pleadings filed by petitioner.

The record further reveals that petitioner had been the plaintiff in at least 12 cases filed since January 1964, and the trial judge indicated that the petitioner was defendant in perhaps half as many. The judge also indicated that one or more motions for the court's reconsideration of its orders had been filed in most of these cases and that petitioner had made a very liberal, if not excessive, use of requests for admissions and motions for summary judgments.

The philosophy governing petitioner's procedural steps seems to be that if one makes persistent hypertechnical use of each pretrial step permitted by law, he will eventually emerge victorious in some case by windfall resulting from oversight by a careless opponent. It

well may be that the numerous motions for reconsideration of the court's rulings are dilatory.

We sympathize with the trial judge and can well understand how provoking and vexatious petitioner's tactics must have been to this judge whose court had the second highest rate of termination of cases of any single-judge district in Arkansas in 1966[1]. If every litigant pursued these same tactics, orderly disposition of litigation would be seriously impeded. Yet, the mere filing and presentation of a motion or of repeated, vexatious and dilatory motions do not constitute contempt of court, so long as they are not presented in a contemptuous or disrespectful manner and do not contain matter which is, of itself, contemptuous. *Johnson* v. *State,* 87 Ark. 45, 112 S. W. 143. As indicated in the cited case, the court may, in the exercise of its inherent powers, refuse to hear, or strike from the files,[2] any motions which are presented not to subserve the ends of justice but for vexation or delay. We do not mean to imply that a trial court may not adopt reasonable procedural rules not in contravention of statute governing the filing of motions for reconsideration of actions by the court.

The petition is granted and petitioner's conviction of contempt is quashed.

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[1]See the Second Annual Report of the Judicial Department in Arkansas. In 1966, 8.69% of all cases terminated in the 18 judicial districts were handled in his district.

[2]There is doubt that this means physical removal from the files of a pleading in proper form, properly executed and verified, and not containing scandalous or impertinent matter. It could well be that any pleading filed should remain in the court's files, at least as long as there is any possibility of the necessity for use thereof on appellate review. It seems likely that it is only intended that such a pleading be "stricken from the files" in the sense that it no longer constitutes a part of the record to be considered by the trial court. See 71 C. J. S., Pleading, § 509; 4A C. J. S., Appeal & Error, § 740.

LUCIAN LEE, JUSTICE OF THE PEACE, MORGAN TOWNSHIP
v. WILLIAM D. WATTS ET AL

5-4382 423 S. W. 2d 557

Opinion delivered January 22, 1968
[Rehearing denied February 26, 1968]

Penix & Penix, for appellant.

Dudley & Burris, for appellees.

J. Fred Jones, Justice. This appeal questions the jurisdiction of a justice of the peace in the trial of misdemeanors in justice of the peace court in Morgan Township, Lawrence County, Arkansas, and also questions the jurisdiction of the justice of the peace to sit as justice of Mayor's Court outside of the corporate limits of the town for whose mayor he acts.

Lucian Lee is a justice of the peace of Morgan Township in Lawrence County, and George Glenn is the mayor of the incorporated town of Lynn in said township. Justice of the peace Lee issued a warrant for Thomas D. Watts for reckless driving, a misdemeanor under state law, and fined Watts $50.00 and sentenced him to five days in jail. The jail sentence was suspended. The fine has not been paid and revocation of the suspended sentence is being threatened unless the fine is paid. Mayor Glenn has designated Mr. Lee as justice of the peace to sit in the mayor's stead as justice of the Mayor's court under the provisions of Ark. Stat. Ann. § 19-1204 (Repl. 1956). Thomas D. Watts was arrested by the town marshal of the town of Lynn and charged with a separate misdemeanor under state law but apparently committed inside the corporate limits of the town of Lynn. He was brought before Mr. Lee as justice of the Mayor's Court for trial at Mr. Lee's home where

he holds justice of the peace court, outside the corporate limits of the town of Lynn but within Morgan Township.

The record is not entirely clear in this case, but it appears that when the town marshal of Lynn makes an arrest, he takes the defendant before justice of the peace Lee, who holds court as justice of the Mayor's Court, and when the offense is committed outside the corporate limits of Lynn and the arrest is made by a deputy sheriff, constable, or some other officer, the defendant is taken before Mr. Lee who conducts court as a justice of the peace in the township. The violation of municipal ordinances is not involved here and it would appear that the only real difference in whether Mr. Lee sits as justice of the peace court or Mayor's Court, has to do with the disposition or division of the fine money between the town of Lynn and Lawrence County. In any event, justice of the peace Lee holds both justice of the peace court and Mayor's Court at his home outside the corporate limits of the town of Lynn.

William D. Watts, as father and next friend of Thomas D. Watts, filed a petition for prohibition in the Lawrence County Circuit Court prohibiting Mr. Lee from taking further action in the cases against young Watts for lack of jurisdiction in Mr. Lee, either as a justice of the peace of Morgan Township or as justice of the Mayor's Court, for the reason that there is a duly constituted municipal court of county-wide jurisdiction in Walnut Ridge in Lawrence County. Prohibition was granted by the circuit court and Mr. Lee has appealed designating the following points for reversal:

> "The Walnut Ridge Municipal Court never has had any jurisdiction in the former Western District, including Morgan Township.
>
> "There is no Municipal Court in Walnut Ridge.
>
> "Appellant was lawfully designated to act as Justice of the Mayor's Court of the Town of Lynn."

We fail to see any connection or conflict between the jurisdiction of the Walnut Ridge Municipal Court and the J. P. Court in Morgan Township or the Mayor's Court in the town of Lynn. The record does not reveal what township Walnut Ridge is in, but we take judicial notice that it is in Campbell Township and not in Morgan Township. Consequently, the legality of the Walnut Ridge Municipal Court is a side issue not germane to the issues presented on this appeal and we do not pass on that question.

Municipal courts have jurisdiction over misdemeanors committed anywhere in the county, but such jurisdiction is exclusive of justice of the peace courts *only* in the township where the municipal court sits and not over the entire county.

In the case of *Logan* v. *Harris,* 213 Ark. 37, 210 S. W. 2d 301, in speaking of the jurisdiction of municipal courts, this court said:

> "One of the matters of exclusive jurisdiction over that of Justice of the Peace of the township in which the municipal court is situated is that of misdemeanors committed therein."

Again in a footnote to *Cableton* v. *State,* 243 Ark. 351, 420 S. W. 2d 534, in speaking of justices of the peace, we said:

> "All have jurisdiction of misdemeanors except those in townships where Municipal Courts sit. Ark. Stat. Ann. § 22-709 (Repl. 1962) and §§ 43-1405, 43-1408 (Repl. 1964); *Logan* v. *Harris,* 213 Ark. 37, 210 S. W. 2d 301 (1948)."

Justices of the peace derive their jurisdiction partially from the constitution and partially from legislative enactment. Their original jurisdiction over criminal matters is derived from the Legislature. The Constitu-

tion of 1836, Article 6, § 15 defined the jurisdiction of justice of the peace and provided:

> "Justices of the peace shall in no case have jurisdiction to try and determine any criminal case or penal offense against the State, but may sit as examining courts and commit, discharge or recognize to the court having jurisdiction, for further trial, * * *"

Article 7, § 40 of the present Arkansas State Constitution in setting out, limiting and defining the jurisdiction of the justice of the peace, provides:

> "They shall have original jurisdiction in the following matters:
>
> * * * third, such jurisdiction of misdemeanors as is now, or may be, prescribed by law; * * *"

The jurisdiction of municipal courts is provided for in Article 7, § 43 of the Constitution, as follows:

> "Corporation courts for towns and cities may be invested with jurisdiction concurrent with justices of the peace in civil and criminal matters, and the General Assembly may invest such of them as it may deem expedient with jurisdiction of any criminal offenses not punishable by death or imprisonment in the penitentiary, with or without indictment, as may be provided by law, and, until the General Assembly shall otherwise provide, they shall have the jurisdiction now provided by law."

Thus it is seen that justices of the peace are invested with constitutional jurisdiction in certain civil matters and the Legislature is authorized to invest justices of the peace with criminal jurisdiction of misdemeanors. Municipal courts are not vested with constitutional jurisdiction at all, but the Legislature is authorized to invest

municipal courts with jurisdiction concurrent with justices of the peace in civil as well as criminal matters.

Ark. Stat. Ann. § 43-1405 (Repl. 1964), as it relates to jurisdiction over *various offenses,* provides:

> "Fourth. City and police courts shall have exclusive jurisdiction of all prosecutions and actions for infractions of the by-laws or ordinances of the city or town in which they are located; and concurrent jurisdiction with the circuit courts and justices' courts of prosecutions for misdemeanors committed in the town or city, and also concurrent jurisdiction in the cases provided by the special statutes creating or regulating such courts.
>
> "Fifth. In criminal causes the jurisdiction of justices of the peace shall extend to all matters less than felony for final determination and judgment. Provided, circuit courts shall have jurisdiction concurrent with justices' courts in all such cases and in all criminal or penal causes except where exclusive jurisdiction is given to city and police courts."

Ark. Stat. Ann. § 22-701 (Repl. 1962) provides for the establishment of municipal courts in cities of 2,400 or more population. This statute provides as follows:

> "All cities having a population of 2,400 or more according to the last official United States census and of cities that may hereafter attain a population of 2,400 or more, and of counties, judicial districts of counties *and townships within which are situated any of such cities,* and county seat towns with population less than 2,400 *shall be* subject to the provisions of this act; * * *" (Emphasis supplied).

The jurisdiction of *municipal courts* is set out in Ark. Stat. Ann. § 22-709, the pertinent part, insofar as this case is concerned, being as follows:

"The municipal courts shall have original jurisdiction coextensive with the county wherein the said court is situated over the following matters:

* * *

"*Exclusive* of justices of the peace *in townships subject to this act* and concurrent with the circuit court over misdemeanors committed within the county." (Emphasis supplied).

Thus, in the case at bar, jurisdiction over the misdemeanor alleged against the defendant Watts, was in the justice of the peace of Morgan Township where the misdemeanor was committed and he was charged, and not in the municipal court of Walnut Ridge, which is located in Campbell Township. Had justice of the peace Lee been justice of the peace in Campbell Township where Walnut Ridge is located, or if Walnut Ridge had been located in Morgan Township where Mr. Lee is justice of the peace, then, and only then, would the municipal court of Walnut Ridge have exclusive jurisdiction in this case. Though municipal courts have district and county-wide jurisdiction over misdemeanors, that jurisdiction is only concurrent with that of justices of the peace in all townships in the county except in the township where the municipal court sits, and in that township the jurisdiction of the municipal court is exclusive of the jurisdiction of the justice of the peace in the trial of misdemeanors under the statutory provisions of § 22-709, *supra.*

By failure to request a change of venue to the nearest municipal court as he might have done under authority of Ark. Stat. Ann. § 22-725 (Repl. 1962), Watts waived any right he might have had to a trial in municipal court and his only remedy was by appeal and not prohibition.

As to the prosecution or trial of appellee by appellant sitting in the mayor's stead as justice of the May-

or's Court of the town of Lynn, Ark. Stat. Ann. § 19-1204 (Repl. 1954) provides in part:

> "The Mayor of a corporation shall be a conservator of the peace throughout its limits, and shall have within the same all power and jurisdiction of a justice of the peace in all matters, civil or criminal, arising under the laws of the State to all intents and purposes whatever, and for crimes and offenses committed within the limits of the corporation, his jurisdiction shall be coextensive with the county, provided, that any mayor may designate, at such times as he shall choose so to do, any duly elected and qualified justice of the peace in the township to sit in the mayor's stead as justice of the Mayor's Court, and all fines and penalties assessed by the said Mayor's Court in such case shall continue to be paid into the town treasury and the justice sitting in the stead of the Mayor shall charge and collect the same fees as justices of the peace are or may be allowed for similar service; the Mayor shall give bond and security in any amount to be ascertained and approved by the council; and the Mayor shall perform all duties required of him by the laws and ordinances of the corporation, and appeals may be taken in the same manner as from decisions of justices of the peace; he shall keep a docket and shall charge and collect the same fees as justices of the peace are or may be allowed for similar services and in addition therefor for his services as Mayor, the Town Council may by ordinance make proper allowance for and payment of the same. . . ."

Ark. Stat. Ann. § 19-1201 (Supp. 1965) requires the mayor to reside within the limits of the corporation.

The territorial jurisdiction of a Mayor's Court is limited to offenses committed within the limits of the jurisdiction of such courts, as prescribed by the statutes creating or regulating them. Ark. Stat. Ann. § 43-1409 (Repl. 1964). Ark. Stat. Ann. § 19-1204 (Repl. 1956) provides that "the Mayor of a corporation shall be a

conservator of the peace *throughout its limits,* and shall have *within the same* all power and jurisdiction of a justice of the peace in all matters, civil or criminal, arising under the law of the state, . . . and for crimes and offenses committed within the limits of the corporation his jurisdiction shall be *coextensive with the county. . . .*" (Emphasis supplied). We interpret this statute to mean that the Mayor's Court can sit only inside the city limits but has powers of process extending throughout the county.

We find no statutory requirements designating any particular place for holding justice or Mayor's Court, but in connection with this point, 21 C. J. S., Courts, § 164 at p. 253-4 states:

> "Constitutional and valid statutory provisions designating the place for holding court or terms or sessions thereof will be accorded effect, they being mandatory and exclusive of other places; and where the place is so fixed the court cannot lawfully be held at any other place.
>
> * * *
>
> "Where no place for the holding of a session is prescribed by statute or otherwise, it may be held, at the discretion of the judge or judges authorized to hold it, anywhere within his or their territorial jurisdiction."

In 62 C. J. S., Municipal Corporations, § 322 at p. 671, it is stated:

> "Since the authority of the municipality and the binding effect of its police regulations are merely coextensive with the city limits, as discussed *supra* § 141, an action or proceeding instituted for the enforcement or punishment of a violation *of an ordinance* must be brought before a properly authorized

and constituted tribunal *sitting within the territorial limits of the municipality.''* (Emphasis supplied).

We conclude from the wording of statutes and authorities, *supra,* that a mayor, sitting in a Mayor's Court, must sit inside the city limits, but has powers of process throughout the county. It follows, therefore, that a justice of the peace legally sitting in the mayor's stead, would have no greater authority or broader venue for holding Mayor's Court than the mayor himself would have. If the law were otherwise, there would be no reason for the mayor to designate a justice of the peace to hold Mayor's Court except for infractions of municipal ordinances, since the mayor and the justice of the peace have concurrent jurisdictions over misdemeanors in violation of a state law committed in the town. Both the justice of the peace and the mayor are limited to the territorial boundaries of their jurisdictions in holding their separate courts.

The trial court erred in granting the writ of prohibition as to the judgment of $50.00 fine and suspended jail sentence entered by the justice of the peace of Morgan Township, and in this the circuit court judgment is reversed.

The trial court did not err in prohibiting the justice of the peace from holding justice of the Mayor's Court of the town of Lynn outside the corporate limits of the town of Lynn, and on this point the judgment of the circuit court is affirmed.

Affirmed in part, reversed in part.

ARKANSAS STATE BOARD OF PHARMACY *v.* S. W. PATRICK

5-4350 423 S. W. 2d 265

Opinion delivered January 29, 1968

Warren & Bullion, for appellant.

Brown, Compton & Prewett, for appellee.

CARLETON HARRIS, Chief Justice. This appeal relates to the revocation of the license of S. W. Patrick to practice pharmacy in the state of Arkansas by the Arkansas State Board of Pharmacy. Patrick was charged with, and found guilty on, two counts of violating the pharmacy laws of Arkansas. After a hearing before the board, wherein evidence was taken, that body found that

Patrick had violated the pharmacy laws, and that such violations were sufficient to justify the revocation of his license to practice pharmacy in this state. An order of revocation was thereupon entered on February 16, 1966. Patrick appealed to the Union County Circuit Court. That court, upon review of the record made before the board, found that the decision was unsupported by material and substantial evidence, and reversed same. From this judgment of the Circuit Court, the State Board of Pharmacy brings this appeal.

Administrative procedures were complied with, and no objection has been raised by appellee as to any irregularity.

Ark. Stat. Ann. § 72-1040 (Supp. 1967) sets out the grounds for revocation of a pharmacist's license, Item 8 of that section being the basis of the first charge against Mr. Patrick. That item provides for revocation or suspension when it is found "that said person has willfully violated any of the provisions of the pharmacy laws of the state of Arkansas." The law which it is contended was violated is found in Ark. Stat. Ann. § 82-1115 as Subsection (k), this provision having been adapted from the Federal Food, Drug and Cosmetic Act, and containing essentially the same language (21 U.S.C. 353 [b] [1] [B]). In *Dugan Drug Stores, Inc.* v. *United States,* 326 F. 2d 835, it was held that the dispensing of a potentially harmful drug without authorization by a prescribing physician constitutes misbranding.

The facts relied upon by the board in entering its order are as follows:

Paul A. Rush, a special investigator for the board, had been given a package by Mr. Woodrow T. Little, Chief Inspector of the State Board of Pharmacy, the package (container) bearing a label, this label showing the name of Mrs. Nancy Henry, such name being fictitious. The label indicated that Dr. R. L. Turnbow, who had given permission for his name to be used, had pre-

scribed for Mrs. Henry, though, of course, this had not happened. This procedure was part of a general investigation, and Rush testified that he was to contact every store in the area.

On December 29, 1964, Rush walked into the Medic Pharmacy in El Dorado, where appellee was pharmacist, and handed to Patrick the container, which bore a Walgreen label, the label indicating that it had contained[1] tablets of Enovid, which had been dispensed (as set out in the preceding paragraph) to Mrs. Nancy Henry on the basis of a prescription by Dr. Turnbow. Enovid E is a legend drug, meaning that it requires a prescription[2]. Rush told Patrick that he had been sent by a lady to get it refilled; appellee accepted the container from Rush, and sold him another container, containing 20 Enovid tablets, Patrick affixing a Medic Drug Store label No. 185622, indicating that the tablets had been dispensed on a prescription by Turnbow to Mrs. Henry. Someone[3] in the drug department then wrote a prescription for Mrs. Henry for 20 tablets of Enovid E, signed Dr. Turnbow's name to it, and appellee signed his name as dispensing pharmacist in compliance with the regulation of the board which requires a pharmacist who fills a prescription to attest that he has personally filled the prescription.

Appellee testified that he did not recall the transaction desiribed by Rush, though the prescription did bear his signature.

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[1]The container, in fact, still contained one Enovid tablet.

[2]Donald W. Stecks, Secretary of the Board of Pharmacy, testified that "a legend drug is controlled by the Food and Drug Act and bears the statement to be dispensed only on a physician's prescription or a doctor's or a dentist or a veterinarian." Mr. Patrick himself agreed that it was a drug requiring a prescription.

[3]The board asserts that the prescription was written by Mrs. Sue Hughes, unlicensed to practice pharmacy, an employee of the drug store. This assumption is apparently based on the fact that Mr. Gene Porter, owner of the drug store, denied that he wrote the prescription, appellee stated that he did not know who wrote it, and it subsequently developed that Mrs. Hughes had written a similar prescription, which will be hereafter discussed.

He said that Dr. Turnbow was a specialist in Obstetrics and Gynecology:

"* * * The date on this is September 14th. He came in in December then it was within his time limit. I don't remember whether I actually filled it and if I did I probably tried to call Dr. Turnbow. If I don't try to call them then on these situations we call them later and get their OK because Turnbow and Rainwater are particular about their prescriptions. They want to check them. I probably tried to call Turnbow and didn't get him. As far as this incident concerning the prescription, I don't recall. * * I think a druggist is entitled to use his professional judgment to know that a pill of this sort or drug of this sort has to be taken regularly it wouldn't be like making the patient run down to the doctor and get a proper prescription when it is explained to you what type of drug it is. There was no doubt as to what it was and knowing Dr. Turnbow and knowing that he gives them for a year at a time I wouldn't hesitate to fill it."

On February 2, 1965, Rush again went to the Medic Pharmacy, taking with him the container which had been given him in December by Patrick. This was presented to Mrs. Hughes, employed in the store at that time. According to Rush, Mrs. Hughes filled the prescription, typed the name on the label, placed the label on the package, and handed it to him. Appellee was in the drug store at the time, but there was no consultation between Mrs. Hughes and Patrick,[4] and Rush stated that, as far as he knew, the act by Mrs. Hughes was performed without knowledge of appellee. However, the prescription was signed by Patrick, and was offered as an exhibit in the case. The aforementioned facts constitute basically the evidence upon which the board acted.

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[4]The packages and labels in both instances were introduced into the record as exhibits.

The Circuit Court found that "the evidence does not[5] sustain the board's finding that Mr. Patrick dispensed 20 tablets of Enovid E without a proper prescription therefor.

"However, the evidence also shows that he did this as a result of a 'trap' set by the very board which acted as judge at his hearing. The evidence shows that an employee of the Board was given a packet containing one Enovid tablet (which the evidence shows is primarily a 'birth control' pill) with another drugstore's label on it and with a prescription number and a doctor's name on it. This employee then took this packet to Mr. Patrick and asked for a refill. Of course, no prescription had been given for the pills in the first place and this was simply a 'trap' or 'test' to see if Mr. Patrick would refill what he was led to believe was a genuine prescription."

The court was somewhat critical of this procedure, but it is, under the circumstances of this case, completely legal, and the practice is frequently followed in enforcing the law. In *Sorrells* v. *United States,* 287 U. S. 435, in an opinion by Chief Justice Hughes, the United States Supreme Court said:

"It is well settled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprises. [Citing cases.] The appropriate object of this permitted activity, frequently essential to the enforcement of the law, is to reveal the criminal design; to expose the illicit traffic, the prohibited publication, the fraudulent use of the mails, the illegal conspiracy, or other offenses, and thus to disclose the would-be violators of the law."

[5]The "not" in the transcript has been scratched through in ink, and a question mark placed behind the word, and this finding of the judge is accordingly not clear. The abstract also includes the "not," but the second sentence indicates that it has been stricken.

Of course, evidence as to violations of the liquor and narcotic laws is frequently obtained by officers who are "undercover" men, and who employ deception in presenting an opportunity for those who may be engaging in illegal traffic. In *Sherman* v. *United States,* 356 U. S. 369, the court said:

"However, the fact that government agents 'merely afford opportunities or facilities for the commission of the offense does not' constitute entrapment. Entrapment occurs only when the criminal conduct was the 'product of the *creative* activity' of law enforcement officials."

In *Dugan Drug Stores, Inc.* v. *United States, supra.* the United States Court of Appeals, Fifth Circuit, pointed out:

"The record shows that the agents did no more than present an opportunity for the violation of the Act by the sale of a prescribed drug without the necessary refill authorization."

Here, Patrick was simply presented the opportunity to violate the law without the necessary refill authorization. Mr. Rush used no persuasion; not in any manner did he induce Patrick to violate the law. There is no reason to believe that the same result would not have occurred if Rush had been a *bona fide* purchaser for a real Mrs. Nancy Henry, who had originally obtained her tablets, by prescription, from a Walgreen drug store. Under those circumstances, appellee, in selling the tablets, would have as surely been guilty of a violation of the law, as under the actual circumstances. It may well be that persons over the country, who have never obtained authorization (prescription) from a physician, acquire these tablets in just such a manner.

As to the second charge, it is contended that Patrick violated Item 5 of § 72-1040, which provides that grounds for revocation or suspension exist if the phar-

macist "has directly or indirectly aided or abetted the practice of pharmacy by a person not authorized to practice pharmacy by the Arkansas State Board of Pharmacy." Relative to this charge, the trial court said:

"However, aside from that, it also does not appear from the evidence that Mr. Patrick did anything that could approach aiding and abetting this lady, Mrs. Hughes, to practice pharmacy. In fact, the evidence does not even show that she practiced pharmacy. It is true that in response to leading questions there is assent at times by a witness to counsel's statement that Mrs. Hughes filled the prescription being inquired about but a close reading of the testimony convinces the Court that no witness really testified that he saw her do anything but put an already printed label on a container; and it is the Court's opinion that putting such a label on a container does not constitute the practice of pharmacy."

We disagree with this finding. Let it be remembered that without appellee's assistance in signing the prescription, Mrs. Hughes could not have sold the container and its contents to Rush, *i. e.,* the drug could not be dispensed without a prescription, because, on inventory, the drugs dispensed must tally with the prescriptions on file. Mr. Patrick signed the prescription. In other words, appellee, though not the direct perpetrator of the prohibited act, yet rendered an act which aided the actual perpetrator. We think there is good reason for such a prohibition, and though nothing more is done than to place a label on a container, it is quite evident that some knowledge is necessary in order to place the *proper* label on the package. There are hundreds of drugs on the market at this time, and an erroneous set of directions could well result in the impairment of a customer's health. It is true that there is a difference between the act performed by Mrs. Hughes, and the compounding or mixing of a preparation called for by a prescription. Nonetheless, we think the public welfare demands that the dispensing of drugs, including the giving of directions, be performed only by an authorized pharmacist.

While we are of the view that there was substantial evidence to support the findings of the board that Patrick had violated the law relating to the practice of pharmacy, we think the punishment administered was too severe. Act 103 of 1963 provides uniform administrative procedures for occupational and professional licensing boards and commissions, including Arkansas State Board of Pharmacy, and prescribes a uniform procedure for taking appeals. Section 19 of that act provides that the court may modify the decision of the board, *inter alia,* if it finds same to be "arbitrary or capricious."[6]

We have concluded that the board, in fixing the punishment herein, acted arbitrarily in the sense that the judgment was extremely harsh, and unreasonable, under all of the facts. Though the evidence reflects that Patrick has been a practicing pharmacist for 28 years, the transcript does not reveal any blemish (except the present charge) on his record. While he certainly did wrong in pursuing the course of action complained of, it may well be true that he had every intention of calling Turnbow, but when other matters intervened, overlooked it. He apparently was familiar with the practice of that doctor in prescribing the particular type of tablet involved. At any rate, we think that, to permanently bar an individual from the profession that he studied and prepared himself for, and has practiced for many years, apparently in a law-abiding manner, requires proof that makes it clearly evident that that individual had embarked on a calculated course of willfully violating the law. That has not been established in this case. We think also that it must be recognized that there is a difference in dispensing Enovid, and in dispensing barbiturates

[6]Act 434 of the General Assembly of 1967, which deals with the same subject matter, expressly repeals Act 103 of 1963, and in the section entitled "Judicial Review of Adjudication" Subsection (h) provides that the court may modify the decision if it finds that same was "arbitrary, capricious, or characterized by abuse of discretion." This indicates that the General Assembly considered that these terms have quite similar meaning. The present case, of course, was subject to the provisions of Act 103 of 1963.

and narcotics. It is our view that, under the evidence cited, Patrick should be suspended from practicing pharmacy for the period of one year. Certainly, this should be sufficient to impress upon the mind of this appellee, and others who may have been careless in dispensing drugs, that the laws relating to the practice of this profession must be observed.

Accordingly, it is the order of this court that the judgment of the Union County Circuit Court be, and hereby is, reversed, and the cause is remanded to that court with directions that it enter its judgment requiring the State Board of Pharmacy to enter an order in conformity with this opinion.

FOGLEMAN, J., dissents in part.

JOHN A. FOGLEMAN, Justice, dissenting. I concur in the opinion of the majority that, in view of the nature of the offense, the absence of any showing that the violations by appellee constituted a pattern of conduct and the apparent unblemished record of appellee, the punishment imposed by appellant seems unduly harsh and severe. It seems so much so, that I feel we are justified in saying that the penalty imposed shocks the conscience of the court, and, thus, constitutes arbitrary action on the part of the board. The Wisconsin court reached such a conclusion in reviewing the revocation of the licenses of real estate brokers by the Real Estate Board. *Lewis Realty, Inc.* v. *Wisconsin Real Estate Brokers' Board,* 6 Wis. 2d 99, 94 N. W. 2d 238 (1959). The action there was taken under the Administrative Procedure Act of Wisconsin, Chapter 227, Title XVIII, Wisconsin Statutes (1963). The provisions of that act on the scope of the circuit court review and appeal to the supreme court are strikingly similar to the act applicable here. §§ 227.20 and 227.21, Wisconsin Statutes (1963). In that case, the court reversed and remanded one license revocation to the trial court with directions to remand the case to the board for proceedings to determine the length of time for which the license was to be suspended and

approved a previous remand of another by the trial court. I feel that we should remand this cause to the circuit court with directions to remand to the board for reconsideration of the penalty to be imposed.

I humbly submit that the action of the majority in fixing the penalty has extended the power and jurisdiction of this court beyond the limits prescribed for review of actions of administrative agencies. I further submit that the boundaries set are particularly appropriate when the agency in question is charged with the responsibility of regulating a particular business, occupation or profession. The scope of our review is governed by Act 103 of 1963.[1] Section 22 of that act provides that a party may appeal from the circuit court under rules applicable in other civil cases. This does not give us the power to hear the matter *de novo* upon the record, as is the case when appeals are taken from a circuit court review of the Arkansas Commerce Commission. See *Fisher* v. *Branscum,* 243 Ark. 516, 420 S. W. 2d 882. The statute governing those appeals, unlike Act 103, requires that we review all the evidence and make such findings of fact and law as we deem just, proper and equitable. Ark. Stat. Ann. § 73-134. In *Arkansas State Board of Pharmacy* v. *Gibson Products Co.,* 239 Ark. 584, 390 S. W. 2d 628, the holding that we would review decisions of this board de novo was based upon a statute that required the circuit court to review the case de novo. Ark. Stat. Ann. § 72-1029 (Repl. 1957). This part of that section was superseded by Act 103 of 1963, in which the scope of circuit court review is much more limited.

If we treat this matter as we would any other appeal in a civil case, it seems obvious to me that we would remand the case to the trial court, unless our decision only left one course of action to be taken, in which event we would render judgment here or direct a specific judgment. See *Longer* v. *Carter,* 102 Ark. 72, 143 S. W. 575

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[1]While this act was repealed by Act 434 of 1967, § 16 of that act provides that the repeal should not apply to pending proceedings.

(on rehearing); *Combs* v. *Bunn W. Robertson, Inc.*, 205 Ark. 20, 166 S. W. 2d 665.

I think it far more desirable that the State Board of Pharmacy decide on the penalty to be imposed in this case in the light of the court's action in reversing. That board is composed of five experienced pharmacists. Ark. Stat. Ann. § 72-1002 (Repl. 1957). It is more likely to know the effectiveness of penalties than any court. It is my feeling that a one year suspension prescribed by this court is virtually a slap on the wrist for one who has falsely certified the issuance and filling of a prescription. It would be no more difficult to do the same if the "prescription" were for narcotics or any other drug. The record clearly shows that appellee has left the state and is plying his trade in Louisiana. I have been unable to find any Louisiana statute that even authorizes, much less requires, suspension there on reciprocity. We cannot assume that his suspension here will have any effect in that state, so appellee might possibly sit out this suspension there and later return to Arkansas without any interruption in his practice of pharmacy at all.

I would either remand the case to the circuit court for further proceedings under Act 103 of 1963, or with directions to remand to the board for appropriate action, preferably the latter.

JERI ANDERSON *v.* FIRST JACKSONVILLE BANK

5-4402 423 S. W. 2d 273

Opinion delivered January 29, 1968

Kenneth Coffelt, for appellant.

Ben E. Rice, for appellee.

LYLE BROWN, Justice. This is a replevin action brought by First Jacksonville Bank against Jeri Anderson. It is undisputed that appellant, Anderson, was in default under the mortgage held by the Bank, and possession of the mortgaged automobile was awarded appellee Bank.

The facts were stipulated by the parties. The appellant executed a promissory note and chattel mortgage to the Bank to secure the purchase price of a 1966 Ford automobile. The certificate of title was never assigned to the appellee; that is, a notation evidencing an encumbrance or lien was never recorded on the title. Jeri Anderson defaulted on the note after making three payments. The sole question to be resolved is whether the Bank is entitled to sustain its action in replevin on the basis of the default and under the facts just recited.

The appeal is founded on two premises. First, appellant asserts that under the Commercial Code a chattel mortgage avails the mortgagee nothing. In support of this proposition we are cited to Ark. Stat. Ann. §§ 85-9-301-2-3-4 (Add. 1961). Appellant claims those provisions provide that a chattel mortgage holder against an automobile is not a lien creditor. The second premise is that Ark. Stat. Ann. § 75-160 (Supp. 1967) (Motor Vehicle Act) states that a valid lien giving right to possession must be noted on the certificate of title. She then points to the stipulation which concedes that the Bank's interest is not noted on the certificate of title. Arguendo, appellant would conclude that the Bank is nothing more than an open account creditor.

We hold the lower court was correct in awarding possession of the automobile to the Bank. A chattel mortgage, as between the parties, is a secured transaction within the meaning of the code. Ark. Stat. Ann. § 85-9-102 (2) (Add. 1961). *Lonoke Prod. Credit Assn.* v. *Bohannon,* 238 Ark. 206, 379 S. W. 2d 17 (1963).

Sections 85-9-301-2-3-4 are not here applicable. Those sections concern priorities of perfected and unperfected security interests as against third persons. This being a suit between the parties, Ark. Stat. Ann. §§ 85-9-201-2-3-4 (Add. 1961) control. Section 85-9-201 reads: "Except as otherwise provided by this act a security agreement is effective according to its terms between the parties. . ." See also *Ward Industries Corp.* v. *Bizzy Bee Cleaners, Inc.,* 6 Adams County Legal Journal 191 (Pa. 1965). Section 85-9-203 provides that the only requirements for an enforcible security interest against a debtor are: (a) a written agreement; (b) the debtor's signature; and (c) a description of the collateral. In the case before us all the requirements are met. So, according to Section 85-9-204, the security interest here attaches immediately because no explicit agreement postponed the time of attaching.

Since a valid security interest *as between the parties* exists under the U. C. C., the final point to be considered is the failure to comply with Ark. Stat. Ann. § 75-160. That statute requires that all liens and encumbrances be noted on the certificate of title. A reading of the statute indicates that it does not apply *as between the parties*. "No . . . chattel mortgage . . . is valid as against the creditors of an owner or subsequent purchaser . . . until the requirements of this article (§§ 75-160, 75-161) have been complied with." In *Benton County Motors* v. *Felder,* 236 Ark. 356, 366 S. W. 2d 721 (1963), we held that the legislative purpose of the statute was for the benefit of bona fide purchasers.

Appellant argues that the unencumbered title remained in her possession and that the Bank's security interest was unperfected. As earlier stated, it is not determinative as between the parties whether the interest is perfected, only that it has attached. As for the "retention of title" argument, the U. C. C. provides for integration of the Motor Vehicle Act into the Code, but they must be read together in order to result in consistency. A primary purpose in the adoption of the U. C. C. was a simplification of the earlier law. One of the more difficult problems resulted in the quest for the title holder. As a result, title is no longer a determining factor under the Code. "Each provision of this Article [chapter] with regard to rights, obligations and remedies applies whether title to collateral is in the secured party or the debtor." Ark. Stat. Ann. § 85-9-202 (Add. 1967).

Since a valid security interest was created by the chattel mortgage and it attached, and nothing in the Motor Vehicle Act changes this as between the parties, the lower court was correct in awarding possession of the automobile to appellee.

Affirmed.

B. E. MILLER *v.* WILLIAM R. DYER

5-4425 423 S. W. 2d 275

Opinion delivered January 29, 1968

Henry & *Boyett,* for appellant.

Troy Wiley, for appellee.

JOHN A. FOGLEMAN, Justice. This appeal involves the question whether a lessee in possession of a motor vehicle is liable for damages thereto by reason of a collision not due to fault or carelessness on his part. The trial court rendered judgment in favor of the lessor in the sum of $650.00 for such damages.

Appellee leased a 1957 GMC truck to appellant by written lease. The lease contains the following pertinent sentences:

> "Lessee agrees to keep in full force and effect the liability, collision and comprehensive insurance which is now in effect, on said vehicles. Lessee agrees to take good care of the property above described, and to surrender the same at the expiration of the term of this lease in good condition."

Both parties were engaged in the business of operating riding devices at out-of-doors shows over several states. The truck was returned to appellee at the termination of the lease in its damaged condition. He instituted this action to recover the difference between the value of the truck at the time of the lease and its value when returned.

Appellee had carried *comprehensive* insurance covering his trucks, but it was automatically terminated when the vehicles were parked for the off season, as this one was when the lease was executed. Appellee admits that there was *no* insurance on the truck at that time, unless appellant had taken it out. Appellee stated that he was sure that appellant had *comprehensive* insurance on the truck in force at the time of the collision and claimed to have seen the policy. He did not read the policy, however, and could only say that "it must have been the right kind of policy."

The trial judge cut off further evidence along this line, stating that he construed the contract to mean that

appellant was required by the terms of the contract to carry *comprehensive* insurance of the type appellee had carried in the past, and that the fact that the insurance was not effective during the time the vehicle was stored on the lot during the off season was immaterial.

The court's ultimate findings were incorporated in its judgment and included the following:

> "The defendant breached the terms of the written lease between the parties by his failure to return the 1957 Chevrolet tractor in a good condition and by his failure to carry collision and comprehensive insurance; the plaintiff has suffered damages in the amount of $650.00."

Appellant relies on three points for reversal. They are:

"I. The court erred as a matter of law in construing the contract to require appellant unequivocably to carry collision and comprehensive insurance on the leased vehicle.

II. Defendant was a bailee for hire and only liable to the plaintiff if his negligence proximately caused the damage to the leased property.

III. Assuming ambiguity in the lease there is no substantial evidence to support the judgment of the court."

We treat two of these grounds jointly, after which we will discuss the other.

I. and III.

We agree with appellant that the court's construction of the contract is erroneous. The contract called on appellant to "keep in full force and effect the liability, collision and comprehensive insurance" which

was then "*in effect*" [Emphasis ours.] We find no evidence that any *collision* insurance was ever carried on the vehicle. Appellant testified that neither he nor Dyer ever carried any collision insurance. This was the only testimony about *collision* insurance. Comprehensive insurance affords coverage of all property damage to motor vehicles, *exclusive* of collision losses. 5 Appleman, Insurance Law & Practice, § 3222, p. 375. This distinction is recognized in the lease contract by the specific reference to both collision and comprehensive insurance. This court has said many times that words in a contract must be given their obvious meaning. *Ramsay* v. *Roberts,* 240 Ark. 943, 403 S. W. 2d 57. It has also been said that where parties make a contract in clear and unambiguous language, it is the duty of the courts to construe it according to the plain meaning of the language employed. *Roth* v. *Prewitt*, 225 Ark. 466, 283 S. W. 2d 155. When we give the words in the contract their plain and obvious meaning, this clause only required appellant to carry such liability, collision and comprehensive insurance as was *then in effect.* Appellee argues that the clause is thus deprived of any meaning. The lease covered 18 trucks and 11 trailers, and we do not know what type of insurance covering the other vehicles was in effect at the time of the lease. Appellant testified, however, that fleet liability insurance protecting both parties was in effect at the time of the lease. Consequently, the clause would not necessarily be nullified by our construction. If we should say that these words required appellant to carry collision insurance, regardless of whether such insurance was in effect on the date the lease was executed, then we would necessarily read the words "which is now in effect" out of the contract. In view of the fact that there is no evidence that collision insurance was carried on this vehicle, the trial court was in error on this point.

II.

As a bailee of the truck, appellant was not an insurer, but was held only to ordinary care and diligence

in the absence of any contractual liability. *Bigger* v. *Acree,* 87 Ark. 318, 112 S. W. 879; *Bertig Bros.* v. *Norman,* 101 Ark. 75, 141 S. W. 201; *Turner* v. *Weitzel,* 136 Ark. 503, 207 S. W. 39. The court found, however, that defendant breached the contract requirement that appellant surrender the truck at the expiration of the term of the lease *in good condition.* While appellee does not make any argument or cite any authority supporting the court's judgment on this basis, we cannot reverse the trial court if its judgment is correct for any reason. *Southern Farm Bureau Casualty Ins. Co.* v. *Reed,* 231 Ark. 759, 332 S. W. 2d 615; *Reamey* v. *Watt,* 240 Ark. 893, 403 S. W. 2d 102.

There is no doubt that a bailee's responsibility may be increased and his liability enlarged by the terms of the contract with the bailor. *Scott-Mayer Comm. Co.* v. *Merchants' Grocer Co.,* 147 Ark. 58, 226 S. W. 1060.

Nor can there be any doubt that the majority rule is that an express agreement by bailee to return the bailed property imposes no greater liability upon the bailee than is implied in every bailment. See 8 Am. Jur. 2d 1034, Bailments. § 139; Annot., 150 ALR 271 and cases cited therein. Yet, this court has held that one who hired a slave upon a written contract that, in addition to providing for payment for the slave's service, required his return at the end of the year, was liable for failure to return him because of the slave's escape without fault of the hirer. *Alston* v. *Balls,* 12 Ark. 664. In that case it was held that the words in the contract constituted an unqualified covenant to return the slave and that it was to be presumed that the parties would have made no covenant on the subject if there had not been an intention to bind the hirer beyond his mere legal liability. *Alston* v. *Balls, supra.*

Although there are holdings to the contrary,[1] the

[1]See 150 ALR 280, et seq.; *Industron Corp.* v. *Waltham Door & Window Co., Inc.* 346 Mass. 18, 190 N. E. 2d 211 (1963), as well as the *Perreault* case later cited in this opinion.

great weight of authority supports the rule that an express obligation to return bailed property in good condition does not enlarge the common law liability of a bailee, in the absence of specific terms requiring the bailee to pay for the property in case of non-delivery or imposing some additional obligation relating to the care and maintenance of the property. See 8 Am. Jur. 2d 1034, Bailments, § 139; Annot., 150 ALR 278, et seq.; *Perreault* v. *Circle Club, Inc.,* 326 Mass. 458, 95 N. E. 2d 204 (1950); *First National City Bank* v. *Fredericks-Helton Trav. Serv.,* 209 NYS 2d 704 (1961), 29 Misc. 2d 1041; *Edward Hines Lumber Co.* v. *Purvine Logging Co.,* 240 Ore. 60, 399 P. 2d 893 (1965). Yet, we cannot consistently apply one rule to a clause simply stating a requirement for return of the property and another to a clause stating a requirement for its return in good condition. It is a general rule of construction of a contract that we must not regard any language therein as surplusage, unless the clear intention of the parties requires us to do so, if any reasonable purpose thereof can be gathered from the entire instrument. *Fowler* v. *Unionaid Life Ins. Co.,* 180 Ark. 140, 20 S. W. 2d 611; *Bailey* v. *Whorton,* 207 Ark. 849, 183 S. W. 2d 52. A construction which entirely neutralizes one provision should not be adopted if the contract is susceptible of another which gives effect to all of its provisions. *American Ins. Union* v. *Rowland,* 177 Ark. 875, 8 S. W. 2d 452; *Fowler* v. *Unionaid Life Ins. Co., supra.*

If we did not apply the rationale of the opinion in the *Alston* case, we would have to treat the words in the lease requiring the surrender of the truck at the termination of the lease in good condition as surplusage. In so doing, we would disregard our own well established rules governing construction of contracts set out in that case and in others cited above. Being unwilling to do so, we hold that this clause in the contract created a liability on the part of appellant for failure to return the truck in good condition.

The judgment is affirmed.

EVANS LABORATORIES, INC. AND ELMER PEARSON
v. RUSSELL C. ROBERTS, CIRCUIT JUDGE

5-4380 423 S. W. 2d 271

Opinion delivered January 29, 1968

John B. Thurman, for petitioners.

Jones & Stratton, for respondent.

J. FRED JONES, Justice. The petitioners seek a writ of prohibition directed to the Faulkner County Circuit Court prohibiting the judge of that court from proceeding further in the trial of a law suit for lack of jurisdiction.

Sue Bradford, a resident of Van Buren County, Arkansas, filed a suit as plaintiff in the Faulkner County Circuit Court, alleging that the defendant, Elmer Pearson, is a resident of Faulkner County and is an employee and agent of the defendant, Evans Laboratories, Inc., an Arkansas corporation; that on or about October 6, 1966, the defendants sold to plaintiff's employer, Climatic of Clinton, Inc., insect eradication service including the actual pesticide to be used in and about the plant

where Sue Bradford worked in Clinton, Van Buren County, Arkansas.

The complaint alleges that the defendants sold the pesticide services, including the pesticide itself, for the purpose of eradicating pests and insects and there was an implied warranty in favor of Sue Bradford, as an employee of Climatic, that such pesticide was reasonably fit for the use for which it was intended and would not be harmful or injurious when used and sprayed in close proximity to human beings; that the pesticide was so used in the plant in Van Buren County and that plaintiff came in contact with the pesticide in the plant where she worked, and because of having done so she became violently ill.

The complaint alleges that the defendants breached an implied warranty for the reason that such pesticide was not in fact fit for its intended use and purpose, and when it was put to its intended use, the plaintiff sustained personal injuries and damages as the direct and proximate result of the defendants' breach of warranty. Summons was served on the defendant, Elmer Pearson, in Faulkner County and on the defendant, Evans Laboratories, Inc., in Pulaski County.

The defendants appeared specially on a motion to quash the summons and dismiss the complaint for lack of jurisdiction in the Faulkner County Circuit Court for the reason that the defendant, Evans Laboratories, Inc., had no place of business, or agent for service, in Faulkner County, Arkansas, and for the reason that the plaintiff was a resident of Van Buren County, Arkansas, and the incident causing the damages complained of, occurred in that county. The trial court overruled the motion.

Petitioner contends that plaintiff's action was for damages for personal injury and must be brought in Van Buren County where the accident causing the in-

jury occurred and where the plaintiff resided at the time of the injury.

Respondent contends that the action is a suit on contract and may be brought in any county in which the defendant, or one of several defendants, resides, or is summoned. The respondent urges us in this case to decide once and for all, whether a suit for breach of warranty is a suit on contract or a suit in tort. Whether a suit for breach of warranty sounds in contract or in tort depends upon the nature of the suit, the nature and extent of the warranty, and the effect or results of the breach. Regardless of whether a suit for a breach of warranty is on contract or in tort, venue for an action is not controlled by such classification, but is controlled by venue statute.

Ark. Stat. Ann. § 27-610 (Repl. 1962) provides as follows:

> "All actions for damages for personal injury or death by wrongful act shall be brought in the county where the accident occurred which caused the injury or death or in the county where the person injured or killed resided at the time of injury, and provided further that in all such actions service of summons may be had upon any party to such action, in addition to other methods now provided by law, by service of summons upon any agent who is a regular employee of such party, and on duty at the time of such service."

All other actions not provided for by specific statute are provided for by Ark. Stat. Ann. § 27-613 (Repl. 1962), as follows:

> "Every other action may be brought in any county in which the defendant, or one of several defendants, resides, or is summoned."

In the case at bar, the complaint alleged personal injuries in breach of contract, but the plaintiff brought

her action *for damages for personal injury by wrongful act* in Faulkner County where she did not reside, and where the accident which caused her injury did not occur.

The venue for this action is in Van Buren County and the circuit court of Faulkner County is without jurisdiction.

Writ of prohibition is granted.

CARL WIDMER *v.* OTIS S. TOLE ET AL

5-4411 424 S. W. 2d 886

Opinion delivered January 29, 1968
[Rehearing denied March 25, 1968]

Carl Widmer, pro se.

Franklin Wilder, for appellees.

CONLEY BYRD, Justice. This appeal by Carl Widmer is from an order dismissing his complaint against Otis S. Tole, Burl T. Ruth and Lewis Kremers, a partnership doing business as Otis Tole Equipment Company,

for failure to comply with an order of the court to make more definite and certain. At issue is the question whether appellant had complied with the court's order.

The complaint contained two counts. The first count set forth the purchase of certain used and new farm machinery from appellees and alleged damages of $11,-270 for breach of certain expressed and implied warranties in the performance of the machinery and the failure of appellees to deliver some of the equipment at the time agreed upon. The second count alleged appellees' removal and conversion of the machinery, actual damages including the rental value, and punitive damages. The complaint was filed by appellant, acting as his own attorney, on November 2, 1965.

On November 17, 1965, appellees filed a Motion to Make More Definite and Certain. This motion, which takes up four pages in the record, detailed the information sought by appellees. It requested appellant, among other things, to state the exact date that each item of equipment broke down, the repairs that were necessary, the expense he incurred for each item repaired and the exact damage claimed for each piece of equipment repaired. One of the many items requested to be made more definite and certain was the question of how appellant arrived at the figure of $5,500 for punitive damages.

On February 2, 1966, appellant filed a Request for Admission of Facts containing fifty-three separate statements. These fifty-three statements attempted to tell of the dealings had by appellant with appellees involving the farm machinery from the date of first contact to the time appellees repossessed the machinery. In proper time appellees filed responses to the Request for Admission of Facts.

Under filing date of March 13, 1967, the court entered an order reciting that on March 8, 1967, the matter of the Motion to Make More Definite and Certain

came on for hearing and giving appellant twenty days to comply with the request for information contained in appellees' motion.

On March 24, 1967, appellant filed an additional Request for Admission of Facts containing seven separate statements about the damages he sustained. Appellees properly responded to this Request for Admission of Facts.

On March 28, 1967, appellant filed the following:

"Comes now the plaintiff in response to Court's Order, filed March 13, 1967, to make more definite and states, that plaintiff incorporates and makes a part of this Response as if set out word for word: all facts set out in the 53 statements contained in Request for Admission of Facts, dated and filed February 2, 1966; all facts now in the exclusive possession of defendants, that come into possession of the plaintiff when defendants respond to Interrogatories to Defendants, dated and filed January 25, 1967; and all facts set out in the 7 statements contained in Request for Admission of Facts, dated and filed March 24, 1967. And that all essential and pertinent questions raised by defendants are answered by the facts set out above."

Thereafter, pursuant to a motion filed by appellees on April 6, 1967, the Court on April 11, 1967, dismissed appellant's complaint because of his failure to comply with the order of March 8 to make more definite and certain.

We hold that the response of March 28, 1967, which incorporated the many statements contained in the Requests for Admission already filed, was a sufficient compliance with the order to make more definite and certain. The information was not only necessary to comply with appellees' motion, but the court's order of March 8 is subject to the construction that an answer was required to each of the various requests made in

appellees' motion. Actually, the statements of fact contained in the Requests for Admission of Facts had set forth in chronological order the dealings appellant had had with appellees and the manner in which he had arrived at his damages. He could not have made a more literal compliance with appellees' motion had he copied into his response the identical information set forth in the Requests for Admission of Facts.

Appellees contend that appellant's Motion to Vacate, filed more than fifteen days after the April 11, 1967 order dismissing the complaint but within the thirty days allowed by Act 123 of 1963, is a motion for new trial and that consequently the appeal was not filed in time. We so held in the first opinion in *Widmer* v. *Wood,* dated September 18, 1967, but upon rehearing decided the issue contrary to appellees' contention, heard *Widmer* v. *Wood,* 243 Ark. 457, upon its merits and entered a substitute opinion.

It is unfortunate for the trial court and the members of the bar representing the many litigants involved that appellant has elected to represent himself. Any lawyer or judge who has ever participated in a proceeding in which a litigant elects to represent himself is aware of the many problems that arise. This case is no exception, for appellant is in a position to make an occupation of the lawsuit whereas the people who hire counsel are burdened with the extra expense caused by appellant's liberal use of the discovery procedures. The trial court's order, the motions contained in the record, and appellees' brief all carry overtones of an abuse of the discovery privilege by appellant. While the issue has not been squarely presented here and we need not rule on the matter at this time, for the benefit of the trial court and the many litigants we point out that the discovery procedures also contain restrictions upon abuse "from annoyance, embarrassments, or oppression." See Ann. 70 A.L.R. 2d 685.

Reversed and remanded.

Dissenting Opinion delivered March 25, 1968

CARLETON HARRIS, Chief Justice, dissenting. After giving this matter a great deal of thought, I have come to the conclusion that this court made a mistake in reversing the above styled case on the grounds set out in the opinion, and a rehearing should be granted. I cannot help but feel that we were somewhat influenced by the fact that appellant was acting as his own lawyer, and because of this fact, "bent over backward" in considering his pleadings. In no prior case that I know of (and the opinion cites none) have we held that an order to make a complaint more definite and certain has been complied with when a defendant simply makes reference to his own requests for admissions, and I gravely doubt that any lawyer would ever have contemplated this procedure as adequate.

Probably a greater mistake was made in considering appellant's "Motion to Vacate," which was not a part of the transcript sent up, but was only a purported copy of the motion that had been made, being attached to the transcript with the affidavit of the appellant. I realize that the original motion had been removed from the file in the Circuit Clerk's office on the order of the trial court, and we permitted the copy to be filed here with the record, but the proper remedy for appellant would have been an application for a writ of certiorari to bring up the missing pleading. The case could not have been reversed without considering this motion to vacate, since without it, the time for appeal had expired. Here again, I feel that we went out of our way to approve a questionable procedure because of the fact that

appellant was acting in his own behalf, was not an attorney, and could have no knowledge of the proper method to correct, or supply defects in, a record.

I am not really as concerned about this case as I am the precedent that is being set, and I am taking this occasion to say that I shall not in future cases approve this haphazard (to me) method of compliance with either an order to make more definite and certain, or to supply defects in a record.

JOHN A. FOGLEMAN, Justice, dissenting. I join in that part of the dissent on rehearing by the Chief Justice with reference to the impropriety of the method of bringing up the motion to vacate but not in the portion with reference to the amendment to the complaint.

SIDNEY A. KEGELES ET AL *v.* ERNIE J. AMBORT

5-4553 423 S. W. 2d 875

Opinion delivered January 31, 1968

Lester & Shults, for appellants.

H. B. Stubblefield, William J. Smith, Ted G. Boswell and *Edward L. Wright,* for appellee.

PAUL WARD, Justice. This appeal calls for a decision on the constitutionality of Act 441 of 1967 which created a State Printing Specifications Review Committee (hereafter referred to as Committee), which has the duty to review and classify state printing contracts, etc. The Committee, consisting of three members, is composed as follows:

1. The Purchasing Agent of one of the state supported institutions of higher learning.
2. The Purchasing Director of the State Health Department.
3. The State Purchasing Director.

On September 8, 1967, Ernie J. Ambort (a taxpayer and appellee herein) filed a Complaint in Chancery

against the Committee and others, alleging that the Secretary of State, pursuant to regulations promulgated by the Committee, is about to take bids on printing contracts in compliance with Act 441; that said Act is unconstitutional, and; that, if the contracts are awarded, plaintiff and other citizens and taxpayers will be irrevocably damaged. The prayer was that said Act be declared unconstitutional and void, and that the Secretary of State and the Commission be enjoined from proceeding further.

The Secretary of State answered that he neither admits nor denies the allegations in the complaint. The Committee, by answer, stated said Act 441 was a valid statute, and asked that the complaint be dismissed. The Attorney General, being permitted to intervene, also asked to have the complaint dismissed.

The matter being presented on a stipulation of facts, the trial court held Act 441 was unconstitutional and void, and enjoined further proceeding under same.

For reversal appellants rely upon one point, stated as follows:

> "Act 441 is a valid enactment of our legislature which does not in any way violate Article 19, § 15 of the Arkansas Constitution."

To clarify the pivotal issue here involved we first quote the portion of the Constitution referred to and abstract briefly Act 441.

Article 19, § 15 reads:

> "15. Contracts for Stationery, printing and other supplies—Personal interest in contracts prohibited. —All stationery, printing, binding and distributing of the General Assembly and other departments of government, shall be furnished and the printing, binding and distributing of the laws, journals, de-

partment reports and all other printing and binding, and the repairing and furnishing the halls and rooms used for meetings of the General Assembly and its committees, shall be performed under contract to be given to the lowest responsible bidder, below such maximum price and under *such regulations as shall be prescribed by law.* No member or officer of any department of the government shall in any way be interested in such contracts, and all such contracts shall be subject to the approval of the Governor, Auditor and Treasurer." (Emphasis ours.)

Act 441 of 1967, in substance and in parts deemed pertinent here, provides.

§ 1. The Secretary of State, with the advice of the Committee, shall prepare specifications of all state printing contracts, etc.

§ 2. Creates the Committee.

§ 3. Relates to when the Committee meets and payment of expenses.

§ 4. The Committee has the following powers: (a) study and review existing contracts contemplated by said Section 15 of Article 19; (b) To evaluate the requirements of various departments relative to costs and services; (c) To assist in developing necessary specifications, rules and regulations.

§ 5. (1) Similar to (c) above—and approve such specifications. (2) Classify and specify the duration of contracts—whether one or two years. (3) Study requirements of state agencies.

§ 6. Secretary of State to supervise the opening and tabulation of bids contemplated under Art. 19, § 15, and specify the time and manner of advertising for bids.

§ 7. Relates to manner of opening bids.

§ 8. Similar to § 7, and requests contracts to be let to lowest responsible bidder.

§ 9. The Secretary of State, with the Auditor and Treasurer, shall determine sufficiency of bond given by bidder, etc.

§ 10. Secretary of State may investigate sufficiency of bidder to carry out contract.

§ 11. The Secretary of State, with approval of the Committee, has discretion to determine when a contractor is in default, etc.

§ 12. All contracts awarded shall be approved by the Governor, Auditor and Treasurer.

§ 13. Repeals all laws in conflict.

§ 14. If any provision is invalid it shall not affect other provisions.

§ 15. Emergency Clause. Since it is found: that state agencies spend thousands of dollars each year for printing and stationery; that most laws governing such contracts are obsolete, and; there is a need to establish a procedure *to review the contracts now being let and in order that new specifications and procedures may be established to promote efficiency and economy in the letting of such contracts,* an emergency is declared. (Our Emph.)

A careful examination of that portion of the Constitution copied above and the provisions of Act 441, leads us to the conclusion that there is nothing in Act 441 which conflicts with the Constitution. We feel it is unnecessary to further belabor this conclusion, because appellee has failed—after being challenged by appellants—to point out any specific conflict or any reasons

for an affirmance of the trial court except those hereafter examined.

One. It is contended by appellee that the case of *Ellison* v. *Oliver*, 147 Ark. 252, 227 S. W. 586, is in point and calls for an affirmance here. We do not agree.

In the *Ellison* case we construed Act 107 of 1889 which selected the Governor, Secretary of State, and Auditor as a Board to award the printing contracts, and held said Act 107 invalid because Art. 19, § 15 necessarily meant someone *other than the Governor* must let or award the contracts. This was based on the fact that the Constitution required the governor to *approve* the contracts, not to *let* them. That conflict of interest does not arise under Act 441.

Also, appellee likewise relies on *Muncrief* v. *Hall*, 225 Ark. 570, 262 S. W. 2d 92, but that case is distinguished from the case here under consideration on the same principle announced in the *Ellison* case. This is fully explained at page 575 of the Arkansas Reports.

Two. Attention has been called to certain language used in § 4 (a) of Act 441 which shows the Act is unconstitutional. It states that the Committee shall have the power and duty "To study and review all existing contracts . . ." There is no merit in this contention. A casual reading of the Act, and especially the emergency clause, indicates clearly there was no intent of the legislature to change any existing contract but only to procure information helpful in negotiating contracts in the future. Also it is pointed out that if such language violates the Constitution it can be eliminated under § 14 of the Act, and would not render the rest of the Act inoperable.

It is therefore our opinion that Act 441 of 1967 is valid and not unconstitutional, and that the decree of the trial court must be, and is hereby, reversed.

BYRD, J., dissents.

CONLEY BYRD, Justice, dissenting. My disagreement goes to the majority opinion's construction of Act 441 of 1967 and their undue emphasis on the use of the words "let" or "letting of contracts" as the same are used in *Ellison* v. *Oliver,* 147 Ark. 252, 227 S. W. 586 (1921). To understand the constitutional issue presented it is necessary to understand not only the provisions of Act 441 but also article 19, § 15 of the Arkansas Constitution as it has been interpreted by our decisions in *Ellison* v. *Oliver, supra,* and *Muncrief* v. *Hall, Secretary of State,* 222 Ark. 570, 262 S. W. 2d 92 (1953).

Act 441, § 1 provides:

"The Secretary of State with the advice and approval of the State Printing Specifications Review Committee shall prepare specifications for all State Printing Contracts to insure finished products of the quality required for the best use of the various departments . . ." Section 2 provides that the "State Printing Specifications Review Committee" shall consist of three members as follows:

(1) One member shall be the Purchasing Agent of one of the State supported institutions of higher learning, to be named by the Commission on Coordination of Higher Educational Finance.

(2) The Purchasing Director of the State Health Department.

(3) The State Purchasing Director.

Section 2 further provides:

"The Committee shall choose one of its members as Chairman, provided that the Secretary of State, charged with the letting of State Printing Contracts, shall be the ex officio Secretary of the Committee and shall keep all records of its proceedings."

Section 4 authorizes the "Committee" to regroup, reclassify, or divide existing contracts into new contracts

and to develop the necessary specifications. Section 5 authorizes the "Committee" to determine which contracts shall be let biannually and which shall be let annually. In addition section 5 provides:

"The number of printing items to be included in each contract or the nature or amount of printing services, stationery, or other items, to be included in each such contract to be let by the Purchasing Official under the provisions of this Act shall be as determined and certified by the State Printing Specification Review Committee."

According to my understanding of the provisions of Act 441, the State Purchasing Director is an appointee of the Governor[1]—*i. e.,* he is appointed by the Director of Administration by and with the consent of the Governor and serves at the pleasure of the Governor. He, together with the other two members of the "State Printing Specifications Review Committee," does whatever negotiating is done in connection with State Printing Contracts—*i. e.,* they determine the specifications for each item, the number of items to be grouped into each contract and whether the contract is for one year or two years.

Article 19, § 15 of our Constitution provides:

"*Contracts for stationery, printing and other supplies—Personal interest in contracts prohibited.*—All stationery, printing, paper, fuel, for the use of the General Assembly and other departments of government, shall be furnished and the printing, binding and distributing of the laws, journals, department reports and all other printing and binding, and the repairing and furnishing the halls and rooms used for the meetings of the General Assembly and its committees, shall be performed under contract to be given to the lowest responsible bidder, below such maximum price and under such

[1]Under Act 468 of 1967 the Director of the Purchasing Division of the State Administration Department has assumed the duties of "The State Purchasing Director."

regulations as shall be prescribed by law. No member or officer of any department of the government shall in any way be interested in such contracts, and all such contracts shall be subject to the approval of the Governor, Auditor and Treasurer."

While construing Article 19, § 15 in *Ellison* v. *Oliver, supra,* as applied to an act which made the Governor, Auditor and Secretary of State ex officio commissioners to superintend the letting of all public contracts, we said:

"We believe that the language used by the framers of the Constitution contains an implied prohibition against giving these officers the power to let contracts for the public printing. The authority conferred is that all such contracts shall be subject to the approval of the Governor, Auditor and Treasurer. This necessarily implies that the letting of the contracts shall be performed by another officer or officers. All of us are of the opinion that the present statute, conferring the power upon the Governor, Auditor and Secretary of State to let the contracts for the public printing, is unconstitutional. A majority of the court is of that opinion, as above stated, because there is an implied prohibition against placing the Governor, Auditor or Treasurer upon a board to superintend the letting of the contracts which the Constitution requires shall be made subject to their approval. Thus successive steps are directed to be taken in the execution of such contracts, and nowhere does the Constitution provide that either of the steps required to be taken shall be conclusive. Each step is intended as a distinct and successive safeguard to protect the State against collusion and extortion. In this way the interest of the public is better safeguarded, and there is a double check against imposition and extravagance."

* * *

"The framers of the Constitution, however, intended that contracts for the public printing should be let by

another officer or officers, but that they should be subject to the approval of the Governor, Auditor and Treasurer. The word 'approval' means that the contracts should receive the official sanction of the officers named, and that this should be given separately. Because their approval is necessary under the Constitution, we must reach the conclusion that their action is designed to be a check upon the action of the board. Each of the officers named is fitted by reason of the duties of his office to pass judgment upon the action of the board. The contract when made can be passed from one to the other for his approval in order that he may give the public the benefit of his judgment and official sanction. It is in the nature of a veto power, and each of the officers can withhold his approval and thus veto the contract."

Again in *Muncrief* v. *Hall, Secretary of State, supra,* we had involved Act 41 of 1953, which provided:

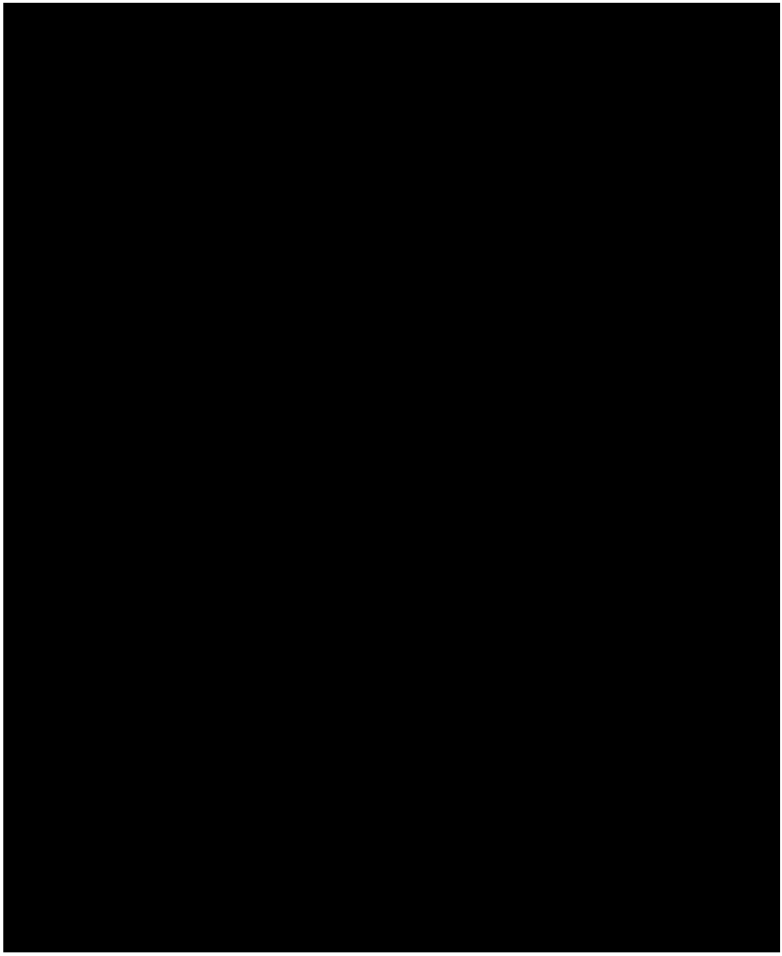
"All contracts negotiated under the provisions of Section 15 of Article 19 of the Constitution, shall be awarded by the Director, subject to the approval of the Governor, State Auditor and State Treasurer . . . ."

The Director therein referred to was the Director of the Department of Finance and Administration, who served at the pleasure of the Governor. In holding that section of the act unconsitutional we said at page 575: "*Ellison* v. *Oliver* clearly holds that the Governor cannot participate in the negotiation or letting of the contracts. His constitutional duty is to approve or reject the contracts after they are negotiated: he is not to negotiate."

"III. '*What One Cannot Do Himself, He Cannot Do Through Another.*' Ever since the early days of our Anglo American legal system, and continuously to the present, there has been the maxim: 'What I cannot do myself, I cannot do through another.' This maxim leads us to these inescapable conclusions in this litigation: (1) that no amount of judicial legerdemain can escape

the fact that the Director of Finance and Administration acts at the direction of the Governor; and (2) since, under *Ellison* v. *Oliver,* the Governor could not serve in the negotiating or letting of the contracts, certainly the Director of Finance and Administration cannot serve in the negotiating and letting of the contracts."

Does Act 441 permit the State Printing Specifications Review Committee to negotiate or let contracts contrary to our decisions in *Ellison* and *Muncrief*? I say that it does. Since the "Committee" is authorized to control item specifications and the number of items to be grouped into each contract, the "Committee," by grouping a patented item (such as a patented photographic paper sold through a franchised dealer) together with other general printing supplies, can effectively select the lowest responsible bidder, because other suppliers, not being able to supply the patented or franchised item, would be unable to comply with the contract specifications. It has been suggested that this is a matter addressed to the wisdom of the legislature rather than to its constitutional validity, but I only point out that it is authorized and permitted by Act 441 and that the "Committee" is thereby authorized by said act to negotiate or let a contract within the very strict construction placed by the majority upon the *Ellison* and *Muncrief* cases.

It is true that the conduct pointed out in the above paragraph can be checked through the approval separately required by the Governor, Auditor and Treasurer, as provided in Article 19, § 15 of the Constitution. However, this also existed in the *Ellison* and *Muncrief* cases and we there held that the Constitution contemplated distinct and successive steps in the negotiation and letting of printing contracts as a "safeguard to protect the State against collusion and extortion."

The distinct and successive step argument is as valid today as it was in 1921 or 1953. Therefore I would affirm the decree of the trial court holding Act 441 unconstitutional.